



13, 2012, granting in part and denying in part the motion. Pursuant to Rule 12 (a) (4), the Frishbergs' Answer was therefore due fourteen days after the Court's decision.

3. My ability to compose an Answer, which under F.R. Civ. P. Rule 11 required me to make a reasonable inquiry of my clients concerning the allegations of the Amended Complaint, which ran to forty-one pages and 163 paragraphs. The fact that my office is half a continent away from where my clients reside made for delay in arranging this, and I was only able to file the Answer on April 3, 2012, by which time it was overdue.

4. I had received and reviewed the Answer filed by the Barrington defendants a few days earlier. When I rushed to prepare the Answer for my clients, I did not realize that the Jury Demand I had seen was in that Answer, and not in the Amended Complaint.

5. Counsel for the parties conferred by telephone for the first time on April 23, 2012, and in reviewing this Court's preliminary conference report, discussed the jury demand. I believe that I expressed at that telephone conference that there was a jury demand in the complaint. In the drafts of the conference report which were circulated in the weeks following the telephone conference, the Receiver asserted that there had been no Jury Demand by the Frishberg defendants and that it was therefore waived. The draft I in turn circulated stated that the Frishberg defendants intended to move this Court for leave to file a jury demand out of time.

6. The leading case in this Circuit concerning the adjudication of a motion for leave to file a jury demand out of time is Daniel International Corp. v. Fischbach & Moore, Inc., 916 F.2d 1061, 1064 (5<sup>th</sup> Cir. 1990). Daniel enunciates as a general rule that because "the seventh amendment confers a fundamental right...[w]hen the discretion of the court is invoked under Rule 39 (b), the court should grant a jury trial in the absence of strong and

compelling reasons to the contrary,” (citing United States v. Unum, 658 F.2d 300, 303 (5<sup>th</sup> Cir. 1981). “When the discretion of the court is invoked under Rule 39(b), the court should grant a jury trial in the absence of strong and compelling reasons to the contrary.” Daniel, *supra*, quoting Unum, *supra*.

7. Daniel adopted a five-factor test which had been articulated by the Eleventh Circuit in Parrott v. Wilson, 707 F.2d 1262, 1267 (11h Cir.) *cert. denied* 464 U.S. 936 (1983).

These are:

(a) whether the case involves issues which are best tried to a jury;

(b) whether granting the motion would result in a disruption of the schedule of the court or that of an adverse party;

(c) the degree of prejudice to the adverse party;

(d) the length of delay in having requested a jury trial; and

(e) the reason for the movant’s tardiness in requesting a jury trial.

8. In Daniel, the court noted that the controversy involved a contract dispute, albeit on with extensive documentation. The court noted that the operative issues were well within the comprehension of a jury. In the case at bar, the central allegations have to do with the Frishbergs having allegedly participated in misleading their investors, by inducing them to place their money in investments which were inadequately secured., or in some instances, rampantly abused by Albert Kaleta and others who made use of the investors’ money in a Ponzi scheme. The extent, if any, of the Frishbergs’ involvement in wrongdoing and breach of fiduciary duties is clearly a fact question of the type which juries are routinely asked to decide. Id.

9. The Daniel court found that, because the case had already been placed on the jury

calendar when a motion was made to strike the jury demand as untimely, there could have been no disruption of the court's schedule. In the case at bar, the Barrington defendants have already made a jury demand, and some of the counts which also allegedly implicate the Frishbergs will be required to be tried by a jury because of that demand. Therefore, granting this motion will not affect this court's trial schedule.

10. There is no prejudice to the Receiver. The Receiver has been on notice even during the negotiation of a joint pre-conference order of the Frishbergs' intention to make this motion. This motion precedes even the exchange of initial disclosure required by F.R. Civ. P. Rule 26 (a), so that the Receiver's ability to frame his discover and trial strategy has not been in any way affected by the timing of this motion.

11. The delay in making an initial jury demand in Daniel was over four months. The Court of Appeals nevertheless held that the jury demand should have been granted. In the case at bar, it has been less than two months since the fourteenth day after this Court's decision, plus ten days, by which time a jury demand was due. As noted in Daniel, and as applies with even more force in the case at bar, the jury demand was clearly not a delaying tactic brought on for purposes of delay on the eve of trial. Id., at 1065.

12. In Daniel, further delay was caused by other party's failure to object. However, the Court, while noting that "mere inadvertence" was not an excuse for the original delay, and rejecting the explanation of the party who had made the demand for its four-month delay, nonetheless held that it was an abuse of discretion to have denied a jury trial, [quoting *Bush v. Allstate Insurance Co.*, 425 F.2d 393, 396 cert. denied, 400 U.S. 883 (1970)]. Here, there has been no lengthy delay, as in Daniel, and the delay caused by the default in making the jury demand has been of even shorter duration. Moreover, the Frishberg Defendants,

rather than simply filing an untimely jury demand, as was done by the defendants in Daniel, who were then benefited by the errors of the court and opposing counsel in not rejecting the demand as untimely, are following the correct procedure prescribed by F.R. Civ. P. Rule 39 (b).

Wherefore, it is respectfully requested that this Court grant the Frishberg Defendants' motion to file a jury demand out of time.

Respectfully submitted,

Aaron David Frishberg  
Attorney fo Daniel and Elisea Frishberg  
116 W. 111<sup>th</sup> Street  
New York, NY 10026  
212 740 4544  
pro hac vice

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

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

**Civil Action No. 4: 12-CV-1491**

**Plaintiffs,**

**PROPOSED  
ORDER**

**v.**

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

**Defendants.**

Pursuant to F.R. Civ. P. Rule 39 (b), Daniel and Elisea Frishberg are granted leave to file a jury demand out of time.

---

Nancy F. Atlas, USDJ