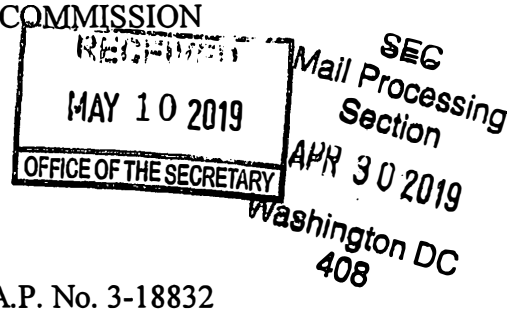
U.S. SECURITIES AND EXCHANGE COMMISSION



Matter of

UNITED DEVELOPMENT FUNDING III, L.P., UNITED DEVELOPMENT FUNDING IV, *and* UNITED DEVELOPMENT FUNDING INCOME FUND V,

Respondents.

A.P. No. 3-18832

RESPONDENTS' MEMORANDUM IN OPPOSITION TO DIVISION'S SUMMARY DISPOSITION MOTION

William E. Donnelly
(wdonnelly@mmlawus.com, 202.661.7011)
Stephen J. Crimmins
(scrimmins@mmlawus.com, 202.661.7031)
Murphy & McGonigle PC
1001 G Street NW, 7th floor
Washington DC 20001

Counsel for Respondents

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO DIVISION'S SUMMARY DISPOSITION MOTION

Respondents oppose the Division's motion for summary disposition under Rule 250. In addition to the points set forth below, Respondents rely on the declaration of Hollis M. Greenlaw and accompanying exhibits and memorandum filed by Respondents on 3/28/2019 in support of their own motion, as directed in the 2/26/2019 briefing order.

Standard for Summary Disposition

Rule 250 provides that a party seeking summary disposition must demonstrate that "the undisputed pleaded facts, declarations, affidavits, deposition transcripts, documentary evidence or facts officially noted pursuant to Rule 323 show that there is no genuine issue with regard to any material fact and that the movant is entitled to summary disposition as a matter of law."

The record here must be evaluated in the light most favorable to Respondents. "In assessing the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them, must be viewed in the light most favorable to the non-moving party." *Matter of Jaycee James*, 2010 WL 3246170 at *3 (ALJ April 2, 2010). "At the summary disposition stage, the hearing officer's function is not to weigh the evidence and determine the truth of the matter, but rather to determine whether there is a genuine issue for resolution at a hearing." *Id.* The question is not who should prevail, but rather whether the evidence is so clear that Respondents should be denied a hearing.

The Commission has stated that a Rule 250 summary disposition motion "is analogous to Federal Rule of Civil Procedure 56." Amendments to Rules of Practice, SEC Rel. 34-78319, 2016 WL 7853756, at n.112 and n.115 (July 13, 2016). Rule 56 similarly provides that a party seeking summary judgment in federal court must demonstrate that "there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." For this reason, on the "standards for summary disposition," precedent interpreting Federal Rule 56 "provides helpful guidance on issues not directly addressed by previous Commission opinions." *Jaycee James*, 2010 WL 3246170 at *2-3.

The Supreme Court has counseled restraint in applying Rule 56. "The evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor. ... Neither do we suggest that the trial courts should act other than with caution in granting summary judgment or that the trial court may not deny summary judgment in a case in which there is reason to believe that the better course would be to proceed to a full trial." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (rejecting "trial on affidavits").

"[A]t the summary judgment stage the judge's function is not himself to weigh the evidence and determine the truth ... but to determine whether there is a genuine issue for trial." *Id.* at 249. *See also Feld v. Fireman's Fund Ins. Co.*, 909 F.3d 1186, 1190 (D.C. Cir. 2018) (on summary judgment motion, must "view[] the evidence in the light most favorable to the non-

movant and draw[] all justifiable inferences in its favor"); *Royal Crown Day Care LLC v. Dept. of Health and Mental Hygiene*, 746 F.3d 538, 544 (2d Cir. 2014) ("On a motion for summary judgment, a fact is material if it 'might affect the outcome of the suit under the governing law,'" quoting *Anderson*, 477 U.S. at 248).

Procedural Objection

Instead of referring this matter to an administrative law judge to review and consider the evidence and legal arguments before making a substantive adjudication and fixing any remedy, the Commission has decided to assign this matter directly to "the Commission" itself. This determination to skip appointing a judge is a new and troubling departure from literally decades of Commission administrative practice. The first §12(j) proceeding ever assigned to the Commission itself was only a few months ago *Matter of Gepco, Ltd.*, 2018 WL 4039417 (OIP Aug. 23, 2018). And since then there have been almost a hundred other such §12(j) proceedings. *E.g. Matter of Cardinal Energy Group, Inc.*, 2019 WL 1254907 (OIP March 18, 2019).

While perhaps efficient, this new streamlined approach is simply not fair for proceedings with a substantive evidentiary record that must be reviewed and weighed against applicable decisional standards. The 2/26/2019 briefing order in the present matter directs the parties to file with the Commission summary disposition motions and supporting briefs that "should include, as attachments, relevant declarations, affidavits, and other supporting documentation" by 3/28/2019, which both sides have already done. The order further directs the parties to file opposition briefs by 4/29/2019, and then to file any reply briefs by 5/13/2019.

With no judge assigned, who will actually do the work contemplated by Rule 250, or its parallel Federal Rule 56, of reviewing these lengthy and detailed submissions? The Division has so far filed an opening brief, declaration and 29 exhibits, and Respondents have so far filed an opening brief, declaration and 93 exhibits. Someone must go through all of these submissions, and those still being filed, in order to "assess[] the summary disposition record, the facts, as well as the reasonable inferences that may be drawn from them," and do so "in the light most favorable to the non-moving party." *Jaycee James*, 2010 WL 3246170 at *3. And Respondents need to present testimony and subpoena third-party witnesses and documents, with the result that there needs to be a fair evidentiary hearing, not an "efficient" summary disposition.

The Commissioners sit as a *de novo* review panel (as federal appeals courts review certain matters *de novo*), but only after an ALJ has already invested the time and effort to hear counsel, personally review the submissions and exhibits and prepare an initial decision. The modern Commission is simply not equipped to sit as a court of first instance, even for a summary disposition where there is a substantive record. There is no way that the four sitting Commissioners can each abandon their other pressing obligations to spend days reading this record to make the determinations that Rule 250 and due process require.

The Commissioners' other obligations are extensive. In just the Enforcement area, the Commissioners during FY2018 had to consider and authorize "a diverse mix of 821 enforcement actions."[1] And they preside over 984 pending administrative proceedings. And they direct their litigation staff on the management and settlement of 1,777 pending federal court actions.[2] On top of this, the Commissioners have management, rulemaking, speaking, and countless other duties across all divisions, offices and program areas, including oversight of $97 trillion in annual securities trading, activities of over 27,000 registered market participants, filings and disclosures by almost 8,000 reporting companies (4,300 exchange-listed), and activities of 22 national securities exchanges, 10 credit rating agencies, 7 active registered clearing agencies, plus the PCAOB, FINRA, MSRB, SIPC, FASB, etc.[3]

The detailed facts in this record need to be heard, determined and weighed against the controlling decisional factors discussed below by a judge who can devote the needed time and attention. Asking Commissioners themselves to personally do the work of reviewing the filings made by the Division and Respondents in this matter would realistically mean either that they would just skim the submissions, or more likely that they would be forced to rely on one or more faceless staff lawyers – the real judges, who would remain anonymous – for how they should decide the matter. This is fundamentally not fair, and does not comport with due process. And the fact that this case has no judge assigned while other cases do have an actively engaged judge additionally creates an equal protection problem.

Factors to Consider in Deregistration Cases

Missing several periodic reports does not automatically result in deregistration. Instead, consistent with due process, the Commission requires each §12(j) case to be resolved based on a careful consideration and weighing of the particular evidence presented against certain articulated factors. This factor-based analysis reflects what the Commission does in other types of administrative adjudication, for example cease-and-desist proceedings. *Matter of KPMG Peat Marwick LLP*, 2001 WL 47245 at *98-99 and n.115 (Jan. 19, 2001), *aff'd*, 289 F.3d 109, 120 (D.C. Cir. 2002) citing and relying on the D.C. Circuit's decision in *SEC v. Steadman*, 967 F.2d 636, 647-648 (D.C. Cir. 1992).

The factors the Commission uses to decide §12(j) cases include: "**[i]** the seriousness of the issuer's violations, **[ii]** the isolated or recurrent nature of the violations, **[iii]** the degree of culpability involved, **[iv]** the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and **[v]** the credibility of its assurances, if any, against further violations." *Matter of Advanced Life Sciences Holdings, Inc.*, 2017 WL 3214455 at *3 (2017), quoting *Matter of Gateway International Holdings, Inc.*, 2006 WL 1506286 at *4 (2006).

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[1] SEC Congressional Budget Justification, p. 23 (3/18/2019), https://www.sec.gov/files/secfy20congbudgjust_0.pdf.

[2] *Id.*, p. 25.

[3] *Id.*, p. 3.

"These factors are non-exclusive, and no single factor is dispositive." *Advanced Life Sciences* at *3. In weighing these factors, Commission begins by assessing the seriousness of violation, recurrent nature, and degree of culpability factors. If the Commission finds the facts to be serious under these three factors, it then it applies a "strong presumption in favor of revocation" unless there is a "strongly compelling showing" on the remaining two principal factors – the remedial efforts to ensure compliance factor, and the credibility of assurances against future violations factor. *Id.* at *3-*4.

The Commission's factors for deciding §12(j) proceedings are still relatively new. In *Gateway International* in 2006, just 13 years ago, the Commission noted that it was presented with "the first litigated appeal in which we must decide what sanctions are appropriate under Exchange Act Section 12(j) when an issuer has violated Exchange Act Section 13(a) and Rules 13a-1 and 13a-13 thereunder by failing to make required filings." 2006 WL 1506286 at *4. Interestingly, the Commission noted that its first-ever §12(j) decision came more than 30 years after the section was enacted by Congress in 1975. *Id.* at n. 26. Section 12(j) proceedings are thus a fairly recent addition to the SEC's enforcement program. And it appears that over the last 13 years no appeals court has had the opportunity to consider the Commission's §12(j) decisional factors or how the factors should be applied in any particular factual context.

Application of Gateway *International* Decisional Factors Here

Under Rule 250, summary disposition must be denied if, after weighing all reasonable inferences in Respondents' favor, there remains a "genuine issue with regard to any material fact." As discussed below, this matter presents genuine issues of material fact necessary to determine each of the *Gateway International* factors that must be considered in a Section 12(j) proceeding. For this reason, summary disposition must be denied, and the matter must be set for an evidentiary hearing.

I. Material Fact Issues Under "Seriousness of Violations" Factor

Resolution of a §12(j) case requires a determination as to "the seriousness of the issuer's violations." *Advanced Life Sciences*, 2017 WL 3214455 at *3; *Gateway International*, 2006 WL 1506286 at *4. Respondents must be allowed to present testimony and documentary evidence, and to subpoena supporting third-party evidence, to prove the following facts material to this decisional factor.

The lapse in periodic reporting in this case resulted from events never seen in prior §12(j) proceedings. Beginning in 2015, Kyle Bass and his Hayman Capital-related entities (collectively "Hayman") perpetrated a short-and-distort manipulation scheme, which included multiple materially false statements to the SEC, other federal agencies, and the investing public, in order to profit by approximately $48M from an undisclosed short position in UDF securities. When Hayman believed officials were too slow to take action on its bogus information, Hayman launched its own campaign to publish materially false and fraudulent misrepresentations directly to investors and to Respondents' auditors in order to capitalize on its short position.

This targeted big-dollar campaign by Hayman to illegally manipulate the price of UDF securities unquestionably prevented Respondents from obtaining the audited financial statements and reviews they needed for periodic reporting. Respondents have since filed an action for damages against Hayman in state court in Dallas, and the court has allowed Respondents to obtain preliminary discovery to substantiate their claims against Hayman. After reviewing Respondents' submissions and holding a five-hour evidentiary hearing, the court denied Hayman's motion to dismiss and ruled that Respondents had made a prima facie case of intentional business disparagement and tortious interference by Hayman. The denial of Hayman's dismissal motion is now on interlocutory appeal.

These unique facts and circumstances distinguish this case from *Matter of Eagletech Communications, Inc.*, 2006 WL 1835958 (2006), which may be the only other §12(j) Commission opinion involving short selling. In *Eagletech*, the issuer was subjected simply to "naked" short selling and argued that the Commission's adoption of Regulation SHO with a "grandfathering" clause resulted in a Constitutional "taking" without due process. However Eagletech actually stopped its periodic reporting while "experiencing extreme financial difficulties at the time," and admitted at the hearing that it lacked resources to get current in its reporting. *Id.* at *1-2. Here as discussed in detail below, UDF was subjected to a sophisticated, long-term and illegal short-and-distort attack designed to crater its stock price and drive off the series of audit firms UDF kept trying to engage and pay in full to do its audit work. Again, nothing like this has ever been seen in a §12(j) proceeding.[4]

Phase One: Lying to Government and Building Massive Short. Hayman commenced its manipulation scheme by making repeated false and misleading statements about UDF to federal agencies, including the SEC Fort Worth Regional Office ("FWRO"), the Federal Bureau of Investigation ("FBI"), and the U.S. Attorney's Office ("USAO") for the Northern District of Texas, all while secretly building a huge short position:

- **1/1/2015-3/31/2015:** Hayman had no short position in UDF IV before 1/1/2015. But by 3/31/2015, Hayman built a 1,215,964 share short position in UDF. [Ex.3][5] (In building its short far beyond this initial position, Hayman worked multiple angles: **(i)** shorting UDF IV stock; **(ii)** shorting a basket of stocks it believed would trade in concert with UDF; and **(iii)** marketing a "Real Estate Distressed Debt Opportunity Fund" ("DDO Fund") that would acquire valuable UDF properties at a discount following a prolonged SEC enforcement investigation that would force UDF into bankruptcy.)

[4] The ALJ opinion in *Matter of China MediaExpress Holdings, Inc.*, 2012 WL 2884859 at *4 (ALJ July 16, 2012), likewise involved simple short selling in the context of the issuer's auditor Deloitte resigning when it "concluded that the company was not proceeding in good faith," charged that the issuer's board did "not have a proper basis for concluding" its financials were "free from material misstatement," and told the issuer to notify investors to no longer rely on its audited financials. Again, nothing like what we see here.

[5] Exhibits cited herein are identified and incorporated in, and furnished with, the accompanying 3/28/2019 Hollis M. Greenlaw Declaration.

- **3/19/2015:** Hayman delivered a 17-page presentation on UDF to the FWRO and USAO. Hayman falsely stated that UDF "exhibits characteristics emblematic of a Ponzi-like scheme" in which new invested capital "is used to fund distributions to existing investors." [Ex.1] Hayman then set up a 4/3/2015 call with the FWRO, and internally discussed that Hayman's goal is to "walk through" the presentation "and provide enough specifics to set the hook with the hope that [they] request a follow-up to do the deep dive." [Ex.4 (emphasis added)]

- **4/17/2015:** Hayman met with the FWRO, FBI, USAO. [Exs.5, 10] Hayman delivered a misleading 80-page presentation on UDF that repeated the false statements in its 3/19/2015 presentation. But Hayman provided additional false claims, including that the "development sites which secure UDF IV loans" showed that "the loans are significantly undercollateralized and would be impaired by potentially 50-75% under reasonable valuation parameters"; that the explanation was "the relationship (and conflict of interest) that existed between UDF IV's manager/key executives and UDF IV's largest borrower"; and finally that UDF's "business is about extracting an exorbitant amount of fees from unsuspecting investors and perpetuating the scheme by continuing to funnel new unsuspecting investors behind older investors." [Ex.6, p.20]

- **5/26/2015:** Hayman had a 5-hour meeting with the FBI. After presenting "specific items" that Bass wanted conveyed, Hayman's representative reported back that the FBI is "very engaged." Hayman's short position reached 1,767,471 shares (a $30.6M position) through additional trading during the meeting with the FBI. [Ex.7] Hayman also emailed a 61-page "revised presentation" to the FWRO. [Ex.8]

- **6/2-6/15/2015:** Hayman met at the FWRO on 6/2/2015. [Ex.9] Hayman emailed a 13-page presentation to the FWRO on 6/12/2015. [Ex.11] Hayman had an "update" call with the FWRO on 6/15/2015, and misrepresented a UDF V loan as an example of UDF's Ponzi-like structure and sent the same false and misleading information to the FBI. [Exs.5, 13, 14, 78]

    - The 6/15/2015 communication illustrated Hayman's approach to misleading federal officials – a series of detailed false statements to create a larger false picture. For example, discussing UDF V's loan to Centurion's Shahan Prairie development, Hayman contrasted what it portrayed as the "success" of the adjacent Wildridge development to make it appear that Shahan Prairie was headed for failure. Hayman falsely stated that Wildridge was being developed in just 3 years when in truth it was already held for 11 years (like Shahan), and presented photos of a corner of the Shahan development to suggest no activity when available aerials showed substantial grading for development at Shahan.

- **6/23-6/25/2015:** Hayman met twice with the FBI and provided additional false information. [Ex.5] Again Hayman was shorting around the meetings with the FBI, and by 6/30/2015, Hayman's short position jumped to 2,067,513 shares. [Ex.3]

- **7/31/2015:** Hayman's UDF short position reached 2,242,513 shares. [Ex.3] Hayman separately began shorting a "basket" of other securities that Hayman expected would be impacted by a negative UDF event." [Exs.16, 17]

- **8/18/2015:** Hayman internally reported that its "UDF basket" of short positions in non-traded REITs, expected to "react/trade in sympathy following a UDF event," had reached $58.2M (5.6% of its AUM), and that it had prepared a new 55-page presentation on UDF "to send to the relevant authorities" that day "and follow up with a call." [Exs.18, 19] Hayman had call with the FWRO on 8/26/2015. [Ex.5]

- **8/31/2015:** The FWRO met with UDF auditor Whitley Penn, questioned whether UDF had misled Whitley Penn about a particular spreadsheet relating to one borrower, and prohibited Whitley Penn from asking UDF questions about the spreadsheet. Whitley Penn added six additional procedures to its 3Q2015 review as a result of this meeting, but did not withdraw prior opinions.

- **9/20/2015:** Hayman planned for its DDO Fund to buy UDF assets after a negative UDF "event." Plan was to deploy $100M of capital, with the general partner getting 30% of the profit "split," plus fees of $15M to $25M. [Ex.20]

- **9/25/2015:** Hayman held pitch meeting for its DDO Fund. Pitch premised on purchasing UDF assets cheaply after SEC put UDF into bankruptcy/receivership. Hayman said its "well planned strategy" would give its fund "first mover advantage" to capitalize on the upcoming "news about UDF." Hayman presentation stated that "30 priority assets in the DFW area have already been identified [including Shahan Prairie] and preliminary diligence on collateral values is largely complete; senior lenders in each situation have also been identified." [Exs.21, 22]

- **11/12/2015:** Just as UDF was filing its Forms 10-Q, Hayman provided the FWRO with a draft letter that Hayman planned to send anonymously to UDF's auditors, Whitley Penn. The draft letter given to the FWRO misrepresented, among other things, "likely material misstatements" in UDF's financials; loan values "likely materially overstated"; "inflated management fees"; UDF's largest borrower "likely insolvent"; "material conflicts" with largest borrower. [Exs.27, 28]

- **11/9, 11/13, 11/16/2015:** UDF filed its quarterly reports on Form 10-Q. Days later, Whitley Penn advised UDF that it would not stand for reappointment as UDF's auditor. Whitley Penn indicated no disagreements with management and did not withdraw prior opinions. UDF immediately began approaching other audit firms to engage so that UDF

could remain current in its periodic reporting. UDF ultimately selected Grant Thornton to be its new auditor.

Phase Two: Lying to Investors and Auditors to Cash In on the Short. As described below, Hayman next proceeded to aggressively push its campaign of misrepresentations out directly to unsuspecting investors and auditors. This scheme paid off handsomely for Hayman. On ultimately closing out its massive and undisclosed UDF short position later in 2016, Hayman reaped approximately $48M in profits through its unlawful manipulation of UDF's stock price.

By 11/24/2015, Hayman's carrying costs on its UDF short position were over $84,000 per day, and Bass was proclaiming that a negative UDF event "will happen in December one way or the other." [Ex.24] On 12/4/2015, Hayman's UDF short position was 3,337,350 shares ($58M), with its trader under orders to "short as much UDF everyday as we can get a locate on." [Ex.30] Success on Hayman's massive short bet against UDF was critical for Hayman during this 2015-16 timeframe. Bass and Hayman's overall performance was then being questioned in the press, amid reports that investors were withdrawing their capital:

- "Bass has had a dismal time of it recently in the land of investment. Suddenly, the former luminary can't seem to get anything right. ... And by Bass' own admission in a recent interview..., things aren't looking all that good in 2015. 'It's been a tough year,' he acknowledged. ..." Barron's, "Kyle Bass' Comeback Plan" (8/13/2015). [Ex.89]

- "Over the past ... nearly eight years, Hayman Capital's main fund had an annualized performance of just 1.56 percent, according to calculations from Hayman Capital letters to investors, which were obtained by The Post. That's slightly better than a Treasury bond ETF – but not much else. After a 1.4 percent loss last year [2014], investors had enough. They pulled out almost a quarter of the firm's capital, forcing Bass to liquidate most of his stock portfolio by year end, according to Hayman documents and regulatory filings. ..." New York Post, "Kyle Bass' Post-Crash Returns Small-Caliber" (8/22/2015). [Ex.90]

- Problems for Hayman were continuing. Reporting on Hayman's bet on the oil market in early 2016, "[f]or Bass, the low [oil] prices have resulted in a 7% loss in his main fund this year, and the biggest losing streak in the history of his Hayman Capital, the Wall Street Journal reported. In the same period, the S&P 500 has gained 1.3%. 'I had no idea crude would fall so low,' Bass said in an interview with the Journal, acknowledging that he bought in too early. ... In a January episode of Wall Street Week, Bass noted that his fund in 2015 suffered 'one of the worst years in the last ten...." Fortune, "The Price of Oil is Slamming Kyle Bass' Hedge Fund" (5/23/2016). [Ex.91]

By late October 2015, with still no SEC or FBI action generating Hayman's desired public negative event as to UDF, Hayman adopted a new proactive approach that involved making material misrepresentations directly to investors through the media and internet posts,

and presenting similar misrepresentations to UDF's auditors, with direct consequences for UDF's ability to produce audited financials:

- **11/20/2015:** Hayman sent an expanded misleading presentation on UDF to the Wall Street Journal, having previously told WSJ reporter on 11/3/2015 that Hayman "will be at your service as you work through this Ponzi scheme." Also sent a misleading presentation to a Dallas-based news magazine, and had a 90-minute follow-up call to the reporter on 11/20/2015. [Exs.26, 29]

- **12/4/2015:** Hayman delivered a revised version of its anonymous false and misleading letter to UDF's former auditor, Whitley Penn. Hayman copied the Wall Street Journal, telling reporter that letter "will likely become public next week," and that the public release "will also be done anonymously." Also copied the SEC and FBI. [Exs.31, 32, 33]

    - In the anonymous letter to Whitley Penn, Hayman challenged auditor's statement ("which shareholders and the market have clearly relied upon") that it had no disagreements with UDF management and no reportable events, and questioned whether auditor "intentionally, recklessly or negligently ignored obvious red flags." Hayman misrepresented, among other things, that loan values "appear to be materially overstated"; management fees were improperly inflated; loans to UDF's largest borrower Centurion "do not appear to be arms-length"; Centurion "may be insolvent"; "material conflicts exist" with Centurion; UDF operates "similar to a Ponzi scheme."

- **12/10/2015:** Hayman's short position in UDF stood at 3,437,250 shares [Ex.3], and it held an additional short position in its "UDF basket" of other REITs and stocks expected to "react/trade in sympathy following a UDF event."

- **12/10/2015:** Hayman anonymously published on the Harvest Exchange "investor community" website the first in a series of anonymous and misleading Hayman posts about UDF ("A Texas-Sized Scheme Exposing the Darkest Corner of the REIT Business"), and sent the link to multiple media outlets. Hayman also anonymously posted its 12/4/2015 anonymous letter to the auditor Whitley Penn. [Exs.34, 35] **UDF stock price immediately dropped from $17.60 to $9.46, wiping out $237M in shareholder value in just one day.**

    - On 12/9/2015, the day before the 12/10/2015 anonymous post that crashed UDF's stock price, Hayman's GC again previewed an advance copy of the post to the FWRO, FBI and USAO. On the evening of 12/9/2015, the FWRO emailed back "Thank you for the heads up." (Hayman otherwise remained anonymous in its series of posts attacking UDF until Hayman launched its UDFExposed website on 2/2/2016, below.)

- From Hayman's 12/10/2015 anonymous post: "The UDF umbrella exhibits characteristics emblematic of a Ponzi scheme: (1) new capital, both equity and debt, is used to fund distributions to existing investors; (2) subsequent UDF companies provide significant liquidity to earlier vintage UDF companies, allowing them to pay earlier investors; and (3) if the funding mechanism funneling retail capital to the latest UDF company is halted, the earlier UDF companies do not appear to be capable of standing alone and the entire structure will likely unravel, with investors left holding the bag."

- **12/11-12/15/2015:** Hayman published four more anonymous posts and provided them to the FWRO and FBI. Posts called UDF a "Ponzi scheme," described UDF as "underwater," alleged "potential misappropriation," questioned whether UDF was a "legitimate lender," claimed UDF's largest borrower "may be insolvent," and questioned "veracity" of UDF's auditors. [Exs.36, 40, 42]

  - Hayman's 12/11/2015 post compared UDF's "scheme" to "Enron, Madoff, and Stanford," and contained multiple material misrepresentations about the status of several developments funded by UDF. Its 12/14/2015 post recapped prior misleading posts with links. Its 12/15/2015 post contained material misrepresentation about UDF and its largest borrower.

- **12/23/2015:** Hayman began working with PR consultants to "control the situation, manage inbound and outbound communications and escalate issues as necessary." "An example of controlling the narrative would be to be offer an exclusive on or off the record to a national media outlet … in order to generate increased awareness around both the situation and Hayman's Capital's position." The PR firm also suggested monitoring online and offline conversations to "control message." [Ex.43]

- **1/2016:** Hayman began to effectuate its "Communications Campaign" against UDF, including "paid amplification," "paid support for media coverage," "paid support to drive microsite traffic," and "paid Twitter to micro target followers of" reporters covering story. Hayman identified existing outreach to FWRO and FBI to be used as what it called "3rd Party Influencers." Hayman registered "UDFExposed.com" site. [Exs.43, 44, 45]

  - **1/4/2016:** Hayman discussed with PR consultants at Edelman the need to clearly communicate "the summary concepts of A) UDF's ponzi-like real estate scheme, B) management's continually misleading investors / management's lack of credibility, C) the insolvency of UDF's borrowers and D) ultimately the insolvency and likely bankruptcy of UDF IV." Hayman explained this is "key if we want to communicate how this all translates to the pending impact to UDF's share price." [Ex.46]

- **1/22/2016:** Hayman and Edelman PR team planned detailed "media blitz" around "launch day" for Hayman's UDFExposed website. [Ex.47]

- **1/29/2016:** Hayman previewed the "udfexposed" website with the FBI and informed them, "We will be going live with our website next Tuesday [2/2/2016]. It is still under embargo as we put the finishing touches on it but I am going to include the site and passwords for you to look through it now... Password: letmein." [Ex.92]

- **2/2/2016:** Hayman's UDFExposed.com website went live. Hayman's "plan is to promote the website tomorrow and begin media outreach following Kyle's appearance on CNBC." Hayman had "communicated our plans to the SEC and FBI" (which executed a search warrant at UDF's offices two weeks later, on 2/18/2016). [Exs.48, 49]

    - On its UDFExposed website, Hayman finally shed its anonymity and referred to UDF as a "billion dollar house of cards" it is "exposing." Said it was shorting UDF IV based on Hayman's "research" showing it was a billion-dollar "Ponzi" preying in retail investors. Said UDF was a "significant bankruptcy risk" that was on the "verge of collapse." Also posted several tabloid-style "research" reports that expanded on its material misrepresentations. [Ex.50]

    - Hayman publicly stated *for the first time* that it was short UDF IV stock and that it would profit if the price declined

    - Hayman kicked off its UDFExposed website with 5 separate posts: **(i)** "How the Scheme Works, From One UDF Fund to the Next"; **(ii)** "UDF's High Flying Conflicts of Interest"; **(iii)** "A Rolling Loan Gathers No Loss: Irregular Patterns Related to UDF's Largest Borrower"; **(iv)** "Anatomy of a Billion Dollar House of Cards: The Case Against UDF IV"; and **(v)** "Shareholders in UDF's Public Companies are being victimized by a Ponzi-like real estate scheme to keep the companies afloat."

- **2/4/2016:** Hayman analyst expressed concern about losing control of the public narrative by having the website live but not promoting it publicly, saying, "I just don't like the fact that the website is just sitting out there to be found and leaked by a blog at any time, we partially lose control in that environment." [Ex.51]

- **2/4/2016:** Hayman began what it calls its "massive push" against UDF, and instructed Hayman personnel to "make sure each and every plaintiffs attorney gets the website" UDFExposed.com. The "massive push" included buying Google marketing links to drive UDF search traffic to Hayman's UDFExposed website. [Ex.52]

- **2/5/2016:** Hayman succeeded in getting wide press coverage of its UDFExposed.com misrepresentations. **The market reacted quickly as UDF stock dropped in that single day from $10.13 to a low of $5.21, a further $151M decline in market cap.**

    - Hayman emailed FINRA, calling UDF a "scheme" that is "ongoing" and "continues to take advantage of small mom and pop investors." Hayman's Kyle Bass then internally commented "Bombs away." [Tab 53]

- **2/12/2016:** Hayman's Kyle Bass was quoted extensively in The Dallas Morning News. Claimed Hayman made big profits shorting UDF IV, and that his actions stopped UDV V from completing a large capital raise, calling it his "civic duty." Compared UDF's denials of Hayman's allegations to how Bernie Madoff would respond.

- **2/16/2016:** Hayman published another post on its UDFExposed website entitled "UDF Management Lacks Credibility – How UDF Management Has Not Recognized Realized Losses in a Public Affiliate."

- **2/18/2016:** After hearing months of Hayman's repeated false Ponzi and other allegations against UDF, the FBI executed a search warrant at UDF's headquarters. Media was onsite to videotape the FBI-jacketed agents entering UDF's building and carrying out boxes of UDF materials into waiting FBI vans. The video of the raid appeared on television news, in addition to print media coverage. **Nasdaq suspended trading in UDF stock, with last trade at $3.20.**

- **4/2016:** Grant Thornton, after meeting extensively with UDF and assembling an audit engagement team, advised UDF that it had determined not to move forward with its preparations to become UDF's auditor.

- **5/12/2016:** Hearing that UDF had not yet been able to formally engage a new auditor, Hayman's Bass responded that this "is a great sign," and expressed frustration that UDF had not been delisted. [Ex.55]

- **6/8/2016:** UDF announced that it has engaged EisnerAmper as its new auditors. [Ex.57] Several days later, EisnerAmper got an anonymous package containing Hayman's UDFExposed.com materials [Ex.59].

- **8/11/2016:** Hayman continued efforts to block UDF from getting audited financials needed for periodic reporting. Hayman's PR firm Edelman circulated its "UDF Exposed Paid Promotion Strategy," involving a targeted multi-week campaign to respond to "Hayman's desire to push the UDF presentation to a primary audience of accounting/auditing firm employees." This would let Hayman "narrowly target accountants at targeted firms in the [Dallas-Fort Worth] area." Some of the targeting was once again intended to be anonymous, with "promoted dark posts from Hayman's

account that are targeted toward these segment(s) but will not be seen by the general public when they view Hayman's profile." [Ex.62]

- **8/11/2016-9/9/2016:** To impede UDF's audit process in advance of the 9/12/2016 Nasdaq deadline, Hayman published additional misleading posts on UDFExposed.com.

    - **8/11/2016:** Post entitled "Is UDF IV a Legitimate Real Estate Investment Trust?" Hayman's messaging points for this post included, "The information provided in the presentation posted to UDFexposed.com is highly relevant to the audit work currently being conducted by UDF's auditor." On this same day, Hayman's PR consultants prepared the UDF Exposed Paid Promotion Strategy described above that was targeted at "a primary audience of accounting/auditing firm employees."

    - **8/30/2016:** Post entitled "UDF's Ponzi-Like Real Estate Scheme Continues to Unravel: The Precarious Preston Manor."

    - **9/9/2016:** Post entitled "UDF's Ponzi-Like Scheme Continues to Unravel: The Northpointe Crossing Quandary." The Hayman analyst wrote about this post, "I know Friday afternoon is not an optimal to release but we're not exactly going for a media rush so we just want to get out before the weekend." [Ex.93]

- **9/14/2016:** UDF IV announced that Nasdaq had granted an extension to 10/17/2016. [Ex.85] Kyle Bass emailed the Hayman analyst, "We will discuss UDF at 1 pm today Parker." [Ex.86] Kyle Bass then sent a calendar invitation with the subject, "KB, PL, JL to discuss UDF listing Status and next steps." [Ex.87]

- **9/29/2016:** The FWRO issued Wells notices to UDF and individuals.

- **10/4-10/12/2016:** After UDF's Nasdaq deadline was extended to 10/17/2016, Hayman took further actions to impede UDF's audit process and influence Nasdaq's listing decision.

    - **10/4/2016:** Hayman engaged law firm Morgan Lewis to send a letter to Nasdaq on its behalf regarding the continued UDF halt. The letter made no reference to Hayman's multiple attempts to influence the auditors and delay the audit. Instead, "Hayman requests that the Panel not grant UDF any further extensions." [Ex.88]

    - **10/5/2016:** Misleading post entitled "A UDF Residential Development Life Cycle: Alpha Ranch – Four Years Later."

    - **10/12/2016:** Misleading post entitled "United Development Funding IV Stated Financial Position vs. Reality."

- **10/19/2016:** UDF resumed trading in the grey market, closing at $1.75. Its $1 low represents a **nearly $500M market cap decline** since Hayman began its scheme. Within days, Hayman **covered its short position, reaped approximately $48M in profits,** and ceased its campaign against UDF.

Hayman's campaign against UDF resembles a case the Commission filed just a few months ago, *SEC v. Lemelson*, 18-cv-11926 (D. Mass.), L.R. 24267, 2018 WL 4431430 (9/13/2018). As alleged in the Commission's litigation release: Lemelson and his advisory firm, after taking a short position for their hedge fund, "issued false information about" Ligand, a publicly-traded pharma company, through "written reports, interviews, and social media" to spread untrue claims, "including that Ligand was 'teetering on the brink of bankruptcy,'" and that its own IR firm agreed that Ligand's flagship drug "was going to become obsolete." This alleged short-and-distort scheme yielded "more than $1.3 million of gains" after "Ligand's stock lost more than one-third of its value during the course of Lemelson's alleged scheme." Several weeks ago, the court sustained the Commission's fraud complaint under Securities Exchange Act §10(b) and Rule 10b-5, Dkt. #29 (1/23/2019). The $1.3M in profits alleged in *Lemelson* pales in comparison with Hayman's profits of approximately $48M.

Meanwhile, the independent trustees on UDF IV's audit committee had retained the law firm Thompson & Knight, assisted by independent forensic accountants from PwC, to conduct an independent investigation into Hayman's allegations. This included individual interviews, analysis of thousands of relevant documents, searches of 1.7 million emails, and analysis of financial reporting. After four months of work, the investigators concluded that there was no evidence of fraud or misconduct; no evidence to substantiate Hayman's Ponzi allegations; no evidence of deception; no evidence that Whitley Penn was misled; and no evidence of efforts to defraud investors. Thompson & Knight and PwC presented these findings to the FWRO on 4/12 and 4/26/2016, and to the FBI and USAO on 5/11/2016.

II. Material Fact Issues Under "Isolated or Recurrent" Factor

Resolution of a §12(j) case requires a determination as to "the isolated or recurrent nature of the violations." *Advanced Life Sciences*, 2017 WL 3214455 at *3; *Gateway International*, 2006 WL 1506286 at *4. Respondents must be allowed to present testimony and documentary evidence, and to subpoena supporting third-party evidence, to prove the following facts material to this decisional factor.

Recurrent failures to file periodic reports typically involve issuers that are unable to devote the necessary time and expenditures needed to the reporting process, including the engagement and payment of independent auditors. Or they involve an issuer conducting a lengthy and detailed internal investigation. This is not that kind of case. Instead of recurrent failure by an issuer, we here see an issuer tirelessly fighting a unitary and targeted campaign by an outsider designed to shut down the issuer's public reporting. Under these circumstances, no issuer could have done more to get an audit and become current in its periodic reporting.

As detailed above, after Hayman built a huge and secret short position while engaging in months of repeated misrepresentations to federal officers at both the FWRO and the FBI, the FWRO told Whitley Penn that UDF had misled Whitley Penn about a spreadsheet. In this environment it was not surprising, and certainly not UDF's fault, that Whitley Penn declined to continue as UDF's auditor. Notably, Whitley Penn still determined there were "no reportable events" to disclose. Shortly thereafter, Hayman sent a 12/4/2015 anonymous letter to Whitley Penn challenging this determination, accusing Whitley Penn of ignoring "obvious red flags," accusing UDF of operating a Ponzi scheme, and contending that UDF's largest borrow Centurion may be insolvent. And a few days later, on 12/10/2015, Hayman anonymously posted its anonymous Whitley Penn letter online. Imagine any issuer trying to engage a new auditor after such an attack on an outgoing auditor.

To remain current in its periodic reporting, UDF then quickly approached EY, PwC, KPMG and Grant Thornton to take over as auditor, ultimately determining to engage Grant Thornton, which then met extensively with UDF and assembled an engagement team in preparation for being formally engaged. However by then Hayman had moved on to the second stage of its short-and-distort manipulation, which began with its series of anonymous posts and continuing with its professional "Communications Campaign" and "media blitz" against UDF, and then proceeded on to Hayman's "massive push" on its new UDFExposed website calling UDF a Ponzi and a "significant bankruptcy risk" that was "on the "verge of collapse." A few days later, the FBI raided UDF's headquarters with the television cameras rolling. Whereupon Grant Thornton abandoned its ongoing steps to take over as UDF's auditor in April. Hayman's Kyle Bass then commented internally on 5/12/2016 that it was a "great sign" that UDF did not yet have a new auditor.

UDF kept trying and proceeded to approach more audit firms including Crowe Horwath. In June UDF was able to engage EisnerAmper as its auditor, which it announced in a 6/8/2016 Form 8-K. However several days later EisnerAmper received an anonymous package containing Hayman's UDFExposed materials. And a few weeks later, on 8/11/2016, Hayman's PR firm Edelman circulated a new Hayman strategy to push its UDF allegations "to a primary audience of accounting/auditing firm employees" to "narrowly target accountants at targeted firms in the area." The following month, the FWRO issued its 9/29/2016 Wells notices to UDF.

Understandably, EisnerAmper stood back from audit work and told UDF it first wanted to see the Wells submissions and then to see confirmation that the matter was settled with a federal court judgment on a non-scienter basis. The events that followed moved on a schedule UDF did not control: the FWRO's Wells discovery (11/9/2016), the date for UDF's Wells submission (12/23/2016), the FWRO's response (4/17/2017), the FWRO's agreement to recommend a non-scienter settlement (5/22/2017), discussion of settlement language (7/5/2017), another year of tolling agreements (8/31/2017-8/20/2018), Commission approval of the non-scienter settlement (6/18/2018), the filing of the settled case (7/3/2018), and entry of judgment (7/31/2018).

With the havoc resulting from Hayman's campaign over, UDF could finally get an audit. But a few weeks later, on 9/24/2018, this §12(j) proceeding was instituted. Again, this was UDF fighting to survive Hayman's unitary and focused attack – exactly the opposite of "recurrent" or serial laxness in carrying out reporting obligations.

III. Material Fact Issues Under "Degree of Culpability" Factor

Resolution of a §12(j) case requires a determination as to "the degree of culpability involved." *Advanced Life Sciences*, 2017 WL 3214455 at *3; *Gateway International*, 2006 WL 1506286 at *4. Respondents must be allowed to present testimony and documentary evidence, and to subpoena supporting third-party evidence, to prove the following facts material to this decisional factor.

Culpability for the lapse in Respondents' periodic reporting rests at Hayman's doorstep, not that of Respondents. While Hayman made an illegal fortune at the expense of investors in UDF, Hayman's scheme deliberately and purposefully thwarted UDF's extensive efforts to engage auditors to allow it to resume periodic reporting, as described below. Each current or prospective auditor felt Hayman's barrage.

Grant Thornton. Following Whitley Penn's declination, UDF promptly began a search for a new audit firm. Over the next two months, UDF approached EY, PwC, KPMG and Grant Thornton. UDF proceeded with Grant Thornton as its new auditor. Grant Thornton thereupon met extensively with UDF and assembled an engagement team in preparation for being formally engaged as auditors. This would have allowed UDF to continue its periodic reporting.

As noted above, however, Hayman launched its UDFExposed website containing material misrepresentations about UDF in early February, whereupon UDF stock dropped sharply. Hayman's Bass followed up with a 2/12/2016 press interview calling UDF a Ponzi and comparing it to Madoff. After communicating with Hayman, the FBI executed a search warrant at UDF headquarters with a television crew recording the event.

Shortly after, Grant Thornton succumbed to the pressure of Hayman's well-orchestrated campaign against UDF. Grant Thornton's advised UDF that it had decided not to become UDF's auditor. Culpability for the loss of Grant Thornton lay squarely with Hayman, not UDF. As noted above, having created the situation through a targeted campaign against UDF, Hayman's Bass commented that it was "great" that UDF did not have an auditor. The inability to engage an auditor made it impossible for UDF to continue its periodic reporting.

EisnerAmper. With Grant Thornton deciding not to proceed as UDF's auditor, UDF proceeded to contact Crowe Horwath and other audit firms for possible engagement. In June 2016, UDF engaged EisnerAmper as its new auditor, and disclosed the engagement on Form 8-K. However Hayman proceeded to magnify its culpability for blocking UDF's audit process by

forwarding anonymous and other misleading submissions directly to UDF's new auditor EisnerAmper, which continued to have the intended effect of impeding the audit.

Over the ensuing months, as detailed above, Hayman continued to post false statements on its UDFExposed website. Hayman particularly stressed its Ponzi allegations. These Hayman claims were also reported in the Dallas news media. Hayman also used its professional marketing firm to craft a negative digital campaign specifically targeting "accounting/audit firm employees" through social media in the Dallas area.

On 9/29/2016, with Hayman's campaign against UDF in its 18th month, the FWRO issued Wells notices to UDF III, UDF IV and seven individuals associated with UDF, and a Wells notice to another individual on 10/14/2016. EisnerAmper thereupon advised that it would not move forward with its UDF audit work until after it had reviewed and fully considered the Wells submissions then being prepared.

In addition, EisnerAmper required UDF to engage a third party to review a select number of portfolio loans, together with historical loan narratives, on a quarterly basis from 12/31/2014 forward. This included assembling all loan underwriting documentation for that time period. In October 2016, UDF engaged Riveron Consulting as the third party to perform this additional work. The scope of the Riveron Consulting engagement was later expanded to include the entire loan portfolio.

The FWRO determined on 11/9/2016 to provide UDF with certain materials as "Wells discovery." After reviewing these materials, UDF filed its Wells submission on its due date, 12/23/2016. In mid-2017, the FWRO indicated that it was prepared to recommend a resolution that would not charge a scienter-based violation, that would not include any officer-and-director or other bars or suspensions, and that would conclude the matter as to UDF III, UDF IV and five individuals. UDF thereupon indicated that they would agree to settle, without admitting or denying, on this non-scienter basis.

In coming to this settlement recommendation, the FWRO necessarily rejected Hayman's relentless misrepresentations about UDF to federal officers, and then to UDF's investors and auditors. Contrary to what Hayman had been misrepresenting to federal officers, investors and auditors, UDF was not a "billion dollar house of cards," was not a billion-dollar "Ponzi" preying on retail investors, and was not a "significant bankruptcy risk" on the "verge of collapse."

The settled complaint, filed in July 2018, included non-scienter charges under Securities Act §§17(a)(2) and (3), and related non-scienter reporting, record-keeping and internal controls charges, alleging that UDF **(i)** had "not adequately disclosed" that UDF IV funds could be loaned to developers to use to pay down UDF III loans; **(ii)** "failed to adequately disclose the nature of multi-phase projects" that began with the acquisition of unimproved properties; and **(iii)** while UDF III's financial statements reflected general reserves, it failed to take a specific impairment

when "unlikely to fully collect on an approximately $80 million loan to its second largest borrower."

IV. Material Fact Issues Under "Efforts to Remedy" Factor

Resolution of a §12(j) case requires a determination as to "the extent of the issuer's efforts to remedy its past violations and ensure future compliance." *Advanced Life Sciences*, 2017 WL 3214455 at *3; *Gateway International*, 2006 WL 1506286 at *4. Respondents must be allowed to present testimony and documentary evidence, and to subpoena supporting third-party evidence, to prove the following facts material to this decisional factor.

During the course of proceedings that followed the conclusion of Hayman's manipulation campaign, UDF has engaged in continuing efforts to become current in its periodic reporting. On 6/2/2017, UDF met with EisnerAmper's Risk Management Office and its General Counsel's Office to discuss the FWRO's proposed non-scienter settlement. At this meeting, EisnerAmper advised that it was prepared to proceed, and that it would be able to rely on management's representations in connection with the audit, but only if the FWRO's charges remained non-scienter and did not ultimately result in any officer or director bars.

The FWRO discussed the non-scienter settlement terms and language with UDF on 7/5/2017, and both sides continued to work to finalize the non-scienter settlement. On 8/31/2017, the FWRO had UDF execute four-month tolling agreements, to 12/26/2017. The FWRO said it would send its settlement recommendation to the Commission during the week of 12/20/2017. Thereafter, the FWRO had UDF further toll for an additional eight months, to 3/26/2018, to 6/19/2018, and to 8/20/2018.

During Fall 2017, EisnerAmper received audit materials and was ready to proceed. Approximately eight months later, the FWRO obtained Commission approval of the non-scienter settlement on 6/18/2018. The FWRO filed the case on 7/3/2018, and the court entered the consent judgment on 7/31/2018. Following entry of the non-scienter consent judgment on 7/31/2018, UDF was for the first time since late 2015 able to obtain the audit it had consistently sought during Hayman's manipulation campaign – first from Grant Thornton and other firms UDF approached, and ultimately from EisnerAmper – and thus to again become current in its periodic reporting. However just a few weeks later, this proceeding was instituted on 9/24/2018.

Before and since this §12(j) proceeding was instituted, Respondents have been working hard to finalize their audited financials and become current in their periodic reporting. To assist in the completion of Respondents' audit workplan and become current in their filings, Respondents retained Riveron Consulting, an independent accounting consulting firm. Respondents and Riveron have been working to assemble comprehensive loan packages for every loan in UDF IV's and UDF V's respective portfolios. These loan packages comprise voluminous and detailed contemporaneous analyses, information and documentation. Efforts to compile auditable loan-related documentation were hampered by the FBI's seizure of documents

during its execution of a search warrant at Respondents' headquarters over three years ago, as described above.

Riveron Consulting has already examined the documentation for all 158 loans in the UDF IV portfolio, including the 59 loans outstanding as of 12/31/2017. Riveron Consulting has also examined the documentation for the 8 loans in the UDF V portfolio, including the 5 loans outstanding as of 12/31/2017. This thorough and time-consuming work required Riveron to prepare a consistent loan review package for each loan that includes loan agreements and modifications, appraisal reports, condensed loan timelines, loan rollforward, cash flows, and investment committee notes. Riveron Consulting has also been providing and will continue to provide assistance with technical accounting matters and financial reporting, as needed.

The events outside Respondents' control described above significantly impeded Respondents' ability to complete the auditable documentation and assemble the detailed backup support required to complete a multi-year audit. Despite these challenges, Respondents have made substantial progress towards finalizing the required auditable documentation for UDF IV and UDF V, and EisnerAmper has a designated team working on this engagement. EisnerAmper is continuing its work on audits and related quarterly reviews, including meetings with management on both UDF IV and UDF V; meetings with the audit committee for UDF IV; continuing field work for audits and reviews for UDF IV and V; finalizing procedures and reaching conclusions; coordination with management regarding review of SEC filings for UDF IV and UDF V; further meetings with the UDF IV audit committee; and finalizing the audit and issuing opinions for both UDF IV and UDF V.

Respondents will also continue to work to bring UDF III into current compliance at their earliest opportunity. In addition to the resources being prioritized to update reporting for the other two funds, UDF III presents different issues in large part due to the allegation in the settled enforcement case that UDF III should have recognized a specific loan allowance relating to a particular borrower's loan, in addition to its general reserve balance, and put the loan on non-accrual status with suspended income recognition as early as UDF III's 2013 Form 10-K. However Respondents will continue to work to overcome these challenges to assure that UDF III joins UDF IV and UDF V in compliance with the periodic reporting requirements.

V. Material Fact Issues Under "Credibility of Assurances" Factor

Resolution of a §12(j) case requires a determination as to "the credibility of ... assurances ... against further violations." *Advanced Life Sciences*, 2017 WL 3214455 at *3; *Gateway International*, 2006 WL 1506286 at *4. Respondents must be allowed to present testimony and documentary evidence, and to subpoena supporting third-party evidence, to prove the following facts material to this decisional factor.

On 11/9, 11/13, and 11/16/2015, Respondents filed Form 10-Q periodic reports for the period ended 9/30/2015. At that time, Respondents were, and had consistently been, current in

their periodic reporting. Its efforts to obtain audited financials and resume reporting throughout the Hayman onslaught described above and since that time show its good faith and the credibility of its assurances to remain in compliance with the periodic reporting requirements.

In advising on delinquency in periodic reporting, the Division of Corporation Finance's Financial Reporting Manual, §1320.4, informs registrants that ordinarily to become current an "omnibus" or "comprehensive" report is the proper method. The Manual says that "generally" the Division "will not issue comments asking a delinquent registrant to file 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."

Respondents are in the process of doing exactly this. Respondents' independent auditors EisnerAmper and Riveron Consulting are presently working to enable Respondents to promptly file the following with the Commission:

- An omnibus comprehensive annual report on Form 10-K for the fiscal years ended 12/31/2015, 2016, 2017 and 2018, with audited financial statements, including summarized unaudited quarterly information for 2017 and 2018; and

- Quarterly reports on Form 10-Q for the periods ended 3/31/2019 and 6/30/2019.

While issuers are regularly permitted to become current through such omnibus filings, this case is very different from the typical delinquent filing case. Here, as described above, it is especially appropriate to allow Respondents to use the omnibus approach and thus to become current without deregistration in view of unique circumstances not found in any prior late filing case the Commission has considered. An omnibus filing should be permitted here.

Respondents submit that suspension or deregistration would not be in the interest of investors. With Respondents working hard alongside respected independent professionals to become current in their periodic reporting, and doing so at their first opportunity to obtain audits following resolution of the Division's non-scienter enforcement action, Respondents submit that a suspension or deregistration would be extremely harmful to UDF's shareholders and to the public interest. Under these circumstances, the public interest would be better served by permitting UDF to become current and resume providing shareholders and the market with the information provided in periodic reports under the Exchange Act.

Conclusion

For the reasons above, the Commission should deny the Division's summary disposition motion. Respondents request that this matter be set for an evidentiary hearing in order to afford them an opportunity to present testimony and exhibits to establish their defenses, to subpoena third-party evidence, and thus to show that it is neither necessary nor appropriate to suspend or revoke the registration of any securities issued by Respondents.

Dated: April 29, 2019

/s/ William E. Donnelly
William E. Donnelly
(wdonnelly@mmlawus.com, 202.661.7011)
Stephen J. Crimmins
(scrimmins@mmlawus.com, 202.661.7031)
Murphy & McGonigle PC
1001 G Street NW, 7th floor
Washington DC 20001
Counsel for Respondents

Certificate of Compliance

The undersigned certifies that this brief contains 9576 words, based on the word-count function of the Microsoft Word software used to prepare the brief.

/s/ William E. Donnelly

Certificate of Service and Filing

Pursuant to Rule 150(c)(2), I certify that on April 29, 2019, I caused the foregoing to be sent: **(1)** By **courier service (original and 3 copies)** directed to the Office of the Secretary, Securities and Exchange Commission, 100 F Street NE, Washington DC 20549-1090, with an electronic courtesy copy by **email** to apfilings@sec.gov. **(2)** By **email and express delivery service** directed to Keefe M. Bernstein and David Whipple, Fort Worth Regional Office, Securities and Exchange Commission, 801 Cherry Street, Suite 1900, Fort Worth, TX 76102, and BernsteinK@sec.gov and WhippleDa@sec.gov.

/s/ William E. Donnelly