

**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-1491

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

Defendants.

**RECEIVER’S MOTION FOR PARTIAL SUMMARY JUDGMENT
AGAINST DANIEL S. FRISHBERG**

Plaintiff Thomas L. Taylor III (“Receiver”), in his capacity as Court-appointed receiver for Kaleta Capital Management, Inc. (“KCM”), BusinessRadio Network, L.P. d/b/a BizRadio (“BizRadio”), Daniel Frishberg Financial Services, Inc., d/b/a DFFS Capital Management, Inc. (“DFFS”) and all entities they own or control (collectively the “Receivership Entities”),¹ moves for partial summary judgment against Defendant Daniel S. Frishberg (“Frishberg”) pursuant to Rule 56 of the Federal Rules of Civil Procedure (the “Rules”), and would show the Court as follows:

¹ Appointed in the action styled *Securities and Exchange Commission v. Albert Fase Kaleta, et al.*, Civil Action No. 4:09-cv-03674, in the United States District Court for the Southern District of Texas, Houston Division (the “Enforcement Action”). See Enforcement Action Doc. # 7, as modified by Doc. # 34 (the “Order Appointing Receiver”). Citation hereafter to the Enforcement Action Docket will be styled as “EA Doc. # ___.”

1. Contemporaneous with the filing of this Motion, the Receiver has filed his Brief In Support of Motion for Partial Summary Judgment (the “Brief”). The Brief is incorporated herein by reference for all purposes.

2. For the reasons stated in the Brief, summary judgment should be entered against Frishberg in regard to the following causes of action in the Receiver’s First Amended Complaint [Doc. # 1]:

- a. Count I, Breach of Fiduciary Duties Owed to DFFS
- b. Count II, Negligence regarding DFFS
- c. Count V, Breach of Fiduciary Duties Owed to BizRadio
- d. Count VI, Negligence regarding BizRadio

3. As outlined with greater specificity in the Brief, the undisputed material facts establish as a matter of law that:

- a. Frishberg owed the duty of care in managing the affairs of DFFS and BizRadio, and owed a duty to DFFS to supervise its account executives offering investment advisory services to clients;
- b. Frishberg owed the fiduciary duty of care to DFFS and BizRadio;
- c. Frishberg owed the fiduciary duty of loyalty to DFFS and BizRadio;
- d. Frishberg breached the duties he owed to DFFS and BizRadio based upon his knowledge and conduct as CEO of those entities;
- e. DFFS and BizRadio were harmed and benefits were conferred on Frishberg as a result of his breaches of duty;
- f. Frishberg’s breaches of duty were substantial factors in the harm caused to DFFS and BizRadio; and

- g. The harm caused to DFFS and BizRadio as a result of Frishberg's conduct was a foreseeable consequence of Frishberg's conduct.

4. The Receiver relies on the following evidence in support of this Motion:

Exhibit A	Affidavit of Receiver Thomas L. Taylor III
Exhibit B	Commission Examination Testimony of Daniel Frishberg, March 25, 2010 ("Frish. Exam.")
Exhibit C	Deposition of Daniel Frishberg, June 4, 2010 ("Frish. Depo.")
Exhibit D	Frishberg Depo. Exhibit 7, Email Draft ["I am mortified"]
Exhibit E	DFFS General Ledger, as of March 31, 2010
Exhibit F	DFFS P&L, 2008
Exhibit G	DFFS P&L, January to September 2009
Exhibit H	BizRadio General Ledger, 2008
Exhibit I	BizRadio General Ledger, 2009
Exhibit J	BizRadio Payroll Spreadsheet, 2008
Exhibit K	BizRadio Payroll Spreadsheet, 2009
Exhibit L	Promissory Notes Issued by KCM to DFFS Clients
Exhibit M	Promissory Notes Issued by DFFS to KCM
Exhibit N	Affidavit of Albert F. Kaleta
Exhibit O	Affidavit of Douglas Fingold
Exhibit P	Deposition of William C. Heath, May 25, 2010 ("Heath Depo.")
Exhibit Q	Heath Depo. Exhibit 1, Correspondence to DFFS Clients

Exhibit R	Heath Depo. Exhibit 4, Terms of Purchase of Assets Under Management at DFFS
Exhibit S	Letter from Fidelity Brokerage Services LLC terminating the DFFS custody arrangement
Exhibit T	Financial spreadsheet, produced by Barrington Financial Advisors, Inc. in discovery
Exhibit U	Kaleta Email re DFFS Payroll payment by KCM
Exhibit V	<i>SEC v. Frishberg</i> , No. 4:11-cv-01097 (S.D. Tex.); Agreed Final Judgment, Doc. # 5 (March 29, 2011); Consent, Doc. # 2-1 (March 25, 2011) (incorporated in judgment)
Exhibit W	Order Instituting Proceedings, Making Findings and Imposing Remedial Sanctions, <i>In the Matter of Daniel Sholom Frishberg</i> , Administrative Proceeding File No. 3-14393; Investment Advisers Act of 1940 Release No. 3206 (May 16, 2011)
Exhibit X	FINRA Rule 3240, "Borrowing From or Lending to Customers"; FINRA Rule 3270, "Outside Business Activities of Registered Persons"; and NASD Rule 3040, "Private Securities Transactions of an Associated Person"
Exhibit Y	Heath Depo. Exhibit 3; copies of checks paid by Barrington to DFFS / Frishberg

WHEREFORE, the Receiver respectfully requests that the Court grant this Motion for Partial Summary Judgment, enter judgment against Frishberg as requested herein, with damages to be ruled on at trial, and also grant to the Receiver all such other relief, at law and in equity, to which he may be entitled.

Dated: October 15, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By: Andrew Goforth

Andrew M. Goforth
Texas State Bar: 24076405
goforth@tltaylorlaw.com

4550 Post Oak Place Drive, Suite 241
Houston, Texas 77027
Tel: 713.626.5300
Fax: 713.402.6154

COUNSEL FOR RECEIVER

CERTIFICATE OF SERVICE

On October 15, 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 served all counsel of record electronically or by other means authorized by the Federal Rules of Civil Procedure.

/s/ Andrew M. Goforth
Andrew M. Goforth