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 RESPONSE TO MOVANT'S EMERGENCY MOTION FOR ORDER DECLARING MOVANT'S CLAIMS EXEMPT FROM RECEIVERSHIP STAY OR, IN THE ALTERNATIVE, FOR AN ORDER LIFTING THE STAY

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TO THE HONORABLE JUDGE OF SAID COURT:

Receiver, Thomas L. Taylor, respectfully files this Response to Movant Barbara Doreen House's ("Movant") Emergency Motion for Order Declaring Movant's Claims Exempt from Receivership Stay or, in the Alternative, for an Order Lifting the Stay. In support thereof, Receiver shows the Court as follows:

INTRODUCTION

Movant – like every other victim of Daniel Frishberg and Albert Kaleta – is anxious to recover funds fraudulently directed to BizRadio and other Frishberg ventures. However, Movant's state-court litigation falls squarely within the unambiguous boundaries of the Receivership Order's litigation stay against employees and officers of receivership entities. First, Movant was a victim of the same coordinated scheme perpetrated by Daniel Frishberg and Albert Kaleta that resulted in this Court appointing a Receiver over the inextricably intertwined Receivership Estate assets and all assets traceable to the Receivership Estate. Second, any investor that could pursue claims against Daniel Frishberg outside this Receivership would infringe upon the Receiver's ability to obtain complete relief for the Receivership Estate. Third, Movant fails to present any evidence supporting her contention this Court should disregard the clear language of its own Order that prohibits suits against employees related to the Receivership Estate. Fourth, the equities weigh heavily in favor of keeping the stay in place, as Movant has failed to: (1) establish that permitting her suit would not affect the status quo, as the suit would cause significant harm to the Receivership Estate; (2) demonstrate *any* harm, much less substantial harm, by keeping the stay in place; and (3) establish that the Receiver has performed all his duties and completed his investigation into an intricate and complex inter-company fraud in the four months since this Court's Modifying Order.

The Receiver must be given a chance to do his important job of marshaling and untangling a company's assets for the benefit of all investors and Movant's arguments, no matter how sympathetic, represent nothing more than an investor's attempt to move to the front of the line.

BACKGROUND FACTS AND PROCEDURAL HISTORY

On November 13, 2009, the Securities and Exchange Commission ("SEC") filed a Complaint against Defendants Albert Fase Kaleta ("Kaleta") and Kaleta Capital Management, Inc. ("KCM") (collectively "Defendants") and Relief Defendants BusinessRadio Network, L.P. d/b/a BizRadio ("BizRadio") and Daniel Frishberg Financial Services, Inc. d/b/a DFFS Capital Management, Inc. ("DFFS") (collectively, the "Relief Defendants") for violations of Section 17(a) of the Securities Act, Section 10(b) of the Exchange Act and Exchange Act Rule 10b-5, Section 206 of the Advisors Act and for unjust enrichment. (Doc No. 1). In conjunction with the Complaint, the SEC filed for a motion to appoint a Receiver. (Doc No. 2).

On December 12, 2009, this Court entered an Agreed Order Appointing Receiver for KCM ("Receivership Order") (Doc No. 7). As part of the Receivership Order:

- This court appointed Thomas L. Taylor to be Receiver for the Receivership Assets and Receivership Records, collectively defined as the "Receivership Estate." (Doc. No. 7, ¶2).
- The Court commanded the Receiver to "[p]erform all acts necessary to conserve, hold, manage, and preserve the value of the Receivership Estate, in order to prevent any irreparable loss, damage, and injury to the Estate[.]" (Doc No. 7, ¶5(g)).
- The Court restrained "creditors and all other persons" from "[t]he commencement or continuation, including the issuance or employment of process, of any judicial, administrative, or other proceeding against the Receiver, the Defendant, the Receivership Estate, or any agent, officer, or employee related to the Receivership Estate, arising from the subject matter of this civil action[.]" [Doc No. 7, ¶7(a)]
- The Court restrained "creditors and all other persons" without prior approval of court from "[a]ny act to obtain possession of the Receivership Estate assets." [Doc No. 8(a)].

On May 4, 2010, the Receiver filed a Motion to Modify Order Appointing Receiver and for Emergency Asset Freeze ("Motion to Modify"). (Doc No. 22). As part of its Motion to

Modify, the Receiver apprised this Court of the following to justify expanding the Receivership Estate: (1) the coordinated scheme perpetrated by Daniel Frishberg and Albert Kaleta; and (2) the inextricably intertwined assets of the Relief Defendants and Defendants. *Id.*

This Court, pursuant to a Stipulation to Modify Order Appointing Receiver ("Stipulation") between the Receiver and Relief Defendants, entered an Order Modifying Order Appointing Receiver ("Modifying Order") on June 17, 2010. (Doc No. 33; Doc. No. 34). The Modifying Order expressly expanded the scope of the Receivership Assets (and thus the Receivership Estate) to include the "assets, monies, securities, properties, real and personal, tangible and intangible, of whatever kind and description, wherever located, and the legally recognized privileges (with regard to the entities) of Relief Defendant Daniel Frishberg Financial Services, Inc. d/b/a DFFS Capital Management, Inc. ("DFFS") and Relief Defendant Business Radio Network, L.P., d/b/a BizRadio ("BizRadio")…" *Id.*

On October 29, 2010, Movant filed an Emergency Motion for Order Declaring Movant's Claims Exempt from Receivership Stay or, in the Alternative, for an Order Lifting the Stay ("Movant's Motion"). For nearly two months the Receiver and Movant's have agreed to extend the date for the Receiver's response to Movant's Motion while the parties sought to negotiate a resolution that included settlements of all claims against DFFS' Errors & Omissions policy issued by American International Specialty Line Insurance Company Policy # 01-766-06-09 (the "Policy"), including a settlement that would benefit the Receivership Estate itself. [Doc Nos. 48, 50, 52].[1] The Policy is owned by DFFS and the Receiver will pursue every avenue available to create value for the victims' of this fraud. To that end, the Receiver cannot permit an asset –

[1] This resolution remains viable; however, schedules and holiday have slowed down progress. If the stay is enforced – as it should be – the Receiver intends to continue to pursue a resolution of this matter through a negotiated settlement on the same terms he has been pursuing.

such as the Policy – to compensate only a single victim at the expense of the scores of other defrauded investors.

ARGUMENT

Despite arguments to the contrary, the indisputable facts establish that: (1) Movant's claims arise out of the subject matter of the litigation and are subject to the Receivership Order's litigation stay; and (2) the *Weincke* factor weighs in favor of enforcing the litigation stay while the receiver completes his investigation and determines the extent of the claims he will assert against former employees of Receivership Entities, including Daniel and Elisea Frishberg.

I. Movant's Claims Are Subject To The Receivership Order And Arise From The Arise Out of the Same Subject Matter That Gave Rise to The Receivership.

A. The State Court Litigation

In 2009, Movant filed suit in the 234th Judicial District Court of Harris County, Texas [Cause No. 2009-46559] against the following defendants: (1) Daniel Frishberg; (2) Elisea T. Frishberg d/b/a Frishberg, Jordan, Stewart & Kaleta Advisors, Daniel Frishberg Financial Services d/b/a Frishberg & Kaleta Advisors; (4) Frishberg & Jordan Advisors; (5) Albert Kaleta; (6) BusinessRadio Partners, L.P.; (7) BusinessRadio Partners Dallas, L.P.; (8) BusinessRadio Partners Houston, L.P.; (9) BusinessRadio, Inc.; (10) BusinessRadio Network, L.P.; and (11) BusinessRadio Network GP, L.P. (the "State Court Litigation").

On October 6, 2010, the Receiver sent Movant's counsel a letter notifying Movant that the State Court Litigation was a dispute arising out of the subject matter of the Receivership and requesting that Movant stay the State Court Litigation pursuant to the Receivership Order and Modifying Order. (Exhibit C to Movant's Motion).

In an effort to avoid the stay detailed in Paragraph 7(a) of the Receivership Order, Movant dismissed all "corporate" defendants from the State Court Litigation as well as Albert

Kaleta. (Movant's Motion, p. 2). However, Movant's efforts did not and do not extricate the State Court Litigation from the clear and unambiguous boundaries of this Court's Receivership Order.

B. Movant cannot initiate an action against the Frishbergs individually because they are Employees of DFFS and Relief Defendants in the underlying fraud action.

Movant claims that this Court has "not exercised jurisdiction over the individual assets and legal rights of Daniel S. Frishberg or Elisea Frishberg." (Movant's Motion, p. 6). While the statement may be technically correct, it is of no consequence because: (1) both Daniel and Elisea Frishberg were employees of an entity subject to Receivership Order and Modifying Order, and thus claims against the Frishbergs are subject to the Receivership Order's litigation stay; and (2) Daniel Frishberg remains a Relief Defendant in the case (i.e., he has received ill-gotten funds and doesn't not have a legitimate claim to those funds) and the Receiver fully plans on initiating litigation to recover wrongfully appropriated funds from Daniel Frishberg.

This Court restrained "creditors and all other persons" from "[t]he commencement or continuation, including the issuance or employment of process, of any judicial, administrative, or other proceeding against the Receiver, the Defendant, the Receivership Estate, or any agent, *officer*, or *employee related to the Receivership Estate*, arising from the subject matter of this civil action[.]" (Doc No. 7, ¶7(a)).

Movant *admits* that "Daniel Frishberg is a partner, director and/or officer of [DFFS]." (Motion, p. 8). The Movant also admits that Elisea Frishberg was "an employee of [DFFS]." (Motion, p. 8). The Receiver notified Movant's counsel of this fact in the October 6, 2010 letter. Nevertheless, the Movant continues her efforts to pursue the State Court Litigation. Paragraph 7(a) of the Receivership was put in place to ensure the Receiver would have adequate opportunity to analyze and develop claims on behalf of the Receivership Estate that would

benefit all of the Receivership Estate's investor-victims. This prohibition is particularly needed when an investor initiates a suit against not only an employee related to the Receivership Estate, but against one of the architects of the overarching scheme that directly led to the Receivership. Should the Movant proceed solely for her own benefit, the Receivership Estate's recovery, if any, from the Policy may be compromised, or worse, directed to the losses of only one of the scores of investor victims.

In addition, Daniel Frishberg is a named a relief defendant in the underlying SEC enforcement action. While a relief defendant is not accused of wrongdoing, a federal court may order equitable relief against such a person where that person (1) has received ill-gotten funds, and (2) does not have a legitimate claim to those funds. *Janvey v. Adams*, 588 F.3d 831, 834 (5th Cir. 2009). The Receivership Order's litigation stay is intended to provide the Receiver adequate time to develop and present those claims to the Court. Specifically, based on the Receivership Order and Modifying Order, the Receiver's duties include collecting and marshaling assets traceable to the Receivership Estate. (Doc. No. 7, ¶¶ 4, 5(b); Doc No. 34). As such, the Receiver's duties include tracing not only the investments made into entities that are part of the Receivership Estate, i.e., BizRadio, but also tracing funds to individuals that have received ill-gotten gains by virtue of their participation in the overarching scheme, i.e., Daniel and Elisea Frishberg.

Moreover, the litigation stay is further intended to ensure that individual investors do not diminish the Receiver's potential recovery by suing the relief defendant before the Receiver is afforded an opportunity to recover from the relief defendant for the benefit of all victims of the fraud. Accordingly, if the Movant is entitled to pursue claims against Daniel Frishberg in his individual capacity, this could potentially infringe on the Receiver's ability to obtain complete

relief for the Receivership Estate. As a result, any claims against Daniel and Elisea Frishberg must be stayed pursuant to the clear and unambiguous orders of this Court.

C. Movant's Petition involves the Same Scheme that led to the Receivership

Even a cursory review of the Movant's Second Amended Original Petition ("Movant's Petition") and the Motion to Modify reveal that the Movant was a victim of the overarching scheme that led to this Receivership. While the Receiver is sympathetic to Movant's status as a victim of this fraud, her claim that she is different or that she has a claim superior to the scores of other victims of this audacious scheme is simply without merit.

According to Movant's Petition, Daniel and Elisea Frishberg, "individually and through Frishberg, Jordan, Stewart & Kaleta Advisors[2], began directly manipulating [Movant's] personal finances and personal decisions…" (Exhibit A to Movant's Motion, at p. 3). Movant claims that Daniel and Elisea Frishberg "caused and/or convinced [Movant] to invest at least $300,000 in one or more businesses commonly known as 'BizRadio.'" (*Id.* at p. 4). Movant further claims that Daniel and Elisea Frishberg "caused and/or convinced [Movant] to invest over $500,000 in several very risky real estate limited partnerships[3] in which Defendants also have a vested interest." (*Id.* at p. 5).

In comparison, the Receiver's Modifying Motion details how Frishberg acted in concert with Kaleta and KCM to implement an overarching scheme that took advantage of innocent investors in a manner similar to that alleged in the Movant's Petition for their own personal gain. Daniel Frishberg and Kaleta owned and controlled a group of corporate affiliates that operated from a shared business location, utilized the services of the same employees and freely directed

[2] Frishberg, Jordan & Stewart Advisors was the d/b/a name for Daniel Frishberg Financial Services, Inc. - an entity subject to the Receivership Estate by virtue of this Court's Modifying Order. (*See, infra*, p. 4).

[3] While these LPs are not listed by name, the LPs referenced within the Movant's Petition include BizRadio (an entity subject to the Receivership Estate) and Wallace Bajalli (an entity whom the Receiver is investigating as having assets traceable to the Receivership Estate). (*See* Movant's Motion, p. 12).

funds from DFFS clients and other investors to their affiliated entities fraudulently represented to be "credit worthy" small businesses. In fact, the vast majority of the money raised through the scheme made its way to BizRadio either directly from KCM or through Wallace & Bajalli. Based off the inextricable connection between KCM, DFFS and BizRadio, and the strength of the Receiver's evidence supporting this claim, Daniel Frishberg consented to an expansion of the Receivership Estate over DFFS and BizRadio pursuant to the Stipulation to Modify Order Appointing Receiver to avoid a receivership over his personal assets. (Doc No. 33; Doc No. 34).

Movant attempts to muddy the clear overlap between the overarching scheme and the facts in her Petition by making a comparison to the SEC's Complaint. (Movant's Motion, pp. 3-4). However, as this Court is aware, the scope of the Receivership has expanded based on the Receiver's detailed investigation. The "subject matter" of this litigation now encompasses the overarching scheme orchestrated by Kaleta and Frishberg – raising additional capital from DFFS clients and other investors to provide liquidity for Daniel Frishberg's failing venture, BizRadio. The Frishbergs "specific manipulation of Movant's personal and financial affairs" (Movant's Motion, p. 4) is directly part of the overarching scheme subject to the Receivership Order and Modifying Order of this Court. There can be no argument that Movant's claims do not arise from the same facts and subject matter that gave rise to this Receivership.

II. This Court Must Not Lift The Stay Because The *Wencke* Factors Weigh Heavily In Favor Of The Receiver To Maintain The Status Quo, To Protect The Receivership Estate And To Give The Receiver Sufficient Time to Marshal and Untangle The Assets

The interests of the receiver are very broad and include not only protection of the receivership estate, but also protection of defrauded investors and considerations of judicial economy. *SEC v. Wencke*, 622 F.2d 1363, 1372-73 (9th Cir. 1980) (*Wencke I*). When a court creates a receivership, its focus is to "safeguard the assets, administer the property as suitable,

and to assist the district court in achieving a final, equitable distribution of the assets if necessary." *SEC v. Wing*, 599 F.3d 1189, 1194 (10th Cir. 2010) *quoting Liberte Capital Group, LLC v. Capwill*, 462 F.3d 543, 551 (6th Cir. 2006).

The burden is on the movant to prove that a receivership stay should be lifted. *FTC v. Med. Resorts, International, Inc.*, 199 F.R.D. 601, 608 (N.D. Ill. 2001).[4] Federal courts across many circuits follow the three-part balancing test established in *Wencke I* to determine whether a court should lift a receivership injunction: (1) whether refusing to lift the stay preserves the status quo or whether the moving party will suffer substantial injury if it is not permitted to proceed; (2) the time in the course of the receivership at which the motion for relief from the stay is made; and (3) the merits of the moving party's claim. *Wencke I*, 622 F.2d at 1363-64; *SEC v. Wencke*, 742 F.2d 1230, 1231 (9th Cir. 1984) (*Wencke II*) (collectively "*Wencke*"); *see also Wing*, 599 F.3d at 1194; *Liberte Capital Group*, 462 F.3d at 551; *United States v. Acorn Tech. Fund, LP*, 429 F.3d 438, 441-42 (3d Cir. 2005); *SEC v. Universal Financial*, 760 F.2d 1034, 1037-38 (9th Cir. 1985) (same); *SEC v. Byers*, 592 F. Supp. 2d. 532, 535-36 (S.D.N.Y. 2008); *Med. Resorts, International, Inc.*, 199 F.R.D. at 608.

As set forth below, Movant has failed to carry her burden and the equities weigh heavily in favor of maintaining the stay to provide the Receiver with sufficient time to marshal and untangle the Receivership Assets and effectively administer the Receivership Estate.

[4] Movant claims that "[t]he Receiver can show no legitimate reason why the stay should not be lifted, how lifting the stay could harm the receivership estate, or why Movant should not be allowed to proceed against insurance proceeds available to Daniel and Elisea Frishberg." (Movant's Motion, p. 14). This turns the standard for lifting a stay on it's head.

A. Lifting the Stay Would Disrupt the Status Quo

Movant fails to establish how lifting the stay will not affect the status quo. Rather, the Movant focuses on whether Daniel and Elisea Frishberg have individual rights to the Policy. This line of argument is a red herring.

The "Named Insured" on the Policy is Daniel Frishberg Financial Services, Inc. d/b/a Frishberg, Jordan & Stewart Advisors. (Policy, p. 1). Movant claims that because "Daniel S. Frishberg is a partner, director and/or officer of [DFFS]" and that "Elisea T. Frishberg [is] an employee of [DFFS]," both are insureds under the Policy. (Movant's Motion, p. 8). Movant further claims that the Policy is a personal asset of Daniel and Elisea Frishberg by virtue of the Policy definition of "Named Insured."

However, the fact that the definition of "Named Insured" within the Policy may apply to Daniel and Elisea Frishberg does not mean the Policy does not apply to DFFS. Whether or not the Frishbergs have rights to the Policy or not is frankly irrelevant for the purposes of determining whether the Policy is part of the Receivership Estate. As established above, DFFS is part of the Receivership Estate and the Policy remains in its name. These facts are unequivocal. [5]

Furthermore, Movant makes the following allegation: "[t]o Movant's knowledge, neither the receiver, nor any of the investors harmed by the misconduct alleged in this Cause have made any claims during the Policy Period…" (Movant's Motion, p. 9). This is incorrect. Other

[5] Additionally, Movant attempts to misdirect this court from seeing that it's own arguments justify how the Movant's claims are restrained against any employee of DFFS by virtue of Paragraph 7(a) of the Receivership Order. *See* Receivership Order, ¶ 7(a) (all persons are restrained from pursuing "any judicial, administrative, or other proceeding against the Receiver, the Defendant, the Receivership Estate, or any agent, officer, or *employee related to the Receivership Estate,* arising from the subject matter of this civil action").

investors have made claims on the Policy in connection with Daniel Frishberg's BizRadio investment recommendations, and these claims have been submitted to the carrier.[6] At least one of the investor claims includes claims against DFFS, the Named Insured under the Policy – and a Receivership Entity. This fact alone buttresses the need for the stay to remain in place to preserve the status quo, as it would: (1) otherwise permit the Movant to seek recoupment on a Policy that is subject to other claims by victimized investors; and (2) deplete the Policy through the accrual of defense costs.

Not surprisingly, federal courts are reluctant to lift a stay when an individual investor's attempts to recover would place the investor in a position above the other investors subject to the receivership order. *See, e.g., Byers,* 592 F. Supp. 2d at 537 (finding that "the best way to maintain the status quo is to permit [the Receiver] to carry on with his investigation []" because movant's attempts to pursue individual litigation in receivership related to Ponzi scheme would diverge interests of the investors as a whole); *see also Wing,* 599 F.3d at 1197 (finding that investors could not proceed against properties related to the receivership estate because it would upset the status quo "which attempts to preserve the assets of the defrauded investors"); *Acorn Tech. Fund, LP,* 429 F.3d at 443 (rejecting movant's claim to lift a stay, finding that "a receiver must be given a chance to do the important job of marshaling and untangling a company's assets without being forced into court by every investor or claimant"); *Universal Financial,* 760 F.2d at 1038 (finding that permitting investors to proceed on individual claims would disrupt status quo by diminishing the size of the receivership estate); *Med Resorts Int'l, Inc.,* 199 F.R.D. at 609

[6] This statement should not be construed as an admission or waiver of rights that the Receiver and the Receivership Estate have in the Policy.

(finding that status quo would not be preserved because permitting other action would cause Receiver to take his attention away from other tasks and diminish the receivership estate).[7]

In this case, permitting Movant to proceed in the State Court Litigation would harm the Receivership Estate (and disrupt the status quo) by: (1) permitting Movant to proceed against the Policy, which is subject to claims from other victims for the same fraud; (2) depleting insurance proceeds from the Policy, as Daniel and Elisea Frishberg would be entitled to defense costs for the State Court Litigation, thus diminishing the Receivership Estate and the Policy proceeds available to victims of this fraud; and (3) permitting an investor who was victimized by the same scheme as scores of other investors to obtain a windfall recovery merely because she filed a lawsuit.

Based on the foregoing, this factor weighs heavily in favor of the Receiver.

B. The Movant Has Not Established That She Will Suffer Any Injury If Not Permitted to Proceed

Movant does not present any *evidence* that she would suffer substantial harm. Rather, Movant states it is "very likely" that the "practical effect" of the continued stay would be a "guaranteed loss" of insurance proceeds. (Movant's Motion, pp. 10-11). Simply put, there is no evidence to support Movant's allegations. In fact, logic suggests that enforcement of the stay would preserve the status quo by staying the litigation that would deplete the Policy.[8]

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[7] Since any one group of investors in a Ponzi-type scheme generally occupy the same legal position as other investors, equity should not permit one group or investor a preference over another; because, as the Supreme Court explained in the litigation that gave the Ponzi-scheme its name, "equality is equity" among "equally innocent victims." *Cunningham v. Brown*, 265 U.S. 1, 13 (1924); *accord* U.S. v. Durham, 86 F.3d 70, 73 (5th Cir. 1999); *SEC v. Forex Asset Mgmt*, 242 F.3d 325, 331-32 (5th Cir. 2001).

[8] A stay would ensure that the proceeds of the Policy are not depleted and it would also cut-off any basis for the accrual of defense costs that would deplete the policy. In addition, the litigation involving the other claims against the Policy have already been stayed.

The Movant's allegations of substantial harm effectively amount to claiming harm for a delay in asserting her claim. However, as the Movant *admitted*, federal courts have found that a delay in asserting a claim is not sufficient to lift an injunction. *Med. Resorts Int'l, Inc.*, 199 F.R.D. at 609 (finding that movants did not present any evidence "showing that they would suffer substantial injury if they were not granted relief from the stay…[and] the only "injury" that [movants] would suffer stems from any delay in enforcing their rights"); *see also FTC v. 3r Bancorp,* No. 04 C. 7177, 2005 U.S. Dist. LEXIS 12503, at *6-7 (N.D. Ill. February 23, 2005) (finding that movant's bald assertion about being "tremendously prejudiced" by the stay was insufficient to establish substantial harm when the receiver had control of the receivership assets).

In this matter, the enforcement of the Receivership Order's litigation stay ensures three results are achieved: (1) that the Policy proceeds are preserved, (2) that the Receiver has adequate time to structure a resolution of Movant's claims – among others – against the Policy, and (3) ensures that all similarly situated investors are treated equally. While the Receiver is sympathetic to the Movant's circumstance, the Receiver must act in the best interest of all the victims of this fraud and cannot prioritize any particular investor-victim over another. Movant has failed to adduce an adequate basis upon which this Count could find she may suffer substantial harm. Meanwhile, lifting the stay would adversely affect the Receivership Estate and the investors the Receiver must protect.

C. Timing Weighs In Favor of the Receiver Given the Facts in This Case

The Receiver has had less than 6 months to investigation the complex fraud perpetrated through DFFS and BizRadio. The case law supports providing the Receiver sufficient time to investigate and assert claims before investors are permitted to pursue actions on their own:

> Where the motion for relief from the stay is made soon after the receiver has assumed control over the estate, the receiver's need to organize and understand the entities under his control may weigh more heavily than the merits of the party's claim. As the receivership progresses, however, it may become less plausible for the receiver to contend that he needs more time to explore the affairs of the entities.

Wencke I, 622 F.2d at 1373-74. At no point during *Wencke I* (or *Wencke II*) did the 9th Circuit create a hard and fast rule about the passage of time, but rather held that the balance "may" shift depending on the case specific factors. *Wing*, 599 F.3d at 1197. Given that the timing issue is case specific, this Court must look at whether the Receiver has performed all his duties, is ready to begin making distributions to victims of the scheme or has presented this Court with details as to how the assets should be allocated. *See Med. Resorts Int'l, Inc.*, 199 F.R.D. at 609 (finding absence of these factors favored maintaining the stay).

First, the matter before this Court involves an intricate fraud involving a variety of different entities partaking in a complex scheme. The Receiver has had less than six months since this Court expanded the Receivership Estate to include DFFS and BizRadio. Federal courts are clear that the receiver's need to organize and understand the entities within his or her control are weighed more heavily when the "finances of the receivership entities [are] so obscure or complex…" *Wencke I,* 622 F.2d at 1372-73; *FTC v. 3R Bancorp*, No. 04 C. 7177, 2005 U.S. Dist. LEXIS 12503, at *6-7 (N.D. Ill. February 23, 2005).

Second, while the Receiver has made substantial progress in his investigation into this expansive scheme of inter-company lending, it is not yet complete. For example, the Receiver is only now beginning to assess possible claims the Receivership Estate may have against third parties, including likely claims against Daniel and Elisea Frishberg individually. Additionally, the Receiver is continuing negotiations with Wallace & Bajalli over funds they owe to

Receivership Entities. Moreover, the Receiver is actively engaged in the process to sell BizRadio's station license. None of these factors suggest that the Receiver is at a position where the Receivership is ready to be completed or that additional facts will not be discovered through further investigation.

Third, most federal courts have rejected claims to lift a receivership stay in place for equal or less time than the current receivership to ensure that the receiver was not being forced into court by the whims of individual investors to the detriment of the Receivership Estate. *See Wing*, 599 F.3d at 1197-98 (finding that even though receiver was in place for more than a year, receiver's need to organize and understand the entities under his control weighed more favorably than underlying party's claim); *Acorn Tech. Fund, LP*, 429 F.3d at 443-44 (finding that district court correctly ruled on denying movant's motion to lift stay on receivership in place for almost two years); *Universal Financial*, 760 F.2d at 1039 (finding that district court correctly denied movant's motion to lift stay on receivership in place for almost four years because additional facts and legal issues continued to come to light and need to be resolved); *Wencke I*, 622 F.2d at 1374 (finding that district court correctly ruled to keep stay in place after four years); *3R Bancorp*, No. 04 C. 7177, 2005 U.S. Dist. LEXIS 12503, at *8 (finding that where "receiver has had little more than three months to begin to unravel these labyrinthine entanglements," this factor weighed heavily in receiver's favor and relief from stay must be denied).[9]

Based on the foregoing, this factor weighs heavily in favor of the Receiver.

[9] While the 9th Circuit did ultimately lift the stay in *Wencke II*, this occurred only after the court observed that the receiver had not discovered any additional material facts for ***6*** years and the receiver was prepared to distribute assets. *Wencke II*, 742 F.2d at 1232. In contrast, this Court only modified the Receivership Estate four months ago to include DFFS and BizRadio - two entities that are firmly entangled in the Movant's Petition.

D. The Merits of Movant's Claims Do Not Shift The Equities In Movant's Favor

While Movant's claims are consistent with acts and practices discovered in the Receiver's investigation, the Receiver is not in a position to address the merits of the Movant's claims. Regardless, Movant's Motion must be denied.

Federal courts are clear that when the other factors do not weigh in favor of lifting the stay, the movant's motion must be denied. *Wing*, 599 F.3d at 1198; *Acorn Tech Fund.*, 429 F.3d at 450; *Universal Financial*, 760 F.2d at 1039; *Byers*, 592 F. Supp. 2d at 537; *Med. Resorts Int'l, Inc.*, 199 F.R.D. at 609. The first two factors weigh heavily in the Receiver's favor.

While the Movant argues that "the Frishbergs convinced Movant to sign documents authorizing them to invest more than $500,000 in several entities, including BizRadio…" (*Id.*). While the Movant's Petition presents compelling arguments that she was a victim of a scheme perpetrated by the Frishberg's whereby they funneled money to BizRadio, her arguments underscore the irrefutable fact that the Movant's State Court Litigation arises from the same scheme that led to this Receivership.

PRAYER

Based upon the foregoing, Receiver respectfully requests that this Court DENY Movant's Emergency Motion for Order Declaring Movant's Claims Exempt from Receivership Stay or, in the Alternative, for an Order Lifting the Stay and such other relief, at law or in equity, as this Court deems appropriate.

Dated: December 20, 2010.

Respectfully submitted,

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RECEIVER

CERTIFICATE OF SERVICE

A true and correct copy of the foregoing document is being provided to all counsel of record via electronic filing on this the 20th day of December, 2010:

/s/ Gene R. Besen
Gene R. Besen

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