

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 §

Civil Action No. 4:09-cv-3674

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. §

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

Plaintiff, §

v. §

Civil Action No. 4:12-cv-1491

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

Defendants. §

RECEIVER'S MOTION FOR APPROVAL OF SETTLEMENT WITH BARRINGTON  
FINANCIAL ADVISORS, INC. AND WILLIAM C. HEATH

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”) in the action styled *SEC v. Albert F. Kaleta, et al.*, Civil Action No. 4:09-cv-3674, in the United States District Court for the Southern District of Texas (the “Enforcement Action”), respectfully moves this Court for an Order approving the proposed settlement of claims with defendants Barrington Financial Advisors, Inc. (“Barrington”) and William C. Heath (“Heath” and collectively the “Barrington Defendants”).

## I. BACKGROUND

### A. The Enforcement Action

On November 13, 2009, the Securities and Exchange Commission (the “Commission”) commenced the Enforcement Action against Albert F. Kaleta (“Kaleta”) and KCM, alleging violations of the antifraud provisions of the federal securities laws arising from the fraudulent offering of promissory-note securities. On December 2, 2009, the Court appointed Thomas L. Taylor III as Receiver for KCM. On June 17, 2010 this Court expanded the Receivership Estate to include Relief Defendants BizRadio and DFFS. *See Agreed Oder Appointing Receiver*, Enforcement Action Doc. # 7; *Order Modifying Order Appointing Receiver*, Enforcement Action Doc. # 34 (collectively the “Order Appointing Receiver”).<sup>1</sup>

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<sup>1</sup> Citations to the “Order Appointing Receiver” refer to pages or paragraphs within Enforcement Action Doc. # 7.

## **B. Litigation by the Receiver Against Barrington and Heath**

On August 23, 2011 the Receiver commenced litigation against Receivership Entity owners, officers and employees Daniel and Elisea Frishberg (the “Frishbergs”) and Kaleta, and against Barrington and its principal Heath (the “Ancillary Action”). Enforcement Action Doc. # 105. The Barrington Defendants filed their Answer to the First Amended Complaint<sup>2</sup> on March 29, 2012. Enforcement Action Doc. # 186. In regard to the Barrington Defendants, the Receiver alleged *inter alia* the fraudulent transfer of assets from DFFS and Daniel Frishberg (“Frishberg”) to the Barrington Defendants, tortious interference with DFFS contracts, and aiding and abetting Frishberg’s breaches of fiduciary duty to DFFS. Ancillary Action Doc. # 1, ¶¶ 132 – 147 (Counts IX, X, XI). On May 2, 2012 the Court severed the Ancillary Action from the Enforcement Action. Enforcement Action Doc. # 199. The Ancillary Action is now styled *Taylor v. Frishberg, et al.*, Civil Action No. 4:12-cv-1491, in the United States District Court for the Southern District of Texas.

The Receiver moved for this Court’s approval of a proposed settlement with Kaleta on February 21, 2013. Enforcement Action Doc. # 235; Ancillary Action Doc. # 17. The Receiver has not reached acceptable settlement terms with the Frishbergs, and currently plans to pursue all claims against them as alleged in the First Amended Complaint, including for claims arising out of the alleged transfer of assets to the Barrington Defendants.

## **C. Settlement Agreement**

On behalf of the Receivership Estate and all persons who have a substantive claim against the Receivership Estate, the Receiver has entered into a proposed settlement agreement

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<sup>2</sup> The Receiver filed a First Amended Complaint on November 17, 2011. Enforcement Action Doc. # 150; Ancillary Action Doc. # 1.

with the Barrington Defendants (the "Settlement," attached hereto as **Exhibit A**), the essential terms of which are:

- (1) the Barrington Defendants will pay to the Receivership Estate the sum of \$50,000 in ten equal monthly installments;
- (2) the Barrington Defendants will release the Receivership Estate from any and all claims as of the date of the Settlement; and
- (3) the Receiver will release the Barrington Defendants from any and all claims of the Receivership Estate as of the date of the Settlement.

The Receiver believes that the proposed Settlement is fair, equitable, and reasonable, and is in the best interests of the Receivership Estate and all claimants to the eventual distribution of Estate assets. The Receiver reaches this conclusion because the Estate will collect the maximum assets from the Barrington Defendants which upon the representations of Heath, as recited in the Settlement, the Barrington Defendants have the resources to pay. The Settlement will also avoid costly and uncertain litigation which, even if successful, would likely not result in a judgment for an amount materially collectible above the Settlement amount. Although the Order Appointing Receiver authorizes the Receiver to resolve the matter without Court approval (see discussion *infra*, p. 5), the settling parties submit the Settlement to the Court in the interest of full transparency, and respectfully request that the Court approve it.

The Receiver respectfully submits that this matter does not require oral argument, unless opposition to the Motion is subsequently submitted to the Court. Any person or entity opposing this Motion must timely file with the Court and serve upon the Receiver a written opposition which complies in all respects with the rules of this Court on or before June 12, 2013. Failure to timely file an opposition may be deemed by the Court to be consent to the granting of the Receiver's Motion.

This Motion and its exhibit are posted on the Receivership Estate's website at <http://www.kcmreceivership.com>, where they may be reviewed in their entirety. Copies will be provided to any interested party upon receipt of a written request which may be directed to: Thomas L. Taylor III, Receiver; The Taylor Law Offices, P.C.; 4550 Post Oak Place, Suite 241, Houston, Texas 77027. The Receiver has discussed this motion and the proposed Settlement with counsel for the Commission, which does not oppose this motion.

## II. ARGUMENT AND AUTHORITIES

### A. Receiver's Authority to Enter Into Settlement

Pursuant to this Court's Order Appointing Receiver, the Receiver is directed and authorized 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." *Order Appointing Receiver* ¶ 5(g). The Receiver is further directed to "compromise ... such actions or proceedings ... that [he] deems necessary and advisable to preserve the value of the Receivership Estate, or ... to carry out [his] mandate under this Order." *Id.* ¶ 5(i). It is also the Receiver's duty to "[p]reserve the Receivership Estate and minimize expenses in furtherance of maximum and timely disbursement ... to claimants." *Id.* ¶ 5(j).

### B. The Settlement Is Fair and in the Best Interest of the Receivership Estate

The Receiver asserted claims against the Barrington Defendants, *inter alia*, under the theories of aiding and abetting Frishberg's breach of fiduciary duty to DFFS, tortious interference with DFFS contracts and the Texas Uniform Fraudulent Transfer Act, TEX. BUS. & COM. CODE ANN. §24.001, *et seq.*, ("TUFTA"). *See* Ancillary Action Doc. # 1, ¶¶ 132 – 147 (Counts IX, X, XI). The Receiver sought to recover damages suffered by the Receivership

Entities in order to satisfy claims against the Receivership Estate by its creditors, including defrauded investors.

The Receiver's action against the Barrington Defendants is contested, and the Barrington Defendants deny the merit of the Receiver's claims. The continuation of litigation against the Barrington Defendants would prove costly with respect to both time and resources available to the Receivership Estate, and would carry substantial risk in regard to any potential outcome. Furthermore, upon the representations of Heath, as recited in the Settlement, the Barrington Defendants lack the resources to satisfy any judgment entered against them in an amount greater than the Settlement amount. Securing a judgment through trial would likely be a Pyrrhic victory, costing the Estate more than any materially recoverable amount. In light of these circumstances, the Receiver has negotiated a settlement with the Barrington Defendants which will benefit the Estate while avoiding the costs and risks associated with litigation.

The negotiations with the Barrington Defendants resulted in the Settlement of which the Receiver now seeks the Court's approval. The material terms of the Settlement are the payment by the Barrington Defendants in the amount of \$50,000 in ten equal monthly installments. Additionally, the Receiver and the Barrington Defendants will mutually release all claims against the other parties and the Receivership Estate. It is noted that while this Settlement releases the Receiver's claims against the Barrington Defendants, the Receiver continues to pursue all claims against the Frishbergs, including those claims related to the transfer of assets to Barrington which gave rise to the claims against the Barrington Defendants.

The Receiver is satisfied that this Settlement is in the best interests of the Receivership Estate. This Settlement represents the best option to recover assets and maximize the value of the Estate, while minimizing the expenses incurred to the Estate in the recovery of said assets.

Continued litigation with the Barrington Defendants will be costly, time consuming and with considerable risk, and could cause further harm to the Receivership Estate and the defrauded investors the Receiver was appointed to protect, even if successful.

### III. CONCLUSION

Receiver respectfully submits to the Court for approval the Settlement with the Barrington Defendants, which he believes is fair, equitable, reasonable and in the best interests of the Receivership Estate. The Receiver respectfully requests the Court grant this Motion in all respects and enter an Order approving the Settlement.

May 22, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.



By: \_\_\_\_\_

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Andrew M. Goforth  
Texas State Bar: 24076405  
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Houston, Texas 77027  
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COUNSEL FOR RECEIVER

**CERTIFICATE OF SERVICE**

On May 22, 2013, I electronically submitted the foregoing document with the clerk of court for the U.S. District Court, Southern District of Texas, using the CM/ECF electronic 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



# **Exhibit A**

From:

**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., BUSINESSRADIO NETWORK, )  
L.P., d/b/a BizRadio and DANIEL )  
FRISHBERG FINANCIAL SERVICES, )  
INC., d/b/a DFFS CAPITAL )  
MANAGEMENT, INC., )**

**Plaintiff,**

**v.**

**Civil Action No. 4:12-cv-01491**

**DANIEL S. FRISHBERG, et al.**

**Defendants**

**CONFIDENTIAL SETTLEMENT AGREEMENT**

This Settlement Agreement (the "Agreement") is made by and between Thomas L. Taylor, III, solely in his capacity as Receiver for Kaleta Capital Management, et al. (the "Receiver") and Barrington Financial Advisors, Inc. ("Barrington") and William C. Heath ("Heath") (collectively the "Settling Parties").

**Recitals:**

WHEREAS, on August 23, 2011, the Receiver initiated this action styled *Thomas L. Taylor III, Solely in His Capacity as Court-appointed Receiver for Kaleta Capital Management, Inc., Businessradio Network, L.P., d/b/a Biz Radio and Daniel Frishberg Financial Service, Inc., d/b/a DFFS Capital Management, Inc. v. Daniel S. Frishberg, Elisea T. Frisberg, Albert F. Kaleta, Barrington Financial Advisors, Inc., and William C. Heath*, Civil Action No. 4:08-cv-03674 in the United States District Court for the Southern District of Texas (the "Lawsuit") seeking damages against Barrington and Heath relating to their participation in the transfer of assets from Defendant Daniel Frishberg Financial Services ("DFFS") to Barrington while DFFS was a relief defendant in a receivership proceeding.

WHEREAS, on May 10, 2012, the Lawsuit was severed from the receivership proceeding, and is currently pending under Civil Action No. 4:12-cv-01491 in the United States District Court for the Southern District of Texas.

From:

WHEREAS, the Receiver has fully investigated his claims against Barrington and Heath and believes that the claims have merit, but the Receiver has scarce resources that must be properly utilized to maximize recovery in this case for the Receivership Estate. Barrington and Heath deny that the claims of the Receiver have any merit whatsoever, and have demanded a trial by jury on the multitude of fact issues relating to the Receiver's claims.

The Settling Parties agree that continuing this litigation would be time consuming, expensive, and would require extensive discovery relating to the confidential financial information of non-parties to this lawsuit. In addition, Barrington and Heath have represented to the Receiver that they have limited resources available to fund any settlement or satisfy any judgment should one ultimately be obtained by the Receiver.

WHEREAS, in light of the risk and expense of litigation and the resources available to Barrington and Heath to settle or satisfy a judgment, the Settling Parties have agreed to resolve the claims against Barrington and Heath on the terms set forth below.

NOW, THEREFORE, in consideration for the promises, covenants, and obligations set forth in this Settlement Agreement, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

**Settlement Terms:**


1. Barrington will pay the Receiver the sum of fifty thousand dollars (\$50,000) (the "Settlement Amount"). The Settlement Amount will be paid in ten monthly installments of five thousand dollars (\$5,000). The first payment of \$5,000 will be paid by ~~April~~ <sup>with</sup> ~~15, 2013~~ <sup>March</sup>, and the second through tenth payments will be paid by the fifteenth of the following nine months, with the final payment to be paid by ~~February~~ <sup>with</sup> ~~15, 2014~~ <sup>March</sup> (the "Payment Period"). The Receiver shall give Barrington written notice of any event of default, giving Barrington ten days from receipt of notice to cure the default.
2. Barrington and Heath agree that in the event that Barrington defaults in the payment of the Settlement Amount, the release and discharge by the Receiver contained in Paragraph 3 is null and void, and the Receiver is free to proceed against Barrington and Heath. The Court shall retain jurisdiction over this matter until Barrington has paid the Settlement Amount in full at the conclusion of the Payment Period.
3. In return for payment of the Settlement Amount, the Receiver releases and forever discharges Barrington and Heath from any and all matters, claims, complaints, demands, damages, judgments, suits, causes or rights of action, liability, or obligation of any kind, type, or nature whatsoever, foreseen or unseen, known or unknown, arising out of or related in any way to the allegations in the Lawsuit.
4. In return for dismissal of the claims against Barrington and Heath, Barrington and Heath release and forever discharge the Receiver from any and all matters, claims, complaints, demands, damages, judgments, suits, causes or rights of action, liability, or obligation of any kind, type, or nature whatsoever, foreseen or unseen,

From:


known or unknown, arising out of or related in any way to the allegations in the Lawsuit. Upon execution of this Settlement Agreement, the Receiver will file notice with the Court that the Settling Parties have settled.

- 5. The laws of Texas will govern this Agreement.
- 6. Each Settling Party acknowledges that each of them has been represented by counsel of their own choosing in connection with the execution of this Agreement, that each of the Settling Parties and their counsel have reviewed the Agreement prior to execution, and that any ambiguity in or dispute about the meaning of any part of the Agreement shall not be construed against any Party, but shall be construed as if the Agreement were jointly drafted.
- 7. This Agreement may be executed in one or more counterparts, and in both original form and one or more photocopies or facsimiles, each of which shall be deemed an original and all of which together shall be deemed to constitute the same instrument.

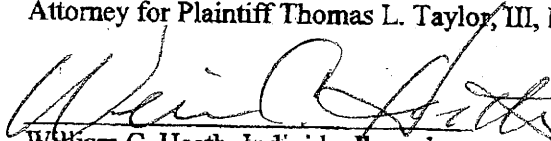
IN WITNESS THEREOF, the Settling Parties, intending to be legally bound, have signed and dated this Agreement below.

  
 \_\_\_\_\_  
 Thomas L. Taylor, III  
 In his capacity as Receiver for Kaleta Capital  
 Management, et al.

April 22, 2013  
 \_\_\_\_\_  
 Date

  
 \_\_\_\_\_  
 Gene R. Besen, Esq.  
 Attorney for Plaintiff Thomas L. Taylor, III, Receiver

4/22/2013  
 \_\_\_\_\_  
 Date

  
 \_\_\_\_\_  
 William C. Heath, Individually and on  
 Behalf of Barrington Financial Advisors, Inc.

5/6/13  
 \_\_\_\_\_  
 Date

\_\_\_\_\_  
 Peter J. Stanton, Esq.  
 Attorney for Defendants Barrington Financial  
 Advisors, Inc. and William C. Heath

\_\_\_\_\_  
 Date

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

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FRISHBERG, ALBERT F. KALETA, §  
BARRINGTON FINANCIAL ADVISORS, §  
INC. and WILLIAM C. HEATH, §

Defendants. §

ORDER GRANTING RECEIVER'S MOTION FOR APPROVAL OF SETTLEMENT  
WITH BARRINGTON FINANCIAL ADVISORS, INC. AND WILLIAM C. HEATH

On May 22, 2013, Thomas L. Taylor III (the “Receiver”), Court-appointed Receiver in *SEC v. Albert Fase Kaleta, et al.*, Civil Action No. 4:09-cv-3674, in the United States District Court for the Southern District of Texas (the “Enforcement Action”), and plaintiff in *Taylor v. Frishberg, et al.*, Civil Action No. 4:12-cv-1491, in the United States District Court for the Southern District of Texas (the “Ancillary Action”), filed a Motion for Approval of Settlement [Ancillary Action Doc. # 18; Enforcement Action Doc. # 241] (the “Motion”) with Ancillary Action defendants Barrington Financial Advisors, Inc. and William C. Heath (the “Barrington Defendants”).

The Court, having considered the Motion and opposition thereto, if any, finds that the Motion should be **GRANTED**. It is therefore

**ORDERED** that the Motion is **GRANTED** in all respects, and the Settlement (as defined in the Motion) is hereby **APPROVED**;

It is further **ORDERED** that this Court shall have and retain jurisdiction over the parties for all matters related to the administration, interpretation, effectuation, or enforcement of this Order, the Settlement between the Barrington Defendants and the Receiver and any related disputes.

Signed at Houston, Texas, this \_\_\_\_\_ day of \_\_\_\_\_, 2013.

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Nancy F. Atlas  
United States District Judge