



COMES NOW Thomas L. Taylor, III (“Receiver”), Court-appointed Receiver in the above styled action (the “Receivership Proceeding”)<sup>1</sup> for Kaleta Capital Management, Inc. (“KCM”), BusinessRadio Network, L.P. d/b/a BizRadio (“BizRadio”), Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc. (“DFFS”) and all entities they own or control (collectively the “Receivership Entities” or “Entities”), and on behalf of the Receivership Estate, the Receivership Entities and their creditors, files this First Amended Complaint<sup>2</sup> (the “Complaint”) against Daniel S. Frishberg (“Frishberg”), Elisea T. Frishberg (“Mrs. Frishberg” and together the “Frishbergs”), Albert F. Kaleta (“Kaleta”), Barrington Financial Advisors, Inc. (“Barrington”) and William C. Heath (“Heath” and collectively with all others the “Defendants”), and based on actual knowledge and information and belief, would respectfully show the Court as follows:

## I. SUMMARY

1. This adversary proceeding is the next step in the Receiver’s continuing efforts to recapture and return to investors those funds which were invested in promissory-note securities made by KCM and BizRadio and fraudulently offered to the public through the Receivership Entities and others, as alleged in the various SEC Actions. Through this action, the Receiver seeks a judgment against the Frishbergs and Kaleta resulting from breaches of their fiduciary

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<sup>1</sup> Pursuant to Local Rule 5.2, the Receiver advises the Court that this Complaint is related to (i) the Receivership Proceeding; (ii) *In the Matter of Albert F. Kaleta, Respondent*, SEC Administrative Proceeding File No. 3-13773, Release No. 2983, February 2, 2010; (iii) *SEC v. Daniel Shalom Frishberg*, Civil Action No. 4:11-cv-01097, in the United States District Court, for the Southern District of Texas (the “Frishberg Action”); (iv) *In the Matter of Daniel Shalom Frishberg, Respondent*, SEC Administrative Proceeding File No. 3-14393, Release No. 3206, May 16, 2011; and (v) *SEC v. David Gordon Wallace Jr. and Costa Bajjali*, Civil Action No. 4:11-cv-1932, in the United States District Court, for the Southern District of Texas (collectively the “SEC Actions”). Citations to a “Doc. [#]” in this Complaint refer to the docket in the Receivership Proceeding.

<sup>2</sup> Under the Federal Rules of Civil Procedure, the Receiver may file this amended pleading as a matter of course. *See* FED. R. CIV. P. 15(a)(1)(B) (“A party may amend its pleading once as a matter of course within ... 21 days after service of a motion under Rule 12(b), (e), or (f)....”) On October 27, 2011, Barrington and Heath filed and served their 12(b) and 12(e) motion (Doc. 147). The Receiver is hereby amending the Original Complaint as a matter of course through the filing of this First Amended Complaint within 21 days after October 27, 2011.

duties, negligence, receipt of fraudulent transfers of Receivership Assets<sup>3</sup> and other tortious conduct that facilitated the fraudulent note offerings and eventually the downfall of the Receivership Entities under their control. Receiver also seeks a judgment against Barrington and Heath resulting from their participation with Frishberg in the tortious and fraudulent transfer of substantially all of the assets of DFFS to Barrington while DFFS was a relief defendant in the Receivership Proceeding and, later, part of the Receivership Estate.

2. Frishberg was the controlling owner, a director and the chief executive officer of both BizRadio and DFFS. His ownership and management responsibilities in both entities extended through all aspects of corporate governance and control, including over his subordinate at both entities, Kaleta. Kaleta was the sole owner, director and officer of KCM, and was also an owner and officer of both BizRadio and DFFS. Mrs. Frishberg was an officer of BizRadio.

3. As the holders of such expansive corporate powers, the Frishbergs and Kaleta were completely derelict in their duties and responsibilities to the entities they controlled. As a result of their breaches of fiduciary duty and mismanagement of the Receivership Entities, they exposed those entities to liability of over \$15 million in investor funds for the fraudulent promissory-note offerings perpetrated through the Receivership Entities, as alleged by the Securities and Exchange Commission (“SEC”) in the SEC Actions; they financially benefitted from the fraud alleged. But for the Frishbergs’ and Kaleta’s wrongful and tortious acts and failures to act as control persons of the Receivership Entities, neither the fraudulent scheme perpetrated through the Receivership Entities, nor the resulting losses for which the Receivership Entities are now subject to liability, would have occurred.

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<sup>3</sup> Capitalized terms not defined herein shall have the meaning given to them in the *Agreed Order Appointing Receiver* (Doc. 7), as modified by the *Order Modifying Order Appointing Receiver* (Doc. 34) (hereinafter the “Order Appointing Receiver”). Citations to specific paragraphs or pages in the *Order Appointing Receiver* refer to paragraphs or pages in Doc. 7.

4. The Receivership Entities were operated, in substance, as a Ponzi scheme funded primarily through the fraudulent offering of promissory-note securities by KCM and BizRadio to the public, rather than through legitimate business revenues. The principals of the respective Receivership Entities used those ill-gotten gains to fund the other Receivership Entities and various affiliates through a circular chain of “loans” -- mostly documented after the fact -- wherein money was funneled to whichever Entity had the most pressing financial need at any given time.

5. Commencing in December 2007, Kaleta -- with Frishberg’s approval -- raised capital from the public by offering promissory notes through KCM (the “KCM Notes”). Frishberg approved the recommendation of KCM Notes to DFFS clients, and Kaleta sold them almost exclusively to DFFS clients. KCM sold at least \$10 million of notes through August 2009. No written materials accompanied the offering, rather, Kaleta and others verbally represented to investors that KCM would use the pooled proceeds to make high-interest, short-term loans to credit-worthy small businesses (the “KCM Loans”), earning a profit on the spread between the respective interest rates of the KCM Notes and KCM Loans. It was also represented to investors that the KCM Loans would only be made to businesses whose investment models had been fully researched and understood after performing due diligence to ensure the borrowers’ ability to repay. It was also represented that a reserve account was maintained to cover the repayment of KCM Notes.

6. In fact, the vast majority of the KCM funds were loaned to BizRadio and DFFS. As CEO of both entities, and as the control person of DFFS who approved the offering of KCM Notes to DFFS clients, Frishberg knew that neither entity (a) embodied the type of small business that Kaleta and others represented to investors would receive KCM Loans and (b)

would almost certainly lack the ability to repay such loans. In fact as CEO of BizRadio and DFFS, Frishberg was in control of those entities' repayment of their respective KCM Loans. As an equity owner and officer of both entities, Kaleta also knew these facts.

7. Commencing in April 2008, Frishberg, as CEO of BizRadio, orchestrated the issuance of BizRadio promissory notes (the "BizRadio Notes"), purportedly to raise capital for BizRadio. As he had with the KCM Notes, Frishberg approved the recommendation of the BizRadio Notes to DFFS clients, and they were sold almost exclusively to DFFS clients by Frishberg, Kaleta, and others. BizRadio -- directly and through intermediaries -- sold approximately \$5.5 million of notes through September 2009. Frishberg caused BizRadio to offer the notes, and Kaleta participated in the offering to DFFS clients and others, knowing that BizRadio was not creditworthy and was either insolvent before or because of the BizRadio Note offering. Furthermore, BizRadio's true purpose was not to generate legitimate business revenue, but rather to promote Frishberg as a purported financial guru, ultimately increasing traffic to his website and growing the client base of DFFS, from which Frishberg and Kaleta would profit. In fact, none of the BizRadio Notes have been re-paid to investors, and those noteholders now hold claims against the Receivership Estate for these amounts.

8. As the CEO of DFFS, Frishberg approved both the KCM and BizRadio Notes (together, the "Notes") for recommendation to DFFS clients. Frishberg delegated the recommendation task to DFFS representative Kaleta, to other subordinates, and other allied financial intermediaries. Frishberg also participated in presentations to potential BizRadio Note investors.

9. Frishberg caused Kaleta and other DFFS personnel to recommend the KCM Notes to DFFS clients and others fully aware:

(a) that KCM Loans would not be made to creditworthy businesses as represented but rather to the affiliated entities BizRadio and DFFS, of which he and Kaleta were insiders;

(b) that those KCM Loans would not be made at arms-length, and that the Frishbergs and Kaleta would receive compensation from the Entities which received KCM Loans;

(c) that KCM had no income or business activity and that KCM's actual purpose was not to generate profits but solely to raise money for BizRadio and DFFS.

10. Moreover, Frishberg did not supervise the KCM Note presentations to DFFS clients or in any way ensure that material information was disclosed to investors regarding the KCM Loans to BizRadio and DFFS, including conflicts of interest that existed because the Frishbergs and Kaleta would be compensated by the entities receiving the KCM Loans.

11. Frishberg, Kaleta, other DFFS personnel, and other allied financial intermediaries, recommended the BizRadio Notes to DFFS clients and others when Frishberg and Kaleta were fully aware:

(a) that BizRadio was not creditworthy, and indeed was either insolvent before or because of the BizRadio Note offering; and

(b) that BizRadio's true purpose was not to generate legitimate business revenue, but rather to promote Frishberg as a purported financial guru, ultimately increasing traffic to his website and growing the client base of DFFS, from which Frishberg and Kaleta would profit.

12. Moreover, Frishberg and Kaleta did not in any way ensure that accurate material information was disclosed to investors during the BizRadio Note presentations, in particular that the Frishbergs and Kaleta would be compensated by BizRadio with investor funds and that those proceeds would also be loaned to DFFS (which would also compensate Frishberg and Kaleta).

13. DFFS clients included among their investment objectives the expectation of earning interest and receiving a return of principal. Frishberg and Kaleta approved for recommendation and/or recommended the Notes to DFFS clients even though the Notes were patently unsuitable for such clients.

14. In addition to the salaries the Frishbergs and Kaleta received from BizRadio and DFFS, they also used the corporate credit cards of the Receivership Entities to pay for personal expenses, and took corporate funds in the form of personal “loans” that they made to themselves (loans, which, like those between the Receivership Entities, were almost always documented after the fact). These monies received by the Frishbergs and Kaleta, in the form of salary, personal loans and personal expenses improperly paid by the Entities, came from the proceeds of the sale of the Notes, and constitute fraudulent transfers under Texas law which must be disgorged to the Receiver for the benefit of the Receivership Entities’ creditors.

15. Subsequent to the commencement of the Receivership Proceeding -- in which DFFS was named as a relief defendant by the SEC -- Frishberg caused substantially all of the assets of DFFS to be transferred to Barrington (the “Barrington Transfer”); Barrington essentially took over the business of DFFS. The principal asset transferred to Barrington was, fundamentally, the cash flow generated by DFFS as a Registered Investment Advisor (“RIA”) for managing the accounts of its clients. As an RIA, DFFS managed the investment portfolios of its clients and was entitled to charge management fees to those clients for that management. That fee-based cash flow constituted substantially all of the revenue earned by DFFS, and had substantial value. In fact according to its books and records, DFFS generated nearly \$5 million in revenue from management fees that were charged to clients in 2008 and 2009, representing over 95% of all revenue earned during that time period. In sworn testimony, Frishberg described

what was transferred to Barrington as the goodwill of DFFS as an asset. Heath, also in sworn testimony, described the transfer as buying a particular set of assets off the DFFS balance sheet. Barrington also (i) took over the DFFS offices in San Antonio, renegotiating the lease between DFFS and its landlord and moving to a smaller suite on the same floor, taking all DFFS office equipment; (ii) hired all or most DFFS employees, both in Houston and San Antonio, to continue the business of DFFS under Barrington's name; and (iii) assumed or paid certain liabilities of DFFS.

16. The Receiver has learned that to date Barrington has made payments to the Frishbergs, directly or indirectly, of at least \$120,000 in return for assets transferred from DFFS. At least \$52,000 was paid to DFFS or Frishberg by Barrington in April of 2010. On information and belief, payments to the Frishbergs by Barrington are ongoing. These payments are consideration for the transfer of DFFS assets and therefore the property of DFFS, not the personal property of the Frishbergs.

17. On or about September 30, 2010, through counsel, the Receiver advised Barrington and Heath that it was the position of the Receiver that any payments made by them to Frishberg were, in substance, compensation to Frishberg for the transfer of DFFS assets and that such payments were the property of DFFS and the Receivership Estate. Receiver further made demand that any payments to Mr. Frishberg be held in escrow pending approval by the Receiver and United States District Court. Heath and Barrington failed to respond and still have not responded, and apparently have continued to make payments to the Frishbergs as alleged hereinabove.

18. The Barrington Transfer constitutes a breach of the fiduciary duties owed to DFFS by Frishberg, in that Frishberg has personally profited at the expense of DFFS and

exposed DFFS to extensive liability in its position as a relief defendant and Receivership Entity. Heath and Barrington knowingly participated in these breaches by Frishberg and are jointly liable for them. Heath and Barrington also knew that the assets being transferred to Barrington were assets of DFFS and not Frishberg individually, and that DFFS had been named a relief defendant by the SEC in the Receivership Proceeding. Notwithstanding this knowledge, Heath and Barrington consummated the Barrington Transfer and made payments to the Frishbergs individually for assets of DFFS. Through these acts, Frishberg, Heath and Barrington tortiously interfered with the contracts DFFS had with its clients.

19. The Barrington Transfer was also a fraudulent transfer under applicable Texas law and, accordingly, Barrington is liable to the Receiver, on behalf of DFFS creditors, for the value of the assets received at the time of the transfer. Additionally, the Frishbergs are liable to the Receiver, on behalf of DFFS creditors, for any payments they have received, directly or indirectly, as a result of the transfer of DFFS assets to Barrington.

20. This adversary proceeding is brought, *inter alia*, pursuant to Texas common law for breach of fiduciary duty, negligence, inducing, aiding or abetting breach of fiduciary duty or other negligent breaches of duty, tortious interference with existing contracts, unjust enrichment, constructive trust, fee forfeiture and an accounting and pursuant to the Texas Uniform Fraudulent Transfer Act (“TUFTA”), TEX. BUS. & COMM. CODE §§24.001 *et seq.* to set aside and recover from the Defendants the value of all fraudulent transfers of assets from the Receivership Entities. The Receiver brings these claims on behalf of the Receivership Estate, the Receivership Entities and their creditors.

## II. PARTIES

21. Plaintiff Thomas L. Taylor, III has been appointed by this Court as the Receiver for “the assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges” of the Receivership Entities. *Order Appointing Receiver* ¶1. Plaintiff Receiver is asserting the claims contained herein solely in his capacity as Court-appointed Receiver over the Receivership Entities.

22. Defendant Daniel S. Frishberg resides in metropolitan Houston, Texas and at relevant times has been an owner, employee, partner, director and/or officer of DFFS, BizRadio and their related entities.

23. Defendant Elisea T. Frishberg is Defendant Frishberg’s wife and resides in metropolitan Houston, Texas. At relevant times she has been vice president and co-founder of BizRadio.

24. Defendant Albert F. Kaleta resides in metropolitan Houston, Texas and at relevant times has been an owner, employee, partner, director and/or officer of KCM, BizRadio, DFFS and their related entities.

25. Defendant Barrington Financial Advisors, Inc. is a Texas corporation and a Texas RIA with its principal place of business at 9800 Richmond Avenue, Suite 250, Houston, Texas 77042 and offices at 13750 San Pedro, Suite 880, San Antonio, Texas 78232.

26. Defendant William C. Heath resides in metropolitan Houston, TX, and is a director and the chief executive officer and president of Defendant Barrington.

### **III. JURISDICTION AND VENUE**

27. As the Court that appointed the Receiver, this Court has jurisdiction over any claim brought by the Receiver to execute his Receivership duties. *Order Appointing Receiver* ¶5(c).

28. This Court additionally has jurisdiction, and venue is proper, under Chapter 49 of Title 28, Judiciary and Judicial Procedure [28 U.S.C. §754].

29. This Court has personal jurisdiction over the Defendants pursuant to FED. R. CIV. P. 4(k)(1)(A).

30. Venue is proper, as all Defendants reside in the Southern District of Texas, and Barrington's principal place of business is in the Southern District of Texas.

### **IV. STATEMENT OF FACTS**

#### **The SEC Actions Against Kaleta and Frishberg**

31. The allegations at the heart of the SEC Actions involve the acts of Frishberg, Kaleta and others taken through the Receivership Entities and their affiliates, including (i) the fraudulent offering of the KCM Notes; (ii) the fraudulent offering of the BizRadio Notes; and (iii) the fraudulent offering of other limited-partnership-interest securities in real estate investment funds, which then purchased BizRadio Notes and equity and received KCM Loans.

32. On November 13, 2009, the SEC commenced the Receivership Proceeding in this Court against Kaleta and KCM, alleging violations of §17(a) of the Securities Act of 1933 (the "Securities Act") [15 U.S.C. §77q(a)], §10(b) of the Securities Exchange Act of 1934 (the "Exchange Act") and Rule 10b-5 promulgated thereunder [15 U.S.C. §78j(b), 17 C.F.R. §240.10b-5], and §206 of the Investment Advisors Act of 1940 (the "Advisors Act") [15 U.S.C. §80b-6].

33. On December 2, 2009 the Court entered the Order Appointing Receiver (Doc. 7) appointing Thomas L. Taylor, III as Receiver over all property, assets, and records of KCM, and all entities owned or controlled by it. On June 17, 2010 the Court entered the Order Modifying Order Appointing Receiver (Doc. 34) expanding the Receivership Estate to include BizRadio, DFFS, and all entities owned and controlled by them.

34. A permanent injunction has been entered as to Kaleta against future violations of §17(a) of the Securities Act, §10(b) of the Exchange Act and Rule 10b-5, and §206 of the Advisors Act. *See Agreed Judgment as to Defendants Albert Fase Kaleta and Kaleta Capital Management, Inc.*, Doc. 6. Civil penalties and disgorgement have been ordered against Kaleta in the amount of \$3,246,979. *See Final Judgment Against Defendant Albert Fase Kaleta*, Doc. 73. Kaleta also has been barred from association with any investment adviser pursuant to §203(f) of the Advisers Act [15 U.S.C. §80b-3(f)]. *See Order Instituting Administrative Proceedings*, SEC Administrative Proceeding File No. 3-13773, Release No. 2983, February 2, 2010.

35. On March 25, 2011, the SEC commenced the Frishberg Action in this Court against Defendant Frishberg, alleging violations of §206 of the Advisors Act [15 U.S.C. §80b-6]. *See Agreed Final Judgment*, Civil Action No. 4:11-cv-01097, Doc. 5. Civil penalties have been ordered against Frishberg in the amount of \$65,000 for violating, and aiding and abetting violations of, §206 of the Advisors Act. *Id.* Frishberg also has been barred from association with any investment adviser pursuant to §203(f) of the Advisers Act [15 U.S.C. §80b-3(f)]. *See Order Instituting Administrative Proceedings*, SEC Administrative Proceeding File No. 3-14393, Release No. 3206, May 16, 2011.

### **The KCM / DFFS / BizRadio Fraudulent Scheme**

36. Through his investigation and information provided by the SEC, the Receiver has learned that the Receivership Entities -- and the individuals controlling them -- are inextricably intertwined.

37. Frishberg and Kaleta owned and controlled the Receivership Entities, a group of corporate affiliates which operated from shared high-rise office suites at 3050 Post Oak Boulevard in Houston, Texas. The Receivership Entities utilized the services of the same employees who, at the direction of Frishberg and Kaleta, freely manipulated the accounting to reflect whatever result was required. The business records of the Receivership Entities were conflated and only minimal efforts were made -- again by shared employees acting at the direction of Frishberg and Kaleta -- to designate expenses among the Receivership Entities and their affiliates.

38. Frishberg and Kaleta provided financial support to the Receivership Entities by offering promissory note securities through KCM and BizRadio to members of the public, the vast majority of whom were DFFS clients with assets under the financial management of Frishberg and Kaleta. Proceeds from the sale of the Notes were transferred among the various Receivership Entities on an "as needed" basis at the direction of Frishberg and Kaleta and then documented as "loans" after the fact by promissory note, if at all. Indeed a circular chain of loans by and among the Frishbergs, Kaleta and their affiliates, personally, and the Receivership Entities and other business affiliates, made the accounting function little more than a creative exercise.

39. The books and records make clear that the Frishbergs and Kaleta regularly used Receivership Entity assets and Note proceeds for their personal benefit, including the payment of

personal expenses and as personal loans. Receivership Entity credit cards were shared with little attention to proper allocation between personal or business expenses, or between the separate expenses of the Entities themselves.

40. During the relevant timeframe, KCM had no business operations and served no function whatsoever other than to raise money from the public; money which was then used to support BizRadio and DFFS, including payments received by the Frishbergs and Kaleta. BizRadio's purpose was not to generate profits, but rather to raise money from the public through the BizRadio Notes, to promote Frishberg as a purported financial guru, to promote Frishberg's website and online products, and to grow the asset base managed by DFFS, all for the ultimate pecuniary gain of the Frishbergs and Kaleta. While DFFS earned some legitimate revenue from the management of the investment assets of its clients, such revenue was comingled with the proceeds of the Notes which KCM and BizRadio transferred to DFFS, and conflated in the books and records of the Receivership Entities. Certain of these management fees were earned by Frishberg and Kaleta as a result of their recommendations to DFFS clients to invest in the Notes.

#### **The KCM Note Offering**

41. As Frishberg knew or should have known, commencing in December 2007 Kaleta and others began offering to investors, many of whom were DFFS clients, three-year promissory notes issued by Kaleta's company, KCM. Frishberg authorized Kaleta to recommend the KCM Notes to DFFS clients, and indeed the vast majority of KCM Note holders are DFFS clients. Through August 2009, KCM sold at least \$10 million of these notes.

42. Kaleta and others under Frishberg's supervision verbally represented to investors the following: (a) that KCM would use the proceeds from the KCM Notes to make short-term

loans to small businesses; (b) that KCM Loans would only be made to credit-worthy entities whose investment models had been fully researched and understood; (c) that due diligence would be performed to ensure that such entities had the ability to repay the KCM Loans; (d) that KCM would charge borrowing entities 12% to 14% annual interest on the KCM Loans; (e) that KCM would profit from the spread between the interest on the KCM Loans and the 10% interest promised to KCM Note investors; and (f) that Kaleta maintained a reserve account to cover note repayments and that he personally guaranteed the KCM Notes -- indicating that he had sufficient personal wealth to repay investors in full.

43. In fact -- as Frishberg knew or should have known when he directed Kaleta to offer the KCM Notes to DFFS clients -- the vast majority of the money raised through the sale of KCM Notes was funneled to BizRadio and DFFS, two non-creditworthy affiliate entities to which Kaleta and Frishberg were insiders, from which the Frishbergs and Kaleta received salaries and which had no reasonable prospect of repaying the KCM Loans they received. Kaleta did not perform due diligence to ensure that BizRadio and DFFS had the ability to repay their KCM Loans, and further failed to disclose the conflicts of interest between KCM on one hand and BizRadio and DFFS on the other, namely that the Frishbergs and Kaleta would receive salaries from the companies that would ultimately receive the proceeds from the sale of KCM Notes, and in fact those salaries would be paid with KCM Note proceeds. The promised reserve account to cover investor losses was not maintained.

44. Indeed, KCM loaned BizRadio approximately \$5.5 million of investor money. During the first eight months of 2009, BizRadio received \$3.6 million from KCM while its books showed more than \$1.6 million in losses. Furthermore, its only significant assets were illiquid radio-station licenses. KCM also loaned approximately \$1.2 million to DFFS, which did

not have sufficient revenue or assets to service such a loan. Frishberg, Kaleta and others proceeded with the KCM Note offering to DFFS clients knowing that the KCM Note proceeds would be redirected to BizRadio and DFFS, entities Frishberg and Kaleta knew had little to no prospect of repaying the KCM Loans -- repayment which Frishberg himself controlled as CEO -- and which they knew would also compensate them through salary, personal loans, and improperly paid personal expenses.

45. This negative financial information regarding BizRadio and DFFS was available to Frishberg and Kaleta when they orchestrated the KCM Loans to BizRadio and DFFS. Frishberg approved and Kaleta recommended the KCM Notes to DFFS clients even though the notes were not suitable for such clients. DFFS clients included among their investment objectives the expectation of earning interest and receiving a return of principal. BizRadio's and DFFS's financial conditions were so poor that they had only nominal prospects for paying back the KCM Loans, and the prospects for repayment of KCM Notes was equally poor. Frishberg and Kaleta knew or were reckless in not knowing this when recommending the KCM Notes to DFFS clients.

46. Not surprisingly, BizRadio and DFFS have not made any repayments to KCM, and KCM Note holders now hold claims against the Receivership Estate for these amounts. Frishberg and Kaleta should be held liable to KCM and its investors in the unpaid amounts.

#### **The BizRadio Note Offering**

47. While serving as CEO of BizRadio in 2008, Frishberg orchestrated the issuance of the BizRadio Notes, purportedly to raise capital for BizRadio. As he had done with the KCM Notes, Frishberg approved the recommendation of the BizRadio Notes to DFFS clients, and they were sold almost exclusively to DFFS clients by Frishberg, Kaleta and others. Kaleta served as an officer of both BizRadio and DFFS, although he was subordinate to Frishberg at both entities.

From April 2008 through September 2009, BizRadio raised approximately \$5.5 million through the promissory-note offering. None of these funds were re-paid and the BizRadio Note holders now hold claims against the Receivership Estate for these amounts.

48. When offering the BizRadio Notes to DFFS clients and others, Frishberg and Kaleta were fully aware that BizRadio was not creditworthy, and indeed was either insolvent before or because of the BizRadio Note offering, that the loans were not at arms-length, and that BizRadio's true purpose was not to generate legitimate business revenue, but rather to promote Frishberg as a purported financial guru, ultimately increasing traffic at his website and growing the client base of DFFS, from which the Frishbergs and Kaleta would profit. Moreover, Frishberg and Kaleta did not in any way ensure that accurate material information was disclosed in the BizRadio Note presentations. In particular, Frishberg and Kaleta failed to ensure that investors were informed that the Frishbergs and Kaleta would be compensated by BizRadio. Such compensation constituted an undisclosed conflict of interest between the investors on one hand and Frishberg and Kaleta on the other.

49. Frishberg and Kaleta recommended the BizRadio Notes to DFFS clients even though the notes were not suitable for such clients. DFFS clients included among their investment objectives the expectation of earning interest and receiving a return of principal. BizRadio's financial condition was so poor that it had only nominal prospects for paying interest and returning principal, a fact Frishberg and Kaleta knew or were reckless in not knowing. Frishberg and Kaleta knew this negative financial information regarding BizRadio when they orchestrated the BizRadio Note offerings and the recommendation of BizRadio Notes to DFFS clients. The BizRadio Notes have not been repaid, and BizRadio Note holders now hold claims

against the Receivership Estate for these amounts. Frishberg and Kaleta should be held liable to BizRadio and its investors in the unpaid amounts.

### **Actions in Breach of Fiduciary Duties to DFFS**

50. Frishberg and Kaleta were officers of DFFS; Frishberg was a director. Accordingly, Frishberg and Kaleta owed the fiduciary duties of loyalty and care, and to act in the utmost good faith, to DFFS and, as registered investment representatives, were fiduciaries of the clients of DFFS.

51. The duty of loyalty dictates that one must act in good faith and not allow his personal interests to prevail over the interests of the corporation, partnership, or one's partners. The duty of loyalty prohibits a fiduciary from deriving a personal profit or advantage at the expense of the corporation or partnership, and requires that a fiduciary act solely for the best interest of the corporation or partnership, unhindered by any individual pecuniary interest.

52. The duty of care requires a fiduciary to be diligent and prudent in managing the corporation or partnership's affairs. A fiduciary must handle corporate or partnership duties with such care as an ordinarily prudent man would use under similar circumstances, and must exercise unbiased or honest business judgment in pursuit of corporate or partnership interests.

53. Frishberg was an interested director and officer of DFFS in relation to his direction to DFFS personnel to recommend the Notes to DFFS clients as investments, his participation in recommending the BizRadio Notes to DFFS clients and as to the loans of Note proceeds to DFFS. In relation to those transactions and acts, Frishberg (a) personally profited from the recommendation to DFFS clients to invest in the KCM Notes and the subsequent KCM Loans to BizRadio and DFFS; (b) personally profited from his and others' recommendation to DFFS clients to invest in the BizRadio Notes and the subsequent loans of note proceeds

BizRadio made to DFFS; (c) transacted business in his capacity as an officer and director of DFFS with other corporations of which he was also a director or officer, and personally profited from those transactions; and (d) transacted business in his capacity as an officer and director of DFFS with a family member, Mrs. Frishberg, in her capacity as an officer of BizRadio, and personally profited from such transactions.

54. Kaleta was an interested officer of DFFS in relation to his recommendation of the Notes to DFFS clients as investments and as to the loans of Note proceeds to DFFS. In relation to those transactions and acts, Kaleta: (a) personally profited from his and others' recommendation to DFFS clients to invest in the KCM Notes and the subsequent KCM Loans to BizRadio and DFFS; (b) personally profited from his and others' recommendation to DFFS clients to invest in the BizRadio Notes and the subsequent loans of note proceeds BizRadio made to DFFS; and (c) transacted business in his capacity as an officer of DFFS with other corporations of which he was also a director or officer, and personally profited from those transactions.

55. Frishberg also caused the transfer of substantially all of the assets of DFFS to Barrington and in return has personally received payments from Barrington for this transfer (as alleged in more detail below). In the event that any payments were made by Barrington to DFFS for these assets, Frishberg diverted those funds to himself as if they had been paid directly to him. Those payments are consideration for the sale of DFFS assets and Frishberg has taken them for his personal benefit, to the detriment of DFFS.

56. Furthermore, Frishberg and Kaleta have acted without diligence and prudence in their management of DFFS's corporate affairs, and have not exercised unbiased or honest

business judgment in pursuit of DFFS's corporate interests, breaching the duty of care they owed to DFFS and its clients.

57. By virtue of Frishberg's direction to DFFS personnel to recommend the Notes to DFFS clients as investments, and Frishberg's, Kaleta's and/or others' doing so, Frishberg and Kaleta have exposed DFFS to liability to those DFFS clients who invested in the Notes based on their recommendation. Furthermore, by causing DFFS to borrow over \$1 million from KCM and BizRadio, knowing that DFFS had no realistic prospect of repaying the loans -- with the repayment of those loans being controlled by Frishberg -- Frishberg and Kaleta have exposed DFFS to substantial liability to those entities and their creditors. They took these actions in order to enrich themselves at the expense of DFFS.

58. As a result of these actions taken by, and at the direction of, Frishberg and Kaleta, DFFS was placed into receivership to be liquidated for the benefit of the Estate's defrauded investors. Frishberg and Kaleta have caused DFFS to become insolvent and did so to advance their own pecuniary interests, which they placed ahead of the interests of DFFS.

#### **Actions in Breach of Fiduciary Duties to KCM**

59. Kaleta was the sole owner, director and officer of KCM.

60. In this capacity, Kaleta placed the interests of KCM behind those of his own, breaching the duty of loyalty he owed to KCM.

61. Kaleta was an interested director and officer of KCM in relation to his orchestration of the KCM Note offering, the recommendation of the KCM Notes to DFFS clients as investments and as to the KCM Loans to BizRadio and DFFS. In relation to those transactions and acts, Kaleta: (a) personally profited from his recommendation to DFFS clients to invest in the Notes; (b) personally profited from the KCM Loans to BizRadio and DFFS; and (c)

transacted business in his capacity as a director and officer of KCM with other corporations of which he was also a director or officer, and personally profited from those transactions.

62. Kaleta also impermissibly used KCM assets to enrich himself to the detriment of KCM, using KCM funds obtained through the KCM Note offering to make personal loans to himself and his allies, and to impermissibly pay for personal expenses.

63. Furthermore, Kaleta has acted without diligence and prudence in his management of KCM's corporate affairs, and has not exercised unbiased or honest business judgment in pursuit of KCM's corporate interests, breaching the duty of care he owed to KCM.

64. Kaleta caused KCM to offer the KCM Notes to the public, knowing he would then cause KCM to make the KCM Loans to BizRadio and DFFS (entities to which Kaleta was an insider and from which he was compensated). Kaleta exposed KCM to over \$10 million in liabilities to KCM Note holders knowing their investment funds would be used to finance entities which had poor prospects for repaying those loans, thus knowing KCM's prospects of repaying KCM Note holders were equally poor. He took these actions in order to enrich himself at the expense of KCM.

65. Frishberg aided or induced Kaleta to orchestrate the KCM Note offering and subsequent KCM Loans to BizRadio and DFFS, and knew or should have known that the KCM Note proceeds would not be used as represented but instead transferred to BizRadio and DFFS. Accordingly, Frishberg knowingly participated in or induced Kaleta's breaches of fiduciary duty to KCM and is jointly liable for all damages caused by those breaches in which he knowingly participated or induced.

66. As a result of these actions taken by Kaleta and Frishberg, KCM was placed into receivership to be liquidated for the benefit of the Estate's defrauded investors. Kaleta and

Frishberg have caused KCM to become insolvent and did so to advance their own pecuniary interests, which they placed ahead of the interests of KCM.

### **Actions in Breach of Fiduciary Duties to BizRadio**

67. The Frishbergs and Kaleta were officers, and Frishberg was a director, of BizRadio.<sup>4</sup> Accordingly, the Frishbergs and Kaleta owed the fiduciary duties of loyalty and care, and to act in the utmost good faith, to BizRadio.

68. In these capacities, the Frishbergs and Kaleta have placed the interests of BizRadio behind those of their own, breaching the duty of loyalty they owed to BizRadio.

69. Frishberg was an interested director and officer of BizRadio in relation to (a) his orchestration of the BizRadio Note offerings, (b) the KCM Loans to made to BizRadio, (c) the BizRadio Note proceeds loaned to DFFS, and (d) BizRadio's air time given to Frishberg and its on-air promotion of Frishberg and his RIA, DFFS. Mrs. Frishberg was an interested officer of BizRadio in relation to (a) her promotional activities of Frishberg and DFFS, (b) her corporate dealings with DFFS relating to the loans from BizRadio to DFFS, by virtue of her marriage to Frishberg, and (c) insider actions taken by Frishberg though BizRadio, in that she profited personally from the actions taken by Frishberg. Kaleta was an interested officer of BizRadio in relation to: (a) his recommendation to DFFS clients to invest in the BizRadio Notes, (b) the KCM Loans made to BizRadio, and (c) the BizRadio Note proceeds loaned to DFFS.

70. In relation to those transactions and acts, the Frishbergs and Kaleta: (a) personally profited from the BizRadio Note offerings; (b) personally profited from the KCM Loans to

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<sup>4</sup> Frishberg was an approximate 57% equity and debt owner of BusinessRadio, Inc., the general partner of BusinessRadio Network, L.P. Through his complete control of the general partner and his misuse of the corporate form, Frishberg was the alter-ego of BusinessRadio, Inc. As its alter-ego, Frishberg was essentially the general partner, and accordingly is liable not only for the breaches of the fiduciary duties owed by him to BusinessRadio, Inc. and BusinessRadio Network, L.P. as an officer and director, but those owed by the general partner to the limited partners of BusinessRadio Network, L.P. Kaleta was an approximate 43% equity and debt owner of BusinessRadio, Inc., and together with Frishberg 100% in control of the general partner.

BizRadio and the loans BizRadio made to DFFS; and (c) transacted business in their capacity as officers and as a director of BizRadio with other corporations of which they were insiders, officers, or directors, and personally profited from those transactions.

71. Furthermore, the Frishbergs and Kaleta have acted without diligence and prudence in their management of BizRadio's corporate affairs, and have not exercised unbiased or honest business judgment in pursuit of BizRadio's corporate interests, breaching the duty of care they owed to BizRadio.

72. BizRadio was run by the Frishbergs and Kaleta as a "loss-leader" for DFFS. The Frishbergs and Kaleta used BizRadio as a vessel through which to promote Frishberg as a successful and knowledgeable financial guru. Through this promotion of Frishberg on BizRadio's airwaves -- airtime which Frishberg did not pay for, to the detriment of BizRadio -- the Frishbergs and Kaleta sought to (a) increase traffic and subscribers to Frishberg's website, (b) increase the attendance at various financial seminars Frishberg held (and continues to hold) nationwide, and, ultimately through these, (c) increase the number of clients and assets under management at DFFS (which in turn would increase management fees received by them). BizRadio's interests were not of any import, but rather the entity was simply a means to an end -- to put money in the Frishbergs' and Kaleta's pockets.

73. By virtue of the Frishbergs and Kaleta's causing BizRadio to take KCM Loans and Frishberg's orchestration of the BizRadio Note offerings, the Frishbergs and Kaleta exposed BizRadio to extensive liability to those who invested in the Notes, and to KCM and its creditors. Frishberg and Kaleta caused BizRadio to take on this debt knowing its poor prospects for repayment; indeed as CEO, Frishberg controlled BizRadio's payments of these debts.

74. Mrs. Frishberg knew or should have known about the various transfers of funds from the Receivership Entities to her and her husband, including personal expenses being paid with Receivership Entity credit cards, that the source of those funds was the fraudulently offered Notes, and that she and Frishberg were insiders to those transactions and were profiting from them to the detriment of BizRadio and its creditors.

75. As a result of these actions taken by and at the direction of the Frishbergs and Kaleta, BizRadio was placed into receivership to be liquidated for the benefit of the Estate's defrauded investors. The Frishbergs and Kaleta have caused BizRadio to become insolvent and did so to advance their own pecuniary interests, which they placed in priority to the interests of BizRadio.

#### **Fraudulent Transfers to the Frishbergs and Kaleta**

76. KCM has taken proceeds from the KCM Notes which were fraudulently obtained from investors. Those proceeds were subsequently transferred, directly or indirectly, to Kaleta, the Frishbergs, DFFS, BizRadio and others in the form of loans, salary, payments of personal expenses or other compensation.

77. BizRadio has taken proceeds from the BizRadio Notes which were fraudulently obtained from investors. Those proceeds were subsequently transferred, directly or indirectly, to the Frishbergs, Kaleta, DFFS and others in the form of loans, salary, payments of personal expenses or other compensation.

78. The Frishbergs have received, directly or indirectly<sup>5</sup>, and continue to receive directly, transfers from Barrington in payment for the Barrington Transfer (as detailed below).

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<sup>5</sup> If payments were made by Barrington to DFFS, Frishberg transferred those payments from DFFS to himself before DFFS was subsumed into the Receivership Estate.

79. These direct and indirect transfers to the Frishbergs and Kaleta of funds derived from Note proceeds and the Barrington Transfer are fraudulent transfers under TUFTA, and must be disgorged to the Receiver for the benefit of the creditors of the Receivership Estate.

### **The Barrington Transfer**

80. Commencing sometime approximately in February of 2010 and continuing through at least June of 2010, Frishberg, in a series of transactions, caused client investment accounts managed by DFFS to be transferred to Barrington. The transfer of these accounts to Barrington was done in an ongoing fashion throughout this time period. The cash flow earned by DFFS resulting from the management fees charged to DFFS clients represented substantially all of the assets of DFFS at the time Frishberg caused these accounts -- and thus the ability to collect management fees on them -- to be transferred. Other assets incidental to Barrington's taking over the DFFS business were also transferred to Barrington in this time period in the form of office related assets (i.e., computers, furniture, etc.).

81. The Barrington Transfer was made after DFFS had been named as a relief defendant by the SEC in the Receivership Proceeding and KCM had been placed into receivership. The Barrington Transfer was made in anticipation of the SEC obtaining a judgment for equitable relief against DFFS for debts due to KCM, and Receiver's moving the Court to subsume BizRadio and DFFS into the Receivership Estate.

82. At the time of the Barrington Transfer, DFFS was liable to BizRadio and KCM for over \$1 million in loans made to DFFS by those entities. Frishberg transferred substantially all of the assets of DFFS to Barrington (i) with actual intent to hinder, delay, or defraud creditors KCM and BizRadio, or (ii) without receiving reasonably equivalent value for the transfer, and (a) during a time in which DFFS was insolvent or became insolvent as a result of the transfer, or (b)

was engaged in a transaction for which its remaining assets were unreasonably small in relation to the transaction or reasonably should have believed that DFFS would incur debts beyond the debtor's ability to pay as they became due. By the time DFFS had been subsumed into the Receivership Estate, the assets available for satisfaction of its debts were negligible in relation to its outstanding debts.

83. Barrington has paid the Frishbergs for these DFFS assets either through payments directly to the Frishbergs or indirectly through DFFS. On information and belief, payments to the Frishbergs by Barrington are ongoing.

84. Indeed the Frishbergs and their affiliates continue to profit from the Barrington Transfer in many ways. Since the Barrington Transfer, Mrs. Frishberg has obtained the position of “Fixed Income/Capital Preservation Specialist for Barrington Financial.”<sup>6</sup> Additionally, on information and belief, Frishberg continues to manage the DFFS client accounts he tortiously transferred to Barrington and continues to earn “fees” on that management. Frishberg continues to disseminate his financial advice newsletters, now with Barrington’s Houston address in the newsletters’ footer. Other former Receivership Entity employees also found employment at Barrington as a result of the Barrington Transfer.

85. The cash flow from the fees charged to manage these accounts was a DFFS asset, and as a DFFS asset was not Frishberg’s to transfer or profit from in his individual capacity. The Frishbergs are liable to the Receiver, on behalf of DFFS creditors, for all assets they have received, and continue to receive, in consideration and as payment for the transfer of DFFS assets to Barrington, including without limitation two transfers from Barrington to the Frishbergs

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<sup>6</sup> <http://themoneymanreport.com/newsletters-a-reports/item/253-macroeconomic-designed-bonds-and-cds.html> [Accessed August 22, 2011].

totaling \$120,000. Barrington is liable to the Receiver, on behalf of DFFS creditors, for the value of the DFFS assets received at the time they were transferred.

**V. CAUSES OF ACTION**

86. The Receivership Estate consists of three separate entities, KCM, BizRadio, and DFFS, and all entities which they own or control. The actions taken by these Receivership Entities and their directors, officers, and other employees which form the basis of the allegations in the SEC Actions and this Complaint were in many cases made by persons with overlapping roles as directors and officers whose capacities -- like those of the lower-level employees they were directing, and the internal financials of the Entities -- were often conflated.

87. Accordingly, the causes of action asserted in this Complaint are pleaded on behalf of the Receivership Estate, the Receivership Entities and their creditors, namely those who hold valid claims against the Receivership Estate which entitle them to Estate assets in a manner to be approved by this Court in the Receiver's eventual Plan of Distribution.

88. To the extent that any of the causes of action or claims for damages alleged herein are in conflict with another, such causes of action and claims for damages are plead in the alternative.

**COUNT I: Breach of Fiduciary Duties Owed to DFFS  
(Against Frishberg and Kaleta)**

89. All preceding paragraphs are incorporated by reference as if fully set forth herein.

90. Frishberg and Kaleta as officers of DFFS, and Frishberg as a director, owed the fiduciary duties of loyalty and care, and to act in the utmost good faith, to DFFS and, as registered investment representatives, were fiduciaries of the clients of DFFS.

91. Frishberg and Kaleta acted in breach of their fiduciary duties owed to DFFS and its clients by, among other things, recommending (or directing others to recommend) to DFFS

clients the KCM and BizRadio Notes (and earning fees based on those recommendations), causing DFFS to borrow millions of dollars of KCM and BizRadio Note proceeds (which were subsequently paid to them as compensation and otherwise), and the other acts of self-dealing, corporate waste, and mismanagement alleged herein. Frishberg further breached his fiduciary duties to DFFS by selling substantially all of the assets of DFFS to Barrington for his own personal benefit.

92. As a direct and proximate result of Frishberg's and Kaleta's conduct, DFFS and its clients have suffered damages, and Frishberg and Kaleta have gained improper benefits.

93. By reason of the above, the Receiver is entitled to an award of actual damages caused by Frishberg's and Kaleta's alleged conduct and disgorgement of all improper benefits gained by Frishberg and Kaleta, in an amount to be proven at trial. Frishberg's and Kaleta's breaches of fiduciary duty were intentional, and accordingly the Receiver is entitled to exemplary damages in an amount to be proven at trial. Receiver is also entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against Frishberg and Kaleta.

**COUNT II: Negligence  
(Against Frishberg and Kaleta)**

94. All preceding paragraphs are incorporated by reference as if fully set forth herein.

95. Frishberg and Kaleta had a duty to protect DFFS against unreasonable risks and actions, including without limitation the exposure of DFFS to liability due to fraudulently offered promissory notes, the self-dealing of management, the misuse of corporate funds, the exposure of DFFS to Note investors, and other tortious conduct by or unjust enrichment of Frishberg, Kaleta and others.

96. Frishberg and Kaleta breached these duties by failing to conform to the appropriate standards of care commensurate with their control of and senior positions at DFFS.

97. As a direct and proximate result of Frishberg's and Kaleta's conduct, DFFS has been damaged by Frishberg and Kaleta's negligence and failure to adhere to standards of appropriate care.

98. By reason of the above, the Receiver, on behalf of DFFS, is entitled to an award of actual damages in an amount to be determined at trial. Frishberg's and Kaleta's conduct was intentional and the Receiver, on behalf of DFFS, is entitled to an award of exemplary damages in an amount to be determined at trial. Receiver is also entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against Frishberg and Kaleta.

**COUNT III: Breach of Fiduciary Duties Owed to KCM  
Inducing or Aiding Breach Fiduciary Duties Owed to KCM  
(Against Kaleta and Frishberg)**

99. All preceding paragraphs are incorporated by reference as if fully set forth herein.

100. Kaleta, as an officer of KCM, owed the fiduciary duties of loyalty and care, and to act in the utmost good faith, to KCM.

101. Kaleta acted in breach of his fiduciary duties owed to KCM by, among other things, causing KCM to offer the KCM Notes knowing the proceeds would be loaned to BizRadio and DFFS (and therefore the low likelihood of the Notes being repaid with interest to investors), loaning millions of dollars of KCM Note proceeds to BizRadio and DFFS (which were subsequently paid to him as compensation and otherwise), and the other acts of self-dealing, corporate waste, and mismanagement alleged herein.

102. Frishberg knowingly induced, or participated in, Kaleta's breaches of fiduciary duties to KCM, including the offering of KCM Notes and the subsequent loans of those proceeds

to BizRadio and DFFS. Indeed Kaleta was Frishberg's subordinate at BizRadio and DFFS. Accordingly Frishberg is jointly liable with Kaleta for the breaches of fiduciary duties to KCM.

103. As a direct and proximate result of Frishberg's and Kaleta's conduct, KCM has suffered damages, and Frishberg and Kaleta have gained improper benefits.

104. By reason of the above, the Receiver is entitled to an award of actual damages caused by Frishberg's and Kaleta's alleged conduct and disgorgement of all improper benefits gained by Frishberg and Kaleta, in an amount to be proven at trial. Frishberg's and Kaleta's conduct was intentional, and accordingly the Receiver is entitled to exemplary damages in an amount to be proven at trial. Receiver is also entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against Frishberg and Kaleta.

**COUNT IV: Negligence; Aiding or Abetting Negligence  
(Against Kaleta and Frishberg)**

105. All preceding paragraphs are incorporated by reference as if fully set forth herein.

106. Kaleta had a duty to protect KCM against unreasonable risks and actions, including without limitation the loss of its assets due to fraudulently offered promissory notes, the self-dealing of management, the misuse of corporate funds, the exposure of KCM to Note investors, and other tortious conduct by or unjust enrichment of Kaleta, Frishberg and others.

107. Kaleta breached these duties by failing to conform to the appropriate standards of care commensurate with his control of and senior position at KCM.

108. Frishberg knowingly assisted or encouraged Kaleta's negligent actions towards KCM, including the offering of KCM Notes and the subsequent loans of those proceeds to BizRadio and DFFS. Indeed Kaleta was Frishberg's subordinate at BizRadio and DFFS. Accordingly Frishberg is jointly liable with Kaleta for Kaleta's negligent breach of duties to KCM.

109. As a direct and proximate cause of the actions of Frishberg and Kaleta, KCM has been damaged by Kaleta's negligence and failure to adhere to standards of appropriate care, and Frishberg's knowing assistance or encouragement of Kaleta's actions.

110. By reason of the above, the Receiver, on behalf of KCM, is entitled to an award of actual damages in an amount to be determined at trial. Frishberg's and Kaleta's conduct was intentional and the Receiver, on behalf of DFFS, is entitled to an award of exemplary damages in an amount to be determined at trial. Receiver is also entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against Frishberg and Kaleta.

**COUNT V: Breach of Fiduciary Duties Owed to BizRadio  
(Against the Frishbergs and Kaleta)**

111. All preceding paragraphs are incorporated by reference as if fully set forth herein.

112. The Frishbergs and Kaleta, as officers of BizRadio, and Frishberg, as a director, owed the fiduciary duties of loyalty and care, and to act in the utmost good faith, to BizRadio.

113. Frishberg and Kaleta breached the fiduciary duties they owed to BizRadio and/or its limited partners by, among other things, orchestrating the offering of BizRadio Notes to the public with no reasonable prospect of repayment, causing BizRadio to borrow millions of dollars of KCM Note proceeds and loan BizRadio Note proceeds to DFFS with no reasonable prospects of repayment to KCM or from DFFS, operating BizRadio as a loss-leader for DFFS, and the other acts of self-dealing, corporate waste, and mismanagement alleged herein.

114. Mrs. Frishberg breached the fiduciary duties she owed to BizRadio by, among other things, participating in the lending of proceeds from the BizRadio Note offerings to DFFS from which Frishberg was compensated, participating in BizRadio's borrowing of KCM Loans from which she and Frishberg were compensated, and the other acts of self-dealing, corporate waste, and mismanagement alleged herein.

115. As a direct and proximate result of the Frishbergs' and Kaleta's conduct, BizRadio and its limited partners have suffered damages, and the Frishbergs and Kaleta have gained improper benefits.

116. By reason of the above, the Receiver is entitled to an award of actual damages caused by the Frishbergs' and Kaleta's alleged conduct and disgorgement of all improper benefits gained by the Frishbergs and Kaleta, in an amount to be proven at trial. The Frishbergs' and Kaleta's breaches of fiduciary duty were intentional, and accordingly the Receiver is entitled to exemplary damages in an amount to be proven at trial. Receiver is also entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against the Frishbergs and Kaleta.

**COUNT VI: Negligence  
(Against the Frishbergs and Kaleta)**

117. All preceding paragraphs are incorporated by reference as if fully set forth herein.

118. The Frishbergs and Kaleta had a duty to protect BizRadio and/or its limited partners against unreasonable risks and actions, including without limitation the loss of its assets due to fraudulently offered promissory notes, the self-dealing of management, waste of corporate assets, the exposure of BizRadio to Note investors, and other tortious conduct by or unjust enrichment of the Frishbergs, Kaleta and others.

119. The Frishbergs and Kaleta breached these duties by failing to conform to the appropriate standards of care commensurate with their control of and senior positions at BizRadio.

120. As a direct and proximate cause of the actions of the Frishbergs and Kaleta, BizRadio has been damaged by the Frishbergs' and Kaleta's negligence and failures to adhere to standards of appropriate care.

121. By reason of the above, the Receiver, on behalf of BizRadio, is entitled to an award of actual damages in an amount to be determined at trial. The Frishbergs' and Kaleta's conduct was intentional and the Receiver, on behalf of BizRadio, is entitled to an award of exemplary damages in an amount to be determined at trial. Receiver is also entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against the Frishbergs and Kaleta.

**COUNT VII: Fraudulent Transfer  
Pursuant to TUFTA § 24.005  
(Against the Frishbergs and Kaleta)**

122. All preceding paragraphs are incorporated by reference as if fully set forth herein.

123. The Frishbergs and Kaleta received transfers, directly or indirectly, derived from Note proceeds in the form of salary, personal loans, improperly paid personal expenses, and other payments which constitute fraudulent transfers under TUFTA.

124. The transfers alleged herein are fraudulent as to all creditors because they were made:

(a) with actual intent to hinder, delay, or defraud the creditors of the transferor entity, as shown, without limitation, by the following facts: (i) made to insiders of the transferor, (ii) the transferor was insolvent or became insolvent shortly after the transfers were made, and (iii) the transfers occurred shortly before or shortly after a substantial debt was incurred by the transferor; or

(b) without receiving a reasonably equivalent value in exchange for the transfer, and the transferor (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the transferor were unreasonably small in relation to the business or

transaction, or (ii) intended to incur, or believed or reasonably should have believed that said entity would incur, debts beyond the transferor's ability to pay as they became due.

125. The Receivership Estate is entitled to all assets fraudulently transferred to the Frishbergs and Kaleta as alleged herein, or the value of those assets when they were transferred.

126. The Receiver's investigation regarding the amount of fraudulent transfers received by the Frishbergs and Kaleta is ongoing. Accordingly, the Receiver reserves the right to supplement or amend this Complaint upon discovery of further evidence.

**COUNT VIII: Fraudulent Transfer  
Pursuant to TUFTA § 24.006  
(Against the Frishbergs and Kaleta)**

127. All preceding paragraphs are incorporated by reference as if fully set forth herein.

128. The Frishbergs and Kaleta received transfers, directly or indirectly, derived from Note proceeds in the form of salary, personal loans, improperly paid personal expenses, and other payments which constitute fraudulent transfers under TUFTA.

129. Those transfers are fraudulent as to the transferor's creditors having claims at the time the transfers were made because they were made:

(a) without receiving a reasonably equivalent value in exchange for the transfer and the transferor was insolvent at that time or became insolvent as a result of the transfer; or

(b) to an insider for an antecedent debt, the transferor was insolvent at that time, and the insider had reasonable cause to believe that the transferor entity was insolvent.

130. The Receivership Estate is entitled to all assets fraudulently transferred to the Frishbergs and Kaleta as alleged herein, or the value of those assets when they were transferred.

131. The Receiver's investigation regarding the amount of fraudulent transfers received by the Frishbergs and Kaleta is ongoing. Accordingly, the Receiver reserves the right to supplement or amend this Complaint upon discovery of further evidence.

**COUNT IX: Fraudulent Transfer**  
**Pursuant to TUFTA §§ 24.005 and 24.006(a)**  
**(Against Barrington and the Frishbergs)**

132. All preceding paragraphs are incorporated by reference as if fully set forth herein.

133. Barrington received transfers from DFFS and/or Frishberg consisting of substantially all of DFFS's assets, which constitute fraudulent transfers under TUFTA. The Frishbergs have received, directly or indirectly, transfers from Barrington as consideration for the DFFS assets transferred, which constitute fraudulent transfers under TUFTA.

134. The transfers alleged herein are fraudulent as to creditors of DFFS because they were made:

(a) with actual intent to hinder, delay, or defraud the creditors of DFFS, as shown, without limitation, by the following facts: (i) DFFS was insolvent or became insolvent shortly after the transfers were made, (ii) the transfers were concealed, (iii) Frishberg retained control of the property transferred after the transfer, (iv) before the transfer was made DFFS had been sued and Frishberg threatened with suit, (v) the transfer was of substantially all of DFFS's assets, and (vi) value of the consideration received by DFFS was not reasonably equivalent to the value of the assets transferred;

(b) without receiving reasonably equivalent value in exchange for the transfer, and DFFS (i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the DFFS were unreasonably small in relation to the business or

transaction, or (ii) intended to incur, or believed or reasonably should have believed that DFFS would incur, debts beyond DFFS's ability to pay as they became due; or

(c) without receiving a reasonably equivalent value in exchange for the transfer and DFFS was insolvent at that time or became insolvent as a result of the transfer.

135. The Receiver is entitled to the value of the DFFS assets at the time they were fraudulently transferred to Barrington and the payments received, directly or indirectly, by the Frishbergs for those assets.

136. The Receiver's investigation has heretofore uncovered approximately \$120,000 of payments made by Barrington to the Frishbergs as a result of the Barrington Transfer.

137. The Receiver's investigation regarding the amount of assets received by Barrington and the Frishbergs as a result of the Barrington Transfer is ongoing, and on information and belief payments from Barrington to the Frishbergs continue. Accordingly, the Receiver reserves the right to supplement or amend this Complaint upon discovery of further evidence.

**COUNT X: Inducing or Aiding Breach Fiduciary Duties Owed to DFFS  
(Against Barrington and Heath)**

138. All preceding paragraphs are incorporated by reference as if fully set forth herein.

139. As alleged above, Frishberg breached the fiduciary duties of loyalty and care, and to act in the utmost good faith, to DFFS through, among other things, his transfer of substantially all of the assets of DFFS to Barrington, and his past and ongoing receipt of payments for those transferred DFFS assets.

140. Heath and Barrington knowingly induced, or participated in, Frishberg's breach of fiduciary duties to DFFS as they relate to the Barrington Transfer. Heath and Barrington knew that DFFS had been named as a relief defendant by the SEC in the Receivership Proceeding, that

the assets they were receiving were the property of DFFS, and not Frishberg, and with this knowledge they still participated with Frishberg in the asset transfer, and on information and belief continue to make payments to the Frishbergs personally as a result of the transfer.

141. Accordingly, Heath and Barrington are liable as joint tortfeasors for the damages caused to DFFS by Frishberg's breach related to the Barrington Transfer, as alleged above, including actual damages, exemplary damages and equitable damages for attorney's fees.

**COUNT XI: Tortious Interference with Existing Contracts  
(Against Frishberg, Barrington and Heath)**

142. All preceding paragraphs are incorporated by reference as if fully set forth herein.

143. DFFS had valid contracts with its clients whose assets were under management at DFFS.

144. Barrington and Heath, as third parties, and Frishberg, as an agent of DFFS acting to serve his own personal interests at the expense of DFFS, willfully and intentionally interfered with those contracts between DFFS and its clients by causing clients to transfer their accounts to Barrington. Frishberg, Barrington and Heath all had either (a) actual knowledge of the contracts and DFFS's interests in them, or (b) knowledge of facts and circumstances that would lead a reasonable person to believe there were contracts in which DFFS had interests.

145. The actual interference with the DFFS client contracts is shown by Frishberg, Barrington and Heath's causing those client accounts to be transferred to Barrington.

146. The alleged interference proximately caused injury to DFFS, namely that DFFS was stripped of the benefits of those contracts, and lost substantially all of its assets while receiving nothing in return.

147. As a result of this interference, Receiver, on behalf of DFFS, is entitled to actual damages, including the lost benefits of the contracts and damages for economic injury, and is

entitled to exemplary damages. Receiver is further entitled to equitable damages of just and reasonable attorney's fees for the bringing of this cause of action against Frishberg, Barrington and Heath.

**COUNT XII: Unjust Enrichment  
(Against the Defendants)**

148. All preceding paragraphs are incorporated by reference as if fully set forth herein.

149. The Frishbergs benefitted and were enriched in the form of salary, personal loans, improperly paid personal expenses, and other payments from their receipt, directly or indirectly, of (i) KCM and BizRadio Note proceeds which were fraudulently obtained by the Receivership Entities, (ii) payments received consisting of fees obtained by DFFS through the offering of the Notes to DFFS clients, and (iii) payments from Barrington related to the Barrington Transfer.

150. Kaleta benefitted and was enriched in the form of salary, personal loans, improperly paid personal expenses, and other payments from his receipt, directly or indirectly, of (i) KCM and BizRadio Note proceeds which were fraudulently obtained by the Receivership Entities, and (ii) payments received consisting of fees obtained by DFFS through the offering of the Notes to DFFS clients.

151. Barrington and Heath benefitted and were enriched from the receipt of the DFFS assets related to the Barrington Transfer, and any cash flow or other benefits currently produced by those assets.

152. This enrichment was at the expense of the Receivership Entities and, ultimately, the Receivership Entities' creditors.

153. Equity and good conscience require full restitution and disgorgement of the benefits which unjustly enriched the Defendants, so that they may ultimately be returned to the defrauded investors of the Receivership Estate.

**COUNT XIII: Constructive Trust  
(Against the Defendants)**

154. All preceding paragraphs are incorporated by reference as if fully set forth herein.

155. As set forth above, the assets of the Receivership Entities, including without limitation proceeds from the sale of the Notes, have been wrongfully diverted as a result of fraudulent transfers, breaches of fiduciary duties, and other wrongdoing of the Defendants for their own individual interests and enrichment.

156. Because of the past unjust enrichment of the Defendants and their breaches of fiduciary duties to KCM, BizRadio and DFFS (and the knowing inducement of or participation in those breaches), the Receiver is entitled to the imposition of a constructive trust with respect to any transfer of funds, assets, or property from the Receivership Entities as well as to any profits received by the Defendants in the past or on a going forward basis in connection with the Receivership Entities or the Barrington Transfer.

**COUNT XIV: Fee Forfeiture  
(Against Frishberg, Kaleta, Barrington and Heath)**

157. All preceding paragraphs are incorporated by reference as if fully set forth herein.

158. As set forth above, Frishberg and Kaleta, in their capacity as fiduciaries to DFFS and its clients, have received fees as a result of their tortious and wrongful conduct alleged herein, including their breach of fiduciary duties to DFFS and its clients in regards to DFFS's recommendations to invest in the Notes, and, for Frishberg, the Barrington Transfer. Barrington and Heath knowingly induced or participated in those breaches relating to the Barrington Transfer and are liable as joint-tortfeasors, and have received fees as a result of those breaches.

159. Because of the tortious and wrongful conduct of Frishberg and Kaleta, and the joint liability of Barrington and Heath in regards to the Barrington Transfer, the Receiver is

entitled to the forfeiture of any fees received by Frishberg, Kaleta, Barrington or Heath as a result of the aforementioned breaches of fiduciary duties.

**COUNT XV: Accounting  
(Against the Defendants)**

160. All preceding paragraphs are incorporated by reference as if fully set forth herein.

161. As set forth above, the assets of the Receivership Entities have been wrongfully diverted as a result of fraudulent transfers, breaches of fiduciary duties, and other wrongdoing of the Defendants for their own individual interests and enrichment.

162. To compensate the Receivership Entities for the amount of assets the Defendants have either diverted from them or gained from said diversion, for their own benefit, it is necessary for the Defendants to provide an accounting of any transfer of funds, assets, or property received from the Receivership Entities or other Defendants, as well as to any profits in the past and on a going forward basis in connection with the Receivership Entities or the Barrington Transfer. Complete information regarding the amount of such transfers misused by or transferred to any of the Defendants for their own benefit is within their possession, custody, and control.

**VI. CONCLUSION AND PRAYER**

163. In relation to the above causes of action, the Receiver seeks:

- (a) Actual damages;
- (b) Exemplary damages;
- (c) Reasonable and just attorney's fees and costs of suit;
- (d) A constructive trust;
- (e) A forfeiture of relevant fees improperly earned;
- (f) An accounting;

- (g) Disgorgement;
- (h) Pre- and post-judgment interest; and
- (i) All other relief, in law and equity, to which he is justly entitled.

November 17, 2011

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.



By: \_\_\_\_\_

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COUNSEL FOR RECEIVER

**CERTIFICATE OF SERVICE**

On November 17, 2011, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the CM/ECF electronic filing system. I hereby certify that I have provided copies to all counsel of record and *pro se* parties electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Thomas L. Taylor III  
\_\_\_\_\_  
Thomas L. Taylor III