

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

THOMAS L. TAYLOR III, RECEIVER, etc., et al.
Plaintiff

v.

DANIEL S. FRISHBERG, et al.,
Defendants

4:12-cv-1491

DEFENDANTS DANIEL FRISHBERG AND
ELISEA FRISHBERG'S MEMORANDUM OF
LAW IN SUPPORT OF MOTION TO COMPEL
F.R. CIV. P. 26 (A) DISCLOSURE

Aaron David Frishberg
116 W. 111th Street
New York, NY 10026
212 740 4544
lawyerADF@aol.com

Attorney for Daniel Frishberg and Elisea Frishberg
Admitted pro hac vice to this Court

Daniel and Elisea Frishberg move this Court for an Order requiring the Receiver to comply with his initial disclosure obligations under F.R. Civ. P. Rule 26 (a) or be precluded from offering at trial evidence which should have been disclosed.

CERTIFICATION

I, Aaron David Frishberg, attorney for Daniel and Elisea Frishberg, certify under penalties of perjury pursuant to federal law that before bringing this motion, I wrote to Andrew Goforth, Esq., the attorney for the Receiver, in a good faith attempt to resolve the issues raised herein without seeking the intervention of the Court but received no additional disclosures in response to my letter.

STATEMENT OF FACTS

Plaintiff is the Receiver of the businesses Daniel Frishberg Financial Services, Inc., (DFFS) and BizRadio. The Amended Complaint alleges that Daniel and Elisea Frishberg were party to fraudulent misrepresentations which induced clients of DFFS to invest in KCM Enterprises, Inc., a corporation which was under the control of Albert Kaleta, by allowing or causing these clients to be given misleading information. The Amended Complaint also claims that Daniel and Elisea Frishberg benefitted financially from the monies borrowed from KCM Enterprises, Inc., and other entities, including monies loaned to DFFS by BizRadio, and monies loaned to BizRadio. Finally, the Amended Complaint alleges that Daniel Frishberg induced clients of DFFS to transfer their invested assets to the management of Barrington Financial Services, and benefitted financially from those transfers. (Amended Complaint, Docket Entry # 1).

On June 22, 2012, pursuant to the scheduling order agreed to by the parties, Plaintiff

Tomas Taylor III served initial disclosures required by F.R. Civ. P. 26 (a)(1)(A). The Receiver's identification of witnesses the testimony he anticipated relying on included categorical descriptions of witnesses, "DFFS [Daniel Frishberg Financial Services, Inc.] investment advisory clients," and "DFFS Financial Services investment advisory clients whose assets under management were transferred to Barrington." No names were provided for either of these classes of witnesses, no addresses, and no telephone numbers. (Exhibit 1).

With respect to his obligatory disclosure of documents he anticipated relying on, The Receiver's document disclosure, *inter alia*, included "DFFS investment advisory client files." One subcategory of this set of documents asserted that "current and operative client files" [are] in the possession, custody, or control of Barrington, Heath, and/or the Frishbergs. In fact, Defendants Daniel and Elisea Frishberg have no client files of DFFS in their possession, because these files were taken by the Receiver. Daniel Frishberg has had no investment relationship with any DFFS client since losing the custodian of DFFS clients' funds, and then surrendering his license as an Registered Investment Advisor in his settlement with the Securities and Exchange Commission..

The second subcategory of documents in this class is, according to the Rule 26 (a) disclosure "in boxes in a storage unit maintained by the Receiver." Although he acknowledges that the documents he expects to use at trial are in his custody and control, beyond the generic description of the documents in question as "DFFS investment advisory client files" there is no description of any of the documents. (Exhibit 1).

The Receiver also has not provided a computation of each (or any) category of damages. except that a figure is attached to the exemplary damages for which the Receiver

deems the Frishbergs to be liable. However, this “computation” is based upon a multiple of “actual damages” for which no figures or computations are provided (Exhibit 1).

LEGAL ARGUMENT

Point I THE RECEIVER HAS AN OBLIGATION TO PROVIDE DISCLOSURE WITH REASONABLE SPECIFICITY

A. The Receiver is Obligated to Provide Names and Addresses of Witnesses and the Subject of Their Testimony

A party which is unwilling to conduct a reasonable inquiry in advance of making initial disclosures cannot provide a laundry list of undifferentiated witnesses. Sender v. Mann, 225 F.R.D. 645 (D. Colo. 2004) held that the presentation of a laundry list of 196 investors and 126 brokers who supposedly had knowledge, without identifying those that had knowledge of particular allegations against the defendant was not adequate disclosure. Concern that the defendants would contact the witnesses did not justify non-compliance with the disclosure requirement. Viveros v. Nationwide Janitorial Ass’n, Inc. 200 F.R.D. 681 (N.D. Ga. 2000). Indeed, one purpose of the initial disclosure obligation is to permit the opposing party to contact the witnesses. Thurby v. Encore Receivable Management, Inc., 251 F.R.D. 620 (D. Colo. 2006) . Sender v. Mann, *supra*, Biltrite Corp. v. World Road Markings, Inc., 202 F.R.D. 359 (D. Mass. 2001).

In the case at bar, the Receiver has not even made the token compliance which was found inadequate in Sender, *supra*. His failure to make initial disclosures of the names and addresses of his witnesses and the subjects on which they will testify should not be tolerated.

B. The Receiver is Obligated to Provide a Reasonably Precise Description of the Documents He Will Rely On

Rule 26 (a) (1) (E) explicitly cautions that “a party is not excused from making its disclosures because it has not fully investigated the case.” In the case at bar, the Receiver acknowledges that the client files of Daniel Frishberg Financial Services, Inc. are in storage in boxes in his possession. The failure to identify the witnesses he intends to call to testify, and their addresses and telephone numbers, is therefore not excusable on the ground that he has been unable to make an adequate investigation. Under F.R. Civ. P. 11, the Receiver has an obligation to make a reasonable inquiry before bringing the suit.

Moreover, the disclosure is expected to focus on the facts that are alleged with particularity in the pleadings. The extent of the disclosure should be reasonable considering the extent of the past working relationship between the attorney and the client, particularly in handling related litigation. Notes of Advisory Committee on 1993 Amendments to Federal Rules of Civil Procedure, F.R. Civ. P. Rule 26. Here, the Receiver is being represented by an attorney in his office, who has been involved in the case since the appointment of the Receiver.

F.R. Civ. P. Rule 26 (a) (3) (A) (iii) calls for identification of each document or other exhibit that the party anticipates using as substantive evidence. The Committee on Rules of Practice and Procedure of the Judicial Conference, in its notes to the 1992 Amendments to the Rules, explained that: “[t]he rule requires a separate listing of each exhibit, though it should permit voluminous items of a similar or standardized character to be described by meaningful categories. For example, unless the court has otherwise directed, a series of vouchers might be shown collectively as a single exhibit with their starting and ending dates.” Committee Note, 146 F.R.D. 519, 636.

A party to litigation must either provide the documents themselves for inspection and copying, or describe them by category so as to convey a reasonable and comprehensive indication of the nature of the documents. Jones v. Kemper Ins. Co., 153 F.R.D. 100 (N.D. Miss. 1994). Even where the documents themselves have been provided to the opposing party, which is not the case here, a party may not rest on the assertion that the party should be able to figure out which are the key documents. Id.

The limitation of the description of a group of documents to the generic identification “investment advisory client files” is simply not a “meaningful characterization.” The description could encompass a record of investments, correspondence with the client, responses to inquiries, or a host of other types of documents. This completely inadequate description admits of only two possible interpretations. The likely explanation is that the Receiver, years after taking possession of the files of Daniel Frishberg Financial Services, Inc., has not troubled himself, before bringing a suit with serious allegations of wrongdoing to determine whether the files in his possession support his claims. The alternative is that he knows which documents he intends to use, but is flouting his obligation under the rule requiring initial disclosure to identify such documents in a meaningful manner.

C. The Receiver is Obligated to Provide a Computation of Each Category of Damages Alleged

F.R. Civ. P. Rule 26 (a) (1) (A) (iii) requires that initial disclosure include a computation of each category of damages, and production for inspection and copying the documents or other evidentiary material on which each calculation is based. In the case at bar, the Receiver has not provided a computation of any category of damages (except exemplary damages as a multiple of unspecified economic and noneconomic damages),

and has produced no documents or evidentiary materials for inspection and copying.

The Court of Appeals for the Second Circuit, in Design Strategies v. Davis, 469 F.3d 284, 295 (2d Cir. 2006), explained that

...by its very terms Rule 26 (a) requires more than providing, without any explanation-undifferentiated financial statements; it requires a “computation” supported by documents. ... At the late point in the proceedings when Design disclosed that it would be presenting lost profit witnesses, much greater detail than previously provided would have been necessary to satisfy Rule 26 (a). See City & County of San Francisco v. Tutor Saliba Corp., 218 F.R.D. 219 (N.D. Cal. 2003) recognizing that Rule 26 (a) (1) (c) anticipates supplemental disclosures with a greater level of detail as discovery progresses.

...Rule 26 (a) requires a party to provide a computation of any category of damages voluntarily, i.e., without awaiting a discovery request.” Design’s failure to comply with this requirement is especially troubling because, as noted by the District Court, the IT Defendants specifically requested a calculation of damages.

In the case at bar, the Receiver has not provided either financial statements or other documents from which his allegations of damages could be calculated, nor a computation.

The undersigned attorney wrote to the Receiver’s counsel concerning the inadequacy of initial disclosures, including the lack of any computation of damages, but did not receive any additional information or any documents in response.

Design Strategies goes on to explain that

Rule 26 (a) requires a party, in addition to providing a calculation of damages to “make available for inspection and copying as under Rule 34 the documents or other evidentiary material...on which such computation is based.” The Advisory Committee Notes to Rule 26 (a) (1) (C) accompanying its promulgation make clear that the rule “imposed a burden of disclosure that includes the functional equivalent of a standing Request for Production under Rule 34. A party claiming damages or other monetary relief must, in addition to disclosing the calculation of such damages, make available the supporting documents for inspection and copying as if a request for such material had been made under Rule 34. F.R. Civ. P. Advisory Committee Notes to 1993 Amendments. Design failed to disclose both a calculation of damages, and

the documents supporting that conclusion.
Id. at 295-96. Based on its analysis, the Court of Appeals upheld a District Court order sanctioning Design Strategies with preclusion of proof of damages.

As discussed above, the Receiver, in the case at bar, has neither provided a calculation of each category of damages, nor provided any documents to support such a calculation. He should be required to do so.

CONCLUSION

The Receiver has flaunted his disregard for initial disclosure obligations imposed upon him by F.R. Civ. P. Rule 26 (a). It is respectfully submitted that this Court should compel him to comply with these obligations. To the extent that he does not make timely initial disclosure, he should be precluded from presenting evidence in court the nature of which should have been disclosed. Moreover, pursuant to F.R. Civ. P. Rule 37, the Receiver should be required to pay the costs of this motion, including attorney's fees.

Respectfully submitted,

/s/

Aaron David Frishberg
Attorney for Defendants Daniel and Elisea Frishberg
pro hac vice
116 W. 111th Street
New York, NY 10026
212 740 4544

(i) The name and, if known, the address and telephone number of each individual likely to have discoverable information—along with the subjects of that information—that the disclosing party may use to support its claims or defenses, unless the use would be solely for impeachment:

1. All Defendants in this action
2. Former employees of the Receivership Entities, including without limitation
 - a. Sonia Joao
 - b. Pamela Caddell
 - c. Robyn Rigney
3. Former DFFS investment advisory clients
4. Former DFFS investment advisory clients whose assets under management were transferred to Barrington
5. David Wallace, Costa Bajjali, Nancy Gollan
 - a. Wallace Bajjali Development Partners, LP; 13131 Dairy Ashford Road, Suite 175, Sugar Land, TX 77478; Phone: 281.768.6700
 - b. Daniel K. Hedges, Esq., Porter Hedges LLP, 1000 Main Street, 36th Fl., Houston, TX 77002; Phone: 713.226.6000
6. Richard Jordan
 - a. Michael J. Black, Esq., Burns & Black, PLLC, 750 Rittiman Road, San Antonio, TX 78209; Phone: (210) 829-2020
7. Dan Stewart
8. Linda Sikes; 12103 Wind Cove Place Court, Humble, TX 77346; Phone: 281-852-8363

(ii) A copy—or a description by category and location—of all documents, electronically stored information, and tangible things that the disclosing party has in its possession, custody or control and may use to support its claims or defenses, unless the use would be solely for impeachment:

1. Securities and Exchange Commission investigative files
 - a. These are not within the Receiver's possession, custody or control
2. DFFS investment advisory client files
 - a. To the extent they were not taken by or on behalf of any of the Defendants, those files are located in boxes in a storage unit maintained by the Receiver
 - b. On information and belief all current and operative client files are in the possession, custody or control of Barrington, Heath, and/or the Frishbergs

3. Internal financial and accounting documents of the Receivership Entities KCM, DFFS and BizRadio
 - a. General Ledgers; Balance Sheets; Profit and Loss Statements; bank statements
 - i. To the extent they were produced previously to the Receiver, they are stored electronically on a firm server
4. Depositions and Examinations conducted in the Receivership Proceeding, *Securities & Exchange Commission v. Kaleta Capital Management, Inc., et al.*, Case 4:09-cv-03674
 - a. Examination of Daniel S. Frishberg; March 25, 2010
 - b. Deposition of Albert F. Kaleta; May 5, 2010
 - c. Deposition of William C. Heath; May 25, 2010

(iii) A computation of each category of damages claimed by the disclosing party—who must also make available for inspection and copying as under Rule 34 the documents or other evidentiary material, unless privileged or protected from disclosure, on which each computation is based, including materials bearing on the nature and extent of injuries suffered:

Counts I – VI:

1. Actual damages shall include the liability of the Receivership Entities to claimants against the Receivership Estate, such liability being caused by the tortious conduct of the Frishbergs and Kaleta in breach of the duties they owed to the respective Receivership Entities. Furthermore, these damages include any benefit conferred on the Frishbergs and Kaleta as a result of their breaches of fiduciary duty. Such damages are subject to expert testimony regarding, without limitation, business valuation and loss.
2. Exemplary damages shall equal the greater of (1) two times the economic damages awarded plus the amount equal to any noneconomic damages awarded by the Court, not to exceed \$750,000; or (2) \$200,000. Post-judgment interest shall also bear on any award of exemplary damages.
3. Equitable damages shall include just and reasonable attorney's fees and costs.

Counts VII – IX:

1. Actual Damages shall include all transfers from the Receivership Entities to Defendants or the value of such transfers, and are subject to expert testimony regarding, without limitation, business valuation.
2. Statutory attorney's fees and costs as are deemed equitable and just pursuant to TEX. BUS. COM. CODE § 24.013.

Count X:

1. Joint and severable liability with Frishberg for the damages described above related to breaches of fiduciary duty to DFFS arising from the Barrington Transfer.

Count XI:

1. Actual damages shall include the lost benefit of the contracts, and economic damages including lost profits, subject to expert testimony.
2. Exemplary damages shall equal the greater of (1) two times the economic damages awarded plus the amount equal to any noneconomic damages awarded by the Court, not to exceed \$750,000; or (2) \$200,000. Post-judgment interest shall also bear on any award of exemplary damages.
3. Equitable damages shall include just and reasonable attorney's fees and costs.

Count XII:

1. Damages shall include full restitution and disgorgement of the benefits which unjustly enriched the Defendants at the expense of the Receivership Entities.

Count XIV:

1. Damages shall include the fees received as the result of tortious and wrongful conduct, or the inducement or participation in such conduct, of Frishberg, Kaleta, Barrington and Heath.
- (iv) For inspection and copying as under Rule 34, any insurance agreement under which an insurance business may be liable to satisfy all or part of a possible judgment in the action or to indemnify or reimburse for payments made to satisfy the judgment:**

N/A