

**No. 12-20633**

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**IN THE UNITED STATES COURT OF APPEALS  
FOR THE FIFTH CIRCUIT**

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SECURITIES AND EXCHANGE COMMISSION,

PLAINTIFF

v.

ALBERT FASE KALETA,

DEFENDANT

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RONALD ELLISOR; LAVONNE ELLISOR; RICHARD KADLICK; SAILAJA URI  
KONDURI; ROBERT FICKS; ET AL.,

APPELLANTS

v.

THOMAS L. TAYLOR III, THE RECEIVER FOR KALETA CAPITAL MANAGEMENT, INC.;  
BUSINESSRADIO NETWORK, L.P., DOING BUSINESS AS BIZRADIO; DANIEL FRISHBERG  
FINANCIAL SERVICES, INC., DOING BUSINESS AS DFFS CAPITAL MANAGEMENT, INC.,  
AND ALL OF THE ENTITIES THEY OWN OR CONTROL,

APPELLEES

*On Appeal from the United States District Court  
for the Southern District of Texas, Houston Division*

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**UNOPPOSED MOTION FOR LEAVE TO FILE  
BRIEF AND RECORD EXCERPTS OF  
APPELLEE RECEIVER THOMAS L. TAYLOR III OUT OF TIME**

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COMES NOW counsel for Appellee Receiver Thomas L. Taylor III and, for good cause shown, respectfully moves the Court for leave to file the Brief of Appellee Thomas L. Taylor III (“Brief”) and Record Excerpts thereto (“Record Excerpts”) out of time. Attached hereto as **Exhibit A** is the affidavit of Andrew

M. Goforth, undersigned counsel for the Appellee Receiver, in support of this Motion for Leave. Undersigned counsel has contacted counsel for Appellants regarding this motion, and Appellants' counsel is unopposed to the relief sought herein. Affidavit at ¶ 11.

**I.**

The Federal Rules of Appellate Procedure allow this Court to permit filings to be made after the time for the filing expires, upon a showing of good cause. FED. R. APP. P. 26(b); 5TH CIR. R. 26.2. Counsel for Appellee requests leave to file the Brief and Record Excerpts out of time for good cause, as shown below.

**II.**

The Brief and Record Excerpts were due March 6, 2013. In attempting timely to file the Brief and Record Excerpts, undersigned counsel encountered technological issues which resulted in the Brief being filed at 12:03:19 AM CST and the Record Excerpts at 12:17:31 AM CST on March 7, 2013. Affidavit at ¶ 3.

When typing the Fifth Circuit website address into the browser address bar, a “drop down” list of options appeared, based on what had been typed into the address bar and websites which previously had been accessed in the browser. Counsel clicked on the first of the “drop down” options, which directed him to a

Google search of “www.ca5.uscourts.gov/cmecf,” rather than the page itself. On the Google search results page, a page link under the main search result was titled “Login.” Affidavit at ¶ 4.

Undersigned counsel clicked on this “Login” page link and was directed to a page which he believed to be the Fifth Circuit CM/ECF login page. Affidavit at ¶ 5. Counsel attempted to login with his Fifth Circuit CM/ECF username and password. The login failed. Counsel made several additional attempts at logging-in, with the belief that there had been a typographical error in the username or password entered. None of these attempts were successful. Affidavit at ¶ 6. Undersigned counsel then searched his computer and that of his assistant in order to confirm the accuracy of the username and password being used to log-in. They were, in fact, correct. When counsel returned to his computer to attempt again to log-in, his attempt again failed. Affidavit at ¶ 7.

Counsel then noticed that the website address of the page he was attempting to access was not the Fifth Circuit’s CM/ECF website, but rather the First Circuit’s CM/ECF website. The “Login” link on the Google search results page had directed counsel to the First Circuit’s CM/ECF website. Affidavit at ¶ 8. Counsel then accessed the Fifth Circuit’s CM/ECF login page through the main page of its website, and was able to successfully login to the CM/ECF system with the username and password which had not worked on the webpage of the First Circuit

linked from Google. Affidavit at ¶ 9. The Brief was successfully filed through the Fifth Circuit's CM/ECF system at 12:03:19 AM CST on March 7, 2013. Affidavit at ¶ 9.

Once the Brief was accepted by the CM/ECF system, undersigned counsel attempted to file the Record Excerpts. He received an error message that the file size of the Record Excerpts exceeded the limits of the CM/ECF system. Counsel then re-saved the Record Excerpts to a reduced file size in Adobe Acrobat X, and was able to successfully file the Record Excerpts at 12:17:31 AM CST on March 7, 2013. Affidavit at ¶ 10.

### III.

The undersigned counsel respectfully requests that the Court grant this Unopposed Motion for Leave to File the Brief and Record Excerpts of Appellee Receiver Thomas L. Taylor III Out of Time for good cause, due to the technological issues detailed above.

March 8, 2013

Respectfully submitted,

THE TAYLOR LAW OFFICES, P.C.

By:           /s/ Andrew M. Goforth          

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COUNSEL FOR RECEIVER

#### **CERTIFICATE OF CONFERENCE**

I certify that on March 8, 2013 I conferred with Troy Tindal, counsel for Appellants, regarding the above Motion to File Appellee Receiver Thomas L. Taylor III's Brief and Record Excerpts Out of Time. Counsel stated he was unopposed to the relief sought in this Motion for Leave.

          /s/ Andrew M. Goforth            
Andrew M. Goforth

#### **CERTIFICATE OF SERVICE**

I certify that on March 8, 2013 a copy of this Motion to File Appellee Receiver Thomas L. Taylor III's Brief and Record Excerpts Out of Time was filed using the U.S. Court of Appeals for the Fifth Circuit's ECF/CM system and all counsel of record listed below were served using the court's electronic Notice of Docket Activity pursuant to 5th Cir. R. 25.2.5.

C. Thomas Schmidt  
Troy Tindal  
SCHMIDT LAW FIRM, PLLC  
3701 Kirby Drive, Suite 845  
Houston, TX 77098  
Tel. 713-568-4899  
Fax 815-301-900

/s/ Andrew M. Goforth  
Andrew M. Goforth

# **Exhibit A**

**AFFIDAVIT OF ANDREW M. GOFORTH**

STATE OF TEXAS           §  
  §  
COUNTY OF HARRIS       §

I, Andrew M. Goforth, do hereby declare under penalty of perjury that the following is true and correct, and that I am competent to testify to the matters stated herein:

1. I am counsel to Appellee Receiver Thomas L. Taylor III in *Securities and Exchange Commission, Plaintiff v. Albert Fase Kaleta, Defendant; Ronald Ellisor; Lavonne Ellisor; Richard Kadlick; Sailaja Uri Konduri; Robert Ficks; et al., Appellants v. Thomas L. Taylor III, the Receiver for Kaleta Capital Management, Inc.; BusinessRadio Network, L.P., doing business as BizRadio; Daniel Frishberg Financial Services, Inc., doing business as DFFS Capital Management, Inc., and All of the Entities They Own or Control, Appellees*, in the United States Court of Appeals for the Fifth Circuit, Case No. 12-20633.

2. This affidavit is offered in support of the Motion for Leave to File Brief and Record Excerpts of Appellee Receiver Thomas L. Taylor III Out of Time (“Motion for Leave”).

3. I attempted timely to file the Brief of Appellee Thomas L. Taylor III (“Brief”) and Record Excerpts thereto (“Record Excerpts”) on March 6, 2013, but



encountered technological issues which resulted in the Brief being filed at 12:03:19 AM CST and the Record Excerpts at 12:17:31 AM CST on March 7, 2013. Attached as **Exhibit 1** to this affidavit are true and correct copies of the automated emails sent to me by the Fifth Circuit CM/ECF system, which show the times of these filings in the CM/ECF system.

4. I began typing the Fifth Circuit website address into the browser address bar on my computer, and a “drop down” list of options appeared, based on what I had typed into the address bar and websites which previously had been accessed in the browser. I clicked on the first of the “drop down” options, which directed me to a Google search of “www.ca5.uscourts.gov/cmecf,” rather than the page itself. On the Google search results page, a page under the main search result was titled “Login.” Attached as **Exhibit 2** to this affidavit is an image capture of the Google search results page for “www.ca5.uscourts.gov/cmecf,” which is a true and correct representation of the webpage as accessed by me on March 6, 2013.

5. I clicked on this “Login” link, and was directed to a page which I believed to be the Fifth Circuit CM/ECF login page. Attached as **Exhibit 3** to this affidavit is an image capture of the CM/ECF login page which was opened when I clicked the “Login” link on the Google search results page in **Exhibit 2**.

6. I attempted to login with my Fifth Circuit CM/ECF username and password. The login failed. I made several additional attempts at logging-in,

believing that I had made a typographical error in the username or password entered. None of these attempts were successful.

7. I then searched my computer and that of my assistant in order to confirm the accuracy of the username and password I was using to log-in. They were in fact correct. I returned to my computer to attempt again to log-in, and my attempt again failed.

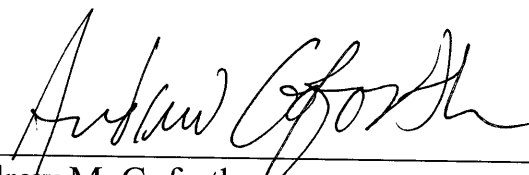
8. I then noticed that the website address of the page I was attempting to access was not the Fifth Circuit's CM/ECF website, but rather the First Circuit's CM/ECF website. See **Exhibit 3**. The "Login" link on the Google search results page had directed me to the First Circuit's CM/ECF website. Attached as **Exhibit 4** to this affidavit is a second image capture of the Google search results page for "www.ca5.uscourts.gov/cmecf" depicted in **Exhibit 2**. The URL link shown at the bottom left of **Exhibit 4** appears when the mouse is hovered over the "Login" link on that page.

9. I then accessed the Fifth Circuit's CM/ECF login page through the main page of its website, and successfully logged-in to the CM/ECF system with the username and password which had not worked on the webpage of the First Circuit linked from Google. I was able to complete the filing of the Brief through the Fifth Circuit's CM/ECF system at 12:03:19 AM CST on March 7, 2013. **Exhibit 1** at p. 1.

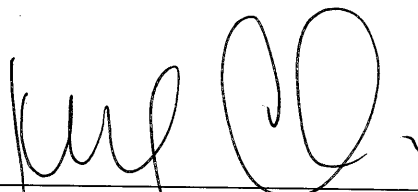
10. After successfully filing the Brief, I attempted to file the Record Excerpts. I received an error message that the file size of the Record Excerpts exceeded the limits of the CM/ECF system. I then re-saved the Record Excerpts to a reduced file size in Adobe Acrobat X, and successfully filed the Record Excerpts at 12:17:31 AM CST on March 7, 2013. **Exhibit 1** at p. 2.

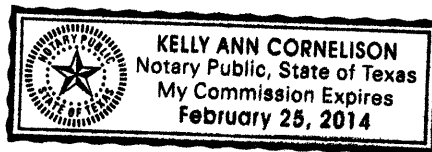
11. On March 8, 2013, I transmitted a draft of the Motion for Leave and this Affidavit in support to Troy Tindal, counsel for Appellants. Appellants' counsel was unopposed to the relief sought in the Motion for Leave.

Executed on March 8, 2013:

  
\_\_\_\_\_  
Andrew M. Goforth

Subscribed and sworn before me  
on this 8<sup>th</sup> day of March, 2013:

  
\_\_\_\_\_  
Kelly Cornelison, Notary Public  
Harris County, Texas



My Commission Expires: 2/25/14

# **Exhibit 1**

**Andrew Goforth**

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**From:** cmecf\_caseprocessing@ca5.uscourts.gov  
**Sent:** Thursday, March 07, 2013 12:03 AM  
**To:** goforth@tltaylorlaw.com  
**Subject:** 12-20633 SEC v. Albert Kaleta "Appellee/Respondent Brief Filed"

**\*\*\*NOTE TO PUBLIC ACCESS USERS\*\*\* Judicial Conference of the United States policy permits attorneys of record and parties in a case (including pro se litigants) to receive one free electronic copy of all documents filed electronically, if receipt is required by law or directed by the filer. PACER access fees apply to all other users. To avoid later charges, download a copy of each document during this first viewing.**

**United States Court of Appeals for the 5th Circuit**

**Notice of Docket Activity**

The following transaction was entered on 03/07/2013 at 12:03:19 AM CST and filed on 03/07/2013

**Case Name:** SEC v. Albert Kaleta  
**Case Number:** [12-20633](#)  
**Document(s):** [Document\(s\)](#)

**Docket Text:**

APPELLEE'S BRIEF FILED by Appellee Mr. Thomas Lee Taylor, III. Date of service: 03/06/2013 via email - Attorney for Appellants: Schmidt, Tindal; Attorney for Appellees: Goforth, Taylor [12-20633] (Andrew M. Goforth )

**Notice will be electronically mailed to:**

Mr. Charles Thomas Schmidt: [tom@schmidtfirm.com](mailto:tom@schmidtfirm.com)  
Mr. Troy Ted Tindal: [troy@schmidtfirm.com](mailto:troy@schmidtfirm.com)  
Mr. Thomas Lee Taylor, III: [taylor@tltaylorlaw.com](mailto:taylor@tltaylorlaw.com)  
Mr. Andrew M. Goforth, Attorney: [goforth@tltaylorlaw.com](mailto:goforth@tltaylorlaw.com)

The following document(s) are associated with this transaction:

**Document Description:** Brief of Appellee Thomas L. Taylor III

**Original Filename:** Receiver's Appellee Brief v6.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1105048708 [Date=03/07/2013] [FileNumber=7310524-0]  
[b86bbfb91d98ec2251984eb13a3ee4ac63591cfed7b18831fda41cd95e91388e572a5526c8e6d3eab55da8363587  
3a433c3fd16f374449a498ff2d8499313d6e]]

**Andrew Goforth**

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**From:** cmecf\_caseprocessing@ca5.uscourts.gov  
**Sent:** Thursday, March 07, 2013 12:18 AM  
**To:** goforth@tltaylorlaw.com  
**Subject:** 12-20633 SEC v. Albert Kaleta "Record Excerpts filed"

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**United States Court of Appeals for the 5th Circuit**

**Notice of Docket Activity**

The following transaction was entered on 03/07/2013 at 12:17:31 AM CST and filed on 03/07/2013

**Case Name:** SEC v. Albert Kaleta  
**Case Number:** [12-20633](#)  
**Document(s):** [Document\(s\)](#)

**Docket Text:**

RECORD EXCERPTS FILED by Appellee Mr. Thomas Lee Taylor, III. Date of service: 03/06/2013 via email - Attorney for Appellants: Schmidt, Tindal; Attorney for Appellees: Goforth, Taylor [12-20633] (Andrew M. Goforth )

**Notice will be electronically mailed to:**

Mr. Charles Thomas Schmidt: [tom@schmidtfirm.com](mailto:tom@schmidtfirm.com)  
Mr. Troy Ted Tindal: [troy@schmidtfirm.com](mailto:troy@schmidtfirm.com)  
Mr. Thomas Lee Taylor, III: [taylor@tltaylorlaw.com](mailto:taylor@tltaylorlaw.com)  
Mr. Andrew M. Goforth, Attorney: [goforth@tltaylorlaw.com](mailto:goforth@tltaylorlaw.com)

The following document(s) are associated with this transaction:

**Document Description:** Record Excerpts - Brief of Appelle

**Original Filename:** APPX Receivers Brief SMALL.pdf

**Electronic Document Stamp:**

[STAMP acecfStamp\_ID=1105048708 [Date=03/07/2013] [FileNumber=7310525-0]  
[3047957b90b1b6c08d3d7a6a5a16f9d07d7de276ac5bd5e3c7c2ea71fd5b6da6a70302a01fd59c392887270382  
0ebbd44e3226b858798ccaf28bd1ee16e8]]

# **Exhibit 2**



www.ca5.uscourts.gov/cmecf



Web Images Maps Shopping More Search tools

About 1,410 results (0.25 seconds)

USCA5 CM/ECF Page

[www.ca5.uscourts.gov/cmecf/](http://www.ca5.uscourts.gov/cmecf/)

CM/ECF Information. NOTICE: The Fifth Circuit U.S. Court of Appeals began MANDATORY electronic case filing on March 15, 2010. Electronic filers must ...

You visited this page on 3/7/13.

Login

Appellate CM/ECF Login. Notice. This is a Restricted Web Site for ...

ECF Filing Standards

CM/ECF Application. ECF Filing Standards. Fall, 2009. Update ...

How to File a Motion

How to File a Motion. USCA5. Page 2. 6. Single click a radio ...

Please Login to PACER

Not Logged In To PACER. Instructions: Please enter your ...

FIFTH CIRCUIT CM/ECF ...

FIFTH CIRCUIT CM/ECF. Contact Information. PACER ...

How to File a Motion ...

... Electronic Learning Module "How to File a Motion/Document ...

More results from uscourts.gov »

[PDF] Practitioner's Guide - U.S. Court of Appeals for the Fifth Circuit -...

[www.ca5.uscourts.gov/clerk/docs/pracguide.pdf](http://www.ca5.uscourts.gov/clerk/docs/pracguide.pdf)

File Format: PDF/Adobe Acrobat - Quick View

http://www.ca5.uscourts.gov/cmecf for more information regarding electronic filing in our court. This guide is not law. For authoritative answers, practitioners



# **Exhibit 3**



# Appellate CM/ECF Login

## Notice

This is a **Restricted Web Site** for Official Court Business only. Unauthorized entry is prohibited and subject to prosecution under Title 18 of the U.S. Code. All activities and access attempts are logged.

**IMPORTANT NOTICE OF REDACTION RESPONSIBILITY:** All filers must redact: Social Security or taxpayer-identification numbers; dates of birth; names of minor children; financial account numbers; and, in criminal cases, home addresses, in compliance with [Fed. R. App. P. 25\(a\)\(5\)](#), [Fed. R. Civ. P. 5.2](#), [Fed. R. Crim. P. 49.1](#), or [Fed. R. Bankr. P. 9037](#). This requirement applies to all documents, including attachments.

I understand that, if I file, I must comply with the redaction rules. I have read this notice.

**Authentication**

Login:

Password:

Client Code:

Login Clear

CM/ECF has been tested using Firefox and Internet Explorer. All testing was performed using the Sun Java Plug-In version 1.7.

# **Exhibit 4**



www.ca5.uscourts.gov/cmecf



Web Images Maps Shopping More Search tools

About 1,410 results (0.27 seconds)

USCA5 CM/ECF Page

www.ca5.uscourts.gov/cmecf/ Share

CM/ECF Information. NOTICE: The Fifth Circuit U.S. Court of Appeals began MANDATORY electronic case filing on March 15, 2010. Electronic filers must ...

Login

Appellate CM/ECF Login. Notice. This is a Restricted Web Site for ...

ECF Filing Standards

CM/ECF Application. ECF Filing Standards. Fall, 2009. Update ...

How to File a Motion

How to File a Motion. USCA5. Page 2. 6. Single click a radio ...

Please Login to PACER

Not Logged In To PACER. Instructions: Please enter your ...

FIFTH CIRCUIT CM/ECF ...

FIFTH CIRCUIT CM/ECF. Contact Information. PACER ...

How to File a Motion ...

... Electronic Learning Module "How to File a Motion/Document ...

More results from uscourts.gov »

[PDF] Practitioner's Guide - U.S. Court of Appeals for the Fifth Circuit - ...

www.ca5.uscourts.gov/clerk/docs/pracguide.pdf

File Format: PDF/Adobe Acrobat - Quick View

http://www.ca5.uscourts.gov/cmecf for more information regarding electronic filing in our court. This guide is not law. For authoritative answers, practitioners ...

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AND ALL OF THE ENTITIES THEY OWN OR CONTROL,

APPELLEES

*On Appeal from the United States District Court  
for the Southern District of Texas, Houston Division*

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**[PROPOSED]**

**ORDER GRANTING APPELLEE RECEIVER THOMAS L. TAYLOR III  
LEAVE TO FILE BRIEF AND RECORD EXCERPTS OF OUT OF TIME**

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CAME ON THIS DAY to be considered, Appellee's Unopposed Motion for  
Leave to File the Brief and Record Excerpts of Appellee Thomas L. Taylor III Out  
of Time ("Unopposed Motion for Leave").

Having reviewed Unopposed Motion for Leave, this Court is of the opinion that it should be **GRANTED** in all respects, for good cause shown.

It is therefore:

**ORDERED** that the Brief of Appellee Thomas L. Taylor III and the Record Excerpts thereto are to be admitted by this Court as previously filed.

Signed this \_\_\_\_\_ day of \_\_\_\_\_, 2013

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UNITED STATES CIRCUIT JUDGE