

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

SECURITIES AND EXCHANGE	§
COMMISSION,	§
Plaintiff,	§
	§
v.	§
	§
ALBERT FASE KALETA and KALETA	§
CAPITAL MANAGEMENT, INC.,	§
Defendants,	§
	§
and	§
	§
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.	§

Case No. 4:09-cv-3674

STATUS REPORT OF THE RECEIVER DATED FEBRUARY 25, 2013

Thomas L. Taylor III (the “Receiver”), Court-appointed Receiver for Kaleta Capital Management, Inc. (“KCM”), BusinessRadio Network, L.P. (“BizRadio”), Daniel Frishberg Financial Services, Inc. (“DFFS”) and all entities they own or control (the “Receivership Entities”), respectfully submits the following Report regarding the Receiver’s efforts to take control, possession and custody of the Receivership Estate and any assets traceable to assets owned by the Receivership Estate and ultimately to achieve an equitable distribution of the Estate’s assets to all defrauded investors. The Receiver reports as follows:

I. BACKGROUND

By an Agreed Order entered on December 2, 2009 [Doc. # 7] (“Order Appointing Receiver”), Thomas L. Taylor III was appointed in order to collect, marshal, and take custody, control and possession of the assets of Kaleta Capital Management, Inc. (“Receivership Assets”) in contemplation of the eventual return of assets to investors harmed by the misconduct alleged in the Complaint. Order Appointing Receiver ¶5(a). On June 16, 2010 the Receiver, DFFS and BizRadio filed a Stipulation to Modify the Order Appointing Receiver [Doc. # 33] to expressly include DFFS and BizRadio within the Receivership Estate. The Court so expanded the Receivership Estate by Order dated June 17, 2010. Doc. # 34.¹

II. CASE STATUS

A. Assets Recovered To Date

(1) Repayment of Loans to KCM

At the inception of the Receivership, demands were made for repayment of all outstanding loans made by KCM to borrowers from proceeds of KCM's note offerings to members of the public. To date, the Receiver has obtained repayment of certain of the notes in the following amounts: \$122,069 (Daniel Frishberg personal note), \$92,348 (David Wallace personal note), and \$45,550 (Costa Bajjali personal note).

(2) Loan to Protechnik Inc. and Brian De Armas

Protechnik Inc. and its principal, Brian De Armas, declined to make payment on their outstanding indebtedness to KCM in the principal amount of \$160,937.50. Accordingly, on April 13, 2010 the Receiver initiated a civil action in the United States District Court -- *Thomas L.*

¹ Citations to the Order Appointing Receiver refer to Doc. # 7.

Taylor III, Solely in his Capacity as Court-Appointed Receiver for Kaleta Capital Management, Inc. v. Protechnik, Inc. and Brian De Armas, No. 4:10-cv-1189 -- seeking payment in full of the principal, along with interest, costs of suit and attorney's fees. The Receiver sought summary adjudication of the matter on July 6, 2011 [Doc. # 89], however prior to this Court's ruling Brian De Armas filed a bankruptcy petition under Chapter 7 of Title 11 of the United States Code in the United States Bankruptcy Court for the Southern District of Texas, Houston Division, Case No. 11-36801-H3-7, and a Suggestion of Bankruptcy in the present action [Doc. # 102]. As a result the Court stayed the Receiver's action against Protechnik, Inc. and De Armas. The Receiver filed a Proof of Claim for the amount of the KCM note in the De Armas bankruptcy action. That action is still active and pending before the Bankruptcy Court.

(3) Loans to DFFS, BizRadio and affiliates

Loans to DFFS, BizRadio and their affiliates represent the majority of the funds which were loaned from proceeds of the KCM note offerings, and were the basis for the Receiver's efforts to expand the Receivership Estate -- based upon the Receiver's extensive investigation and discovery efforts which revealed commingling and conflation of KCM proceeds and assets with those entities.

As a consequence of the expansion of the Estate, Radio Station KTEK 1110 AM and related assets (the "Station") was held as an asset of the Receivership Estate, and Receiver obtained this Court's approval of the sale of the Station in his continuing efforts to liquidate the assets of the Estate for the benefit of its claimants. Furthermore, the Receiver also now holds the legal claims which DFFS and BizRadio could have asserted prior to their being subsumed into the Receivership Estate.

(4) Management and Sale of Radio Station KTEK

When BizRadio was placed within the Receivership Estate, the Station license, with the assistance of FCC counsel, was transferred into the name of the Receiver. Subsequently, the Receiver operated the Station and, consistent with FCC requirements, an employee of the Receiver acted as the manager of the Station. Although the Station, broadcasting in the same format as it had prior to the license transfer to the Receivership Estate, generated *de minimis* income for the Estate, it held significant value to potential purchasers. Notwithstanding the Station's lack of significant revenue, in order to preserve the FCC broadcast license the Receiver was required to maintain the Station as a going concern and continue to broadcast programming until a sale of the Station could be completed.

Prior to being subsumed into the Receivership, BizRadio had entered into an agreement with respect to the sale of the Station license to South Texas Broadcasting, Inc. (“South Texas” or “STB”). Litigation had also been previously commenced by another potential purchaser of the Station, Asia Vision, Inc., asserting rights to acquire the station in a prior transaction -- which assertion was contested by BizRadio’s then management. That litigation, pending in Harris County District Court was stayed as to BizRadio because of the present Receivership. The Receiver engaged in discussions with South Texas concerning its purchase of the Station under the changed circumstances implicated by the Receivership. The Receiver also continued and began negotiations with other potential purchasers of the Station. Receiver also negotiated settlement terms with the Asia Vision plaintiffs of the lawsuit against BizRadio and others.

When BizRadio was placed in Receivership by this Court, (1) the Original Sale Agreement with STB already had been executed; (2) the Federal Communications Commission already had approved the transfer of Radio Station KTEK to STB -- a known commodity in the broadcast industry; and (3) STB already was obligated to and was, in fact, operating the Station

pursuant to a Time Brokerage Agreement associated with the Original Sale Agreement. The Receiver was advised by FCC counsel that this interim arrangement by which the Station was being operated was consistent with industry practice pending final transfer of the Station license. FCC counsel also advised the Receiver that closing of the transfer to STB could take place seamlessly, upon approval by this Court without the necessity of re-initiating an application of FCC approval. STB held a perfected security interest in the Station assets reflected in UCC filings. No competing perfected security interest appeared of record in UCC filings.

The Receiver sought the District Court's approval for procedures for the sale of the Station in a stalking horse auction form. On April 4, 2011 the District Court entered an Order approving the proposed sale procedures (as modified², the "Sale Procedures Order") [Doc. # 62]. In summary, the Receiver was authorized to enter into a "stalking horse" agreement with South Texas and then to seek higher "topping bids" through an auction process. The "stalking horse" sale of the Station provided for a consideration of \$1,000,000 in cash and the discharge of approximately \$1,500,000 in secured indebtedness held by South Texas. As ordered by the Court, the Receiver gave notice of the Station in the Houston Chronicle in addition to advertising the proposed sale in two widely circulated trade publications/websites. The Receiver also contacted media brokers who had expressed interest in the Station. Notwithstanding these efforts, no "topping bids" were received by the deadline established in the Procedures Order and, accordingly, the Receiver sought confirmation of the sale of the Station to South Texas, pursuant to the "stalking horse" contract.

Prior to the hearing on the Receiver's Motion for Confirmation of the Sale, a group of investors, through counsel, objected to the sale on a variety of grounds and asserted they held

² Doc. # 62 was subsequently modified and amended by Docs. # 66 and 120.

security interests in the Station assets superior to the security interest held by South Texas and other unsecured creditors, and that notice of the sale to potentially interested parties was insufficient. After hearing legal arguments with respect to the competing claims, the District Court determined that additional efforts to notify potentially interested parties should be undertaken, and 172 potentially interested persons were then served with the pertinent papers.

The Court then received arguments with respect to the competing claims of security interests and entered an Order [Doc. # 120] extending the time period to receive additional bids for the Station. After no qualified bids were received³, all objections to the sale of the Station to South Texas were withdrawn; however certain claims for priority interest over other Estate claimants in the proceeds of the sale were then argued before the Court. On December 2, 2011 the Court entered a Memorandum and Order rejecting the priority claims of the objecting investors to the proceeds from the sale of the Station [Doc. # 156].

On October 27, 2011 the Court entered a confirmation Order approving the sale of the Station to South Texas [Doc. # 146]. Following the deadline for appeal of the confirmation Order on November 28, 2011, the Receiver and South Texas finalized the closing of the sale of the Station and the transfer of the FCC license on December 21, 2011.

(5) Settlement of Claims with Richard Jordan

On August 23, 2011 the District Court authorized and approved the Receiver's Settlement with Richard Jordan, a former officer and equity owner of Receivership entity DFFS.

³ The Objectors initially approached the Receiver with a bid for the Station which was untimely and did not conform to other requirements of the Sale Procedures Order. This purported bid was abandoned. Nonetheless, during the extended bidding period implemented by this Court, the Objectors' counsel advised the Court and the Receiver that Ron Crider and a group of potential investors apparently aligned with the Objectors was prepared to make a formalized bid for the Station. Notwithstanding extensive efforts on the part of the Receiver to accommodate Mr. Crider's bid, it did not materialize.

In connection with his investigation regarding the Receivership entities, the Receiver determined that in or about October 2008, Mr. Jordan entered into a transaction with DFFS, Albert Kaleta and Daniel Frishberg, pursuant to which Mr. Jordan's ownership interest would be purchased by DFFS. In or about November 2008, Mr. Jordan was paid the sum of \$250,000 as a first installment on that purchase. The Receiver contended that the \$250,000 paid to Mr. Jordan consisted of proceeds raised by Kaleta through the KCM promissory note offerings to investors. Without admitting knowledge of the source of these proceeds, Mr. Jordan agreed to pay \$250,000 to the Receivership Estate. The amount of \$50,000 was paid following the execution of the Settlement Agreement. The remaining \$200,000 due under the settlement was timely paid by Mr. Jordan in two installments of \$100,000 each. The final payment was received by the Receiver on approximately December 17, 2012 in full satisfaction of the terms of the settlement agreement.

(6) Settlement of Claims with Wallace Bajjali Related Parties

Following protracted negotiations with David Wallace, Costa Bajjali and the Wallace Bajjali affiliated entities, the Receiver reached settlement terms with respect to funds borrowed from KCM by those entities and their principals and, based upon the inclusion of BizRadio in the Receivership Estate, with respect to potential liability of the Wallace Bajjali entities and their principals related to investments by members of the public in BizRadio. Subject to this Court's approval, the Receiver and the Wallace Bajjali parties executed the Settlement Agreement as of September 12, 2011.

Per the terms of the settlement, the Wallace Bajjali entities which received proceeds from the KCM note offerings were to pay all amounts received (totaling \$1,177,755.77) (plus accruing interest) by February 29, 2012. Pursuant to the Settlement Agreements, David Wallace and

Costa Bajjali were required to personally guarantee the payouts notwithstanding that they had not personally guaranteed re-payment of the amounts when the loans occurred. Additionally, Wallace Bajjali Development Partners are to pay the Receivership Estate \$300,000 to \$450,000 in fees earned from its Amarillo development project depending upon the timing of payment to the Receivership Estate. Pursuant to the Settlement Agreement, the parties would mutually release all claims against each other, with the exception of certain of the Wallace Bajjali entities' claims to any future distribution of Receivership Assets, which would benefit investors who purchased limited partnership interests in those entities. David Wallace and Costa Bajjali specifically would release any monetary claims against the Estate they may have had in their individual capacities. As a condition to the settlement, the Receiver has asked for a Claim Bar Order, barring claims of any BizRadio note holders who purchased their notes through Wallace Bajjali as their agent, against any of the Wallace Bajjali entities. The Receiver moved the Court for approval of the Settlement on September 12, 2011 [Doc. # 113].

With some exceptions the same investors who objected to the sale of the Station to South Texas also interposed Objections to the Wallace Bajjali settlement [Doc. # 124]. The Receiver responded to those Objections [Doc. # 142] and the Objectors failed to file a Reply. On February 7, 2012, the Court entered a Memorandum and Order approving the settlement, including the Claim Bar Order, with the Wallace Bajjali parties [Doc. # 170]. The Objectors subsequently filed a Motion for Reconsideration of the Memorandum and Order approving the settlement [Doc. # 179]. Following the Receiver's Response [Doc. # 182] and the Objectors' Reply thereto [Doc. # 188], on May 2, 2012 the Court held a conference on the Motion for Reconsideration. A second conference was held before the Court on August 1, 2012. There the

Court denied the Motion for Reconsideration and entered the Claim Bar Order submitted in the settlement with the Wallace Bajjali parties. Doc. # 210.

On August 31, 2012, certain investors, materially those who opposed the approval of the settlement between the Receiver and the Wallace Bajjali parties before this Court, filed a Notice of Appeal of the Claim Bar Order to the Fifth Circuit Court of Appeals (USCA No. 12-20633). Doc. # 214. Appellants filed their brief with the Fifth Circuit on January 2, 2013. The Receiver's brief is due on or before March 6, 2013.

(7) DFFS E&O Insurance Policy

The Receiver has asserted the Receivership Estate's right to proceeds of a DFFS Errors & Omissions insurance policy issued by American International Specialty Line Insurance Company Policy # 01-766-06-09 (the "Policy"). In this regard, the Receiver has acted to stay multiple private actions seeking recoveries from Daniel Frishberg as a named insured under the Policy. After securing stays of the private litigation, the Receiver coordinated with counsel for the carrier, as well as plaintiffs' counsel, to facilitate a global resolution to claims against the Policy which would include a monetary distribution to the Estate. Prior to an agreed upon mediation between the Receiver, the carrier and claimants, counsel for Mr. Frishberg produced a letter identifying numerous additional claimants that purportedly asserted timely claims on the Policy. These additional claims clearly implicated potentially covered claims against DFFS itself -- in addition to Mr. Frishberg. Counsel for the carrier requested additional time to evaluate these new claims and to determine its coverage position, and the Receiver continued to press the carrier for an overall resolution which would serve at least a portion of the Policy proceeds for the benefit of the Receivership Estate.

On March 16, 2012 the former DFFS clients whose state court case against Daniel Frishberg was stayed pursuant to the Order Appointing Receiver filed a Motion to Lift the Stay as to their litigation [Doc. # 181], to which the Receiver filed a Response [Doc. # 190], and to which the movants Replied [Doc. # 191]. On July 3, 2012, the Court denied the movants' Motion to Lift Stay, based on the Receiver's continuing negotiations with the insurance carrier as to settlement on the remaining Policy amounts. Doc. # 205. The Receiver filed reports on the status of his settlement negotiations with the insurance carrier on August 29, 2012 [Doc. # 213] and December 27, 2012 [Doc. # 226].

On February 21, 2013, the Receiver filed a Motion to Approve Settlement regarding the remaining Policy proceeds. Doc. # 234. The material settlement terms include (1) the payment to the Receivership Estate of \$800,000 -- approximately 85% of the remaining Policy proceeds; (2) mutual releases executed by the parties to the agreement; and (3) the entry by the Court of a Bar Order, which would bar any party from commencing any action against the insurance carrier or the Policy. The Receiver further moved for the approval of an interim distribution of \$700,000 of the settlement proceeds to the fourteen parties who made timely claims against the Policy (to be distributed on a *pro rata* basis based on net out-of-pocket losses, subject to proof), with the remaining \$100,000 in settlement proceeds to remain with the Receivership Estate. Claimants receiving a portion of this distribution would not receive any further distribution from the Estate unless and until all other claimants reached the same level of recovery on a *pro rata* basis. That motion is currently pending before the Court with a docket date of March 14, 2013.

B. Ongoing Litigation by the Receiver

(1) *Receiver v. the Frishbergs, Kaleta, Barrington Financial Advisors, Inc. and William C. Heath*

On August 23, 2011, the Receiver commenced an action in the U.S. District Court against Daniel and Elisea Frishberg, Albert Kaleta, Barrington Financial Advisors, Inc. (“Barrington”), and William C. Heath, Barrington’s president and CEO. The suit alleges that the Frishbergs and Kaleta breached the fiduciary duties of loyalty and care which they owed to KCM, BizRadio, and DFFS as officers and directors, and seeks damages commensurate with the liabilities that the Receivership Entities were exposed to as a result of those breaches of fiduciary duty -- namely claims against the Receivership Estate by defrauded investors. The suit also seeks the return of all KCM and BizRadio Note proceeds received, directly or indirectly, by the Frishbergs and Kaleta as fraudulent transfers from the Receivership Entities.

The Receiver further seeks damages from Barrington and Heath for their participation with Frishberg in the tortious interference with, and transfer of, DFFS client accounts to Barrington, which commenced prior to the Receiver’s efforts to place DFFS into the Receivership Estate. As alleged in the Complaint, this transfer represented substantially all of the assets of DFFS and was effectuated to deprive DFFS creditors (namely KCM and Estate claimants) of satisfaction of their debts. Frishberg has received payments from Barrington for these DFFS assets and Barrington has profited from their transfer; by his Complaint the Receiver seeks the return of those payments to the Receivership Estate.

Following the filing of Motions to Dismiss by Barrington, Heath and the Frishbergs, and a First Amended Complaint by the Receiver, the Court denied the Motions to Dismiss as to all causes of action save one (against Daniel Frishberg) [Doc. # 180]. All defendants other than Kaleta filed Answers to the First Amended Complaint [Docs. # 186, 187]. The ancillary action against the Frishbergs, Kaleta, Barrington and Heath was severed from the above-styled action by Order of this Court on May 10, 2012 [Doc. # 199], into Civil Action No. 4:12-cv-01491.

(a) Kaleta Settlement

On the deadline date to file his Answer, January 26, 2012, Kaleta filed a voluntary petition in the United States Bankruptcy Court for the Southern District of Texas for relief under Chapter 7 of Title 11 of the United States Bankruptcy Code, *In Re Albert F. and Connie T. Kaleta*, Case No. 4:12-bk-30558 (the “Bankruptcy Action”). The Receiver’s suit as to Kaleta was thereafter subject to the automatic stay arising from Kaleta’s voluntary petition in bankruptcy.

On April 23, 2012 the Receiver instituted an adversary proceeding against Kaleta in the United States Bankruptcy Court for the Southern District of Texas, *Thomas L. Taylor III, Receiver v. Albert Fase Kaleta*, Case No. 4:12-ad-03209 (the “Adversary Action”), through the filing of a Complaint to Determine Dischargeability Pursuant to 11 U.S.C. § 523. On May 1, 2012 the Receiver filed in the Adversary Action a Motion for Withdrawal of Reference Pursuant to 11 U.S.C. § 157(d) and FED. R. BANKR. P. 5011(a).

Prior to the hearing on the Motion for Withdrawal of Reference, the Receiver and Kaleta agreed to terms on a framework for settlement of the Adversary Action. Judge Bohm, with the agreement of the parties, issued a Report and Recommendation that the Motion for Withdrawal of Reference to the Bankruptcy Court be granted. This Court granted the motion, and the Adversary Action was restyled *Thomas L. Taylor III, Receiver v. Albert Fase Kaleta*, Civil Action No. 4:12-cv-2401, in the United States District Court for the Southern District of Texas (See No. 4:12-cv-2401 Docs. # 1, 4). The Bankruptcy Court ordered the automatic stay be “lifted pursuant to 11 U.S.C. §362(d)(1) so that matters may proceed before the Honorable Nancy F. Atlas.” Bankruptcy Action Doc. # 30. On February 6, 2013 this Court issued an Order consolidating the Adversary Action into the lead case, the Enforcement Action. Doc. # 231.

The Receiver's settlement with Kaleta contains the following material terms: (1) Kaleta consents to the entry of a judgment against him in the amount of \$1,000,000; (2) Kaleta waives (a) the dischargeability of the judgment in the present and any future bankruptcy proceedings and (b) any claims against the Receivership Estate; and (3) the Receiver and Kaleta executed a mutual release of all other claims the parties may have. Receiver filed a Motion to Approve the Settlement with Kaleta on February 21, 2013, which motion has a docket date of March 14, 2013. Doc. # 235.

(b) Remaining Action against the Frishbergs, Barrington and Heath

Settlement negotiations with the Frishbergs, Barrington and Heath have been continuing for several months. However, at this time, the Receiver is skeptical that an agreement can be reached in settlement with any party which is acceptable for the Receivership Estate. The Receiver is prepared to move forward with this litigation. The Receiver anticipates a joint filing in the near term to reset deadlines which have passed during the settlement negotiations with those parties.

February 25, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.



By: _____

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COUNSEL FOR RECEIVER

CERTIFICATE OF CONFERENCE

I certify that I conferred with counsel for the Securities and Exchange Commission regarding this Status Report and counsel has communicated its approval.

I further certify that I conferred with Troy Tindal, counsel for certain Receivership Estate investors, in regard to the portions of this Status Report regarding the appeal of the Claim Bar Order issued after confirming the Wallace Bajjali settlement, and counsel has no objection.

/s/ Andrew M. Goforth
Andrew M. Goforth

CERTIFICATE OF SERVICE

On February 25, 2013, I electronically submitted the foregoing Status Report to the clerk of court for the U.S. District Court, Southern District of Texas, using the CM/ECF case filing system. I hereby certify that I have provided copies to all counsel of record electronically or by another manner authorized by Federal Rule of Civil Procedure 5(b)(2).

/s/ Andrew M. Goforth
Andrew M. Goforth