

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS  
HOUSTON DIVISION

THOMAS L. TAYLOR, III SOLELY IN §  
HIS CAPACITY AS COURT- §  
APPOINTED RECEIVER FOR §  
KALETA CAPITAL MANAGEMENT, §  
INC., BUSINESS-RADIO NETWORK, §  
L.P., d/b/a BizRadio and §  
DANIEL FRISHBERG FINANCIAL §  
SERVICES, INC., d/b/a DFFS §  
CAPITAL MANAGEMENT, INC. §

Plaintiffs

v.

DANIEL S. FRISHBERG, ELISEA T. §  
FRISHBERG, ALBERT F. KALETA §  
BARRINGTON FINANCIAL ADVISORS §  
INC., and WILLIAM C. HEATH §

Defendants

Civil Action No. 4:09-cv-03674

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DEFENDANTS' BARRINGTON FINANCIAL ADVISORS, INC., AND  
WILLIAM C. HEATH'S MOTION TO DISMISS PURSUANT TO RULE 9,  
OR IN THE ALTERNATIVE, MOTION FOR MORE DEFINITE STATEMENT

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TO THE HONORABLE COURT:

Now comes BARRINGTON FINANCIAL ADVISORS, INC. ("Barrington"), and WILLIAM C. HEATH, ("Heath") Defendants in the above styled and numbered cause, and pursuant to Rule 9 of the Federal Rules of Civil Procedure request the Court to dismiss the Receiver's Original Complaint Against Daniel S. Frishberg, Elisea T. Frishberg, Albert F. Kaleta, Barrington Financial Advisors, Inc., ("the

Complaint”) as it pertains to Barrington and Heath, or in the alternative, to require the Plaintiff to replead his allegations against these Defendants as required by Rule 12(e) of the Federal Rule of Civil Procedure. As grounds for the relief requested, Barrington and Heath show as follows:

1.0. THOMAS L. TAYLOR, III (“the Receiver”) solely in his capacity as court-appointed receiver for Kaleta Capital Management, Inc., Business Radio Network, L.P., D/b/a Bizradio and Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc. (“the Receivership Entities”), filed the Complaint in this case where he was appointed receiver. In the Complaint, the Receiver seeks to recover money from the persons alleged to be responsible for the demise of the Receivership Entities. But the Receiver also makes claims in the Complaint against Barrington and Heath, registered Financial Advisors, for undertaking to advise the clients of Daniel Frishberg Financial Services Inc. (“DFFS”) after the actions of the Receiver made it impossible for DFFS to fulfil its fiduciary obligations to its clients.<sup>1</sup> The Receiver seeks to hold Barrington and Heath liable under the Texas Uniform Fraudulent Transfer Act, Tex. Bus. & Comm. Code § 24.001, *et seq.* (“TUFTA”). As shown below, the allegations against Barrington and Heath do not comply with the particularity requirements of Rule 9, and the allegations of the Complaint are insufficient to allow Barrington and Heath to adequately prepare their defenses.

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<sup>1</sup> The evidence will establish that Barrington entered into Advisory Agreements with some of the clients of DFFS after it became apparent that DFFS could not longer serve as an investment advisor clients using DFFS’s advisory services.

2.0. **The Complaint Must Comply with Rule 9.** All of the Receiver's claims against Barrington and Heath are grounded on the fraudulent transfer of "substantially all of DFFS's assets..." the Complaint, Count IX, ¶131, Count X, ¶ 136, Count XI, ¶142) And it is the transfer of these "assets" upon which the foundation of the Receiver's case is built. However, some claims under TUFTA, such as those in the Complaint which alleges "...**actual intent to hinder, delay or defraud...**" (Complaint p. 34, ¶131) "must be pleaded in compliance with Rule 9(b)." *Alexander v. Holden Bus. Forms, Inc.*, 2009 U.S. Dist. LEXIS 62279 (N.D. Tex. July 20, 2009), citing, *Van-Am. Ins. Co. v. Schiappa*, 191 F.R.D. 537, 541-43 (S.D. Ohio 2000); *Ind. Bell Tel. Co. Inc. v. Lovelady*, 2006 U.S. Dist. LEXIS 7996, 2006 WL 485305, at \*1 n.5 (W.D. Tex. Jan. 11, 2006); *Quilling v. Stark*, No. 3:05-CV-1976-L, 2006 U.S. Dist. LEXIS 40672, 2006 WL 1683442, at \*5 (N.D. Tex. June 19, 2006) (observing that "most courts hold that Rule 9(b) applies to fraudulent-transfer actions") pursuant to Rule 12(e).

3.0. Rule 9 in this context, requires the Receiver to plead,"the who, what, when, where, and how: the first paragraph of any newspaper story." *DiLeo v. Ernst & Young*, 901 F.2d 624, 627 (7<sup>th</sup> Cir. 1990), see also, *Ind. Bell Tel. Co. v. Lovelady*, (*supra*). The allegations in the Complaint, relating to Barrington and Heath, are so general and vague, that even if Rule 9 did not apply, the allegations would be insufficient, and the Court should order the Receiver to replead.

40. **The Complaint must comply with Rule 8.** A motion for a more definite statement is proper when a complaint is so vague or ambiguous that a defendant cannot reasonably prepare a response. Fed. R. Civ. P. 12(e); *Sisk v. Tex. Parks & Wildlife Dep't*, 644 F.2d 1056,1059 (5<sup>th</sup> Cir. 1981); see Fed. R. Civ. P. 8(a)(2). As shown below, with regard to the peculiar assets that the Receiver is alleging were “transferred” under TUFTA, the Complaint fails to properly comply with even the liberal pleading requirements of Rule 8. Barrington and Heath would request the Court to order repleader of the Complaint pursuant to Rule 12.

5.0. **The Facts in the Complaint.** The Complaint is quite lengthy, but when it comes to the allegations against Barrington and Heath, the facts are quite scanty. In particular, on page 7, ¶15, it is alleged that “subsequent to the commencement of the Receivership proceeding”, or on p.24, ¶79, it is alleged, that “...sometime after February of 2010”, Frishberg caused “substantially all of the assets of DFFS - its client investment accounts under management” (p.7, ¶15), or the “client accounts under management at DFFS...” (Complaint, p.24, ¶79), or even “...substantially all of DFFS’s assets...” (P. 34, ¶ 131) to be transferred to Barrington. The same “transfers” form the basis of the cause of action for tortious interference (p. 36, ¶ 142) and inducing Frishberg to breach his fiduciary duty. (Complaint, p. 36, ¶ 138), alleged against Heath.

6.0. **The Complaint does not adequately allege what was transferred.** Under either Rule 8 or 9, Barrington and Heath are entitled to notice of what the

Receiver is alleging was actually transferred. It appears that the Receiver could be alleging it was the actual transfer of client funds which was fraudulent. But the funds under management by a registered investment adviser belong to the client, not the company which purports to act as adviser, as required by the federal Investment Advisers Act of 1940 (“Investment Advisers Act”) . See, 15 U.S.C. § 80b-18b, “Custody of Client Accounts”. Or it could be that the Receiver might be referring to the transfer of rights to manage the funds over which DFFS had a fiduciary duty pursuant to its agreements with DFFS’s clients. In that case the Receiver would have to deal with the prohibition against assigning those rights contained in the applicable contracts as required by the Investment Adviser’s Act, and the rules promulgated thereunder. On the other hand, it could be that the Receiver is alleging the that the “...investment accounts under management...” are really the right to charge fees pursuant to whatever agreement DFFS had with the broker/dealer actually has custody of the funds belonging to the clients. Barrington simply cannot determine from the Complaint what the Receiver alleges was transferred. This issue gains further import because it is alleged that Barrington is alleged to liable to the Receiver “...for the value of the DFFS assets received at the time they were transferred.” (Complaint, p. 25, ¶ 83)

**7.0. The Complaint does not adequately allege when the transfers were made.** There is absolutely no particularity as when the alleged transfers were made. This is important, because under §24.007(B) of TUFTA, the transfer will be deemed

to take place when “...the transfer is so far perfected that a creditor on a simple contract cannot acquire a judicial lien otherwise than under this chapter that is superior to the interest of the transferee...” As the Court can see, when the alleged “transfer” took place is important just to see the exact nature of the asset transferred, *i.e.* when DFFS’s creditors have any right to the “...investment accounts under management...” that would be superior to that of Barrington. Obviously DFFS’s creditors have no right to DFFS’s clients’ money. It simply does not make any sense, therefore, to say that DFFS’s creditors have any right to DFFS’s client’s “accounts”. This issue gains further import because it is alleged that Barrington is alleged to liable to the Receiver “...for the value of the DFFS assets received **at the time they were transferred.**” (Complaint, p. 25, ¶ 83)

8.0. **The Complaint does not adequately allege how the assets were transferred.** There is nothing in the Complaint that even comes close to alleging how one can “transfer” a “client account under management”. Since the contracts between DFFS and its clients were not assignable, and presumably, the clients have some say in the matter, Barrington cannot adequately prepare its defense to the allegation in the Complaint without knowing how it is alleged that the asset was transferred to Barrington.

9.0. The transfers alleged to violate TUFTA are the very same transfers alleged to form the basis of the claims against Heath in Counts X and XII. Barrington and Heath therefore request that the Court order those transfers to be

plead with the degree of specificity required by Rule 8 and 9.

**10.0. PRAYER FOR RELIEF.**

10.1. The Defendants pray that the Complaint be dismissed as to Barrington and Heath, or in the alternative, order the Complaint to be replead as stated herein.

Respectfully Submitted,

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C. Heath

**CERTIFICATE OF SERVICE**

I hereby certify that on October 27, 2011, the foregoing document was filed with the Clerk of the Court via CM/ECF system which will send notification of such filing as appropriate to:

Thomas L. Taylor, III  
The Taylor Law Offices, PC  
4550 Post Oak Place Dr., Ste. 241  
Houston, Texas 77027

*PETER J. STANTON*

PETER J. STANTON

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RECEIVER FOR KALETA CAPITAL §  
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ORDER GRANTING  
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On this day came on to be heard the Defendants' Barrington Financial Advisors, Inc., and William C. Heath's Motion to Dismiss Pursuant to Rule 9, or in the Alternative, Motion for More Definite Statement ("the Motion"). The Court after considering the Motion is of the opinion that the relief requested therein should be granted. All claims against the Defendants' Barrington Financial Advisors, Inc., and William C. Heath are hereby DISMISSED.

Signed this the \_\_\_\_ day of \_\_\_\_\_, 2011..

\_\_\_\_\_  
Hon. Nancy Atlas