

“Rules”) in regard to the Receiver’s Motion for Partial Summary Judgment [Doc. # 26] (the “Motion”), and as permitted by Order of this Court [Doc. # 41] (the “Order”).

The Court permitted the Frishbergs “to supplement their Rule 56(d) request to add additional information, if any, regarding the topics and need for Taylor’s deposition.” Order at p. 5 (emphasis added). In this regard, the Supplement does not contain any “additional information” which the Frishbergs have not asserted previously in their Response [Doc. # 35] (the “Response”) to the Motion or their letter to the Court [Doc. # 40] (the “Letter”). The Supplement asserts that this Court should delay the consideration of the Motion so that the Frishbergs may depose the Receiver regarding the topics of (1) the circumstances surrounding the sale of Radio Station KTEK, which was previously asserted in the Response, at pp. 6, 10-11, 18, and Letter, at p. 2; and (2) the purported refusal by the Receiver to allow KCM creditors to exchange their debts for equity in DFFS, which was previously asserted in the Response, at pp. 11.

The Frishbergs’ Supplement simply repeats their previously asserted reasoning for the delay of the Court’s consideration of the Motion -- repetition has not improved their argument. The Receiver has alleged that Frishberg’s actions (and failures to act) in the years preceding the commencement of the Securities and Exchange Commission’s (the “Commission”) Enforcement Action breached several duties which he owed to DFFS and BizRadio. Actions taken by the Receiver following his appointment² are irrelevant to the inquiry regarding Frishberg’s alleged

² Frishberg conflates two separate and distinct circumstances related to the Enforcement Action -- DFFS and BizRadio being named as Relief Defendants by the Commission in its Complaint, and DFFS and BizRadio being placed into Receivership following the appointment of the Receiver. The Commission named DFFS and BizRadio as Relief Defendants in its Complaint [Enforcement Action Doc. # 1] on November 13, 2009. This Court entered the Agreed Order Appointing Receiver [Enforcement Action Doc. # 7] on December 2, 2009. The Receiver had no authority over KCM or the Receivership Estate prior to his appointment, and could not have negotiated on behalf or for the benefit of KCM or its creditors at all, much less in regard to the conversion of fraudulently sold promissory notes for equity

breaches of duty and whether the Receiver is entitled to summary judgment under the Motion. As stated by the Court, the Receiver's actions following his appointment "appear to be related to damages or mitigation issues, at best." Order at p. 4. While Frishberg correctly states that causation is an element of the Receiver's negligence and breach of fiduciary duty claims, Supplement at p. 3, the causation element goes to the amount of damages for which Frishberg is liable -- the amount of damages proximately caused by Frishberg's tortious conduct. The Motion seeks summary judgment as to whether Frishberg's conduct breached the duties he owed to DFFS and BizRadio. Whether these breaches proximately caused damages to the Receivership Estate is not presently before the Court.

In regard to timeliness,³ the Frishbergs fail to establish any diligence whatsoever in seeking to compel the deposition of the Receiver. The Frishbergs first noticed the Receiver's deposition in September 2012. The Court's last modification of the Scheduling Order (which was unopposed by the Frishbergs [*see* Doc. #22] and set the close of discovery on September 13, 2013) was entered on June 7, 2013 [Doc. # 23]. The Frishbergs had over three months to compel the Receiver's deposition before the close of discovery; they failed to do so. Moreover, the Receiver's discovery responses served on the Frishbergs on September 9 and 13, 2013, were timely responses to the Frishbergs' Second Request for Production of Documents, served on or about August 12, 2013. *See* Receiver's Reply to Frishberg's Response, Doc. # 38 (the "Reply"), at p. 16-17. Furthermore -- and notwithstanding that the Frishbergs' discovery requests were patently objectionable and over-broad -- the Receiver offered the Frishbergs unlimited access to

interests in the Registered Investment Advisor from which they were sold.

³ The Court has previously declined to consider Frishberg's claims in regard to previous discovery disputes between the parties. Order at p. 3 n.3. These purported discovery disputes do not bear on the Rule 56(d) inquiry regarding the Receiver's deposition, and in fact establish the lack of diligence undertaken by the Frishbergs in pursuit of discovery in this action.

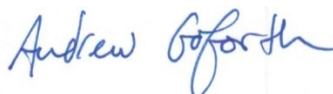
Receivership Records for inspection and copying in Houston. *Id.* The Frishbergs never sought to retrieve any documents as offered by the Receiver. *Id.*

“In order to obtain a continuance [under Rule 56(d)], 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)). The Frishbergs have not offered any additional information regarding how the deposition of the Receiver would pertain to the Court’s consideration of the Motion, and have further “failed [timely] to bring the matter to the Court’s attention pursuant to the Court’s Procedures or any Federal Rule of Civil Procedure.” Order at p. 3. They are not entitled to relief pursuant to Rule 56(d).

Dated: December 19, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.



By: _____

Andrew M. Goforth
Texas State Bar: 24076405
goforth@taylorlaw.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 December 19, 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