UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION

ADMINISTRATIVE PROCEEDING
File No. 3-18832

In the Matter of

United Development Funding III, LP, United Development Funding IV, and United Development Funding Income Fund V,

Respondents.

DIVISION OF ENFORCEMENT'S OPPOSITION TO RESPONDENTS' MOTION FOR SUMMARY DISPOSITION

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Statutes

The Division of Enforcement ("Division") submits this Opposition to the Motion for Summary Disposition ("Respondents' Motion") filed by Respondents United Development Funding III, LP ("UDF III"), United Development Funding IV ("UDF IV"), and United Development Funding Income Fund V ("UDF V") ("Respondents"), and respectfully shows as follows:

I. INTRODUCTION

This administrative proceeding seeks to revoke the registration of Respondents' securities, because Respondents have failed to file any periodic reports since the third quarter of 2015 in violation of Section 13(a) of the Exchange Act and related rules thereunder. Respondents' Motion does not dispute the facts material to the determination at hand—specifically, that Respondents have failed to file any periodic reports for approximately three years and are not presently able to cure the deficiencies. Respondents' Motion instead argues that the Commission should excuse their protracted deficiencies, alleging that several years ago a short seller impeded their efforts to obtain audited financial statements but that they intend to file an "omnibus" Form 10-K at some undetermined point in the future. As demonstrated in the Division's Motion for Summary Disposition ("Division's MSD"), which is incorporated by reference, these allegations, even if true, do not warrant a lesser sanction than revocation, and under settled Commission precedent, it is the Division, not Respondents, who is entitled to an order of summary disposition.

II. STATEMENT OF FACTS

The Division incorporates the facts and evidence set forth in and attached to (a) the Division's MSD and the Declaration of Keefe Bernstein in Support of the Division's MSD ("First Bernstein Decl.") and (b) the Declaration of Keefe Bernstein in Support of the Division's Opposition to Respondents' Motion for Summary Disposition ("Second Bernstein Decl."). The

Division also requests that pursuant to Rule of Practice 323, the Court take official notice of all of the filings and submissions Respondents have made or not made with the Commission through EDGAR. *See also* Joint Prehearing Conference Report at ¶ 5 (Respondents' agreement to such official notice).

A. Undisputed Facts[1]

Is undisputed that each Respondent has a class of securities registered with the Commission pursuant to Section 12(g) of the Exchange Act and has failed to file any periodic reports with the Commission since filing Forms 10-Q for the period ended September 30, 2015. (OIP, ¶¶ II.A.1-3; Respondents' Answer, ¶¶ 1-3; Respondents' Forms 8-12AG, Second Bernstein Decl., Exs. 1-3.) As of the date of this Opposition, Respondents have collectively failed to file a total of 39 required periodic reports, with each failing to file four Forms 10-K and nine Forms 10-Q. (*See, e.g.,* UDF IV's Form 12b-25 filed on March 19, 2019, First Bernstein Decl. Ex. 14.)

Respondents initially claimed that they could not timely file reports due to the resignation of their prior auditing firm, but Respondents retained their current auditor, EisnerAmper LLP, in June 2016. (Forms 12b-25 and Forms 8-K, First Bernstein Decl., Exs. 4-9.) Since that time more than two-and-a-half years ago, Respondents have continued to recite that EisnerAmper LLP has been engaged but that there can be no assurance as to when Respondents will be able to file periodic reports. (*See, e.g.,* Forms 12b-25, First Bernstein Decl., Exs. 10-15.)

Respondents' securities are not listed on any exchange. (Respondents' Answer, ¶¶ 1-3.) UDF IV's common shares previously traded on the Nasdaq Global Select Market, however, on February 18, 2016, Nasdaq halted trading in UDF IV's shares. (Respondents' Answer, ¶¶ 2, 16.)

[1] The Division's MSD, which is incorporated by reference, contains a more detailed recitation of the relevant undisputed facts. (Division's MSD, pp. 2-7.)

On May 26, 2016, UDF IV received notice from Nasdaq that it would be delisted due to its failure to file periodic reports with the Commission unless it requested a hearing, which it did. (Nasdaq materials, First Bernstein Decl., Exs. 16-21.) Before and during that hearing, which took place on July 7, 2016, UDF IV told Nasdaq that its delay in filing periodic reports was precipitated by its need to find a replacement auditor and allegations made online by short seller Hayman Capital Management, L.P. ("Hayman"). (*Id.*) UDF IV also told Nasdaq that its audit committee had substantially completed an investigation of the Hayman allegations, that it had engaged new auditors, and that it should be able to file the delinquent periodic reports by September 12, 2016. (*Id.*)

After UDF IV failed to meet this deadline and an extended deadline, Nasdaq suspended trading in UDF IV's common stock on October 19, 2016. (Respondents' Answer, ¶ 2; UDF IV Form 8-K, First Bernstein Decl., Ex. 22.) On May 18, 2017, Nasdaq filed a Form 25 to delist UDF IV. (Respondents' Answer, ¶ 2; Nasdaq Form 25, First Bernstein Decl., Ex. 23.) UDF IV's common stock began trading on the over-the-counter markets. (Respondents' Answer, ¶ 2.)

On July 3, 2018, the Commission filed a settled enforcement action against UDF III, UDF IV, and five company executives styled *SEC v. United Development Funding III, LP et al.*, Case 3:18-cv-01735 (N.D. Tex. Dallas Division) ("*SEC v. UDF*"), alleging violations of various antifraud, reporting, books and records, and internal accounting control provisions of the federal securities laws. (Complaint, First Bernstein Decl., Ex. 25.)[2] On July 31, 2018, the Court entered Final Judgments by consent against UDF III, UDF IV, and the company executives ordering, among other relief, that the executives pay approximately $8.2 million in disgorgement,

[2] The Division requests that pursuant to Rule of Practice 323, the Court take official notice of all District Court filings and information referenced in this Opposition and/or attached to the First Bernstein Decl.

prejudgment interest, and civil penalties and that the defendants be permanently enjoined from violating Sections 17(a)(2) and (3) of the Securities Act of 1933 ("Securities Act"), and the disclosure, books and records, and internal accounting control provisions of Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. (Consents and Final Judgments, First Bernstein Decl., Exs. 26-29.)

B. Disputed Facts

Respondents' Motion does not include a section identifying the facts Respondents contend are undisputed and support the motion. Instead, Respondents' Motion contains multiple pages of argument mixed with factual allegations. To the extent Respondents provide summary disposition evidence in support of their factual allegations, the support is contained in the Declaration of Hollis Greenlaw ("Greenlaw Decl."). Most of the Greenlaw Decl., however, is a narrative about UDF's business history and feud with Hayman. Little, if any, of the Greenlaw Decl. relates to the relevant issues—Respondents' failure to file its quarterly and annual reports and its present inability to cure the deficiencies.

Thus, the Division does not and could not feasibly address each of the numerous, irrelevant factual statements and characterizations set forth in Respondents' Motion.[3] The Division does, however, object to and dispute the following statements in Respondents' Motion:

- The Division disputes Respondents' characterization of the Division of Corporation Finance's ("Corp Fin") Financial Reporting Manual ("CF Manual"), including the statement that the CF Manual "informs registrants that ordinarily to become current an 'omnibus' or 'comprehensive' report" is "the proper method." (Respondents' Motion, p. 1.) The CF Manual,

[3] The Division reserves the right to contest additional factual allegations by Respondent for other purposes, including at a hearing of this matter. The Division also expressly disputes the factual allegations to the extent they contradict the allegations in the *SEC v. UDF* Complaint.

which speaks for itself, provides only that Corp Fin *generally* will not issue *comments* (*i.e.*, comments issued as part of a review of a filing made *prior* to the initiation of an enforcement action) asking delinquent registrants to separately file all of its delinquent reports *if* the registrant files a comprehensive annual report on Form 10-K that includes *all material information* that would have been included in *all* of the delinquent filings. The FR Manual further provides that filing such a comprehensive filing *does not* absolve the registrant of Exchange Act liability for failing to file the required reports, *does not* foreclose an enforcement action for the filing delinquencies, and *does not* result in the registrant being considered *current* for purposes of Regulation S, Rule 144, or Form S-8 registration statements. (FR Manual § 1320.4, Second Bernstein Decl., Ex. 6.). Nowhere does the FR Manual indicate that Corp Fin views the filing of a single Form 10-K that lacks material information from multiple periods to be the "ordinary" way to "become current," much less one proposed to be filed after initiation of a Section 12(j) proceeding.

- The Division disputes that Respondents are working to promptly file a comprehensive report on Form 10-K. (Respondents' Motion, p. 1.) By Respondents' own admissions, their proposed "omnibus" Form 10-K would not include any quarterly information for 2016 and would only include "summarized" quarterly information for 2017 and 2018. (*Id.*) The FR Manual discusses a comprehensive Form 10-K as one that provides "all the material information that would have been included in those [separate delinquent] filings." Respondents are proposing, then, to file a report that contains far less than what Corp Fin discusses as "comprehensive." (FR Manual § 1320.4, Second Bernstein Decl., Ex. 4.)

- The Division disputes Respondents' claim that Hayman's actions "unquestionably prevented Respondents from obtaining the audited financial statements and reviews they needed for periodic reporting." (Respondents' Motion, p. 2.) Respondents have submitted no evidence

from their auditor or otherwise to directly support this assertion. Further, Respondents concede the Hayman actions at issue occurred years ago. (Respondents' Motion, pp. 11, 13-14.) Even if Respondents could come forward with evidence that Hayman's actions previously caused a delay in obtaining audited financial statements, Respondents have not and cannot show that these actions have prevented them from filing any audited financial statements—with either an unqualified or qualified audit opinion—through the present day.

- The Division disputes that in coming to the *SEC v. UDF* settlement recommendation, the Division necessarily rejected (or accepted) any of Hayman's claims, and further disputes Respondents' characterizations of the allegations in the *SEC v. UDF* complaint. (Respondents' Motion, p. 13.) The Division states that the Complaint, which speaks for itself, charged UDF III and UDF IV and four UDF executives for antifraud and other securities law violations in connection with their alleged roles in misleading investors by, among other things, failing to disclose that UDF could not pay its distributions and that it was using money from a newer fund (UDF IV) to pay distributions to investors in the older fund (UDF III). (Complaint, pp. 1-3., First Bernstein Decl., Ex. 25.)[4]

III. ARGUMENT AND AUTHORITIES

A. Standards Applicable to Respondents' Summary Disposition Motion

Rule 250(b) of the Commission's Rules of Practice provides that a hearing officer may grant a motion for summary disposition if there is no genuine issue with regard to any material fact and the party making the motion is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(b); *see Michael Puorro*, Initial Dec. Rel. No. 253, 2004 SEC LEXIS 1348, at *3 (June 28,

[4] The Division also disputes Respondents' claim that it prohibited Respondents' prior auditors, Whitely Penn, from asking UDF questions about the referenced spreadsheet at issue. (Respondents' Motion, p. 4.) Respondents again provide no evidence to support this assertion and it is false.

2004) (citing 17 C.F.R. § 201.250(b)). Respondents do not contend in their Motion that they have satisfied this standard, Respondents do not cite any authority to support such a proposition, and the Division is not aware of any case where a delinquent issuer has obtained summary disposition in a proceeding instituted under Section 12(j) of the Exchange Act.

It is, however, appropriate to grant the Division summary disposition and revoke a registrant's registration in a Section 12(j) proceeding where, as here, there is no dispute that the registrant has failed to comply with Section 13(a) of the Exchange Act. *See Citizens Capital Corp.*, Exchange Act Rel. No. 67313, 2012 SEC LEXIS 2024, at *34-35 (June 29, 2012).[5] It is the Division, and not Respondents, that has satisfied the summary disposition standard for the reasons set forth in the Division's MSD.

B. Respondents Are Not Entitled to Summary Disposition, Because Respondents Have Repeatedly Violated Section 13(a) of the Exchange Act and Rules Thereunder

Section 13(a) of the Exchange Act and the rules promulgated thereunder require issuers of securities registered pursuant to Section 12 of the Exchange Act to file periodic and other reports with the Commission. No showing of scienter is necessary to establish a violation of Section 13(a) or the rules thereunder. *St. George Metals, Inc.*, Initial Dec. Rel. No. 298, 2005 SEC LEXIS 2465, at *7 (Sept. 29, 2005).

There is no genuine issue with regard to any material fact as to Respondents' violations of Section 13(a) of the Exchange Act and Rules 13a-1 and 13a-13 thereunder. It is undisputed that

[5] *Cobalis Corp.*, Exchange Act Rel. No. 64813, 2011 WL 2644158, at *4-6 (July 6, 2011) ; *Ocean Res., Inc.*, Initial Decision Rel. No. 365, 2008 SEC LEXIS 2851, at *2-5 (Dec. 18, 2008); *Chemfix Techs, Inc.*, Initial Dec. Rel. No. 378, 2009 SEC LEXIS 2056, at *23 (May 15, 2009) (same); *California Serv. Stations, Inc.*, Initial Dec. Rel. No. 368, 2009 SEC LEXIS 85, at *15 (Jan. 16, 2009) (same); *Ocean Res, Inc.*, 2008 SEC LEXIS 2851, at *17 (same); *Wall Street Deli, Inc.*, Initial Dec. Rel. No. 361, 2008 SEC LEXIS 3153, at *4-13 (Nov. 14, 2008); *Bilogic, Inc.*, Initial Dec. Rel. No. 322, 2006 SEC LEXIS 2596, at *12 (Nov. 9, 2006) . (same); *Investco, Inc.*, Initial Dec. Rel. No. 240, 2003 SEC LEXIS 2792, at *7 (Nov. 24, 2003) (same); *Nano World Projects Corp.*, Initial Dec. Rel. No. 228, 2003 SEC LEXIS 3146, at *3 (May 20, 2003) (same).

Respondents are issuers of securities registered pursuant to Section 12 of the Exchange Act, and that Respondents have failed to file periodic reports for approximately three years. Thus, as detailed in the Division's MSD, the Division, and not Respondents, is entitled to summary disposition as a matter of law. *See Citizens Capital Corp.*, 2012 SEC LEXIS 2024 at *34-35.

C. Respondents Cannot Show as a Matter of Law That a Sanction Less Than Revocation is Required Under the *Gateway* Factors

Section 12(j) of the Exchange Act provides that the Commission may suspend or revoke the registration of a class of an issuer's securities "as it deems necessary or appropriate for the protection of investors." 15 U.S.C. § 78l(j). The Commission's determination of which sanction is appropriate "turns on the effect on the investing public, including both current and prospective investors, of the issuer's violations, on the one hand, and the Section 12(j) sanctions on the other hand." *Gateway Int'l Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288, at *19-20 (May 31, 2006).

In making this determination, the Commission has said it will consider, among other things: (1) the seriousness of the issuer's violations; (2) the isolated or recurrent nature of the violations; (3) the degree of culpability involved; (4) the extent of the issuer's efforts to remedy its past violations and ensure future compliance; and (5) the credibility of the issuer's assurances against future violations. *Id.* Further, although no one factor is dispositive, the Commission has stated that a "***'recurrent failure to file periodic reports' is 'so serious that only a strongly compelling showing with respect to the other factors we consider would justify a lesser sanction than revocation.'***" *Absolute Potential, Inc.*, Exchange Act Rel. No. 71866, 2014 SEC LEXIS 1193, at *24 (April 4, 2014) (*quoting Impax Labs., Inc.*, Exchange Act Rel. No. 57864, 2008 SEC LEXIS 1197, at *27 (May 23, 2008)) (emphasis added).

Respondents cannot establish as a matter of law that revocation of their securities is not the appropriate remedy under the *Gateway* factors. To the contrary, the detailed analysis of the *Gateway* factors in the Division's MSD establishes the opposite—revocation as a matter of law is the appropriate remedy.

1. Respondents' violations are serious and recurrent

Respondents have failed to file *any* periodic reports since filing Forms 10-Q for the period ended September 30, 2015, almost three-and-a-half-years ago. As of the date of this motion, *each* Respondent has failed to file 13 periodic reports. There is no question that these continuing violations of Section 13(a) of the Exchange Act and the rules thereunder are serious and recurrent. *See, e.g., Impax Labs., Inc.*, 2008 SEC LEXIS 1197 at *24-26 (Commission finding failure to file eight required periodic reports over more than four years was serious and recurring).[6]

Respondents' Motion does not challenge these *Gateway* factors. Instead, Respondents argue that short seller Hayman made it difficult for Respondents to obtain an audit and become current in their periodic reports. (Respondents Motion, pp. 15-16.) Even if accepted as true, this does not change that Respondents committed serious and recurrent violations of Section 13(a) of the Exchange Act and the rules thereunder.

[6] *Eagletech Commc'ns, Inc.*, Exchange Act Rel. No. 54095, 2006 SEC LEXIS 1534, at *4 (July 5, 2006) (Commission finding failure to file multiple periodic reports over more than three years was serious and recurring); *Gateway*, 2006 SEC LEXIS 1288, at *21 (Commission finding failure to file seven periodic reports over eighteen months was serious, egregious, and recurrent); *Digital Brand Media & Mktg. Grp., Inc.*, Initial Dec. Rel. No. 1226, 2017 SEC LEXIS 3620, at*23-25 (November 16, 2017) (failure to file two annual reports and six quarterly reports over almost two years was serious and recurrent); *Freedom Golf Corp.*, Initial Dec. Rel. No. 227, 2003 SEC LEXIS 1178, at *5 (May 15, 2003) (failure to file one annual report and one quarterly report over less than a year was recurrent and egregious).

2. Respondents' culpability supports revocation

It is undisputed that Respondents knew of their reporting obligations yet each failed to file numerous periodic reports over a period of three years. (*See, e.g.,* Respondents' Answer, p. 2-8; *See, e.g.,* Forms 12b-25, First Bernstein Decl., Exs. 10-15.) This establishes a high degree of culpability that is more than sufficient to support summary disposition in the Division's favor. *See Gateway*, 2006 SEC LEXIS 1288, at *21 (Commission found delinquent issuer "evidenced a high degree of culpability," because it "knew of its reporting obligations, yet failed to file" its periodic reports); *Digital Brand Media & Mktg. Grp., Inc.*, 2017 SEC LEXIS 3620, at*23-25 ("Because [respondent] knew of its reporting obligations and nevertheless failed to file periodic reports, it has shown more than sufficient culpability to support revocation").[7]

Respondents do not challenge their knowing failure to file the periodic reports, but argue that there are mitigating factors. (Respondents Motion, pp. 15-16.) Respondents claim they could not stay current in their periodic reporting primarily because short seller Hayman was engaged in a short-and-distort campaign against them that made it difficult for them to obtain an audit. (*Id.*)

Respondents cannot avoid revocation, however, by blaming the actions of a third-party short seller, because it is Respondents' own failure to file its periodic reports and present inability to cure those deficiencies that is the only matter relevant to this proceeding. *Eagletech Commc'ns, Inc.*, 2006 SEC LEXIS 1534, at *6 ("*Eagletech*") (Commission finding that even if respondent's allegations about short seller interference were accepted as represented, the alleged third-party

[7] Respondents' executives were also ordered to pay $8.2 million in disgorgement, prejudgment interest, and civil penalties, and UDF III, UDF IV, and the executives have been permanently enjoined from violating Sections 17(a)(2) and (3) of the Securities Act and Sections 13(a), 13(b)(2)(A), and 13(b)(2)(B) of the Exchange Act and Rules 12b-20, 13a-1, and 13a-13 thereunder. Nonetheless, Respondents have continued to violate Section 13(a) of the Exchange Act by not filing any periodic reports in the reporting periods following the entry of the District Court final judgments. *Gateway*, 2006 SEC LEXIS 1288, at *24, n. 30 (Commission may consider "other matters that fall outside of the OIP in assessing appropriate sanctions").

wrongdoing did not alter the only matter relevant to the proceeding—the fact that respondent had failed to file its periodic reports and was presently not able to cure the deficiencies).

Respondents' attempt to distinguish *Eagletech* by claiming that the respondent in *Eagletech* was subjected only to "naked" short selling and Hayman engaged in more direct obstruction. (Respondents' Motion, p. 16.) This argument is not persuasive, and Respondents are downplaying the conduct in *Eagletech.* The issuer in *Eagletech* was subjected to two separate alleged criminal manipulations schemes—a pump and dump scheme and a short selling scheme—that destroyed the company's finances. *Eagletech Commc'ns, Inc.,* 2006 SEC LEXIS 1534, at *3-6. Respondents' argument also misses the point. Whether the short seller's conduct was different or less damaging in *Eagletech* does not change the operative facts that Respondents have failed to file any periodic reports for years or cure the deficiencies. *Eagletech* turns not on what the short seller did, but on what the issuer, like Respondents, did not do—file its periodic reports and cure the deficiencies.

Eagletech is also not, as Respondents suggest, an isolated case. The Commission has repeatedly rejected respondents' efforts to avoid revocation by blaming third parties, mishaps, or business difficulties for their failure to stay current in their reporting. *See, e.g., In the Matter of Advanced Life Sciences Holdings, Inc.*, Exchange Act Rel. No. 81253, 2017 WL 3214455, at *3-4 (July 28, 2017) (finding revocation at summary disposition was appropriate because respondent's business and auditor difficulties did not excuse its failure to file periodic reports); *Impax Labs., Inc.,* 2008 SEC LEXIS 1197 at *34 (rejecting respondents argument that registration should not be revoked, because its outside auditors failed to act quickly enough to address a revenue recognition policy); *Cobalis Corp.*, 2011 WL 2644158, at *5-6 (actions of creditor and shareholder in forcing involuntary bankruptcy proceeding and forcing issuance of stock did not excuse Exchange Act violations); *Digital Brand Media & Marketing Group, Inc.*, Initial Decision Rel. No. 1226, 2017

SEC LEXIS 3620, at*23-24 ("[a]n issuer's attempt to blame others and a variety of mishaps is not a defense for failure to file."). Nor is *Eagletech Commc'ns, Inc.*, the only decision involving purported interference by short sellers. *See, e.g., China MediaExpress Holdings, Inc.*, Initial Dec. Rel. No. 464, 2012 WL 2884859, at *1, 6 (July 16, 2012) (ALJ granting summary disposition despite claims that an alleged short selling scheme, the resignation of the company auditors, and an ongoing internal investigation prevented respondent from filing its periodic reports).

Furthermore, the outside factors Respondents purport to rely upon as mitigating factors relate to conduct that occurred years ago and cannot credibly explain Respondents' current and long-running delinquencies. Respondents' prior auditors resigned almost four years ago in the fall of 2015, Respondents engaged their current auditors almost three years ago in June 2016, the FBI raid occurred in early 2016, and Hayman's "short and distort" campaign occurred in 2015 and 2016. This long passage of time makes Respondents' arguments even less compelling than the unsuccessful arguments the respondents made in *Eagletech* and the other cases cited above that ordered revocation.

Finally, Respondents contend "no issuer could have done more to get an audit and become current in its periodic reporting." (Respondents' Motion, p. 16.) Even if this unsupported and hyperbolic statement was true (it is not), it would not justify a lesser sanction than revocation. As discussed in the Division's MSD, Respondents have not demonstrated, and cannot demonstrate, why remaining registered but not filing any periodic reports for over three years is a justified response to the difficulties they claim they encountered. If their current auditors were not willing to issue an *unqualified* opinion in light of the circumstances at the company, Respondents had other options. If the problems at Respondents were truly so acute that it was actually impossible for Respondents to make any periodic filings for a prolonged period of time as Respondents'

claim, then Respondents could have sought to deregister their securities and then register again if and when the storm passed. The law does not authorize an issuer to throw up its hands and continually violate Section 13(a) of the Exchange Act.

3. Respondents have not made sufficient efforts to remedy their past violations

The Commission has made it clear that for a delinquent issuer to demonstrate sufficient efforts toward remedying filing delinquencies, it must, at a minimum, file all of its past-due reports, and those filings must not contain any material deficiencies. *See Nature's Sunshine Prods., Inc.*, Exchange Act Rel. No. 59268, 2009 SEC LEXIS 81, at *15-17 (Jan. 21, 2009); *California Serv. Stations, Inc.*, Initial Dec. Rel. No. 368, 2009 SEC LEXIS 85, at *13-15 (Jan. 16, 2009). Respondents do not and cannot contest that they have failed to remedy any of their past violations and that they have continued to violate Section 13(a) by failing to file periodic reports since the Commission instituted the OIP more than six months ago.

Rather, Respondents state that they have retained a consulting firm to assemble and review loan packages. (Respondents' Motion, p. 16.) Setting aside that Respondents have submitted no evidence on this point, it is unclear how this fact, if true, supports Respondents on this *Gateway* factor. Whatever work the consulting firm has done, Respondents have still not provided a single past due filing. Respondents also do not explain why this loan review work is relevant to their purported "Hayman defense," or why it was not performed months, if not, years ago, during the earlier reporting periods.

Notably, Respondents provide no evidence from their auditors to support their claim that the auditors have been unwilling to issue an audit opinion, nor have they addressed whether the auditors would have been willing to provide a *qualified* opinion. Respondents also provide no

evidence from the auditors or otherwise about the status of the audit or any timetable for when Respondents will purportedly be in a position to bring their reporting current. For UDF III, Respondents say only that they will work to bring UDF III into current compliance at their earliest opportunity. (Respondents' Motion, p. 17.) Respondents' Answer included an estimate of June 30, 2019 for bringing UDF IV and UDF V into current compliance, but that was not referenced or supported with any evidence in the Motion. Moreover, Respondents premised that estimate on the filing of an "omnibus" 2017 Form 10-K, which, as discussed below, is not authorized under Commission rules.

4. Respondents have provided no credible assurance against future violations

Respondents do not provide, and cannot provide, any credible assurance against future violations.[8] Instead, Respondents merely state in conclusory fashion that revocation is not in investors' interest. (Respondents' Motion, p. 17.). This is not relevant to the "credible assurance" *Gateway* factor. More relevant is that fact that over a period of several years, Respondents have repeatedly underestimated the amount of time needed to file their periodic reports. For example, UDF IV repeatedly failed to meet its own estimated filing deadlines it provided to NASDAQ in 2016—and more than two-and-a-half years later, it still has not made any filings. *See Impax Labs., Inc.*, 2008 SEC LEXIS 1197 at *30 (respondent's failure to meet its promise to Nasdaq to file delinquent reports undermined its assurances of future performance); *Nature's Sunshine Prods., Inc.*, 2009 SEC LEXIS 81, at *23-24 (discounting assurances of respondent who had previously underestimated the time it needed to become compliant).

[8] Indeed, UDF III and UDF V violated Section 13(a) of the Exchange Act after Respondents filed their Motion when they failed to file their Forms 10-K for the year ended December 31, 2018. UDF IV stated its inability to file its Form 10-K a few days before Respondents' filed their Motion.

Respondents' assertion that revocation would be overly harmful to Respondents' shareholders is also not correct. Revocation would lessen, but not eliminate, shareholders' ability to transfer their securities. *See Eagletech Commc'ns, Inc.*, 2006 SEC LEXIS 1534, at *9. Revocation will not only protect current and future investors, who lack the necessary information about the issuer because of its failure to make required Exchange Act filings,[9] it will also deter other similar companies from failing in their reporting obligations. If Respondents decide to seek registration after their securities are deregistered, a new registration process will place all investors on an even playing field.

5. Respondents' proposed "omnibus" Form 10-K, even if filed, would not support a lesser sanction

Respondents state that it is their intention at some undetermined point in the future to file a purported "omnibus" Form 10-K to cover their delinquent annual and quarterly reporting for 2015 through 2017. Respondents have come forward with *no evidence* to establish whether, and if so, when this filing will occur. Even if Respondents had in fact already made the filing they propose to make, however, it would not support Respondents' argument against revocation for at least three reasons.

First, the proposed omnibus filing would be deficient, because as proposed it would not include any quarterly information for 2016 and only summary quarterly information for 2017 and 2008. (Respondents' Motion, p. 1.) A comprehensive Form 10-K must, at a minimum, include *all material information* that would have been included in each of the delinquent filings. *Citizens Capital Corp.*, 2012 SEC LEXIS 2024, at *26; FR Manual § 1320.4 ("Generally, the Division of Corporation Finance will not issue comments asking a delinquent registrant to file

[9] Respondents' conduct has and will cause harm current and future investors, as it deprives them of meaningful and timely information needed to make an informed investment decisions.

separately all of its delinquent filings if the registrant files a comprehensive annual report on Form 10-K that includes all material information that would have been included in those filings").

Second, even if it was comprehensive, Commission rules do not provide for or authorize Respondents to make a comprehensive filing instead of filing all of their delinquent periodic reports. *See In the Matter of Advanced Life Sciences Holdings, Inc.* Exchange Act Rel. No. 81253, 2017 WL 3214455, at *4 (July 28, 2017); *Citizens Capital Corp.*, 2012 SEC LEXIS 2024, at *26.

Third, if Respondents were able to become current in their filings, the public interest would still require revocation to support the purpose of the reporting requirements—that issuers provide investors with timely and material information so that informed investment decisions can be made—and to deter other issuers that might become delinquent. The Commission has repeatedly found revocation appropriate in cases where registrants fail to comply with their filing requirements and then make filings during the pendency of a Commission administrative proceeding. *See Absolute Potential, Inc.*, 2014 SEC LEXIS 1193, at *16-22 (revoking respondent's registration despite respondent having filed twenty past-due reports and becoming current in its filings while action was pending); *Nature's Sunshine Prods., Inc.*, 2009 SEC LEXIS 81, at *34.

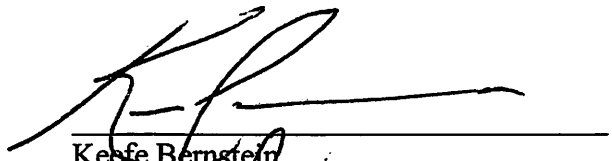
IV. CONCLUSION

A "recurrent failure to file periodic reports' is 'so serious that only a strongly compelling showing with respect to the other [*Gateway*] factors we consider would justify a lesser sanction than revocation." *Absolute Potential, Inc.*, 2014 SEC LEXIS 1193, at *24 (internal quotation omitted). Respondents have not and cannot make such a showing, much less do so as a matter of

law. For this reason and the reasons set forth above and in the Division's MSD, the Division respectfully requests that the Commission deny Respondents' Motion.

Dated: April 29, 2019

Respectfully submitted,



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Counsel for Division of Enforcement

Service List

Pursuant to Rules 150 and 151 of the Commission's Rules of Practice, I hereby certify that a copy of the foregoing was served to each of the following, on April 29, 2019, by the method indicated:

Via Facsimile, Electronic Mail, and UPS Overnight
Vanessa Countryman, Secretary
Office of the Secretary
100 F. Street, N.E.
Washington, DC 20549

Via Electronic Mail and UPS Overnight
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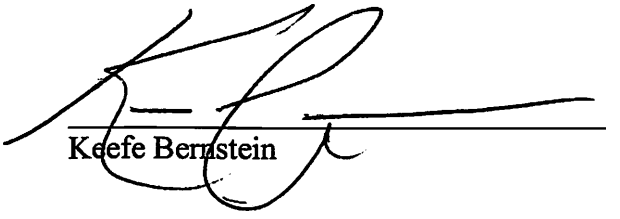
In addition, an electronic courtesy copy of this filing was emailed to APFilings@sec.gov.



Keefe Bernstein