



## **I. PRELIMINARY STATEMENT**

The Receiver has set forth in the Motion material facts which establish that Frishberg is liable to the Receivership Estate for negligence and the breach of his fiduciary duties of loyalty and due care which he owed to DFFS and BizRadio. Frishberg's Response is based entirely upon an unsupported, argumentative declaration (Doc. # 35-3, the "Frishberg Declaration") tied to no competent record evidence whatsoever. Frishberg's self-serving, conclusory assertions -- blaming everyone but himself for the collapse of DFFS and BizRadio in a web of unlawful investment schemes -- are unavailing. The Receiver has established in the Motion material facts which Frishberg has failed to dispute, or to address at all; these undisputed material facts establish that Frishberg is liable to the Receivership Estate for damages sustained by DFFS and BizRadio arising from Frishberg's reckless and unlawful conduct as Chief Executive Officer of those entities.

## **II. ARGUMENT**

### **A. Frishberg Fails to Dispute Material Facts Established in the Motion or Raise Undisputed Facts which Contradict his Liability for Negligence and Breach of Fiduciary Duty**

In his Response, Frishberg relies on a number of assertions in the Frishberg Declaration which are either improperly supported in the record or are self-serving, conclusory assertions which are not adequate to support a response to a motion for summary judgment.<sup>2</sup> In this regard, the Court of Appeals for the Fifth Circuit has consistently held that while affidavits "constitute valid summary judgment evidence ... without more, 'conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden' and defeat a motion

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<sup>2</sup> See Receiver's Objection to Frishberg Declaration and Motion to Strike, filed concurrently with this Reply, and incorporated by reference herein.

for summary judgment.” *Mosley v. White*, 464 Fed. Appx. 206, 213 (5th Cir. 2010) (quoting *Douglass v. United Servs. Auto. Ass’n*, 79 F.3d 1415, 1429 (5th Cir. 1996)) (internal citation omitted); see also *DIRECTV, Inc. v. Budden*, 420 F.3d 521, 531 (5th Cir. 2005); *United States v. Lawrence*, 276 F.3d 193, 197 (5th Cir. 2001) (“self-serving allegations are not the type of ‘significant probative evidence’ required to defeat summary judgment”); *BMG Music v. Martinez*, 74 F.3d 87, 91 (5th Cir. 1996) (affirming summary judgment where “the only evidence in support of the defendants’ theory is a conclusory, self-serving statement by the defendant”). Moreover, even if this Court were to consider the assertions of “fact” made in the Frishberg Declaration, they are contradictory and either fail adequately to refute material facts established in the Motion, or actually support the material facts established in the Motion. Thus the facts set forth in the Receiver’s Motion stand uncontroverted and Frishberg’s liability for negligence and breach of fiduciary duty to DFFS and BizRadio are established as a matter of law.

Additionally, a nonmovant who asserts that a fact is genuinely disputed must support his assertion by “citing to particular parts of materials in the record,” or “showing that the materials cited [by the movant] do not establish the absence ... of a genuine dispute ... .” FED. R. CIV. P. 56(c)(1). In the Response, Frishberg cites generally to the Frishberg Declaration, a 29-page document, with no particularity whatsoever. *See, generally*, Resp. at pp. 8-13. Because the citations in the Response fall woefully short of the particularity required by Rule 56(c)(1), the Court should not consider the facts addressed in Frishberg’s Declaration and should consider those facts established in the Receiver’s Motion as undisputed for purposes of the Motion, pursuant to Rule 56(e)(2).

**1. Frishberg's "Counter-Statement of Facts" and Frishberg's Declaration Fail to Address Undisputed Material Facts Established in the Motion**

The Court may consider facts undisputed for purposes of a motion for summary judgment when the nonmovant fails properly to address the movant's assertions of fact as required by Rule 56(c). FED. R. CIV. P. 56(e)(2). Frishberg fails to address in his Response a number of facts propounded in the Motion, which establish his liability for negligence and breach of fiduciary duty to DFFS and BizRadio. These facts should be considered undisputed in the Court's consideration of Frishberg's liability as set forth in the Motion.

**a. KCM Note Proceeds Transferred to BizRadio**

Notably, Frishberg fails to address the loans made from KCM to BizRadio, which totaled approximately \$5 million dollars by the end of 2009. Brief at 13.<sup>3</sup> Frishberg does not refute that BizRadio, the company for which he was Chief Executive Officer and controlling owner of its general partner, borrowed millions of dollars from KCM. In fact he confirms it, admitting that "cut[ting] off all connection with Kaleta and KCM ... would mean the end of Biz[R]adio operations." Frish. Decl. at p. 16. Thus, Frishberg admits his knowledge and understanding that BizRadio received funds from KCM and, indeed, that BizRadio's operations depended on receipt of such funds from KCM. It is not disputed that KCM is the fulcrum of a Ponzi scheme device which raised funds from public investors/noteholders who were DFFS / Frishberg clients.

Although Frishberg purports to disclaim knowledge regarding loans from KCM to DFFS of DFFS clients' money, Frish. Decl. at p. 6, he never disputes that BizRadio was borrowing money of DFFS clients through KCM, or that he knew it was doing so. See Brief at pp. 13-14. In fact even if Frishberg's (unsupported) claim from his Declaration related to KCM that it had \$2 million in non-DFFS-client money, Frish. Decl. at p. 6, with debts to KCM exceeding \$5

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<sup>3</sup> Citations to documents filed with the Court refer to page numbers of the CM/ECF Headers as applied to those documents by the CM/ECF filing system.

million through 2009, BizRadio necessarily was borrowing DFFS client money to Frishberg's knowledge. Moreover, Frishberg does not dispute that he instructed Kaleta to make payments from KCM on behalf of BizRadio, as stated by Kaleta in his affidavit. Brief at p. 13, Mot. Exh. N at ¶9. Frishberg also fails to dispute that he conflated his personal finances and the finances of DFFS and BizRadio through the use of the KCM American Express card to pay for personal and business expenses. Brief at pp. 13-14.

**b. BizRadio's Financial Condition**

Frishberg fails to address the dire financial straights in which BizRadio operated, and its chronic need for funds. Brief at pp. 10-11. These desperately needed funds came from KCM, Wallace Bajjali related investment funds (the "WB Funds" as further defined in the Brief, at p. 12), and DFFS clients who made equity and debt investments. Brief at pp. 10-14. These material facts stand unaddressed and undisputed in Frishberg's Response; accordingly, this Court can and should receive them as undisputed. The interrelatedness of these sources of funds for BizRadio establishes that these transactions must be given greater scrutiny because Frishberg was "interested" under Texas law in regard to the movement of funds between the above entities. *See* Brief at 27-29. Scrutinizing the funding sources of BizRadio shows that these sources were themselves predominantly receiving funds from DFFS clients through a myriad of investments approved, recommended and offered by DFFS account executives including Frishberg and others under Frishberg's supervision, and that the use of DFFS clients to keep BizRadio in operations personally benefitted Frishberg. These transactions were not fair to BizRadio, which had no prospect of repayment, or the DFFS investors themselves whose money was continually funneled to BizRadio. Frishberg is liable to the Receivership Estate for the harm done to BizRadio and DFFS as a result of these transactions.

**c. Frishberg's Supervision of Kaleta and the KCM Note Offering**

The Receiver bases his claims against Frishberg for negligence and breach of fiduciary duty, in part, upon Frishberg's supervision of Kaleta as an employee of DFFS and as an account executive who met with DFFS clients. In this regard, Frishberg did not address in his Response his failure to review or audit KCM, or the KCM note program. Brief at pp. 14-15. Frishberg knew that KCM was a lending company and approved KCM as a replacement to a commercial credit line that was lost. Frish. Decl. at p. 5. Frishberg asserts that he approached Kaleta to inquire about the KCM note program and loans of client funds to DFFS from KCM on a single occasion. Frish. Decl. at p. 6. Frishberg claims that he instructed Kaleta "to immediately create a new account, so that [Kaleta] could keep client money in one account and non-client money in the other account." Frish. Decl. at p. 6. However Frishberg does not claim to have followed up on his request other than to have seen this account was opened. Frish. Decl. at p. 6. He does not -- and cannot -- claim that he reviewed the KCM note program on a regular basis beforehand or thereafter, or otherwise ensure that DFFS financials were properly segregated from the funds of those of its clients at KCM. This inaction, conceded in his deposition testimony, Mot. Exh. C, Doc. # 28-3, at p. 11 (38:18-39:25), definitively establishes that Receiver's claims against Frishberg for breach of fiduciary duty and negligence.

**2. Frishberg's "Counter-Statement of Facts" and Frishberg's Declaration Fail to Controvert Material Facts Propounded in the Motion**

The Court may consider facts undisputed for purposes of a motion for summary judgment when the nonmovant fails properly to support his assertions of fact as required by Rule 56(c). FED. R. CIV. P. 56(e)(2); *Tempest Publ., Inc. v. Hacienda Records & Recording Studio, Inc.*, Civil Action No. 12-00736, 2013 U.S. Dist. LEXIS 159467 (S.D. Tex. Nov. 7, 2013).

Frishberg's Response comments upon material facts set forth in the Motion but fails properly to support or establish controverting facts.<sup>4</sup> In fact a number of assertions of fact made by Frishberg in the Response further support material facts established by the Receiver in the Motion.

**a. DFFS's Utilization of KCM for Financial Support**

Frishberg asserts that "[DFFS] did not need hundreds of thousands of dollars a year to survive." Frish. Decl. at p. 3. He attempts to divide operations between different periods of time, some in which DFFS was purportedly expanding and borrowing on credit lines, others in which it was purportedly self-sustaining. Frish. Decl. at pp. 1-2. Frishberg's asserted timelines are vague, overlapping, and unsupported by any evidence in the record. His assertions are further belied by other assertions made by Frishberg in the Frishberg Declaration and evidence in the record. Frishberg admits that he accepted Kaleta's offer to provide financing for DFFS through KCM after the bank credit line was withdrawn, Frish. Decl. at p. 5, which occurred in late 2007. *See* Brief at 11. This admission by Frishberg contradicts his (unsupported) assertions regarding the timeline of DFFS's financial needs. Frishberg declares that "in the period between 2000 and 2005, financing was tight, and a credit line was required in order to allow the company to expand its business, which it did steadily and successfully." Frish. Decl. at p. 3. After this period of time, allegedly, no more financing was needed. Frish. Decl. at p. 5. Frishberg contends that loans from KCM to DFFS by 2008 were unnecessary and unknown to him. Frish. Decl. at pp. 5, 10. However, loans from the Jordan family trust are shown in the DFFS general ledger to be occurring throughout 2007 and 2008<sup>5</sup>, and loans from KCM starting in late 2007 and continuing

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<sup>4</sup> To the extent that the Court grants the Receiver's Motion to Strike, filed concurrently with this Reply, the assertions by Frishberg which are stricken should be treated as unaddressed, and therefore undisputed, in the same manner as those facts detailed *supra*, §II(A)(1), at p. 4.

<sup>5</sup> *See* Brief at p. 10, n.4.

through 2009. Brief at 13; Motion Exh. M, Doc. # 29-4. Furthermore, Frishberg asserts that “Period 4” began in 2006, Frish. Decl. at p. 1, but the line of credit at Compass Bank, purportedly only needed for expansion, was in use throughout 2007 when it was canceled by Compass Bank as of year end 2007. *See* Brief at p. 11.

These contradictory positions taken by Frishberg do not place in dispute the material facts established by the Receiver in the Motion regarding DFFS’s need for financing to survive, Brief at p. 10; if anything Frishberg’s admission (albeit unintentional) lends support to material facts set forth by the Receiver. Frishberg’s negligence and breach of fiduciary duty in the management of DFFS and its finances is clearly established by the Receiver and uncontroverted by Frishberg. *See* Brief at pp. 20-21.

**b. Frishberg’s Knowledge that KCM Notes were Sold to DFFS Clients and that DFFS was Borrowing KCM Funds**

Frishberg never asserts that he did not know KCM note proceeds were raised from DFFS clients; he asserts only that he did not know KCM was loaning “client money” to DFFS. Frish. Decl. at p. 6. However Frishberg has failed adequately to place this fact in dispute. Frishberg asserts that when he was told by Jordan that DFFS client money was being loaned to DFFS through KCM, he met with Kaleta and instructed him “to immediately create a new account, so that he could keep client money in one account and non-client money in the other account.” Frish. Decl. at p. 6. Despite the self-serving nature of this declaration testimony, it establishes that Frishberg was informed regarding KCM’s loans of client funds to DFFS. When viewed from the context that Frishberg also knew that KCM was borrowing money from DFFS clients at the same time it was loaning money to BizRadio, which occurred as early as March 2008, Brief at p. 13, Frishberg’s knowledge of KCM use of DFFS client funds is established and undisputed.

Frishberg's assertion also contradicts two other claims made by Frishberg in his Declaration: (i) that KCM Notes were not an approved investment for DFFS clients, Frish. Decl. at p. 17, and (ii) that Frishberg was unaware that DFFS was borrowing money from KCM because Kaleta was concealing the loans. Frish. Decl. at p. 10, 12, 18. First, Frishberg's claim that KCM Notes were not approved for sale to DFFS clients is belied by Frishberg's instruction to Kaleta to keep DFFS client proceeds separate from non-client proceeds -- he did not instruct Kaleta to stop offering KCM Notes to DFFS clients altogether. Second, Frishberg's claim that Kaleta was secretly making loans from KCM to DFFS without his knowledge is also belied by the fact that Frishberg's instruction to separate client and non-client funds so that DFFS would not borrow client funds. If DFFS had no need for repeated funding from KCM to support its exorbitant expenses, then Frishberg's only instructions to Kaleta would have been to halt the loans from KCM to DFFS -- Frishberg did not halt these loans, and in fact they continued into 2009. *See* Mot. Exh. M, Doc. 29-4 at pp. 32-67.

It is established and undisputed by these admissions that Frishberg knew KCM was borrowing from DFFS clients, and that DFFS was borrowing funds from KCM. Frishberg attempts to blame Kaleta for these actions due to Frishberg's illness, Frish. Decl. at pp. 10, 18, or his travel schedule. Frish. Decl. at pp. 10, 12, 18. However these assertions are unsupported and themselves contradicted by others made in Frishberg's Declaration, including that he was in the office at least once a week. Frish. Decl. at pp. 10, 18. Because Frishberg was "interested" under Texas law in regard to these transactions, see Brief at p. 21-22, they must be given greater scrutiny as to their fairness to DFFS and BizRadio. In fact these transactions only propped up DFFS and BizRadio and allowed Frishberg to continue to financially gain from the KCM loans to those entities, until their ultimate collapse.

**c. Frishberg's Promotion of Kaleta to Chief Compliance Officer of DFFS**

Frishberg also fails to place in dispute his knowledge and actions (or failure to act) when he approved Kaleta as the Chief Compliance Officer of DFFS. Frishberg asserts that his trust in Kaleta was not misplaced because “when Jordan made a complaint involving compliance [Frishberg] always followed up.” Frish. Decl. at p. 7. Frishberg admits that he had to ask Kaleta “[o]n several occasions ... to explain how he was explaining some of [DFFS’s] investment decisions to clients, in response to concerns voiced by the compliance officer.” Frish. Decl. at p. 7. This assertion establishes that Frishberg received several complaints from his compliance officer about Kaleta’s disclosures to clients. Furthermore, those complaints were not unfounded - “[w]hen Kaleta’s answer seemed to be less than adequate, I retrained Kaleta offering specific verbiage that would be more accurate for these explanations.” Frish. Decl. at p. 7. Despite Frishberg’s self-serving assertions that complaints against Kaleta were based on personal issues and office disharmony, Frish. Decl. at p. 7, Frishberg had received several complaints from compliance about Kaleta which were substantiated and required additional training. Notwithstanding his knowledge of Kaleta’s checkered compliance history, when Jordan left DFFS Frishberg placed Kaleta in charge of compliance. Frish. Decl. at p. 7. Frishberg did so because Kaleta “had recently completed study and passed an exam on compliance to qualify for series 65, so its rules were fresh in his mind.” Frish. Decl. at p. 20. This purported rationale -- even if true -- does nothing to dispute the Receiver’s claims. The facts underlying Frishberg’s actions in promoting Kaleta are undisputed and, as established in the Motion, were negligent and in breach of Frishberg’s fiduciary duties to DFFS. *See* Brief at pp. 14-15, 24-25.

**d. Frishberg's Involvement with DFFS and BizRadio Operations**

Frishberg’s attempts to claim ignorance and place the blame on Kaleta during a time Kaleta was running the day-to-day operations of DFFS are likewise contradictory and fail to

refute the material facts established and supported in the Motion. Frishberg and Kaleta operated from an office suite shared by DFFS and BizRadio personnel; their offices were next to each other. Mot. Exh. B, Doc. # 28-2 at pp. 9 (30:15-18), 21 (78:16-23). Frishberg had discussions with Kaleta “at least two or three days a week” regarding “[e]verything about the company ... [while Kaleta] was running the company.” *Id.* at 21 (78:20-79:1). Frishberg asserts that he was severely ill and was unable to supervise the operations of DFFS and BizRadio. Frishberg asserts that his illness occurred in the 2008 – 2009 time period, Frish. Decl. at p. 10, but then later asserts it was in 2007 – 2008. Frish. Decl. at p. 18. Frishberg asserts that Kaleta took advantage of Frishberg’s absence during this time and instigated the KCM loans to DFFS and the high expenses and salaries paid by DFFS. Frish. Decl. at p. 12. In fact Frishberg contradicts himself in several respects with regard to blaming Kaleta for DFFS expenses, salaries and loans from KCM. Frishberg asserts that Kaleta was responsible for paying exorbitant salaries to DFFS account representatives, Frish. Decl. at p. 12, which included Jordan through 2008, see Brief at pp. 14-15, and yet also states that Kaleta was disturbed by Jordan’s pay grade because he felt Jordan didn’t put in enough time at the office. Frish. Decl. at p. 7. Additionally, while Frishberg asserts his illness provided Kaleta the opportunity to engage in fraudulent behavior without his knowledge, he also states that he “was in the office at least 1 day a week” during that time period, Frish. Decl. at p. 19, and that he continued to travel to Chicago and New York City on behalf of BizRadio and DFFS. Frish. Decl. at pp. 10, 12, 18.

Frishberg also fails to address his testimony before the Commission in which he admitted that the signatures on the DFFS notes from KCM were his, Doc. # 28-2 at pp. 46 (178:7-13), 47 (183:2-13), and that he often and regularly signed documents without even reviewing their contents. *Id.* at p. 47 (183:20-22). Frishberg’s assertions that he is not responsible for Kaleta’s

actions due to his illness are contradictory and vague, and are insufficient to controvert material facts set forth in the Motion regarding his knowledge and involvement with DFFS operations as the entity's Chief Executive Officer.

**e. Frishberg's Loan from KCM to Purchase a Home**

In regard to his loan from KCM to purchase his home, Frishberg admits that he approached Kaleta and sought the money for a down payment on the home. Frish. Decl. at p. 5. Despite Frishberg's self-serving semantic gymnastics that this was an "investment," and not a loan, the fact remains that he used KCM funds, and therefore DFFS client funds, to purchase his personal residence. Whether or not KCM asserted a lien against the home is irrelevant. This fact is undisputed and establishes the benefits Frishberg personally received as a result of the KCM Note program and the use of KCM Note proceeds to sustain the operations of DFFS, BizRadio, and to personally benefit the Frishbergs (*see also* discussion regarding the KCM American Express card used by Frishberg for personal expenses, *supra* at §II(A)(1)(a), p. 5; Brief at pp. 14, 23, 28).

**B. Frishberg's Assertions Regarding the Receiver and the Placement of BizRadio and DFFS into the Receivership are not Germane, Let Alone Material, to the Receiver's Motion; They Are Also Demonstratively False**

Frishberg's bizarre -- and patently false -- account of the circumstances under which he agreed to the placement of DFFS and BizRadio into the Receivership Estate is utterly pointless in the context of the present Motion. After blaming almost every other person working for DFFS and BizRadio for the consequences of Frishberg's misconduct, Frishberg proceeds to blame the Receiver for the damages he caused to DFFS and BizRadio. In this regard, it should be noted that damages are not in any way pleaded in the present Motion. Nonetheless, Frishberg's

allegations are unsubstantiated and unsupported. In regard to Frishberg's allegations regarding the placement of DFFS and BizRadio into Receivership, and the negotiations regarding that action, the Receiver refers the Court to the affidavit of Gene R. Besen, Receiver's counsel (attached hereto as Exhibit A, the "Besen Declaration"), which details the facts and circumstances regarding the expansion of the Receivership.

The Receiver's position in regard to the expansion of the Receivership, *inter alia*, to include DFFS, BizRadio and Mr. Frishberg was clearly set forth in his Motion to Modify Order Appointing Receiver and for Emergency Asset Freeze (*see* Enforcement Action Doc. # 22, the "Motion to Expand"), filed May 4, 2010. Following a preliminary hearing on the Motion to Expand, counsel for the Receiver engaged in negotiations with counsel for Frishberg, DFFS and BizRadio regarding a stipulation of the parties as to the expansion of the Receivership to include DFFS and BizRadio. Besen Decl. at ¶¶8, 9. Counsel for the Receiver made clear to opposing counsel that once BizRadio and DFFS became part of the Receivership Estate the Receiver would make an independent assessment of what was in the best interest of the Receivership Estate. *Id.* at ¶9. In this regard, the Stipulation of the parties placing DFFS and BizRadio into Receivership (Enforcement Action Doc. # 33) made no mention of any pending business transactions of the entities, including with Salem Broadcasting. *Id.* at ¶10. In fact, the only negotiated issue of substance raised by Mr. Frishberg's counsel was concerning the amount of debt DFFS owed to KCM. *Id.* The negotiations over the agreed Stipulation did not relate to or depend upon any transaction with Salem or any other business transaction involving the entities now in the Receivership. *Id.* at ¶11. Frishberg's assertions that the Receiver made any representations regarding BizRadio are wholly unsupported and directly controverted in the record.

**C. Frishberg is Not Entitled to a Continuance under Rule 56(d) to Take the Deposition of the Receiver**

Frishberg is not entitled to further delay of these proceedings under Rule 56(d) for the purpose of taking the Receiver's deposition in this matter. "In order to obtain a continuance, the moving party must demonstrate specifically how the requested discovery pertains to the summary judgment motion and must have diligently pursued the relevant discovery." *Silver Dream, L.L.C. v. 3MC, Inc.*, Case No. 11-30968, 2013 U.S. App. LEXIS 5297, at \*10-11 (5th Cir. 2013) (citing *Wichita Falls Office Assoc. v. Banc One Corp.*, 978 F.2d 915, 919 (5th Cir. 1992)); *Enplanar, Inc. v. Marsh*, 11 F.3d 1284, 1292 (5th Cir. 1994) (The party needs to inform the district court "of how the sought-after discovery might reasonably be supposed to create a factual dispute."). Frishberg has failed to demonstrate the relevance of the Receiver's deposition to his Response to the summary judgment Motion. Moreover, Frishberg has failed diligently to pursue the Receiver's deposition -- or any discovery -- in the months before the discovery deadline in this case. His request for a continuance under Rule 56(d) should be denied.

As an initial matter, the Court should not delay its consideration of the Receiver's Motion pursuant to Rule 56(d) because Frishberg has failed to establish how the requested discovery pertains to the summary judgment Motion. The Motion seeks entry of summary judgment against Frishberg for negligence and breach of his fiduciary duties to DFFS and BizRadio resulting from his misconduct in operating DFFS and BizRadio, the transactions entered into by those entities through Frishberg as an "interested" officer and director, for his failure adequately to supervise Kaleta and the KCM offering. The Motion is supported by material facts established regarding Frishberg's actions in management of DFFS and BizRadio which bear on his liability for negligence and breach of fiduciary duty to those entities. The material facts involve

Frishberg's actions and knowledge leading up to the commencement of the Enforcement Action by the Commission.<sup>6</sup> The Motion does not seek judgment on damages but reserves that determination for subsequent proceedings.

Frishberg asserts his desire to depose the Receiver regarding the Receiver's alleged "blocking the recovery of BizRadio and the role of the Receiver's representations in inducing Daniel Frishberg as Chief Executive Officer of BizRadio not opposing its becoming a relief defendant, followed by an about-face by the Receiver once he had taken control of BizRadio as a receivership asset." Resp. at p. 6. It bears repeating that these allegations are patently false and wholly without merit, *see supra* at p. 12-13; Frishberg has not established -- or even attempted to establish -- that these issues bear on his liability to the Receivership Estate as alleged in the Motion. Indeed, they do not and, accordingly, cannot be a basis for continuance under Rule 56(d).

Frishberg also has failed to diligently pursue this discovery prior to seeking relief under Rule 56(d). The discovery period in this case closed pursuant to the Court's Scheduling Order, as amended, on September 13, 2013. *See* Doc. # 23. As stated by counsel for Frishberg in his declaration (Doc. # 35-1, the "ADF Declaration"), discovery was postponed by agreement between the parties for a time in order to pursue settlement, however settlement discussions failed and discovery resumed. ADF Decl. at ¶14. While discussions took place regarding the Receiver's deposition between counsel after the resumption of discovery, no resolution of the matter was reached. Besen Decl. at ¶14. The last communications between counsel in this

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<sup>6</sup> Certain of the facts established in the Motion relate to the transfer of DFFS cash flow and goodwill as an asset to former defendant Barrington Financial Services, Inc. without the transfer of DFFS liabilities, leaving DFFS with no ability to repay its debts to KCM. Frishberg has not asserted that the Receiver's deposition would be in regard to these allegations.

regard occurred approximately in late June of 2013, approximately 10 weeks prior to the close of discovery. *Id.*

Following those late June 2013 communications, counsel for Frishberg failed to take any action in regard to the Receiver's deposition, and further failed to seek any discovery of Receivership documents, notwithstanding the Receiver's offer to make virtually all records of the Receivership Estate available to him for inspection and copying. In this regard, on or about August 12, 2013, Frishberg's counsel served on the Receiver's counsel the Frishbergs' Second Request for the Production of Documents (the "August 2013 production request"). Besen Decl. at ¶15, Exh. 5. The August 2013 production request was overbroad in that it sought virtually all of the documents of the Receivership Estate. Compliance with the August 2013 production request as drafted would have been burdensome, imposed an extreme hardship on the Receivership, and would have resulted in the expenditure of unnecessary time and resources. Notwithstanding this patent overreach, the Receiver wished to avoid expensive and time consuming "meet and confer" efforts and motion practice before the Court.

Accordingly, on or about September 9, 2013 and September 13, 2013, the Receiver served responses to the August 2013 production request, producing certain responsive electronically stored information and making available for inspection and copying virtually all paper files, servers, computers and hard drives which belonged to the Receivership entities and contained "Receivership Records" as defined in the Order Appointing Receiver (and which were not protected by any privilege).<sup>7</sup> Besen Decl. at ¶15, Exhs. 6, 7. Notwithstanding Frishberg's open-ended access to inspect and copy virtually all Receivership Records, he made no effort to

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<sup>7</sup> Counsel for Frishberg states that he received this production "in response to other long-outstanding discovery requests." ADF Decl. at ¶20. This is incorrect. These documents were produced within 30 days of the Frishbergs' discovery request of August 12, 2013, and within the open discovery period as ordered by the Court. Besen Decl. at ¶15.

access any of them, and further failed to confer regarding the Receiver's deposition until the present Rule 56(d) motion in the Response.<sup>8</sup>

Frishberg's counsel has had ample opportunity to pursue the Receiver's deposition and, if the parties were unable to reach a solution, to move the Court for relief within the period for open discovery.<sup>9</sup> He failed to do so. The Frishbergs cannot now seek to delay the Court's consideration of summary judgment to take the Receiver's deposition under Rule 56(d) because they failed diligently to pursue such discovery both prior to this Court's set deadline and in the months following its passing.

### **III. RELIEF REQUESTED**

The Receiver requests that the Court deny Frishberg's motion for continuance pursuant to Rule 56(d) because the discovery sought is unrelated to the issues before the court on summary judgment, and because counsel for Frishberg failed to exercise diligence in obtaining this discovery prior to seeking Rule 56(d) relief.

The Receiver further requests this Court grant the Receiver's Motion for Partial Summary Judgment Against Daniel Frishberg, finding that Frishberg (1) was negligent in his management of DFFS's affairs, (2) breached the fiduciary duties of due care and loyalty he owed to DFFS, (3) his negligence and breaches of fiduciary duty proximately caused harm to DFFS and / or provided a benefit to Frishberg (4) was negligent in his management of BizRadio's affairs, (5) breached the fiduciary duties of due care and loyalty he owed to BizRadio, and (6) his

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<sup>8</sup> Counsel for Frishberg states that his failure to pursue the Receiver's deposition was due to his assumption that no dispositive motions would be filed. ADF Decl. at ¶19. This is not diligence as required by Rule 56(d).

<sup>9</sup> The travel plans of the Frishbergs' counsel's the weeks following this Court's previously scheduled dispositive motion deadline is immaterial to the issue of timeliness and diligence. Counsel failed to diligently pursue the Receiver's deposition within the discovery period months before this trip, even while pursuing and receiving other forms of discovery up to that deadline.

negligence and breaches of fiduciary duty proximately caused harm to BizRadio and / or provided a benefit to Frishberg. The Receiver further requests all other relief to which he may be entitled.

Dated: December 2, 2013

Respectfully submitted,

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COUNSEL FOR RECEIVER

**CERTIFICATE OF SERVICE**

On December 2, 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