

**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.

**MOTION FOR RELIEF FROM SCHEDULING ORDER RE: MEDIATION
AND ALTERNATIVELY FOR EXTENSION OF DEADLINE**

Thomas L. Taylor III (“Receiver”), Court-appointed Receiver for Kaleta Capital Management, Inc., *et al.*, in the action styled *SEC v. Albert Fase Kaleta, et al.*, Case No. 09-cv-3674, in the Southern District of Texas (the “Enforcement Action”), files this Motion for Relief from Scheduling Order in regard to Mediation between the remaining parties to the above-styled action (the “Frishberg Action”), and will respectfully show the Court as follows:

The Receiver initially filed the Frishberg Action against five defendants, Daniel S. Frishberg, Elisea T. Frishberg, Albert F. Kaleta, Barrington Financial Advisors, Inc. and William C. Heath. This Court entered a Scheduling Order on September 4, 2012 (Doc. # 13) requiring the parties, *inter alia*, to mediate the claims asserted by the Receiver in the litigation. This Court

has modified the Scheduling Order, most recently setting November 8, 2013 as the deadline to mediate the dispute. Doc. # 23. The Receiver has settled the Frishberg Action against Defendant Albert Kaleta (*see* Doc. # 21) and Defendants Barrington Financial Advisors, Inc. and William C. Heath (*see* Doc. # 24) -- Daniel and Elisea Frishberg (the "Frishbergs") are the only remaining Defendants. On October 15, 2013 the Receiver filed a Motion for Partial Summary Judgment against Daniel Frishberg. Docs. # 26-29. Frishberg's opposition is presently due on November 15, 2013.

The Receiver moves the Court to excuse the remaining parties to the Frishberg Action from any obligation to participate in mediation of the underlying disputes. Counsel for the Receiver has on several occasions engaged in settlement discussions with counsel for the Frishbergs. These discussions have not resulted in meaningful negotiation of mutually acceptable terms of settlement. It is clear to the Receiver that Mr. Frishberg -- who denies liability for the operation of the KCM Ponzi scheme -- will not agree to relief which the Receiver would be prepared to recommend to this Court. Because settlement discussions with counsel for the Frishbergs have not approached acceptable terms on which to base a settlement, the Receiver does not believe that mediation between the parties would be a productive use of the Receivership Estate's limited resources.

Undersigned counsel has conferred with counsel for the Frishbergs in regard to the relief sought herein, and the Frishbergs' counsel is opposed at this time to the Court excusing the parties' requirement to mediate.

Alternatively, the Receiver moves the Court for relief from the Scheduling Order and for an extension of time for the parties to complete mediation. The initial Scheduling Order (Doc. # 13) set a mediation deadline approximately six weeks after the deadline for dispositive motions,

which would have allowed the parties the opportunity to more fully establish their positions through the summary judgment process. In light of the Frishbergs' extension to November 15, 2013 to file a response to the Receiver's Motion for Partial Summary Judgment (*see* Doc. # 31), and due to the ensuing holidays following the time for the filing of any Reply or Sur-Reply, the Receiver would ask the Court to extend for approximately 90 days (to February 7, 2014) the deadline for the parties to mediate, or otherwise to move the Court for relief from mediation following an opportunity to review the papers filed in regard to summary judgment.

Undersigned counsel has conferred with counsel for the Frishbergs in regard to an extension of time to mediate or otherwise move for relief therefrom, and the Frishbergs' counsel is not opposed to such an extension. The Receiver does not believe, however, that such an extension will result in a productive or otherwise successful mediation of this action.

November 13, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.



By: _____

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COUNSEL FOR RECEIVER

CERTIFICATE OF CONFERENCE

I certify that prior to filing this Motion I contacted counsel for the Frishbergs to discuss the relief requested herein. Counsel for the Frishbergs stated that he was opposed to the Court relieving the parties of their obligations to mediate at this time. Counsel for the Frishbergs was not opposed to an extension of time to either complete mediation or otherwise move the Court to excuse the parties from mediation in the future.

/s/ Andrew M. Goforth
Andrew M. Goforth

CERTIFICATE OF SERVICE

On November 13, 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