

UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF TEXAS

SECURITIES AND EXCHANGE  
COMMISSION

VS.

ALBERT FASE KALETA and  
KALETA CAPITAL MANAGEMENT

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§  
§  
§  
§  
§  
§

CIVIL ACTION NO. 4:09-cv-3674

**DANIEL FRISHBERG'S MOTION TO QUASH SUBPOENA  
TO PRODUCE DOCUMENTS IN A CIVIL ACTION**

TO THE HONORABLE COURT:

COMES NOW, Daniel Frishberg, a non-party, files this his Motion to Quash Subpoena to Produce Documents issued at the request of Thomas L. Taylor, III, ("Receiver") and would respectfully show the court the following:

I.

On or about March 1, 2010, Receiver caused to be served upon Daniel Frishberg a subpoena to produce various enumerated documents, the original of the notice and request being on file in this action and incorporated herein by reference as Exhibit "A". The deadline listed for Daniel Frishberg's response to Receiver's subpoena for production of documents was March 8, 2010, one week after its issuance.

II.

The requests contained in the subpoena imposes an undue burden upon Daniel Frishberg. Whether a subpoena imposes upon a witness an undue burden depends upon such factors as relevance, the need of the party for the documents, the breadth of the document request, the time

period covered by it, the particularity with which the documents are described and the burden imposed.<sup>1</sup> In this instance, the requests contained in Exhibit A show a sweeping request for personal documents and material with little apparent or likely relevance to the subject matter of the suit. The deadline imposed under subpoena also presents undue expense and inconvenience to Mr. Frishberg.<sup>2</sup>

III.

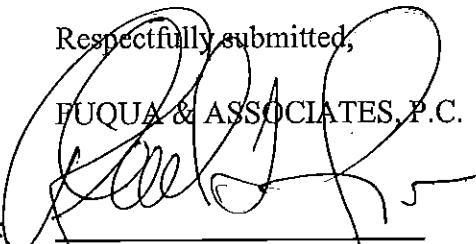
The subpoena to produce documents issued to Daniel Frishberg, therefore, must be quashed because it failed to allow a reasonable time to comply, required disclosure of privileged or other protected matter, and compliance with the subpoena to produce documents subjects Mr. Frishberg to undue burden, expense, and inconvenience.

Daniel Frishberg, therefore prays that the court quash the subpoena to produce documents and thus relieve him of the obligation to produce any of the requested documents or records, or that, in the alternative, the court order the subpoena duces tecum modified and restricted so that only the relevant records which are actually in the care, custody or control of Mr. Frishberg need be produced, and for such other relief to which defendants may be entitled.

Respectfully submitted,

FUQUA & ASSOCIATES, P.C.

By:

  
Richard L. Fuqua  
Texas Bar #07552300  
2777 Allen Parkway, Ste. 480

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<sup>1</sup>See *Concord Boat Corp., et al., v Brunswick Corp.*, 169 F.R.D. 44, 1996 US Dist. LEXIS 15570, (S.D.N.Y. 1996).

<sup>2</sup>If the person to whom the document request is made is a non-party, the court may also consider the expense and inconvenience to the non-party. See *Ken Wiwa v. Royal Dutch Petroleum Co.*, 392 F.3D 812, 818 (5<sup>th</sup> Cir. 2004).

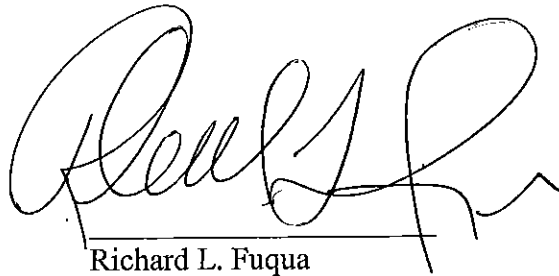
Houston, TX 77019  
(713) 960-0277  
(713) 960-1064 (fax)

ATTORNEYS FOR DANIEL FRISHBERG.

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Motion to Quash was forwarded by facsimile transmission, personal delivery and/or Certified United States mail, return receipt requested, on this 11<sup>th</sup> day of March, 2010 to the following person(s):

Marcela Cuadrado  
Taylor Cuadrado, P.C.  
3200 Southwest Fwy, Ste 3300  
Houston, TX 77027  
713-402-6173  
cuadrado@tc-lawyers.com



Richard L. Fuqua

SCA 2516  
3-8-10

AO 88A (Rev. 01/09) Subpoena to Testify at a Deposition or to Produce Documents in a Civil Action

UNITED STATES DISTRICT COURT

for the  
Southern District of Texas

SECURITIES AND EXCHANGE COMMISSION,  
*Plaintiff*  
v.  
ALBERT FASE KALETA and  
KALETA CAPITAL MANAGEMENT, INC.,  
*Defendant*

Civil Action No. 4:09-cv-3674

(If the action is pending in another district, state where:

SUBPOENA TO TESTIFY AT A DEPOSITION  
OR TO PRODUCE DOCUMENTS IN A CIVIL ACTION

To: DANIEL FRISHBERG

*Testimony:* YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

|  |                                    |
|--|------------------------------------|
| Place: Taylor Cuadrado P.C.<br>3200 Southwest Fwy, Ste 3300, Houston, TX 77027 | Date and Time:<br>03/08/2010 00:00 |
|--|------------------------------------|

The deposition will be recorded by this method: \_\_\_\_\_

*Production:* You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The Receiver hereby requests the following documents, records, and information in your possession, custody, or control which relates directly or indirectly to, or which discloses information bearing directly or indirectly upon, the subject matter of the Securities and Exchange Commission v. Albert Fase Kaleta and Kaleta Capital Management, Inc., Case No. 4:09-cv-3674, United States District Court, Southern District Texas.. and the use, transfer, location and/or disposition of assets of Kaleta Capital Management, Inc. during the period January 1, 2007, through the present. See Exhibit "A",

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 03/01/2010

CLERK OF COURT

DAVID J. BRADLEY

OR

Signature of Clerk or Deputy Clerk

Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing (name of party) \_\_\_\_\_  
Thomas L. Taylor III, Receiver \_\_\_\_\_, who issues or requests this subpoena, are:  
Marcela Cuadrado, Taylor Cuadrado P.C., 3200 Southwest Fwy, Ste 3300, Houston, TX 77027; 713.402.6173  
cuadrado@tc-lawyers.com .



Exhibit A

The Receiver hereby requests the following documents, records, and information in your possession, custody, or control which relates directly or indirectly to, or which discloses information bearing directly or indirectly upon, the subject matter of the *Securities and Exchange Commission v. Albert Fase Kaleta and Kaleta Capital Management, Inc.*, Case No. 4:09-cv-3674, United States District Court, Southern District Texas and the use, transfer, location and/or disposition of assets of Kaleta Capital Management, Inc. ("KCM") during the period January 1, 2007, through the present. Please produce the following:

1. Books of original entry and subsidiary records including but not limited to: general ledger, general journal, cash receipts journal, accounts receivable ledger, payroll journals and ledgers, purchase journal, shipping and receiving reports, and contingent liabilities related to you or KCM, BusinessRadio Network LP d/b/a/ BizRadio ("BizRadio"), Frishberg and Kaleta, Daniel Frishberg Financial Services, Inc., d/b/a DFBS Capital Management, Inc. or any other entity owned or controlled by any of them, or any of their parents, subsidiaries, predecessors, successors or assigns (collectively, "KCM Affiliates").
2. Original source records, transaction summary reports, supporting records and documents, and informal work papers related to, or resulting in entries made in the above noted books and records, including, but not limited to: bank records, confirmations, purchase orders, delivery tickets, invoices, paid bills, loan files, and real property records related to you or any KCM Affiliate.
3. Bank records for all known accounts, encompassing, but not limited to checking accounts, savings accounts, loans, lines of credit, and other financial instruments. These records would include bank statements, canceled checks, deposit tickets, check stubs and register, bank debit and credit memos, etc. related to you or any KCM Affiliate.
4. Brokerage Records for all known accounts held in your name or in the name of any KCM Affiliate.
5. Articles of incorporation and corporate minutes; or any partnership agreements involving you or any KCM Affiliate.
6. Correspondence files, including e-mail or other electronic files, related to assets of any kind owned or controlled by you or any KCM Affiliate.
7. Reports and accountants' work papers concerning preparation of financial records and reports and audits of you or any KCM Affiliate. Responsive documents include, but are not limited to: audited and unaudited financial statements (balance sheet, income statement, etc.),

expense and revenue summaries, trial balances, changes in working capital, cash flow analysis, cost analysis, financial forecasts, and correspondence.

8. Tax returns for you or any KCM Affiliate; both Federal and State, sales, and employment tax returns with supporting schedules and work papers. Also, amended returns, if any, and records of extensions, adjustments, and audits.
9. Insurance policies, records, and correspondence for you or any KCM Affiliate.
10. Documents related to any credit card or online payment service (e.g., Paypal) used by you or your immediate family or affiliates including, but not limited to, account statements or transaction runs and communications.
11. Personal income statements prepared by you or on your behalf, including drafts.
12. Promissory notes and communications concerning promissory notes involving you or any KCM Affiliate.
13. All documents concerning promissory notes drafted to reflect transactions that had already occurred.
14. All documents related to the reclassification of any balance sheet entries concerning you or any KCM Affiliate.
15. All documents related to any transaction with Masterpiece or its owners, principals, promoters or employees.
16. All emails and electronic data concerning the transfer or attempted transfer of assets to and from KCM or any KCM Affiliate.
17. Any and all other information in your possession not specifically requested above related to your assets or the assets of KCM or the assets of any KCM Affiliate.

## Federal Rule of Civil Procedure 45 (c), (d), and (e) (Effective 12/1/07)

**(c) Protecting a Person Subject to a Subpoena.**

**(1) Avoiding Undue Burden or Expense; Sanctions.** A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The issuing court must enforce this duty and impose an appropriate sanction — which may include lost earnings and reasonable attorney's fees — on a party or attorney who fails to comply.

**(2) Command to Produce Materials or Permit Inspection.**

**(A) Appearance Not Required.** A person commanded to produce documents, electronically stored information, or tangible things, or to permit the inspection of premises, need not appear in person at the place of production or inspection unless also commanded to appear for a deposition, hearing, or trial.

**(B) Objections.** A person commanded to produce documents or tangible things or to permit inspection may serve on the party or attorney designated in the subpoena a written objection to inspecting, copying, testing or sampling any or all of the materials or to inspecting the premises — or to producing electronically stored information in the form or forms requested. The objection must be served before the earlier of the time specified for compliance or 14 days after the subpoena is served. If an objection is made, the following rules apply:

**(i)** At any time, on notice to the commanded person, the serving party may move the issuing court for an order compelling production or inspection.

**(ii)** These acts may be required only as directed in the order, and the order must protect a person who is neither a party nor a party's officer from significant expense resulting from compliance.

**(3) Quashing or Modifying a Subpoena.**

**(A) When Required.** On timely motion, the issuing court must quash or modify a subpoena that:

**(i)** fails to allow a reasonable time to comply;

**(ii)** requires a person who is neither a party nor a party's officer to travel more than 100 miles from where that person resides, is employed, or regularly transacts business in person — except that, subject to Rule 45(c)(3)(B)(iii), the person may be commanded to attend a trial by traveling from any such place within the state where the trial is held;

**(iii)** requires disclosure of privileged or other protected matter, if no exception or waiver applies; or

**(iv)** subjects a person to undue burden.

**(B) When Permitted.** To protect a person subject to or affected by a subpoena, the issuing court may, on motion, quash or modify the subpoena if it requires:

**(i)** disclosing a trade secret or other confidential research, development, or commercial information;

**(ii)** disclosing an unretained expert's opinion or information that does not describe specific occurrences in dispute and results from the expert's study that was not requested by a party; or

**(iii)** a person who is neither a party nor a party's officer to incur substantial expense to travel more than 100 miles to attend trial.

**(C) Specifying Conditions as an Alternative.** In the circumstances described in Rule 45(c)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

**(i)** shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and

**(ii)** ensures that the subpoenaed person will be reasonably compensated.

**(d) Duties in Responding to a Subpoena.**

**(1) Producing Documents or Electronically Stored Information.** These procedures apply to producing documents or electronically stored information:

**(A) Documents.** A person responding to a subpoena to produce documents must produce them as they are kept in the ordinary course of business or must organize and label them to correspond to the categories in the demand.

**(B) Form for Producing Electronically Stored Information Not Specified.** If a subpoena does not specify a form for producing electronically stored information, the person responding must produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

**(C) Electronically Stored Information Produced in Only One Form.** The person responding need not produce the same electronically stored information in more than one form.

**(D) Inaccessible Electronically Stored Information.** The person responding need not provide discovery of electronically stored information from sources that the person identifies as not reasonably accessible because of undue burden or cost. On motion to compel discovery or for a protective order, the person responding must show that the information is not reasonably accessible because of undue burden or cost. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(b)(2)(C). The court may specify conditions for the discovery.

**(2) Claiming Privilege or Protection.**

**(A) Information Withheld.** A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material must:

**(i)** expressly make the claim; and

**(ii)** describe the nature of the withheld documents, communications, or tangible things in a manner that, without revealing information itself privileged or protected, will enable the parties to assess the claim.

**(B) Information Produced.** If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party must promptly return, sequester, or destroy the specified information and any copies it has; must not use or disclose the information until the claim is resolved; must take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under seal for a determination of the claim. The person who produced the information must preserve the information until the claim is resolved.

**(e) Contempt.** The issuing court may hold in contempt a person who, having been served, fails without adequate excuse to obey the subpoena. A nonparty's failure to obey must be excused if the subpoena purports to require the nonparty to attend or produce at a place outside the limits of Rule 45(c)(3)(A)(ii).