UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

SECURITIES EXCHANGE ACT OF 1934
Release No. 80947 / June 15, 2017

ACCOUNTING AND AUDITING ENFORCEMENT
Release No. 3877 / June 15, 2017

ADMINISTRATIVE PROCEEDING
File No. 3-18024

In the Matter of **ERIC W. KIRCHNER and RICHARD G. RODICK,** **Respondents.**	**ORDER INSTITUTING CEASE-AND-DESIST PROCEEDINGS PURSUANT TO SECTION 21C OF THE SECURITIES EXCHANGE ACT OF 1934, MAKING FINDINGS, AND IMPOSING A CEASE-AND-DESIST ORDER**

I.

The Securities and Exchange Commission ("Commission") deems it appropriate that cease-and-desist proceedings be, and hereby are, instituted pursuant to Section 21C of the Securities Exchange Act of 1934 ("Exchange Act"), against Eric W. Kirchner and Richard G. Rodick (collectively, "Respondents").

II.

In anticipation of the institution of these proceedings, Respondents have submitted Offers of Settlement (the "Offers") which the Commission has determined to accept. Solely for the purpose of these proceedings and any other proceedings brought by or on behalf of the Commission, or to which the Commission is a party, and without admitting or denying the findings herein, except as to the Commission's jurisdiction over them and the subject matter of these proceedings, which are admitted, and except as provided herein in Section V, Respondents consent to the entry of this Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-and-Desist Order ("Order"), as set forth below.

III.

On the basis of this Order and Respondents' Offers, the Commission finds[1] that:

SUMMARY

1. These proceedings involve UTi Worldwide Inc.'s ("UTi's") disclosures regarding serious risks to the company's liquidity and capital resources in its Form 10-Q for the quarter ending October 31, 2013, which were inadequate under the standards appearing in Item 303 of Regulation S-K. Beginning in October 2013, UTi internally identified its United States rollout of 1View, a critical proprietary operating system, as a possible contributing factor to UTi's lower than historical cash flow volumes. Despite these significant issues, UTi's Form 10-Q, which was signed and certified by both then-Chief Executive Officer Eric W. Kirchner and then Chief Financial Officer Richard G. Rodick, did not include adequate information in the Management's Discussion & Analysis ("MD&A") section to allow investors and others to meaningfully assess UTi's financial condition and results of operations, particularly as to UTi's future prospects.

2. As the Commission has repeatedly emphasized, the MD&A is intended to provide investors with "an opportunity to look at the company through the eyes of management by providing both a short- and long-term analysis of the business of the company."[2] Item 303(b) of Regulation S-K requires issuers' quarterly filings to discuss material changes in the items enumerated in Item 303(a) which, in turn, requires that management discuss and analyze the registrant's financial condition, changes in financial condition, and results of operations, with a specific focus on "material events and uncertainties known to management that would cause reported financial information not to be necessarily indicative of future operating results or of future financial condition." 17 C.F.R. § 229.303(a), Instruction 3. Among other things, Item 303 requires management to "[i]dentify any known trends or any known demands, commitments, events or uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way." 17 C.F.R. § 229.303(a)(1), (3)(ii). In its 2003 interpretive guidance, the Commission explained that "disclosure of a trend, demand, commitment, event or uncertainty <u>is required</u> unless a company is able to conclude either that it is not reasonably likely that the trend, uncertainty or other event will occur or come to fruition, or that a material effect on the company's liquidity, capital resources or results of operations is not reasonably likely to occur."[3] Release No. 33-8350, 2003 SEC LEXIS 3034 at*36 (Dec. 19, 2003) (emphasis added). The 2003 guidance further instructed issuers to "evaluate separately their ability to meet upcoming cash requirements over both the short and long-term," defining short-term as one year. *Id.* at *43 n.43. Item 303(b)(1) of Regulation S-K requires that "[i]f the interim financial statements include an interim balance sheet as of the corresponding interim date of the

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[1] The findings herein are made pursuant to Respondents' Offers of Settlement and are not binding on any other person or entity in this or any other proceeding.

[2] *See, e.g., Management's Discussion and Analysis of Financial Condition and Results of Operations*, Securities Act Release No. 6835 (May 18, 1989).

[3] The Commission has explained that the "reasonably likely" standard for disclosures mandated by Item 303 is lower than "more likely than not." *Commission Statement About Management's Discussion and Analysis of Financial Condition and Results of Operations*, Release No. 33-8056 (Jan. 25, 2002).

preceding fiscal year, any material changes in financial condition from that date to the date of the most recent interim balance sheet provided also shall be discussed." Finally, the Commission cautioned issuers against relying on boilerplate. Release No. 33-8350, 2003 SEC LEXIS 3034, at*46-47 ("companies should avoid generic or boilerplate disclosure").

RESPONDENTS

3. **Eric W. Kirchner** resides in Palos Verdes Estates, California. He was UTi's Chief Executive Officer and a member of the board of directors from January 2009 to December 2014. With respect to UTi's periodic and other reports filed with the Commission, Kirchner reviewed the company's reports at the end of the drafting process and signed them as the principal officer of UTi.

4. **Richard G. Rodick** resides in Huntington Beach, California. He was UTi's Chief Financial Officer from October 2012 to January 2016. At all relevant times, he was responsible for UTi's accounting, tax, treasury, internal audit, and investor relations. With respect to UTi's periodic and other reports filed with the Commission, Rodick reviewed the drafts as they became available and then signed the final version.

RELATED ENTITY

5. **UTi**, a British Virgin Islands corporation, was based in Long Beach, California. UTi's operations spanned the world, having grown through several multinational acquisitions. Until UTi was acquired by DSV A/S, a Danish logistics company traded on the Nasdaq OMX exchange in Copenhagen, on January 22, 2016, UTi's common stock was listed on the NASDAQ Stock Market LLC. UTi is now a wholly-owned subsidiary of DSV and does not separately report its financial results.

FACTS

6. UTi was a multinational freight forwarding and logistics company. In connection with its freight forwarding business, UTi provided cash outlays for transportation costs, customs, duties, taxes, and other expenses. These disbursements temporarily consumed cash as UTi typically paid them in advance, and then obtained reimbursement from its customers through invoicing. As a result, in times of growth in volume in its freight forwarding business, UTi generally had weaker operating cash flows. In order to maintain the level of working capital necessary to operate its business, UTi relied on continuing access to credit and robust collections.

7. In the first two quarters of fiscal year 2014 (beginning February 1, 2013), UTi had to seek amendments or waivers of its debt covenants due to poor operating results. Each successive amendment relaxed the covenant computations going forward. Nonetheless, UTi continued to have difficulty meeting its debt covenants due to the continuing deterioration of UTi's financial performance.

UTi's Disclosures in its Form 10-Q for the Quarter Ending October 31, 2013

8. In order to streamline and harmonize its operations, in 2012 UTi began a phased rollout of a proprietary freight forwarding operating system called 1View. 1View was a key element of UTi's multiyear transformation initiative, which also included the consolidation of UTi's regional finance operations into three shared service centers. UTi touted the transformation initiative to the investor community as key to future cost savings. UTi initially deployed 1View in smaller markets. On September 1, 2013, 1View was implemented in the United States, which was UTi's largest market by volume.

9. Following the United States rollout of 1View on September 1, 2013, UTi's challenges in issuing timely invoices in the United States began to manifest in early October 2013, and the potential impact to cash flow in the United States was noted then. On October 11, 2013, Rodick received an email chain that included comments from an employee responsible for UTi's daily cash management. At the time, Rodick understood the cash manager had been observing UTi's cash inflows were at volumes lower than historically seen. In the email, the cash manager explained he had looked into causes of UTi's cash shortages, and described circumstances in which 1View had properly recorded transactions but the system had not automatically printed out the invoices. As a result, UTi issued late invoices to those customers, causing delays in receiving payment.

10. Throughout the third quarter, UTi took steps to try to improve its liquidity position in an effort to compensate for, among other things, the 1View-related invoicing delays. For example, in late October 2013 UTi completed a sale of up to $75 million in receivables to a third party. At the time UTi was already having difficulties meeting its debt covenants and the sale of receivables would bring cash in faster to help UTi with its debt covenant compliance.

11. UTi's monthly cash receipts continued to decline in November and UTi began experiencing cash flow issues in the United States. The issues related to 1View's ability to transmit timely invoices, which led to higher than usual "unbilled" receivables.

12. After UTi discovered that the United States rollout of 1View resulted in invoicing and liquidity problems, UTi took steps to remediate the invoicing issues that had occurred. By November 7, 2013, Rodick noted UTi's cash flows in October were "off approximately $16M. We are really struggling with liquidity and we need to get our billing corrected immediately."

13. UTi sought to manage its cash flow, in part, by delaying payments to vendors. When UTi's Controller inquired on November 15, 2013 about the status of certain aged invoices from vendors, he was told that more than $5 million in vendor payments were on hold due to the "cash crunch we have been experiencing since 10/31." Both Kirchner and Rodick were aware that UTi was delaying payments to vendors partly in an effort to conserve cash. In an attempt to improve its cash inflows, UTi management, including Rodick, enlisted its sales and operations staff to assist the finance department in focusing on collections and in correcting the invoicing issues.

14. Rodick also began preliminary inquiries regarding the possibility of a convertible debt offering in late November 2013. This was because by that time, due to UTi's overall liquidity problems, Rodick was preparing a high-level internal report in which he planned to describe UTi's liquidity problems and offer some options for improving short-term and long-term liquidity.

15. Starting late in the third quarter, Rodick repeatedly reported UTi's liquidity problems to Kirchner. Kirchner was able to monitor the backlog of unbilled shipments through "a series of reports that showed unbilled shipments by location" and he was aware that UTi was taking steps to address its liquidity issues.

16. Kirchner also received feedback on the impact of the 1View billing delays from the sales team. On November 18, 2013, Kirchner sought information from UTi's Senior Vice-President of Sales to understand the impact of the 1View rollout from the sales perspective. Among several bulleted items, the Senior Vice-President informed Kirchner that: "invoicing has been consistently late;" "invoice corrections are being delayed as well;" and such delays result in "cash flow . . . challenges." Another item referenced the sales teams' assistance in September on non-sales activities, and reported that, as of this mid-November date, some sales team members in several locations were still continuing to perform data entry and invoicing. Kirchner was told that such efforts would create a "dampening impact on [the] sales pipeline and future sales." Rodick also received this feedback from the sales department.

17. On November 20, 2013, Kirchner and Rodick both received a retrospective Monthly Performance Report for the Americas region that noted under the heading "1VIEW implementation issues" the following bulleted items: "Service issues and lack of timely responses impacting client relationships"; "[i]nvoicing accuracy and timeliness"; and "Area Sales still providing assistance at desk level thus reducing sales capacity." The report also stated that use of overtime and temporary workers related to 1View in the United States resulted in higher-than-budgeted staff costs.

18. Also on November 20, 2013, a cash manager advised UTi's Treasurer in an email that "USA [regional operations are] running out of cash tomorrow," which was escalated to Rodick. Rodick directed the Treasurer to reach out to one of UTi's existing lenders to request an increase in UTi's credit facility. Rodick advised the Treasurer to tell the lender that "we need access to the credit line immediately" because "we are experiencing a cash crunch due to increased volumes and the transformation and we expect improved FCF [free cash flow] in the upcoming weeks." Rodick also directed the Treasurer to "[p]ull all the levers you can" to satisfy UTi's cash needs in the United States.

19. On December 2, 2013 Kirchner told Rodick and other senior managers at UTi: "We continue to have significant cash/covenant issues much of which arises from the collections delay associated with unbilled shipments. . . . Getting accurate billing in the customers' hands is the only way to accelerate collections and get us back on an acceptable cycle."

20. In a December 3, 2013 email, Kirchner provided detailed comments on the draft internal report Rodick was preparing on UTi's cash flow and options for improving short-term and long-term liquidity. In that December 3 email, Kirchner directed Rodick to quantify UTi's "reduction in available cash coupled with quarterly peril regarding covenants" and provide "a clear path forward." Kirchner also observed that UTi had $1 billion in outstanding receivables, 20% of which was past due. Because Kirchner was concerned that UTi's lenders might not approve an amendment to its debt covenants in the fourth quarter, Kirchner instructed Rodick to describe "the liquidity options and contingency plans to fund the company's cash requirements."

21. In early December, Rodick met with UTi's leading lender to request an amendment to UTi's loan covenants. The lender agreed to an amendment for the third quarter but indicated that it would not grant any further amendments.

22. Rodick circulated his report on UTi's cash flow problems internally on December 6, 2013. In that report, Rodick identified "1View go-lives" as one of three primary causes of UTi's declining cash position. On a slide entitled "How Long Do We Expect to Have Liquidity Issues," Rodick stated that "January is historically our best cash collection month," but he estimated that liquidity issues would persist for the next 9-12 months, and proposed several ideas for improving liquidity both short-term and long-term. In detailing the issues with 1View go-lives, Rodick noted that 1View implementation had caused billing delays and poor billing quality. To underscore his assertion that "we will have liquidity issues for the next 9-12 months," Rodick explained that he did not anticipate a significant profit improvement during the first half of the upcoming fiscal year.

23. In his internal report on UTi's cash flow issues, Rodick stated that UTi had failed its debt covenants for three successive quarters, and that UTi had been notified that it would not receive any amendment to its debt covenants for the fourth quarter. Rodick noted that these issues had affected UTi's access to credit, citing as examples the elimination of UTi's overdraft facility by one bank and an $11 million reduction in UTi's overdraft facility from another. Rodick identified several liquidity options, including a mandatory convertible debt offering and an equity offering. UTi ultimately decided not to pursue these options, and instead to pursue other financing options which included additional receivable and/or inventory sales and new or increased credit lines.

24. On December 10, 2013, UTi filed its third quarter Form 10-Q (quarter ended October 31, 2013). Kirchner and Rodick each signed and certified the report. In its Form 10-Q, UTi's financial statements reflected material fluctuations in certain line items relating to liquidity from the beginning of the fiscal year and compared to the same period of the prior fiscal year. For example, UTi reported that its cash and cash equivalents had decreased from $237,276,000 for the period ending January 31, 2013 to $171,220,000 for the period ending October 31, 2013 – a -28% change in nine months. The $171,220,000 in cash and cash equivalents also represented a 25% decrease from the $226,993,000 in cash and cash equivalents UTi reported for the same period of the prior fiscal year.

25. UTi also reported a trade receivables balance of $1.084 billion third quarter. Consistent with past practice, the Form 10-Q did not specify the amount of trade receivables that was unbilled. However, in the monthly reports UTi provided its lenders as a condition of obtaining amendments to its debt covenants for the second quarter, UTi detailed that the unbilled receivables amounted to $210 million – nearly 20% of its publicly disclosed trade receivables balance – at the end of October 2013.

26. In the Liquidity and Capital Resources section of the MD&A, UTi disclosed that its operating cash position had declined since the beginning of the fiscal year: "During the first nine months of fiscal 2014, we used approximately $68.9 million in net cash from operating activities. This resulted from usages from (i) a net loss of $21.7 million and (ii) an increase in trade

receivables and other current assets of $232.4 million . . . ." UTi did not report any of the specific known 1View billing problems that contributed to these changes.

27. UTi did discuss the seasonal nature of its business and explained that historically UTi's liquidity improved in the second half of the third quarter and in the fourth quarter.

> Our primary sources of liquidity include cash generated from operating activities, which is subject to seasonal fluctuations, particularly in our Freight Forwarding segment, and available funds under our various credit facilities. We typically experience increased activity associated with our peak season, generally during the second and third fiscal quarters, requiring significant disbursements on behalf of clients. During the second quarter and the first half of the third quarter, this seasonal growth in client receivables tends to consume available cash. Historically, the latter portion of the third quarter and the fourth quarter tend to generate cash recovery as cash collections usually exceed client cash disbursements.

Apart from this and other generic discussions of seasonal fluctuations in UTi's business, no further explanation was provided for why trade receivables had increased and liquidity had declined.

28. The only other mention of the U.S. launch of 1View in the MD&A portion of its Form 10-Q was an acknowledgement that 1View had been deployed in the United States on September 1, 2013 and was considered "ready for its intended use" as of that date for purposes of amortization. UTi described 1View as follows:

> *Freight Forward Operating System.* On September 1, 2013, we deployed our global freight forwarding operating system in the United States. As of that date, based on a variety of factors, including but not limited to operational acceptance testing and other operational milestones having been achieved, we considered it ready for its intended use. Amortization expense with respect to the system began effective September 2013, and accordingly, we recorded amortization expense related to the new application of approximately $3.3 million during the third quarter ended October 31, 2013.

UTi also noted in the MD&A portion of its Form 10-Q that it had entered into a receivables purchase agreement with a third party "as an alternative source of short term funding," but omitted any discussion of the 1View billing issues.

UTi Experiences a Liquidity Crisis After Filing its Form 10-Q

29. UTi obtained a $35 million increase in its credit line from one of its existing lenders in December 2013. UTi used some of these funds to re-purchase the receivables it had sold in October to a third party. Rodick was unable to execute his other ideas for improving liquidity, such as inventory or receivables sales.

30. Rodick began to observe improved cash receipts in December and January but the cash inflows were not sufficient to enable UTi to meet its debt covenants at the end of January because, among other things, UTi had fallen so far behind in its billings.

31. UTi's management, including Kirchner and Rodick, described the backlog in receivables as a "bubble." By the end of January 2014, Rodick estimated that the size of the "bubble" was $40 million.

32. By late January, based on preliminary fourth quarter results, it became clear to Rodick that UTi would again miss its debt covenants. Rodick contacted UTi's leading lender to seek an amendment of its debt covenants, but the lender wanted to be paid off and refused to grant the requested amendment. Rodick immediately advised Kirchner of the lender's position. Shortly thereafter, Rodick notified UTi's auditor that UTi would not meet its debt covenants for the fourth quarter and would likely not be able to obtain an amendment of those covenants.

33. In early February 2014, UTi engaged an investment bank to help it raise additional capital.

34. On February 26, 2014, UTi filed a Form 8-K which publicly disclosed, for the first time, details regarding the extent and causes of its liquidity problems. Specifically, UTi disclosed that the implementation of 1View in the United States caused significant billing issues, "which have led to higher than normal receivables and weaker cash collections." It further disclosed that, due in part to these billing issues and in part to three other major factors including net losses, capital expenditures and severance expenses, it was unlikely to be in compliance with its debt covenants for the fourth quarter and had obtained a short-term waiver. UTi also announced an offering of $350 million in Convertible Senior Notes and a $175 million private placement of Convertible Preference Shares to address its liquidity and covenant compliance issues. Finally, UTi reported that, in connection with the re-issuance of UTi's financial statements as part of the offering documents for this financing, its independent accountant had amended its audit opinion for the fiscal year ending January 31, 2013 to include a statement expressing doubt about the company's ability to continue as a going concern under its existing capital structure. Following the 8-K filing, the price of UTi's shares fell to $10.74, down nearly 30% from the prior day's close of $15.26.

35. UTi's auditor issued the going concern opinion primarily due to the company's impending covenant violation. Because UTi had cross default provisions across its debt agreements, the debt would be immediately classified as current, and if the announced financing was not completed on schedule, the company would not have sufficient liquidity to repay the debt in the next 12 months.

VIOLATIONS

36. As a result of the conduct described above, Kirchner and Rodick caused UTi's violations of Section 13(a) of the Exchange Act and Rules 12b-20 and 13a-13, thereunder, which require every issuer of a security registered pursuant to Section 12 of the Exchange Act to file with the Commission information, documents, and quarterly reports as the Commission may require, and mandate that periodic reports contain such further material information as may be necessary to make the required statements not misleading. Additionally, Regulation S-K Item 303 requires registrants to disclose in the MD&A sections of required periodic filings "any known trends or

uncertainties that will result in or that are reasonably likely to result in the registrant's liquidity increasing or decreasing in any material way." The MD&A's failure to comply with Regulation S-K constitutes a violation under Section 13(a) of the Exchange Act.

37. Also as a result of the conduct above, Kirchner and Rodick violated Exchange Act Rule 13a-14, which requires that every Form 10-Q include certifications signed by each principal executive and principal financial officer (or persons performing similar functions). *See* 17 C.F.R. 240.13a-14. The certifying officers must confirm that, to their knowledge, the Form 10-Q does not contain any untrue statement of a material fact or omit to state a material fact necessary to make the statements made, in light of the circumstances under which such statements were made, not misleading.

IV.

In view of the foregoing, the Commission deems it appropriate to impose the sanctions agreed to in Respondents' Offers.

Accordingly, it is hereby ORDERED that**:**

A. Pursuant to Section 21C of the Exchange Act, Respondent Kirchner cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-13, and 13a-14, thereunder.

B. Pursuant to Section 21C of the Exchange Act, Respondent Rodick cease and desist from committing or causing any violations and any future violations of Section 13(a) of the Exchange Act and Rules 12b-20, 13a-13, and 13a-14, thereunder.

C. Respondent Kirchner shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $40,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). Respondent Rodick shall, within 30 days of the entry of this Order, pay a civil money penalty in the amount of $40,000 to the Securities and Exchange Commission for transfer to the general fund of the United States Treasury, subject to Exchange Act Section 21F(g)(3). If timely payment is not made, additional interest shall accrue pursuant to 31 U.S.C. §3717. Payment must be made in one of the following ways:

(1) Respondent may transmit payment electronically to the Commission, which will provide detailed ACH transfer/Fedwire instructions upon request;

(2) Respondent may make direct payment from a bank account via Pay.gov through the SEC website at http://www.sec.gov/about/offices/ofm.htm; or

(3) Respondent may pay by certified check, bank cashier's check, or United States postal money order, made payable to the Securities and Exchange Commission and hand-delivered or mailed to:

Enterprise Services Center
Accounts Receivable Branch
HQ Bldg., Room 181, AMZ-341
6500 South MacArthur Boulevard
Oklahoma City, OK 73169

Payments by check or money order must be accompanied by a cover letter identifying Eric W. Kirchner and Richard G. Rodick as a Respondents in these proceedings, and the file number of these proceedings; a copy of the cover letter and check or money order must be sent to John W. Berry, Associate Director, Division of Enforcement, Securities and Exchange Commission, 444 S. Flower Street, Los Angeles, CA 90071.

D. Amounts ordered to be paid as civil money penalties pursuant to this Order shall be treated as penalties paid to the government for all purposes, including all tax purposes. To preserve the deterrent effect of the civil penalty, Respondents agree that in any Related Investor Action, they shall not argue that they are entitled to, nor shall they benefit by, offset or reduction of any award of compensatory damages by the amount of any part of Respondents' payment of a civil penalty in this action ("Penalty Offset"). If the court in any Related Investor Action grants such a Penalty Offset, Respondents agree that they shall, within 30 days after entry of a final order granting the Penalty Offset, notify the Commission's counsel in this action and pay the amount of the Penalty Offset to the Securities and Exchange Commission. Such a payment shall not be deemed an additional civil penalty and shall not be deemed to change the amount of the civil penalty imposed in this proceeding. For purposes of this paragraph, a "Related Investor Action" means a private damages action brought against Respondents by or on behalf of one or more investors based on substantially the same facts as alleged in the Order instituted by the Commission in this proceeding.

V.

It is further Ordered that, solely for purposes of exceptions to discharge set forth in Section 523 of the Bankruptcy Code, 11 U.S.C. §523, the findings in this Order are true and admitted by Respondents, and further, any debt for disgorgement, prejudgment interest, civil penalty or other amounts due by Respondents under this Order or any other judgment, order, consent order, decree or settlement agreement entered in connection with this proceeding, is a debt for the violation by Respondent of the federal securities laws or any regulation or order issued under such laws, as set forth in Section 523(a)(19) of the Bankruptcy Code, 11 U.S.C. §523(a)(19).

By the Commission.

Brent J. Fields
Secretary