

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

SECURITIES AND EXCHANGE COMMISSION,	§	
	§	
	§	
Plaintiff,	§	
v.	§	Civil Action No. 4:09-cv-3674
	§	
ALBERT FASE KALETA and KALETA CAPITAL MANAGEMENT, INC.,	§	
	§	
	§	
Defendants,	§	
	§	
BUSINESSRADIO NETWORK, L.P. d/b/a BizRadio and DANIEL FRISHBERG FINANCIAL SERVICES, INC., d/b/a DFFS CAPITAL MANAGEMENT, INC.,	§	
	§	
	§	
Relief Defendants, Solely for the Purposes of Equitable Relief.	§	
	§	

**RECEIVER’S MOTION TO MODIFY ORDER
APPOINTING RECEIVER AND FOR EMERGENCY ASSET FREEZE**

Thomas L. Taylor III, Court-appointed Receiver for Defendant Kaleta Capital Management, Inc. (“KCM”), hereby files this Motion To Modify Order Appointing Receiver to expressly include as part of the Receivership Estate the following individuals and entities: Defendant Albert F. Kaleta (“Kaleta”); Daniel Frishberg (“Frishberg”); and Relief Defendant Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc. (“DFFS”), Frishberg & Kaleta Capital Management (“F&K”) d/b/a Frishberg & Kaleta Advisors, Relief Defendant Business Radio Network L.P., d/b/a BizRadio (“BizRadio”); BizMedia Network LLC (“BizMedia”), Frishberg Global Investments, LLC (“FGI”), and Portnoy, LLC (“Portnoy”).

I.

PRELIMINARY STATEMENT

Daniel Frishberg and Defendant Albert Kaleta created a network of affiliated companies (KCM, DFFS, F&K, BizRadio, BizMedia, FGI and Portnoy) (the “FK affiliates”) -- all owned and controlled by Frishberg and Kaleta. All of these entities have conducted business either from a shared office suite¹ or from the homes of Frishberg or Kaleta. DFFS and F&K were investment advisory firms through which Frishberg and Kaleta developed a substantial client base. A number of investment advisory clients of these entities became victims of the KCM promissory note fraud which is at the center of the present action. BizRadio and BizMedia operate a radio network that broadcasts programming designed to attract clients to the DFFS and F&K investment advisory business. KCM was established to provide funding both to the investment adviser and to the radio network through the sale of securities to the public. KCM was strategically positioned to raise capital for Frishberg and Kaleta’s other businesses because their shared principals, Frishberg and Kaleta, provided KCM a ready base of potential investors -- namely Frishberg and Kaleta’s investment advisory clients.

As shown below, all of the entities and individuals sought to be included in the KCM Receivership by this Motion are inextricably intertwined with both KCM, the Defendant presently in receivership, and Defendant Kaleta, against whom disgorgement -- in an amount to be determined -- has already been ordered by this Court’s Judgment dated December 2, 2009. As alleged by the SEC, Relief Defendants DFFS and BizRadio received funds and property from KCM which are proceeds of the unlawful activities of Defendants KCM and Kaleta; and Relief Defendants obtained funds belonging to the defrauded KCM investors “under circumstances in which it is not just, equitable, or conscionable for them to retain the funds and property.”

¹ 3050 Post Oak Blvd, Ste 1680, Houston, Texas.

Both KCM and Kaleta have been determined by this Court's Judgment to have violated the Securities Exchange Act of 1934 and other statutes in connection with their sale of KCM securities to the public. This Court's judgment was entered upon the Commission's charges that Kaleta and others had used KCM as a medium for raising money from members of the public, purportedly for the purpose of investing the proceeds in creditworthy small businesses which would return principal to the investors along with an attractive rate of interest. The Commission charged that, in fact, KCM and Kaleta had induced investors to purchase KCM promissory notes using the proceeds to finance businesses owned and controlled by Kaleta, Frishberg and others -- businesses which were anything but creditworthy.

More than half of the KCM investors' funds, were loaned to Relief Defendant BizRadio. Perpetrating a blatant, intentional fraud, Kaleta and Frishberg failed to disclose to KCM investors that all of BizRadio's tangible assets had purportedly been "pledged" to third parties which would potentially leave the KCM investors little more than BizRadio's dubious prospects for future income and -- as it turns out -- fraud and other claims against the entities and their principals.²

BizRadio is now the subject of an involuntary liquidating Chapter 7 bankruptcy petition brought by individuals who allege they loaned money to BizRadio directly. In re BusinessRadio Network, LP, Case No. 10-32532 (Bankr. S.D. Tex - Judge Karen K. Brown). The putative Debtor filed a motion to dismiss the petition and an answer denying certain allegations in the petition which is set for hearing on May 10, 2010, at 11:00 a.m. As set forth below, Plaintiff believes that the police powers exception to the automatic stay of Section 362 of the Bankruptcy Code is applicable in the BusinessRadio Network LP case and, accordingly, that this Court may proceed

² The Receiver is investigating the circumstances of these purported pledges and will challenge any assertion of priority by the recipients of these pledges vis-à-vis the KCM investors.

with this matter.³ There is a pending sale of BizRadio's station license to Salem Communications which has been informed of the KCM Receiver's claims -- in the neighborhood of \$6,000,000 -- against BizRadio as a Relief Defendant. The Receiver requests that this Court exercise its equity jurisdiction to place BizRadio, its affiliates and its two principals (Kaleta and Frishberg) within the pending receivership so that the claims of KCM investors can be pursued in an orderly manner.

Relief Defendant DFFS is a registered investment advisor. At all relevant times, DFFS was owned and controlled by defendant Kaleta and Frishberg. Kaleta and Frishberg caused KCM to loan DFFS amounts aggregating approximately \$1,280,000.00 from the KCM note offering. These "loans" were not legitimate arms-length transactions. The KCM loans to DFFS were, in substance, a misappropriation of KCM investor funds. The Receiver is informed that Barrington Financial, a registered investment advisor, has entered into an agreement with DFFS, acting through Frishberg, pursuant to which it acquired the asset base of DFFS yielding to DFFS (or Frishberg himself) a substantial share of future revenues generated by the asset base. The Receiver served Barrington's Chief Executive Officer and Director of Compliance with the Order Appointing Receiver on February 17, 2010.

It is the Receiver's understanding that DFFS, still owned and controlled by Frishberg, is a going concern with cash flow from which to respond in the present action and assets that might satisfy an order for disgorgement of the proceeds of the KCM note offering.

By this Court's Order, the Receiver is directed to "[c]ollect, marshal, and take custody, control, and possession of all the funds, accounts, mail and other assets of, or in the possession of or under the control of the receivership estate, *or assets traceable to assets owned or controlled by the receivership estate...*" The Receiver requests that this Court give specific effect to that relief

³ The Receiver is advising the bankruptcy court and the counsel in the bankruptcy court proceeding of this Motion. Plaintiff has not been advised of any of the other Defendants or Relief Defendants being subject to a voluntary or involuntary bankruptcy petition.

vis-à-vis Frishberg, Kaleta, DFFS, F&K, BizRadio, Biz Media, FGI, and Portnoy. The Receiver believes that unless these individuals and entities are expressly included within the Receivership, the ability of KCM investors to obtain compensation for their losses in connection with defendants' fraudulent scheme will be seriously compromised.

Accordingly, the Receiver seeks a modification of the Order Appointing Receiver to include Frishberg, Kaleta, KCM, DFFS, F&K, BizRadio, Biz Media, FGI, and Portnoy within the Receivership on the grounds that they are related to, affiliated with, and under common control with Defendant KCM. This modification of the Order would extend the Order's restraint on the transfer or disposition of assets, documents and records to interrelated companies whose assets are traceable to KCM. The Receiver seeks a modification of the Order on the further ground that Frishberg and Kaleta are the alter egos of KCM, DFFS, F&K, BizRadio, Biz Media, FGI, and Portnoy. In support of the Receiver's request to pierce the corporate veil and reach Frishberg and Kaleta in their individual capacities, the Receiver will demonstrate that each individual participated in a course of conduct constituting an abuse of corporate privilege and that recognizing the existence of a separate corporate existence would bring about an inequitable result to defrauded investors.

The Receiver also requests -- on an emergency basis -- a freeze of assets pending this Court's determination of The Motion to Modify the Receivership Order. As explained below, an asset freeze is necessary to prevent further dissipation of the KCM investors' funds and to preserve assets that could be used to pay disgorgement and civil penalties.

II.

STATEMENT OF FACTS

Frishberg and Kaleta own and control a group of corporate affiliates that operated from a shared business location, utilizing the services of the same employees and freely manipulating the

accounting to reflect whatever result they required. The individuals and entities shared KCM credit cards with little attention to their repayment or proper allocation between personal or business expenses or between entities. A daisy chain of loans by and among KCM, Frishberg, Kaleta, Biz Radio, DFFS, F&K and other related parties made the accounting function little more than a creative exercise. The business records of the affiliates were conflated and it appears that only minimal efforts were made -- by shared employees acting at the direction of Kaleta and Frishberg -- to designate expenses among the FK Affiliates. Loans from KCM to those entities were taken on an “as needed” basis and documented (by promissory note) after the fact. Moreover, the books and records make clear that Frishberg and Kaleta have regularly used KCM assets for their personal benefit. KCM had no business operations and served no function whatsoever other than to raise money from the public. Accordingly, every dollar transferred from KCM to the FK Affiliates came from defrauded investors.⁴

A. KCM Was Nothing More Than A “Credit Line”

KCM was, in substance, a vehicle through which Kaleta and Frishberg funded the operations of BizRadio and DFFS -- and, not incidentally -- their own personal expenses through the payment of salaries and the use of KCM credit cards. KCM had the “benefit” of being integrated with Frishberg and Kaleta’s investment advisory businesses. KCM had access to DFFS clients and Frishberg and Kaleta used KCM to solicit investment from existing clients, without disclosing their intention to loan the proceeds of the KCM note offering to themselves.

KCM made loans to other entities owned and controlled by Frishberg and Kaleta without regard to creditworthiness and without even the semblance of due diligence. KCM’s prior counsel -- Kaleta’s present counsel -- has confirmed to the Receiver that KCM had no due diligence files.⁵ KCM is now left with no liquid assets and almost \$10 million in liabilities to defrauded investors.

⁴ Taylor Aff., ¶4.

⁵ Taylor Aff., ¶5

In records reviewed by the Receiver, Frishberg referred to KCM as a “Credit Line” to Biz Radio.⁶ He could not have been more accurate.

As reflected in email communications between employees of BizRadio, KCM, DFFS, F&K and others as late as September 2009, promissory notes were created after the fact to document ad hoc advances by KCM to fund the business operations of BizRadio, DFFS and other FK Affiliates. Focused searches of the entities’ e-mails have yielded substantial evidence of the conflation of the business operations of KCM and the FK Affiliates and the ready access of Frishberg, Kaleta and their affiliates to the proceeds of the KCM note offering.

Thus, in September 2009, an F&K marketing employee (presumably asked to perform an accounting function) wrote an email entitled “**Need Notes For**” which captures the extent to which the assets of the FK Affiliates are commingled:

I have put together a spreadsheet of items that KCM paid for that we are missing notes to/from LFW or BizRadio. Can you please take a look at the spreadsheet and see what notes you need to come up with please. Some of these items I am not sure exactly which entity owes a note back to KCM for, so your feedback will be much appreciated.⁷

Another email from an employee of F&K demonstrates the haphazard manner in which KCM books and records were compiled (and loans documented) -- long after the fact -- and only in response to an SEC subpoena.

Al, Linda and I met yesterday evening to go over KCM’s books, and we were wondering if you have any record of payments that may have been made by KCM on Wallace Bajjali’s (or any other project’s) behalf (as in the case of the 15% notes). We have record of a few payments, but we’re just trying to make sure we have everything completely in order to show the SEC and don’t want to miss anything. Thanks for your help!⁸

As evidenced by numerous communications reviewed by the Receiver, the preparation of KCM’s books and records was a community effort -- on the part of principals and employees of the FK affiliates -- reflected complete disregard for the protection of KCM, all of whose funds came from public investors in the KCM promissory notes. See email dated September 2009 attaching a

⁶ Taylor Aff., ¶6, Ex. 2.

⁷ Taylor Aff., ¶7a, Ex. 3.

⁸ Taylor Aff., ¶7b, Ex. 4

promissory note dated as of March 2009.⁹

There were instances where notes were created and delivered to various related borrowers which had no supporting documentation whatsoever. Numerous transactions were merely papered by the principals of the FK Affiliates to account for capital raised by the public which had been improperly dissipated.

David brought me a copy of a KCM Promissory Note that showed up on his desk the other day.Will you please send me some sort of documentation or evidence that \$25,000 was, in fact, loaned to LFW on this date? I do not have any records of this transaction. Perhaps it has been confused with another transaction. ...Again, please provide us with something to substantiate the April 24, 2009 Promissory Note and we will be happy to record it. Otherwise, we will go on the assumption that the April 24, 2009 Promissory Note was a duplicate created in error and is, therefore, null/void.¹⁰

LFW Fund is one of the borrowers from KCM (from the proceeds of the KCM note offering) which is presently in default. LFW Fund and its principal and affiliates had a host of joint investment projects with Frishberg and Kaleta.¹¹

Moreover, F&K employees were purporting to provide an employee of Biz Radio (assigned to coordinate KCM accounting) with documentation of KCM transactions and what they described as Kaleta's payments from "Al's account."

I've included in this email the notes that Lyndsay provided for Jack McElligott's investment in KCM. They were two separate investments, of \$400k and \$600k. Also, i've attached one of the invoices that i found. Warren might be able to provide you with the additional invoices, if not, you can probably do the math as to what interest was paid while we held that note. It was repaid this summer. Let me know if you need the date for that. You should have seen that in Al's account.¹²

Outside accountants were also involved in creating promissory notes to match the records provided by FK Affiliates.

I met with the controller at BizRadio yesterday after I gave her all those notes you created, and apparently there are a lot of discrepancies. That list I gave you was one I got from going over Al's accounts with him, but she has an actual record of all of the money that KCM has ever loaned BizRadio which is completely accurate. Basically, I need you to cancel all of the BizRadio notes you have on record, and use

⁹ Taylor Aff., ¶7c, Ex. 5

¹⁰ Taylor Aff., ¶7d, Ex. 6

¹¹ The Receiver is in negotiation with LWF Fund and its affiliates (also borrowers from KCM) for re-payment. The Receiver is also assessing potential liability of individuals and entities affiliated with LWF Fund for other improvident KCM loans. The Receiver may seek additional relief related to the LWF related parties at a later time.

¹² Taylor Aff., ¶7e, Ex. 7.

this spreadsheet to create new notes.¹³

In light of the foregoing, spreadsheets purporting to reflect outstanding promissory notes due to KCM from various borrowers that were located among the books and records of KCM reviewed by the Receiver are suspect as to precise amounts taken from KCM. There can be no doubt, however, that most of KCM's funds were transferred to and comingled with the assets of the FK Affiliates.

1. Loans to BizRadio Reflected In the Books and Records of KCM

The books and records of KCM reflect serial loans to BizRadio in varying amounts beginning in April 2007. It appears that BizRadio utilized KCM as a credit line or an automatic teller, with up to nine promissory notes in one month, and notes ranging in size from a few hundred dollars to \$800,000 at a time. The books and records are not definitive for multiple reasons. First, they have been revised by employees of the FK Affiliates at the behest of principals of those entities in order to contest purported accounting errors. Second, they are maintained on excel spreadsheets comprised of columns and rows. The books and records suggest that some of the note sums in column 2 may represent totals of multiple smaller notes. Nonetheless, the evidence of improper transfers -- not at arm's-length -- from KCM to BizRadio is indisputable. The books and records reflect KCM loans to Biz Radio as of the third quarter 2009 in amounts exceeding \$5,000,000.¹⁴

¹³ Taylor Aff., ¶7 f, Ex. 8

¹⁴ Taylor Aff., ¶7 g, Ex. 9

2. Loans to F&K and DFES Reflected In the Books and Records of KCM

The books and records reviewed by the Receiver reflect loans to F&K and DFES through the third quarter of 2009 in the neighborhood of \$1,300,000.¹⁵ Mr. Frishberg has asserted -- falsely -- that the F&K and DFES notes do not come due until 2013.¹⁶

3. KCM Loan To Daniel Frishberg For The Purchase Of A Residence

Abandoning all pretense of legitimacy, Frishberg accessed the proceeds of the KCM note offering for the purchase of his personal residence. The note was repaid with interest to the Receiver in the amount of \$122,068.56 on January 14, 2010. This payment is the only amount which has been repaid by Frishberg or Frishberg controlled entities and was made, no doubt, in recognition that the transaction would not have been considered lawful by anyone's reckoning.

The residence transaction -- albeit re-paid -- demonstrates the need to include Mr. Frishberg in the KCM Receivership on the basis of the commingling of KCM investor funds and freely accessing KCM funds as if they were his own.

4. KCM Credit Cards Were Used To Pay Operating Expenses of Biz Radio, DFES, F&K and The Personal Expenses of Frishberg and Kaleta

The Receiver was informed by employees of FK Affiliates that KCM credit cards were used to pay the operating expenses of BizRadio and other affiliated entities as well as personal expenses of Kaleta and Frishberg. KCM's recordkeeping for credit card transactions reflects conflating and commingling the obligations of the various individuals and entities. This is reflected in an email from Kaleta concerning Frishberg and his wife's personal spending on KCM credit cards:

Have you finished the Amex for Dan and Elisea personal spending., they have been paid several times and nothing has been reported to them or me as to what they owe. Let me know Monday were we are on this..... AL¹⁷

¹⁵ Taylor Aff., ¶7 h, Ex. 10.

¹⁶ Taylor Aff., ¶7 i, Ex. 11.

¹⁷ Taylor Aff., ¶7 j, Ex. 12.

The Receiver's review of the books and records of KCM included, among other data, an electronic spreadsheet entitled, "Personal (year 2009) which purports to analyze certain payments from KCM to credit cards used by FK Affiliates and the reclassification of same to "shareholder's equity."¹⁸

A spreadsheet found among the KCM books and records also purports to be a register of all KCM transactions which reflects serial payments to American Express, Diner's Club and other credit cards for which no corresponding reimbursements were made by Biz Radio and others. Instead, as reflected in the KCM "Notes To Financial Statements," KCM payments to American Express were simply allocated to responsible affiliates and notes receivable were created to reflect these amounts. In instances where a credit card amount was paid by KCM on behalf of a principal, it appears that the accounting records were adjusted -- after the SEC inquiry began -- to reflect a corresponding debit to "Stockholder Equity" in the amount of KCM's payment to a credit card or other personal expense. The "Notes To Financial Statements" are attached to the Receiver's affidavit.¹⁹

5. Kaleta's Potential Liability For Credit Card Transactions

An analysis prepared by the SEC staff related to Kaleta's personal expenditures on KCM credit cards suggests that Kaleta owed KCM upwards of \$1.5 million.²⁰ Since the preparation of that analysis, the Receiver is informed that Kaleta has asserted that downward adjustments are warranted to account for expenses incurred by FK Affiliates and certain payments made by Kaleta personally on behalf of KCM. Notwithstanding his position, these adjustments would still result in huge personal expenses charged to KCM by Kaleta and his family for which repayment has not been proffered to the Receiver.

¹⁸ Taylor Aff., ¶7 k, Ex. 13.

¹⁹ Taylor Aff., ¶7 l, Ex. 14.

²⁰ Taylor Aff., ¶7 m, Ex. 15.

B. KALETA, FRISHBERG, AND THE FK AFFILIATES HAVE FAILED AND REFUSED TO RESPOND TO RECEIVER'S DEMAND FOR PAYMENT

The Receiver has demanded that the FK Affiliates, and others, return all sums borrowed from KCM. Kaleta, DFFS, Biz Radio and F&K have failed and refused to do so. Disturbingly, Kaleta's counsel -- former KCM counsel -- recently indicated to the Receiver that Kaleta does not have funds sufficient to pay any form of disgorgement, let alone funds sufficient to cover the shortfall in recovery sustained by KCM investors.

Statements published by Frishberg clearly state that Kaleta recently sold his interest in DFFS to Frishberg. The details concerning Kaleta's sale of his interest in DFFS to Frishberg have not been provided to the Receiver. However, Frishberg has indicated that the DSSF entity earns approximately \$3,000,000 in fees on an annual basis. Therefore, it would be unreasonable to assume that Kaleta sold his interest in DFFS for a nominal sum or that he is legitimately facing insolvency.²¹

Moreover, notwithstanding the substantial indebtedness of DFFS to KCM, Kaleta personally has accepted repayment from DFFS for a series of "personal loans" he purportedly made to his affiliate. Apparently Kaleta has determined that his purported "loans" to DFFS were superior to the KCM promissory notes he executed. Moreover, Kaleta arranged that the purported "repayment" be directed to the Fidelity account of his son, instead of into his own.²²

From loans you have given to DFFSI from your personal accounts, the balance we owe you is \$17,469.11. Today we are sending a \$5000 check into Cole's Fidelity account.

In light of the foregoing, it is clear that the Order Appointing Receiver should be extended to the FK Affiliates, and that their assets should be frozen immediately to avoid the transfer or dissipation of any assets traceable to KCM.

²¹ Taylor Aff., ¶6, Ex. 2.

²² Taylor Aff., ¶7 o, Ex. 16.

C. BIZRADIO -- THROUGH FRISHBERG -- REQUESTED THAT THE RECEIVER CONSIDER A PROPOSED WORKOUT WITH BIZRADIO; SUBSEQUENTLY AN INVOLUNTARY BANKRUPTCY PETITION WAS FILED.

The Receiver advised counsel for BizRadio and DFFS that he would be open to a proposed workout solution between KCM and BizRadio with respect to BizRadio's indebtedness to KCM. The Receiver has been awaiting a specific proposal for weeks. In this regard, the Receiver has made it unmistakably clear that BizRadio and Frishberg should not engage in the solicitation of KCM note holders -- many of whom are not by any stretch "accredited investors" -- for an exchange of BizRadio Securites for their KCM promissory notes. On March 31, 2010, without notice to the Receiver or to this Court, a Chapter 7 Involuntary Bankruptcy petition was filed on behalf of three BizRadio investors. Since BizRadio is an existing Relief Defendant in the current action and at least one of the BizRadio investors petitioning for its involuntary bankruptcy is also a KCM investor, the Receiver urges this Court to retain jurisdiction over BizRadio and that it be brought within the Receivership Estate.

2. DFFS / Frishberg & Kaleta Have Failed To Respond To Demand For Repayment and Have Transferred Asset Base To Barrington Financial

The KCM books and records reflect outstanding loans to DFFS in the amount of approximately \$1,280,000.00. DFFS has failed and refused to pay its indebtedness to KCM as demanded by the Receiver. Moreover, it has failed and refused to comply with the Receiver's subpoena for documents notwithstanding ample time in which to do so.

According to an email from Frishberg to Kaleta, attaching a writing from Frishberg, DFFS (1) is highly profitable and earned \$3 million in fees this year, (2) owes \$6 million to KCM, (3) is wholly owned by Frishberg who has purchased Kaleta's interest, and (4) will be combined with BizRadio into a holding company. Frishberg writes, in pertinent part:

We own two companies. After purchasing kaleta's interest, I have a highly profitable, solely owned investment advisor firm, which earns \$3 million in fees

this year, and increased its assets under management by 90 million dollars this year. ...

Bizradio, on the other hand is not profitable, yet, though it has tremendous goodwill and is responsible for generating the IA business. The combined companies are quite profitable, as the radio network reaches profitability in the first quarter of 2010. **I am simply extending the same model, by combining the two companies via a holding company for major markets throughout the U.S.** This is what we are raising money for. Combined with the IA it is an excellent business model and has the assets to grow. **Money is not hard for us to come by to finance that growth, though it took a transition to get past losing the credit line of KCM.**²³

Notwithstanding its purported profitability, Frishberg has failed and refused to repay its debt as demanded by the Receiver. In fact, during recent testimony before the SEC, Frishberg testified that DFFS did not have obligations due and payable to KCM until 2013 and that it was current in its payments. That is not the case. In fact, Frishberg claimed -- implausibly -- not to have known the extent of the DFFS debt to KCM until the SEC action was commenced.²⁴

Moreover, Frishberg testified before the SEC that Barrington Financial, a registered investment adviser, has entered into an agreement with DFFS, acting through Frishberg, pursuant to which it acquired the asset base of DFFS for a substantial share of future revenues generated by the asset base. This transfer of the existing asset base would leave DFFS with the KCM debt, but without a revenue stream from which to repay it. Frishberg, on the other hand anticipates being paid by Barrington a percentage of the assets transferred to it.²⁵

DFFS's operations have been funded directly from KCM and hence by KCM investors. DFFS and Frishberg should be placed within the KCM Receivership so that any cash flow from Barrington to DFFS (or Frishberg personally) is preserved for the benefit of the KCM investors.

3. ATTEMPTED SALE OF BIZ RADIO'S PHYSICAL ASSETS, INCLUDING RADIO STATION EQUIPMENT, FURNITURE AND COMPUTERS.

²³ Taylor Aff., ¶6, Ex. 2.

²⁴ Taylor Aff., ¶7 i, Ex. 11, Frishberg Testimony.

²⁵ Taylor Aff. ¶8, Ex. 17, Frishberg Testimony.

On April 15, 2010, the Receiver was informed that in sworn testimony before the SEC a BizRadio employee had testified that -- at Frishberg's instigation -- radio equipment, office furniture and computers of substantial value was about to be transferred to third-parties for consideration, probably benefitting Frishberg. The Receiver advised Frishberg's counsel that he considered any assets of BizRadio to be potentially the assets of the KCM receivership and that any improper transfer of these assets would be the subject of an Order to Show Cause re Contempt. On April 22, 2010, Counsel for Mr. Frishberg gave the Receiver assurances that no transfers of the physical assets of BizRadio would take place. But the fact that these transfers were contemplated or attempted demonstrates that the KCM investors are at unacceptable risk and that the KCM Receivership should be expanded to encompass expressly the two Relief Defendants, their affiliates and their principals.²⁶

4. KALETA'S MASTERPIECE STOCK "PURCHASE" AND MISAPPROPRIATION OF MASTERPIECE ITEMS

In connection with its review of receivables of KCM, the Receiver encountered transaction records and correspondence related to Masterpiece Investments, a company that produces and sells bronze sculptures of high market value. In January 2010, the Receiver asked Kaleta to explain the transactions which included (1) a loan from KCM to Masterpiece in the amount of \$100,000.00; (2) a purchase (by KCM) of 2 million shares of Masterpiece Common Stock; and (3) the purchase by KCM of a number of Masterpiece sculptures. Each of these transactions was funded by KCM. Kaleta first indicated that he had personally purchased four of the sculptures.²⁷ Upon a review by the Receiver of KCM emails and books and records, it became apparent that the equity investment - - claimed by Kaleta or his own -- had in fact been funded by KCM. Moreover, all of the documents drafted by KCM's transactional counsel to memorialize the transactions identified KCM as the

²⁶ Taylor Aff., ¶9

²⁷ Taylor Aff., ¶10.

purchaser of the Masterpiece stock -- not Kaleta. Finally, the Receiver reviewed emails concerning the terms of the transaction which clearly identified KCM as the purchaser of 2,000,000 shares of Masterpiece. Kaleta responded to this email with, "great review and very accurate as to terms." After commencement of this litigation Kaleta attempted to claim that the stock purchase had been a personal investment. He apparently prepared or caused to be prepared a stock certificate dated February 3, 2009, reflecting that he was the owner of 2,000,000 shares. The electronic metadata, however, indicates that the stock certificate had been created approximately three months later on May 13, 2009. Finally, counsel to Kaleta indicated that Kaleta had abandoned his initial position that the investment had been made in his individual capacity and conceded that the equity in Masterpiece did, in fact, belong to KCM as did the funds used to purchase the equity.²⁸

Kaleta made similar misrepresentations concerning Masterpiece sculptures purchased with KCM assets. When asked by the Receiver to turn over the four sculptures identified by Kaleta, the Receiver was informed that the sculptures had been moved from the KCM/BizRadio/DFFS offices to Kaleta's home. Kaleta agreed to return the four sculptures to the KCM/DFFS/BizRadio office for collection. Kaleta assured the Receiver through counsel that there were no other sculptures that remained undisclosed. The Receiver's repeated requests for confirmation were met with repeated assurances that there were only four sculptures and that they had already been turned over to the Receiver. This was false.²⁹

The facts were uncovered during the Receiver's telephonic collection efforts to note holders. He contacted Masterpiece to demand repayment of its \$100,000.00 note to KCM. Masterpiece's principal referenced a number of other sculptures purchased by KCM but delivered to or picked up by Kaleta. When asked to provide supplemental information, Masterpiece delivered to the Receiver detail regarding sculptures in Kaleta's possession that had not been

²⁸ Taylor Aff., ¶ 11

²⁹ Taylor Aff., ¶ 12

disclosed. In response to the Receiver's subpoena and already confronted with evidence that the Receiver had received from Masterpiece, Kaleta admitted possession of the sculptures and agreed to deliver them to the Receiver.³⁰

Kaleta's attempts to misappropriate and convert KCM assets and his pervasive use of KCM to pay his personal expenses provide clear evidence that he should be included personally in the KCM Receivership.

C. THE FK AFFILIATES ARE ALTER EGOS OF FRISHBERG AND KALETA

As has been made clear by the manner in which the business of the FK Affiliates has been conducted, KCM, BizRadio, DFFS and K&A are the alter egos of Frishberg and Kaleta.

1. The FK Affiliates Are Controlled By Frishberg & Kaleta

As demonstrated below, the books and records of Defendants establish their identity as common officers, directors and/or principals of the entities over which Receivership is sought. Kaleta and Frishberg each held equity positions and/or occupied principal positions in the affiliated entities.³¹

A. Kaleta's Stock Ownership and Control Over FK Affiliates

During the period at issue in the SEC Complaint against Kaleta and KCM, Kaleta owned 100% of KCM and a substantial portion of the of DFFS. Kaleta was also a Texas-registered investment-adviser representative and served as DFFS's vice president and chief compliance officer. Moreover, Kaleta was an owner and officer of F&K to the extent it was intended to be separate from DFFS.

B. Frishberg's Stock Ownership and Control Over FK Affiliates

At all relevant times, Frishberg owned DFFS and now purports to be its sole owner. Frishberg, along with others, also controlled Biz Radio. Moreover, Frishberg recently formed an

³⁰ Taylor Aff., ¶ 13

³¹ Taylor Aff., ¶ 14, Ex. 18&19

entity named Frishberg Global Investments. The Receiver has limited information concerning this entity, however, because Frishberg has failed and refused to produce documents pursuant to the Receiver's subpoena. Therefore, all inferences should be drawn in favor of receivership.

C. FK Affiliates Share Common Addresses Business Address

The FK Affiliates shared a common business address or utilized the residential address of either Frishberg or Kaleta on public records. The physical office address used for the FK Affiliates, including the Relief Defendants is 3050 Post Oak Blvd., Suite 1680, Houston Texas 77056. The Receiver's review of the books and records of KCM evidences the use of this address by: BizRadio, DFFS, F&K and at times, KCM.

The address reflected on the public records of KCM is the residential address of Kaleta. It is clear from the Receiver's review of books and records, however, that the business of KCM was conducted at 3050 Post Oak Blvd., Suite 1680, Houston Texas 77056. Similarly, the address for the newly formed Frishberg Global Investments, LLC appears to be a residential address for Frishberg.³²

D. FK Affiliates Shared Employees

It also appears that the employees of Biz Radio, DFFS and/or F&K occupied multiple functions and often were assigned tasks for other FK affiliates, including the preparation and reconciliation of accounting data. Linda Sikes, for example functioned as controller and in-house accountant for BizRadio, DFFS, KCM and others. She was compensated by BizRadio and supervised in her performance of accounting function for all of the entities by Kaleta and Frishberg.

³² Taylor Aff., ¶ 14

MEMORANDUM OF LAW

Federal courts have broad discretion to determine relief in a receivership. *See SEC v. Elliott*, 953 F.2d 1560, 1566 (11th Cir. 1992). The granting of equitable relief may be appropriate against an entity that has not been charged with wrongdoing because it “possesses illegally obtained profits but has no legitimate claim to them.” *SEC v. Cheriff*, 933 F.2d 403, 414, n.11 (7th Cir. 1991), *cert. denied*, 112 S. Ct. 966 (1992). The appointment of a receiver is particularly appropriate in cases where a defendant, through its management, has defrauded members of the investing public. *See, e.g., SEC v. First Financial Group of Texas*, 645 F.2d 429, 438 (5th Cir. 1981). As Relief Defendants, Biz Radio and DFFS are already charged with having wrongfully received the proceeds of the KCM note offering. These transfers were not legitimate commercial transactions. At the instigation of Kaleta and Frishberg these entities looted KCM for their own benefit with full knowledge that all of their “borrowings” from KCM came directly from KCM investors who were in some cases also DFFS clients. KCM, BizRadio, DFFS, Frishberg and Kaleta should be addressed as a continuous whole -- a conflated entity -- having commingled KCM’s funds between and among themselves. Frishberg and Kaleta should not escape personal liability through their fraud and abuse of the corporate form. The Receivership should be expanded accordingly.

A district court may extend an equitable receivership over related entities. *See Elliott v. SEC*, 935 F.2d. at 1565 n.1 (where defendants had commingled funds between various companies, the district court treated the various companies as one entity for the purpose of the receivership proceeding.); *see also SEC v. Elmas Trading Corp.*, 620 F. Supp. 231, 236 (D. Nev. 1985), *aff’d* 805 F.2d 1039 (9th Cir. 1986)(ordering the expansion of receivership to include third party entities where a party seeking expansion establishes a commingling of funds, intertwined business

operations, utilization of an identical business address or office, co-identity of officers, or co-identity of directors and principals.) Under Texas law, "alter ego applies when there is such unity between corporation and individual that the separateness of the corporation has ceased and holding only the corporation liable would result in injustice." *Bollore S.A. v. Import Warehouse, Inc.*, 448 F.3d 317, 325 (5th Cir. 2006), citing *Castleberry v. Branscum*, 721 S.W.2d 270, 272, 29 Tex. Sup. Ct. J. 481 (Tex. 1986).

The granting of equitable relief against Defendants and any entity owned or controlled by them is appropriate even without charging these entities with wrong-doing on multiple grounds. *See, SEC v. Cheriff*, 933 F.2d at 414, n.11; *see also Elliott v. SEC*, 935 F.2d. at 1565 n.1; *SEC v. Elmas Trading Corp.*, 620 F. Supp. at 236.

This Court unquestionably has equitable authority to freeze assets to ensure that a future order of disgorgement or Order Appointing Receiver will have effect. *See, e.g., SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1106. *See also, e.g., Unifund SAL*, 910 F.2d at 1041-42. *See also SEC v. Margolin*, 1992 U.S. Dist. LEXIS 14872 at *19-*20 (S.D.N.Y. Sept. 30,1992) (court issued freeze order based on "sufficient showing" that an asset freeze was necessary to prevent defendants from "secreting or dissipating" assets) and *United States v. Cannistraro*, 694 F. Supp. 62, 71 (D.N.J. 1988), *aff'd in part, vacated in part on other grounds*, 871 F.2d 1210 (3d Cir. 1989).

- **Determination of Alter Ego**

The FK Affiliates are the alter egos of their principal, Frishberg and Kaleta and are the alter egos of each other." The Receiver seeks to disregard the corporate entities and reach all FK Affiliates and both Frishberg and Kaleta individually.

In determining if a company is the alter ego of another, Courts consider a "laundry list of factors..." *United States v. Jon-T Chems., Inc.*, 768 F.2d 686, 691 (5th Cir. 1985). These factors include whether or not the two companies have common stock ownership; common directors or

officers; common business departments; file consolidated tax returns or financial statements; are jointly financed; are incorporated together; if one operates with "grossly inadequate capital"; if the salaries and expenses of one are paid by the other; if all the business of one is provided by the other; if the property of one is used by the other as its own; if the daily operations aren't kept separately; and if one company does not "observe the basic corporate formalities..." *Id.* at 691-92.

A corporation is the alter ego of an individual if "there is such unity between corporation and individual [or parent corporation] that the separateness of the corporation has ceased and holding only the corporation liable would result in an injustice." *Bollore S.A. v. Imp. Warehouse, Inc.*, 448 F.3d 317, 325 (5th Cir. Tex. 2006), citing *Castleberry v. Branscum*, 721 S.W.2d 270, 272, 29 Tex. Sup. Ct. J. 481 (Tex. 1986).

As demonstrated by the emails and conflated operations discussed above, the FK Affiliates are nothing more than shells designed to protect Frishberg and Kaleta from pay their obligations to the detriment of. Frishberg and Kaleta are personally involved in the ownership, management, and operation of the FK Affiliates entities. Indeed, record keeping is so fluid that it is difficult to determine where one entity leaves off and the other begins. Moreover, shared owners, principals, office space, employees, financial officers, credit cards and creditors makes clear that a unity of interest exists among the FK Affiliates sufficient to bring them within the Receivership Estate.

IV.

THE FILING OF AN INVOLUNTARY CHAPTER 7 BANKRUPTCY PETITION DOES NOT OUST THIS COURT OF JURISDICTION OVER BIZRADIO

A. The District Court Has Jurisdiction To Determine Applicability of Automatic Stay as to BizRadio

This Court has jurisdiction to determine whether Receiver's Motion To Modify Order Appointing Receiver (to include BizRadio and other affiliates³³), is impacted by the involuntary bankruptcy petition filed by three alleged BizRadio investors. *SEC v. Wolfson*, 309 B.R. 612, 617 (D. Utah 2004), citing *In re Baldwin-United Corp. Litig.*, 765 F.2d 343, 347 (2nd Cir. 1985) ("The Court in which the litigation claimed to be stayed is pending has jurisdiction to determine not only its own jurisdiction but also the precise question whether the proceeding pending before it is subject to the automatic stay."); *SEC v. Bilzerian*, 131 F. Supp. 2d 10, 13-14 (D.D.C. 2001). BizRadio is already before this Court as a Relief Defendant. This Court has concurrent jurisdiction with the Bankruptcy Court to determine the effect of the BizRadio bankruptcy proceeding on this case. *See Id.*, at 617 *Wolfson*, 309 B.R. at 617, citing *United States Dep't of Housing & Urban Dev't v. Cost Control Marketing & Sales Mgm't*, 64 F.3d 920, 927 n.11 (4th Cir. 1995)) (noting that "the district court has concurrent jurisdiction with the bankruptcy court to determine the extent to which the Section 362 automatic stay limits the actions of the Commission in its ability to pursue the pending district court action.").

As noted by the Court in *Cost Control*, *supra*, "because the district court's jurisdiction attached first in time, it was superior." *Id.*; see also *United States v. Delta Distributors Co., Inc.*, 1996 U.S. Dist. LEXIS 12062, 1996 WL 460112 (June 21, 1996 S.D.W.V.) (finding that "because this Court's jurisdiction attached first in time, it is superior.").

"[T]here is no question that this enforcement action presently before this Court is excepted from the automatic stay" recently triggered by the BizRadio Chapter 7 involuntary bankruptcy petition filed on March 30, 2010. *SEC v. Wolfson*, 309 B.R. 612, 623 (D. Utah 2004) ("Defendants

³³ The other defendants and relief defendants are not part of the BizRadio involuntary bankruptcy case and could not even show that any automatic stay vis-à-vis BizRadio benefits them.

in enforcement action sought ‘preposterous’ result in the Bankruptcy Court by asking that Court to enjoin the Commission and the Receiver from proceeding in the case at bar”)(citations omitted).³⁴

It is well settled that the primary purpose of Commission enforcement actions is to promote public policy and safety by ensuring fair and equitable securities markets. *See, e.g., First Fin. Group*, 645 F.2d at 439; *SEC v. Towers Fin. Corp.*, 205 B.R. 27, 30 (S.D.N.Y. 1997). Indeed, in *SEC v. Brennan*, 230 F.3d 65, 71 (2d Cir. 2000), the court found that the purpose of the Section 362(b)(4) exception “is to prevent a debtor from frustrating necessary governmental functions by seeking refuge in bankruptcy court.”

Elmas is factually analogous to the present case. There, the court-appointed Receiver moved the court for an order modifying both the Permanent Injunction and the Order Appointing Permanent Receiver to expand the scope of the receivership and to include additional entities that were not parties to litigation. One entity included in the receiver's petition had recently filed for bankruptcy and argued that the automatic stay in the bankruptcy proceeding protected it from the District Court’s jurisdiction and the Receiver’s equitable powers. The *Elmas* Court disagreed. The court stated that the “petition for bankruptcy does not operate to stay the action before this Court.... The policy behind the police or regulatory exception to the automatic stay is to prevent the bankruptcy court from becoming a haven for wrongdoers.” 620 F. Supp. at 240-41.

As stated by this Circuit in *First Financial*, “the appointment of a temporary receiver . . . itself serves to prevent dismemberment of the corporate estate by management personnel who have been found to have acted fraudulently and who could otherwise easily dispose of the assets to the detriment of the bettor's creditors.” *First Financial Group*, 645 F.2d at 439. Thus, this Court’s

³⁴ Section 362(b)(4) of Title 11 of the United States Code provides, in pertinent part:

b) The filing of a petition under section 301, 302, or 303 of this title, or of an application under section 5(a)(3) of the Securities Investor Protection Act of 1970, does not operate as a stay
 (4) under (1), (2), (3), or (6) of subsection (a) of this section, of the commencement or continuation of an action or proceeding by a governmental unit . . . to enforce such governmental unit's . . . police and regulatory power....
 11 U.S.C. § 362(b)(4)

exercise of its equitable jurisdiction over BizRadio -- already a Relief Defendant in the present action -- is warranted to prevent the dissipation of assets directly traceable to KCM. It is of no substantive difference that the involuntary bankruptcy in the present case was filed by competing claimants to those assets. Further, in *Federal Trade Commission v. R.A. Walker & Assocs.*, 37 B.R. 608 (D.D.C. 1983), the court found that it had jurisdiction over and authority to issue and continue the freeze over the defendants' assets, notwithstanding the pendency of bankruptcy proceedings and that the maintenance of the freeze, pending appointment of a trustee in bankruptcy or a receiver, or both, is necessary to prevent dissipation of the assets. *Id.* at 609-10.

As discussed above, all entities discussed herein are controlled by or under common control with Defendants and all appear undercapitalized and unable to repay assets borrowed from KCM and traceable directly to the funds invested by the public in the KCM Notes. Moreover, like in *SEC v. Elmas Trading Corp.*, there is pervasive evidence of commingling of funds, intertwined business operations, utilization of an identical business address or office, co-identity of officers, or co-identity of directors and principals among these entities.

VIII.

CONCLUSION

WHEREFORE, the Receiver, Thomas L. Taylor III, respectfully requests that this Court (1) enter an Order to Modify Order Appointing Receiver to expressly include the following individuals and entities as part of the Receivership Estate: Albert F. Kaleta; Daniel Frishberg; Relief Defendant Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc., Frishberg & Kaleta Capital Management; Frishberg & Kaleta Advisors; Relief Defendant Business Radio Network L.P, d/b/a BizRadio, BizMedia Network LLC, and Frishberg Global Investments, LLC.

Moreover, for the foregoing reasons, this Court should grant the Receiver's application for a temporary order freezing assets pending this Court's determination of the Motion to Modify Order Appointing Receiver.

Respectfully submitted,

TAYLOR CUADRADO PC

By: /s/ Thomas L. Taylor III

Thomas L. Taylor III

Receiver for Kaleta Capital
Management, Inc.
4550 Post Oak Place Dr., Ste 241
Houston, Texas 77027
Telephone: 713.626.5300
Facsimile: 713.402.6154

In accordance with Local Rule 7.1(d), the Receiver contacted counsel for Defendants, Relief Defendants and the FK Affiliates on May 3, 2010, to confer about the disposition of this **Receiver's Motion To Modify Order Appointing Receiver And For Emergency Asset Freeze**. The parties were unable to reach an agreement.

/s/ Thomas L. Taylor III

Thomas L. Taylor III

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document is being provided to all counsel of record via electronic filing and certified mail, return receipt requested on this the 4th day of May, 2010:

/s/ Thomas L. Taylor III

Thomas L. Taylor III