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

THOMAS L. TAYLOR, III, Receiver, Plaintiff,	§	
v.	§	CIVIL ACTION NO. H-12-1491
DANIEL S. FRISHBERG, *et al.*, Defendants.	§	

MEMORANDUM AND ORDER

This case is before the Court on Plaintiff Thomas L. Taylor, III's ("Taylor" or "Receiver") Motion for Partial Summary Judgment against Daniel Frishberg [Doc. # 26] ("Motion for Summary Judgment"). Defendant Daniel Frishberg ("Frishberg") has filed a Response to the Motion for Summary Judgment [Doc. # 35], to which the Receiver replied [Doc. # 38]. Also before the Court is the Receiver's Objection to the Declaration of Daniel Frishberg and Motion to Strike [Doc. # 39] ("Motion to Strike").[1] Having reviewed the parties' briefing, the applicable legal authorities, and all evidence of record, the Court **denies** both the Receiver's Motion to Strike and the Receiver's Motion for Summary Judgment.

[1] Instead of filing a response to the Motion to Strike, Frishberg's counsel filed a "Request for Order on Issue Agreed to by the Parties" [Doc. # 42], which clarified that the parties would treat the Motion to Strike as part of the Receiver's Reply and not as a separate motion.

I. BACKGROUND

A. Daniel Frishberg Financial Services

Daniel Frishberg Financial Services ("DFFS")[2] was a registered investment advisor ("RIA") with the State of Texas and the Securities and Exchange Commission ("SEC").[3] Frishberg was a principal and shareholder, chief executive officer ("CEO") and chief of investment decisions of DFFS.[4] Other DFFS shareholders included, at various times, Richard Jordan ("Jordan"), Danny Stewart ("Stewart"), and Albert Kaleta ("Kaleta").[5]

Over the course of its existence, DFFS received loans or lines of credit from various sources, including from "the Jordan family trust" and "a bank credit line arranged by Kaleta."[6] At some unidentified point, Kaleta ceased guaranteeing the bank credit line he had arranged.[7] Instead, Kaleta offered to provide financing

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2 Frishberg refers to DFFS as "Frishberg, Jordan, and Stewart,"or "FJS." *See* Declaration of Daniel Frishberg [Doc. # 35-3] ("Frishberg Decl."), at 1.

3 Examination of Daniel Frishberg [Doc. # 28-2] ("Frishberg Exam."), at 8:11-13.

4 Deposition of Daniel Frishberg [Doc. # 28-3] ("Frishberg Depo."), at 34:9-11; Frishberg Exam., at 21:8-11, 24:12-21.

5 Frishberg Exam., at 21:12-23.

6 Frishberg Decl., at 3.

7 *Id.*, at 5. According to Kaleta, Compass Bank, the loan provider, terminated the credit line after reviewing Frishberg's credit report. *See* Affidavit of Albert Kaleta [Doc. (continued...)

through Kaleta Capital Management ("KCM"), and DFFS accepted the offer.[8] Kaleta stated that loans to DFFS would be secured by KCM's loans from Compass Bank and through the sale of KCM promissory notes, and would be provided on a "short term basis in order to pay expenses and further loan funds to BizRadio and real estate funds operated by David Wallace . . . and Costa Bajjali."[9]

Frishberg encountered various compliance-related issues involving Kaleta. Between 2006 and 2008, Jordan informed Frishberg that "he was concerned that Kaleta was lending the company money obtained from clients."[10] Frishberg instructed Kaleta to create two separate KCM accounts to ensure that client money was not commingled with non-client money; Kaleta thereafter created those accounts.[11] Frishberg also "retrained Kaleta" when he found Kaleta's explanations of DFFS investment decisions inadequate.[12] In late 2008, Frishberg appointed Kaleta

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7 (...continued)
29-5] ("Kaleta Aff."), ¶ 4.

8 Frishberg Decl., at 5.

9 Kaleta Aff., ¶ 5.

10 Frishberg Decl., at 6.

11 *Id.* Frishberg also states that, at that time, KCM held over $2 million in non-client money. *Id.*

12 *Id.*, at 7.

as chief compliance officer ("CCO").[13]

B. Entities Affiliated with DFFS

BuisnessRadio Network, LP ("BizRadio") was a business radio station that was formed in 2004 based on a CBS radio program run by Frishberg.[14] DFFS and BizRadio had a "close relationship."[15] The two companies shared space, storage, and expenses, as well as a health insurance and payroll administrator.[16] DFFS' programming on BizRadio, like Frishberg's radio program on CBS, was initially designed to attract clients to DFFS,[17] though BizRadio later generated profits from other sources, including syndication and programming fees and advertising revenue.[18]

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13 According to Frishberg, Kaleta was appointed to this position because "he was a retired colonel in the army, decorated for extreme heroism and worked for years as a senior compliance officer and investigator of Army aviation violations, where he presided over multimillion dollar investigations of complicated compliance issues." *Id.*, at 20. When he was appointed CCO, Kaleta was "the senior person in the company at that time" and "had recently completed study and passed an exam on compliance." *Id.*

14 Frishberg Exam., at 86:25-87:7.

15 Frishberg Decl., at 8.

16 *Id.*, at 8-9.

17 *Id.*, at 9; *see also* Frishberg Exam., at 87:12-14; Typewritten Notes [Doc. # 28-4], at 1. The Court notes that the "Typewritten Notes" do not bear the name of an author or a date stamp. However, Frishberg has testified that he drafted this document. *See* Frishberg Depo., at 131:9-20.

18 Frishberg Exam., at 88:10-17, 89:21-90:3; Frishberg Decl., at 10.

BizRadio also held a 25% stake in Laffer Frishberg Wallace Economic Opportunity Fund, LP (the "LFW Fund"), which was later merged into the Wallace Bajjalli Investment Fund (the "WB Fund").[19] BizRadio received equity investments from DFFS clients and other individuals, as well as loans from the WB Fund.[20] BizRadio was never profitable and ran a "cash flow short every single month."[21] BizRadio's payroll costs totaled over $3.2 million in 2008 and almost $1.5 million in 2009.[22] Frishberg himself was paid approximately $285,000 in 2008 and approximately $230,000 in 2009, which was a "very small salary" to Frishberg.[23]

Kaleta Capital Management ("KCM") was a financial management firm owned and controlled by Kaleta.[24] Between 2007 and 2009, KCM issued promissory notes

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19 Frishberg Decl., at 24.

20 Frishberg Exam., at 114:3-22.

21 *Id.*, at 91:21-23, 113:25-114:2.

22 Business Radio Partners, L.P. 2008 Payroll Report [Doc. # 28-10]; BusinessRadio Network, LP [Doc. # 28-11].

23 *See* Business Radio Partners, L.P. 2008 Payroll Report [Doc. # 28-10], at 1-2; BusinessRadio Network, LP [Doc. # 28-11]; Frishberg Exam., at 169:3-6. Elisea Frishberg was paid approximately $85,000 in 2008 and approximately $70,000 in 2009. *See* Business Radio Partners, L.P. 2008 Payroll Report [Doc. # 28-10], at 1-2; BusinessRadio Network, LP [Doc. # 28-11].

24 Frishberg Decl., at 4. Frishberg has also described KCM as a "mezzanine lender" and a "loan company," Frishberg Exam., at 157:4-5, and as a "tax-oriented corporate device," Frishberg Depo., at 38:13-15.

to investors (the "KCM Notes").[25] No offering documents were employed for these notes.[26] Around the same time, DFFS (under the name "Frishberg, Jordan & Kaleta Advisors") issued notes to KCM, bearing Frishberg's signature (the "DFFS Notes"), in exchange for loans from KCM.[27] Frishberg asserts that he "did not know these notes were being made," that he "did not sign them," and that he "did not authorize anyone to create a stamp of [his] signature" in order to sign them.[28] KCM also loaned funds to both DFFS and BizRadio.[29] Frishberg knew "while [KCM] was lending money to BizRadio" that DFFS and KCM shared clients, and that some money from DFFS clients was being routed through KCM to BizRadio.[30] Frishberg never audited

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25 *See* Kaleta Aff., ¶ 6; KCM's Promissory Notes [Docs. # 29-1, # 29-2, and # 29-3].

26 Frishberg Exam., at 161:10-13.

27 *See* DFFS' Promissory Notes [Doc. # 29-4].

28 Frishberg Decl., at 11.

29 *See generally* DFFS' Promissory Notes [Doc. # 29-4]; BusinessRadio Network, LP General Ledger [Doc. # 28-8]. Frishberg requested that KCM provide funding to BizRadio, including for the purchase of a radio station in Dallas, Texas, and an Online Training Academy and to pay for lease time in Dallas and Denver. Kaleta Aff., ¶ 9. Furthermore, Frishberg instructed Kaleta to pay Arthur Laffer, an owner of the LFW Fund, for "consulting work on the LFW Fund and for appearing on BizRadio programming as a guest." *Id.*

30 Frishberg Exam., at 157:17-158:13.

KCM to see what it was "doing from year to year."[31]

The Wallace Bajjali Investment Fund ("WB Fund") was a real estate investment fund run by Wallace and Costa Bajjali ("Bajjali"). Frishberg introduced clients to the WB Fund, some of whom invested in notes issued by that fund.[32] The WB Fund invested in BizRadio on the basis of pitch from Frishberg.[33] After its investment in BizRadio, Wallace presented Frishberg with a proposal to offer additional notes in order to help finance the WB Fund (the "WB Fund Notes").[34] Frishberg granted Wallace access to DFFS clients for meetings regarding these notes.[35] The WB Fund Notes were used to help finance BizRadio.[36] Moreover, the WB Fund Notes were secured only by BizRadio or other single assets.[37]

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31 Frishberg Depo., at 38:18-22.

32 Frishberg Decl., at 13; Frishberg Exam., at 60:9-61:1.

33 Frishberg Decl., at 13.

34 *Id.*, at 14.

35 *Id.*

36 Frishberg Depo., at 118:12-119:14.

37 Affidavit of Douglas Fingold [Doc. # 29-6] ("Fingold Aff."), ¶ 3. According to Frishberg, when he originally reviewed the WB Fund Notes and approved them for client investment, they were to be secured by multiple assets. Frishberg Decl., at 14. Frishberg states that he would not have allowed Wallace access to DFFS clients had Frishberg know the actual terms of the loans. *Id.*, at 15. After learning the actual terms of the WB Fund Notes, Frishberg contacted Wallace and his clients, and (continued...)

On November 13, 2009, the Securities and Exchange Commission ("SEC") commenced an action against Frishberg, Kaleta, and KCM, alleging violations of the anti-fraud provisions of the federal securities laws for perpetrating frauds related to promissory-note securities (the "Enforcement Action"). As a result, Fidelity Brokerage Services, LLC ("Fidelity") withdrew as custodian of the DFFS accounts.[38] At that point, Frishberg had intended to sell DFFS to Barrington Financial Advisors ("Barrington"), whose principal was William C. Heath ("Heath").[39] Barrington ultimately did not purchase DFFS and its clients' assets.[40] Instead, a new registered investment advisor ("RIA") fund was established, entitled "Barrington Financial Advisors - Post Oak," to which DFFS client assets were transferred (with the clients' agreement) and for which Frishberg acted as an advisor.[41] The client assets were held at Charles Schwab Institutional.[42] Frishberg was hired on an at-will basis, and his

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(...continued)
personally encouraged Wallace to change the terms "to reflect the pools value of all WB partnership assets." *Id.*

38 *See* Letter from Peter Svorinic, dated December 9, 2009 [Doc. # 29-10].

39 Frishberg Decl., at 26.

40 *Id.*

41 *See* Terms of Purchase of AUM at Daniel Frishberg Financial Services, Inc. [Doc. # 29-9]; Frishberg Decl., at 26.

42 *See* Terms of Purchase of AUM at Daniel Frishberg Financial Services, Inc. [Doc. # (continued...)

employment and compensation ceased after his settlement with the SEC.[43]

C. The Enforcement and Ancillary Actions

In 2011, the SEC filed *SEC v. Frishberg*, No. 4:11-cv-01097, in the Southern District of Texas.[44] Under the terms of the agreed judgment in that case, Frishberg was "enjoined from violating . . . Section 206 of the Investment Advisors Act of 1940" and ordered to pay $65,000.[45] The SEC also filed an administrative proceeding against Frishberg, *In the Matter of Daniel Sholom Frishberg*, File No. 3-14393.[46] Under the terms of the settlement in that proceeding, the SEC barred Frishberg from "association with any broker, dealer, investment adviser, municipal securities dealer, or transfer agent."[47]

In the Enforcement Action, commenced in November 2009, the Court appointed Taylor as the Receiver for KCM and Relief Defendants BizRadio and DFFS. On August 23, 2011, the Receiver commenced litigation against Receivership

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42 (...continued)
29-9], ¶ 1.

43 Frishberg Decl., at 26.

44 *See* Agreed Final Judgment as to Defendant Daniel Sholom Frishberg [Doc. # 29-13].

45 *See id.*, at 1-2.

46 *See* Order Instituting Administrative Proceedings [Doc. # 29-14].

47 *Id.*, at 2.

Entity owners, officers, and employees Frishberg, Elisea Frishberg, and Kaleta, and against Barrington and its principal Heath (the "Ancillary Action"). On May 2, 2012, for ease of administration, the Court severed the Ancillary Action from the Enforcement Action. The Receiver previously sought and obtained this Court's approval of a proposed settlement with Kaleta and a separate proposed settlement with Barrington and Heath.[48] Investors have filed claims against the Receivership Estate based on actions by, among others, BizRadio and KCM. Claims against the Receivership Estate deriving from the KCM Notes total approximately $4.6 million.[49] Claims against the Receivership Estate resulting from BizRadio investments total at least $9.5 million.[50]

The Receiver has alleged the following causes of action against Frishberg: breach of fiduciary duty to DFFS; negligence towards DFFS; breach of fiduciary duty (or inducing or aiding such breach) to KCM; negligence (or aiding and abetting negligence) to KCM; breach of fiduciary duty to BizRadio; negligence to BizRadio; fraudulent transfer; tortious interference with contract; unjust enrichment;

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48 *See* Memorandum and Order [Doc. # 21]; Memorandum and Order [Doc. # 24].

49 Affidavit of Receiver Thomas L. Taylor III [Doc. # 28-1] ("Taylor Aff."), ¶ 6.

50 *Id.*

constructive trust; fee forfeiture; and accounting.[51] The Receiver now moves for partial summary judgment against Frishberg on his claims that Frishberg was negligent in his management of and breached fiduciary duties he owed to DFFS and BizRadio. The Receiver has not moved for summary judgment on his other claims against Frishberg, nor has the Receiver moved for summary judgment on any claims against the other remaining defendant, Elisea Frishberg.[52]

II. EVIDENTIARY MOTIONS

A. Motion to Strike

The Receiver, along with his Reply to Frishberg's Response, has moved to strike the Declaration of Daniel Frishberg [Doc. # 35-3] ("Frishberg Declaration") pursuant to Federal Rule of Civil Procedure 56(c). According to the Receiver, the Frishberg Declaration is "defective in several respects, in that it lacks adequate citation to the record for support, when citation is made at all, and it is filled with self-serving, conclusory assertions which are unsubstantiated and speculative at best."[53] The Receiver also asks the Court to strike the Frishberg Declaration because

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51 *See* Complaint, ¶¶ 89-162.

52 The Receiver has not indicated whether he intends to pursue his remaining causes of action against Frishberg or Elisea Frishberg.

53 Receiver's Objection to the Declaration of Daniel Frishberg and Motion to Strike [Doc. # 39] ("Motion to Strike"), at 2. The Receiver points to particular sections of (continued...)

Frishberg relies on evidence "that would be inadmissible pursuant to Rule 56(c)(4)."[54]

"An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out the facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters asserted." FED. R. CIV. P. 56(c)(4). Conclusory, unsupported, or self-contradictory assertions are insufficient to defeat a motion for summary judgment. *See Mosley v. White*, 464 F. App'x 206, 213 (5th Cir. 2010) ("[W]e have explained that without more, 'conclusory allegations, speculation, and unsubstantiated assertions are inadequate to satisfy the nonmovant's burden' and defeat a motion for summary judgment."); *Kampen v. Amer. Isuzu Motors, Inc.*, 157 F.3d 306, 318 (5th Cir. 1998) (citing *Marshall v. East Carroll Parish Hosp. Serv. Dist.*, 134 F.3d 319, 324 (5th Cir. 1998)).

The Court concludes much (but not all) of the Frishberg Declaration is admissible as summary judgment evidence. Frishberg's declaration is largely based on his personal knowledge and his own claimed understanding of the events that transpired. Frishberg is qualified to attest to these events as he experienced them firsthand. The statements in the Frishberg Declaration are, for the most part,

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(...continued)

the Frishberg Declaration that he contends are self-serving and conclusory or improperly cite to summary judgment evidence. *See id.*, at 4-12.

54 *Id.*, at 12-13.

renditions of facts from Frishberg's perspective. To the extent that Frishberg makes legally conclusory assertions in his Declaration, the Court will not rely on those statements, as those statements alone are inadequate to defeat a motion for summary judgment. Accordingly, the Receiver's Motion to Strike is denied.[55]

B. Rule 56(d) Application

Frishberg has urged the Court to delay its decision on the Receiver's Motion for Summary Judgment until Frishberg has an opportunity to depose the Receiver.[56] Frishberg highlights two reasons this discovery is important for a decision on the pending motion. First, Frishberg asserts that "the Receiver was personally involved in blocking the exchange of the BizRadio equipment to Salem Radio," and that "it could be critical to the defense to test the Receiver's conclusion that BizRadio was insolvent . . . before he sold the same equipment" in a different transaction.[57] Second, Frishberg argues that the Receiver did not approve Frishberg's proposed exchange

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55 The Receiver misreads Federal Rule of Civil Procedure 56(c). The Frishberg Declaration does not need to cite to *other* evidence to be admissible. Rather, in asserting that a genuine issue of material fact exists precluding summary judgment, a nonmovant (*i.e.*, Frishberg) must cite to "particular parts of materials in the record. including . . . affidavits or declaration . . ." FED. R. CIV. P. 56(c)(1)(A). Frishberg has done so here in his Response by citing to the Frishberg Declaration, which part of the evidence of record.

56 *See* Response [Doc. # 35], at 15-16.

57 Declaration in Further Support of Rule 56(D) Application [Doc. # 43], at 2.

of KCM Notes for shares in DFFS, which "resulted in the inability of Daniel Frishberg to retire the KCM [N]otes, and to DFFS being made a relief defendant."[58]

The discovery period in this case began in 2011 and closed on September 13, 2013. At no point during the discovery period did Frishberg advise the Court of any impasse between the parties regarding the Receiver's deposition, let alone move to compel the Receiver's deposition. Nor did Frishberg request an extension of the discovery deadline (before the close of discovery or prior to the Receiver's filing the pending summary judgment motion) in order to secure this deposition. Instead, Frishberg has raised this issue for the first time in response to the Receiver's motion and over two months *after* the close of discovery.

Moreover, topics Frishberg seeks to address in the Receiver's deposition are not relevant to the issues raised by the Receiver in his motion. Frishberg's requested discovery, at most, appears to implicate the damages attributable to Frishberg as a Relief Defendant, and not Frishberg's liability. Both of the events that Frishberg cites occurred after the Receiver was appointed in this case. In contrast, whether Frishberg was negligent or breached any fiduciary duty will focus on Frishberg's conduct in managing DFFS or BizRadio *prior to* the Receiver's appointment. Accordingly, the

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58 *Id.*, at 3.

Court denies Frishberg's Rule 56(d) application at this time.

III. MOTION FOR SUMMARY JUDGMENT

A. Summary Judgment Standard

Rule 56 of the Federal Rules of Civil Procedure mandates the entry of summary judgment, after adequate time for discovery and upon motion, against a party who fails to make a sufficient showing of the existence of an element essential to the party's case, and on which that party will bear the burden at trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986); *Little v. Liquid Air Corp.,* 37 F.3d 1069, 1075 (5th Cir. 1994) (en banc); *see also Baton Rouge Oil and Chem. Workers Union v. ExxonMobil Corp.,* 289 F.3d 373, 375 (5th Cir. 2002). Summary judgment "should be rendered if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law." FED. R. CIV. P. 56(a); *Celotex*, 477 U.S. at 322-23; *Weaver v. CCA Indus., Inc.*, 529 F.3d 335, 339 (5th Cir. 2008).

For summary judgment, the initial burden falls on the movant to identify areas essential to the non-movant's claim in which there is an "absence of a genuine issue of material fact." *Lincoln Gen. Ins. Co. v. Reyna*, 401 F.3d 347, 349 (5th Cir. 2005). The moving party, however, need not negate the elements of the non-movant's case.

See Boudreaux v. Swift Transp. Co., 402 F.3d 536, 540 (5th Cir. 2005). The moving party may meet its burden by pointing out "'the absence of evidence supporting the nonmoving party's case.'" *Duffy v. Leading Edge Prods., Inc.*, 44 F.3d 308, 312 (5th Cir. 1995) (quoting *Skotak v. Tenneco Resins, Inc.,* 953 F.2d 909, 913 (5th Cir. 1992)).

If the moving party meets its initial burden, the non-movant must go beyond the pleadings and designate specific facts showing that there is a genuine issue of material fact for trial. *Littlefield v. Forney Indep. Sch. Dist.*, 268 F.3d 275, 282 (5th Cir. 2001) (internal citation omitted). "An issue is material if its resolution could affect the outcome of the action. A dispute as to a material fact is genuine if the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *DIRECT TV Inc. v. Robson*, 420 F.3d 532, 536 (5th Cir. 2006) (internal citations omitted).

In deciding whether a genuine and material fact issue has been created, the court reviews the facts and inferences to be drawn from them in the light most favorable to the nonmoving party. *Reaves Brokerage Co. v. Sunbelt Fruit & Vegetable Co.*, 336 F.3d 410, 412 (5th Cir. 2003). The non-movant's burden is not met by mere reliance on the allegations or denials in the non-movant's pleadings. *See*

King v. Dogan, 31 F.3d 344, 346 (5th Cir. 1994) (holding that unverified pleadings do not "constitute competent summary judgment evidence"). Likewise, "conclusory allegations" or "unsubstantiated assertions" do not meet the non-movant's burden. *Delta & Pine Land Co. v. Nationwide Agribusiness Ins. Co.*, 530 F.3d 395, 399 (5th Cir. 2008). Instead, the nonmoving party must present specific facts which show "the existence of a genuine issue concerning every essential component of its case." *Am. Eagle Airlines, Inc. v. Air Line Pilots Ass'n, Int'l*, 343 F.3d 401, 405 (5th Cir. 2003) (citation and internal quotation marks omitted). In the absence of any proof, the court will not assume that the non-movant could or would prove the necessary facts. *Little*, 37 F.3d at 1075 (citing *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888 (1990)).

The Court may make no credibility determinations or weigh any evidence, and must disregard all evidence favorable to the moving party that the jury is not required to believe. *See Chaney v. Dreyfus Serv. Corp.*, 595 F.3d 219, 229 (5th Cir. 2010) (citing *Reaves Brokerage Co.*, 336 F.3d at 412-413). The Court is not required to accept the nonmovant's conclusory allegations, speculation, and unsubstantiated assertions which are either entirely unsupported, or supported by a mere scintilla of evidence. *Id*. (citing *Reaves Brokerage*, 336 F.3d at 413). Affidavits cannot preclude summary judgment unless they contain competent and otherwise admissible evidence.

See FED. R. CIV. P. 56(c)(4); *Love v. Nat'l Med. Enters.*, 230 F.3d 765, 776 (5th Cir. 2000); *Hunter-Reed v. City of Houston*, 244 F. Supp. 2d 733, 745 (S.D. Tex. 2003).

Finally, "[w]hen evidence exists in the summary judgment record but the nonmovant fails even to refer to it in the response to the motion for summary judgment, that evidence is not properly before the district court. *Malacara v. Garber*, 353 F.3d 393, 405 (5th Cir. 2003). "Rule 56 does not impose upon the district court a duty to sift through the record in search of evidence to support a party's opposition to summary judgment." *See id.* (internal citations and quotations omitted).

B. Legal Standards Applicable to Receiver's Claims

1. Breach of Fiduciary Duty

To prevail on a claim for breach of fiduciary duty, the Receiver must establish that (1) a fiduciary relationship existed between Frishberg and DFFS or BizRadio, (2) Frishberg breached his fiduciary duty to DFFS or BizRadio, and (3) Frishberg's breach resulted in injury to DFFS or BizRadio or benefit to Frishberg. *See, e.g.*, *Meaux Surface Protection, Inc. v. Fogleman*, 607 F.3d 161, 169 (5th Cir. 2010) (citation omitted); *Dernick Res. v. Wilstein*, 312 S.W.3d 864, 877 (Tex. App.—Houston [1st Dist.] 2009); *Jones v. Blume*, 196 S.W.3d 440, 447 (Tex. App.—Dallas 2006).

Under Texas law, corporate officers and directors and general partners in a limited partnership owe fiduciary duties to the corporation or partnership. *See McBeth v. Carpenter*, 565 F.3d 171, 177 (5th Cir. 2009) (citing *Crenshaw v. Swenson*, 611 S.W.2d 886, 890 (Tex. Civ. App.–Austin 1980, writ ref'd n.r.e.) (partnership); *Engenium Solutions, Inc. v. Symphonic Techs., Inc.*, 924 F. Supp. 2d 757, 793 (S.D. Tex. 2013) (corporation); *Lifshutz v. Lifshutz*, 199 S.W.3d 9, 18-19 (Tex.App.–San Antonio, 2006, no pet.) (corporation). Officers and directors owe a corporation "the duties of obedience, loyalty, and due care." *Gearhart Indus., Inc. v. Smith Int'l, Inc.*, 741 F.2d 707, 719 (5th Cir. 1984). Fiduciaries in a partnership owe the partnership the duties of "good faith and candor," "full disclosure of all matters affecting the partnership," "refraining from self-dealing," and "refraining from competition with the partnership." *Hawthorne v. Guenther*, 917 S.W.2d 924, 934 (Tex.App.–Beaumont 1996, writ denied).

The Receiver claims Frishberg breached the duty of loyalty and duty of due care. "The duty of loyalty dictates that a corporate officer or director must act in good faith and must not allow his or her personal interest to prevail over the interest of the corporation." *Loy v. Harter*, 128 S.W.3d 397, 407 (Tex. App.–Texarkana 2004). "The duty of loyalty is described as requiring an extreme measure of candor,

unselfishness, and good faith on the part of the officer or director." *Id.* (citing *Int'l Bankers Life Ins. Co. v. Holloway,* 368 S.W.2d 567, 577 (Tex. 1963)).

The duty of due care requires that a director or officer "demonstrate the same care as an ordinarily prudent man would use under similar circumstances." *Floyd v. Hefner*, 2006 WL 2844245, at *26 (S.D. Tex. Sept. 29, 2006) (Harmon, J.) (citing *McCollum v. Dollar*, 213 S.W. 259, 261 (Tex. Comm'n App. 1919, holding approved). This duty also "requires that a director to be diligent and prudent in managing the corporation's affairs." *Gearhart Indus.*, 741 F.2d at 720. The Fifth Circuit has added that "[u]nquestionably, under Texas law, a director as a fiduciary must exercise his unbiased or honest business judgment in pursuit of corporate interests." *Id.* Under the "business judgment rule," a non-interested director cannot be held liable for a breach of the duty of due care "unless the challenged action is ultra vires or is tainted by fraud." *Id.* at 721.

2. Negligence

"Under Texas law, the elements of a negligence claim are (1) a legal duty on the part of the defendant; (2) breach of that duty; and (3) damages proximately resulting from that breach." *Lane v. Halliburton*, 529 F.3d 548, 565 (5th Cir. 2008) (citing *Sport Supply Group, Inc. v. Columbia Cas. Co.*, 335 F.3d 453, 466 (5th Cir.

2003)); *see also IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *D. Houston, Inc. v. Love*, 92 S.W.3d 450, 454 (Tex. 2002).[59]

C. Analysis

There is no doubt that Frishberg owed fiduciary and other similar duties to both DFFS and BizRadio. Frishberg was the CEO and a principal of DFFS.[60] Frishberg was also the CEO of and a member of the general corporate partner that ran BizRadio.[61] The question on summary judgment, therefore, is whether Frishberg breached any duties he owed to either DFFS or BizRadio and whether that breach resulted in any injury to those entities or benefit to Frishberg.

1. DFFS

The Receiver asserts that the Frishberg was negligent in managing DFFS in numerous ways. The Receiver claims that Kaleta, under Frishberg's supervision, sold notes to DFFS clients and did not disclose that the proceeds would be used to fund

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59 To the extent that the Receiver argues that Frishberg was negligent in his management of DFFS and BizRadio because he "failed to exercise due care" with regard to those entities, *see* Motion for Summary Judgment, at 13-14, 22-23, the Receiver's claim of negligence is essentially the same as his claim of breach of fiduciary duty.

60 *See* Deposition of Daniel Frishberg [Doc. # 28-3] ("Frishberg Depo."), at 34:9-11; Frishberg Exam., at 21:8-11, 24:12-21.

61 Frishberg Exam., at 84:23-86:5.

DFFS and BizRadio.[62] The Receiver also claims that Frishberg personally benefitted from the proceeds of the KCM Notes.[63] Thus, the Receiver argues that Frishberg "failed reasonably to supervise Kaleta and the KCM Note offering," which was "made worse" when Frishberg promoted Kaleta to CCO.[64]

Furthermore, the Receiver asserts that Frishberg breached his duties of loyalty and care towards DFFS. The Receiver claims that Frishberg breached his duty of loyalty with regard to the KCM Note offering in promoting Kaleta to CCO.[65] The Receiver also maintains that Frishberg breached his duty of loyalty "in regard to the investments introduced by DFFS to its clients in BizRadio and the WB Funds."[66] Finally, the Receiver argues that Frishberg breached his duty of loyalty to DFFS by transferring client accounts to Barrington.[67] Moreover, the Receiver argues, based on the above, that Frishberg did not manage DFFS with "due care" and that his actions

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62 Motion for Summary Judgment, at 17-18.

63 *Id.*, at 18. The Receiver also argues that Frishberg used the KCM Amex to pay for his personal expenses and borrowed money from KCM for the purchase of a personal residence, but does not explain how these actions were negligent as to DFFS. *See id.*, at 18.

64 *Id.*, at 18-19.

65 *Id.*, at 20.

66 *Id.*, at 20.

67 *Id.*, at 21.

should not be protected by the business judgment rule.[68]

Whether Frishberg's conduct amounts to negligence or a breach of fiduciary duty is highly fact-specific. Numerous issues of material fact remain in dispute such that granting summary judgment on the Receiver's negligence or breach of fiduciary duty claims with respect to DFFS would be improper. These include but are not limited to:

- Whether Frishberg knew, at the time, that the money KCM raised through its issuance of the KCM Notes would be used or was used to fund DFFS.
- Whether Frishberg knew that DFFS was issuing the DFFS Notes to KCM, and whether Frishberg signed or authorized others to sign the DFFS Notes.
- Whether Frishberg's promotion of Kaleta to CCO was reasonable given the circumstances of the company at the time and Kaleta's compliance background.
- Whether Frishberg properly supervised Kaleta in the 2008-2009 period given Frishberg's illness and his position at DFFS at the time.
- Whether Frishberg introduced DFFS clients to the WB Fund in order to promote investment in that fund and to secure funds for the WB Fund to invest in BizRadio to the detriment of BizRadio.
- Whether Frishberg's decision to transfer client assets to Barrington was warranted in light of Fidelity's withdrawal as custodian of the DFFS client accounts.

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68 *Id.*, at 22.

Decisions on some or all of these issues, and thus disposition of the Receiver's claims against Frishberg, require assessing and balancing competing evidence of record, including Frishberg's credibility. These issues are best decided by a jury at trial.

2. BizRadio

The Receiver also argues that Frishberg was negligent—that is, he "failed to exercise due care"—in his management of BizRadio.[69] Specifically, the Receiver claims that BizRadio was "always operating at a loss," and that Frishberg nonetheless "increased his compensation" from BizRadio.[70] Moreover, the Receiver asserts that BizRadio raised capital from DFFS clients and affiliated entities which, in turn, conflated the business expenses of BizRadio and other businesses managed by Frishberg.[71]

Similarly, the Receiver contends that Frishberg breached his duties of loyalty and due care to BizRadio. The Receiver asserts that BizRadio "borrowed funds from or received investments from entities of which Frishberg was also an officer, had supervisory control or had a significant financial interest," and that Frishberg knew that those entities (*i.e.*, KCM and the WB Fund) were investing in or loaning money

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69 Motion for Summary Judgment, at 22.

70 *Id.*

71 *Id.*, at 22-23.

to BizRadio.[72] The Receiver claims that these transactions "were not fair" and "caused substantial harm" to BizRadio.[73] Furthermore, the Receiver argues that Frishberg breached his duty of due care through this conduct.[74]

Here, too, numerous issues of material fact remain in dispute, such as:

- Whether Frishberg's compensation from BizRadio was excessive in light of BizRadio's profits, operating expenses, and payroll costs.
- Whether Frishberg operated BizRadio as a "loss leader" in order to attract clients to DFFS.
- Whether Frishberg was acting in "good faith" or with "due care" in borrowing and/or receiving funds from KCM and the WB Fund.

These contested issues of fact prevent the Court from granting summary judgment on the Receiver's claims. A decision on these issues must be reserved for the trier of fact.

IV. CONCLUSION

The Court has scrutinized the evidence of record and concludes that a trial on the Receiver's claims is necessary. To be sure, the Receiver has offered substantial evidence tending to suggest Frishberg's liability on the Receiver's various claims of

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72 *Id.*, at 24.

73 *Id.*, at 24-25.

74 *Id.*, at 25.

negligence and breach of fiduciary duty. A full review of the evidence presented, however, makes clear that the Court cannot grant summary judgment on the Receiver's claims because genuine issues of material fact remain, which must be decided by the trier of fact. These issues preclude the Court's decision as a matter of law. This ruling, however, does not prevent the Court's issuance of issuing judgment as a matter of law on the motion of either party at trial, if the evidence warrants such a result.

For the foregoing reasons, it is hereby

ORDERED that Plaintiff Thomas L. Taylor, III's Objection to the Declaration of Daniel Frishberg and Motion to Strike [Doc. # 39] is **DENIED**. It is further

ORDERED that Plaintiff Thomas L. Taylor, III's Motion for Partial Summary Judgment against Daniel Frishberg [Doc. # 26] is **DENIED**. ("Motion for Summary Judgment"). It is further

ORDERED that by **February 14, 2014,** the parties must supply the Court with the name of a mutually-agreeable mediator and the mediation date. If by that date the parties cannot agree on a mediator, the Court will select one. The parties must complete mediation by **March 24, 2014**. It is further

ORDERED that docket call in this case is rescheduled for **March 25, 2014,**

at 3:00 p.m.

SIGNED at Houston, Texas, this **5th** day of **February, 2014**.

Nancy F. Atlas
United States District Judge