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 REPLY IN SUPPORT OF ITS MOTION FOR SUMMARY DISPOSITION

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The Division of Enforcement ("Division") submits this Reply in Support of Its Motion for Summary Disposition ("DOE's Motion") against 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.

A. Respondents' Procedural Objection Has No Merit

Respondents make the implausible claim that it "does not comport with due process" for the Commission to hear this case in the first instance. They appear to acknowledge, however, as they must, that the Commission is statutorily authorized to institute this proceeding (*see* 15 U.S.C. § 78*l*(j)) and that "[b]y law, the Commission may itself preside over" any administrative proceeding that it institutes. *Lucia et al. v. SEC*, 138 S. Ct. 2044, 2049 (2018); 17 C.F.R. 201.110. Nevertheless, Respondents insist—while citing no authority in support of their claim—that it was somehow unlawful for the Commission to exercise that authority here instead of assigning the case to an administrative law judge ("ALJ").

The crux of their argument seems to be that the Commission is unequipped to render decisions in disputed, fact-intensive cases. But Respondents concede that the Commission regularly does just that when it exercises *de novo* review in adjudicative proceedings. And the fact that, in some cases, an ALJ may have first considered the record and reached an initial decision in no way minimizes the independent work the Commission does when determining whether to "affirm, reverse, modify, set aside or remand for further proceedings, in whole or in part," the ALJ's law judge's initial decision. 17 CFR 201.411(a); *see also* 5 U.S.C. 557(b) ("On appeal from or review of the initial decision, the agency has all the powers which it would have in making the initial decision . . . ."); *Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *24-25 & n.151 (Sept. 17, 2015) (emphasizing the Commission's "thorough, de novo review of the

record"). Respondents offer no reason why the Commission cannot exercise that same thorough, thoughtful judgment in this case.

Respondents also assert that requiring them to proceed before the Commission violates equal protection because it disadvantages them relative to other respondents whose cases the Commission has assigned to an ALJ. The Commission has stated repeatedly that such "class-of-one" equal protection claims are "not legally cognizable." *See Timbervest, LLC*, Advisers Act Release No. 4197, 2015 WL 5472520, at *28-29 (Sept. 17, 2015); *Mohammed Riad & Kevin Timothy Swanson*, Release No. 4420, 2016 WL 3226836, at *50 (June 13, 2016); *Harding Advisory LLC and Wing F. Chau*, Release No. 3796, 2014 WL 988532, at *6 (Mar. 14, 2014) ("facially defective").[1] As the Supreme Court has explained, there "are some forms of state action . . . which by their nature involve discretionary decisionmaking based on a vast array of subjective, individualized assessments." *Engquist v. Oregon Dep't of Agric.*, 553 U.S. 591, 594 (2008). In those cases, "treating individuals differently is an accepted consequence of the discretion granted" and "allowing a challenge based on the arbitrary singling out of a particular person would undermine the very discretion that such state officials are entrusted to exercise." *Id.* The Commission has explained that its selection among lawful and authorized choices for adjudicating enforcement actions reflects just such a "discretionary decision." *Timbervest*, 2015 WL 5472520, at *29.

Even if this claim were cognizable, however, it would fail as a factual matter because Respondents do not allege that they have been treated differently than similarly situated persons. Indeed, they expressly acknowledge that this case is one of many instituted in recent months under

[1] Although these orders are no longer precedential following the Supreme Court's resolution of the Appointments Clause issue in *Lucia v. SEC*, 138 S. Ct. 2044 (2018), and the D.C. Circuit's subsequent remand of those cases to the Commission, the Commission's reasoning on the separate legal questions raised here remains persuasive.

Section 12(j) ("almost a hundred" since August 2018) in which the Commission has assigned the proceeding to itself in the first instance.

B. Respondents Have Not Raised a Genuine Issue of Material Fact

"Not every alleged factual dispute precludes summary disposition. To prevent summary disposition, the opposing party must present facts demonstrating a genuine issue of fact that is material to the charged violation." *Absolute Potential, Inc.*, Exchange Act Rel. No. 71866, 2014 SEC LEXIS 1193, at *20-21 (April 4, 2014) (internal citation omitted). For this reason, and as detailed in the DOE's Motion, summary disposition revoking a respondent's registration under the *Gateway*[2] factors is appropriate where, as here, there is no dispute that the registrant has failed to comply with Section 13(a) of the Securities Exchange Act of 1934 ("Exchange Act"). (DOE's Motion, pp. 8, 10, citing cases.)

Indeed, Respondents' Opposition does not dispute any facts material to the determination at hand—specifically, that Respondents have failed to file any periodic reports for approximately three years in repeated violation of Section 13(a) of the Exchange Act and have not cured the deficiencies. Instead, Respondents argue that the Commission should excuse their protracted deficiencies, alleging that several years ago a short seller impeded their efforts to obtain audited financial statements. As set forth in the DOE's Motion and in the Division's Opposition to Respondents' Motion for Summary Disposition ("DOE's Opposition"), these allegations, even if proven as true, do not as a matter of law warrant a lesser sanction than revocation under settled Commission precedent that has rejected such attempts to blame third parties. (DOE's Motion, pp. 16-17; DOE's Opposition, pp. 10-12.)

Further, Respondents' Opposition misapplies the *Gateway* factors, all of which support revocation as a matter of law:

[2] *Gateway Int'l Holdings, Inc.*, Exchange Act Rel. No. 53907, 2006 SEC LEXIS 1288 (May 31, 2006) ("*Gateway*").

Seriousness of the Violations. It is undisputed that Respondents have repeatedly violated Section 13(a) of the Exchange Act by failing to file *any* periodic reports since filing Forms 10-Q for the period ended September 30, 2015, more than three-and-a-half-years ago. Thus, Respondents' violations are extremely serious. (DOE's Motion, p. 11, citing cases.) Respondents' Opposition purports to address this factor by detailing the alleged misconduct of the short seller. (Respondents' Opposition, pp. 4-14.) The short seller's conduct is not relevant to whether the violations themselves were serious.

Recurrent Violations. It is undisputed that Respondents have violated Section 13(a) of the Exchange Act numerous times, with *each* Respondent now having failed to file *13* periodic reports. Thus, the violations are recurrent. (DOE's Motion, p. 11, citing cases.) Respondents' Opposition again purports to address this factor by raising the alleged misconduct of the short seller (Respondents' Opposition, pp.14-15.), which is not relevant to the issue of whether the violations themselves were recurrent.

Degree of Culpability. It is undisputed that Respondents knew of their reporting obligations yet failed to file numerous periodic reports. Thus, Respondents have evidenced a high degree of culpability. (DOE's Motion, p. 12, citing *Gateway* and other cases.) Respondents' Opposition again purports to address this factor by raising the alleged misconduct of the short seller. (Respondents' Opposition, p. 16.) Respondents' argument is misplaced. The issue is not whether Respondents acted with bad intent—no showing of scienter is necessary to establish a violation of Section 13(a) of the Exchange Act—but whether Respondents are responsible for failing to make required filings, which is undisputed. Further, as discussed in the DOE's Motion and the DOE's Opposition, Respondents' attempts to blame third parties for their failure to file

periodic reports cannot absolve them of this responsibility. (DOE's Motion, pp. 16-17; DOE's Opposition, pp. 10-12.)

Sufficient Efforts to Remedy Past Violations. To demonstrate sufficient efforts toward remedying filing delinquencies, the issuer must, at a minimum, file all of its past-due reports, and those filings must not contain any material deficiencies. (DOE's Motion, pp. 12-13, citing cases.) It is undisputed that Respondents have not filed *any* of their delinquent periodic reports. Respondents' Opposition claims that Respondents have been working on the filings but have been stymied by the short seller's campaign and the Commission's investigation. (Respondents' Opposition, pp. 18-19.). These are not legitimate excuses and in any event do not credibly explain Respondents' continued failure to file any of the delinquent reports years later. (DOE's Motion, pp. 17-18.) Moreover, to whatever extent Respondents purport to have made efforts toward remedying their past violations, the investing public still does not have access to past and current audited financial information.

Credibility of Assurances Against Future Violations. Respondents do not provide, and cannot provide, any credible assurances against future violations. Respondents state, with *no evidence* in support, that Respondents intend to make an omnibus filing at some undetermined point in the future. Respondents have failed to keep promises about bringing their filings current before, including to Nasdaq. (Respondents' Motion, pp. 19-20.) Even if Respondents make the purported omnibus filing, it would be deficient as proposed, because it would not include any quarterly information for 2016 and only summary quarterly information for 2017 and 2018. (DOE's Opposition, pp. 15-16.) Commission rules also do not provide for or authorize Respondents to make a comprehensive filing instead of filing all of their delinquent periodic reports. (*Id.*)

C. A Hearing Is Not Warranted

Respondents request a hearing, arguing that Respondents must be allowed the opportunity to present testimony and documentary evidence and to subpoena third-party evidence. (*See, e.g.,* Respondents Opposition, pp. 4, 14.) A hearing is unnecessary. As set forth in the DOE's Motion, even if all of Respondents' factual allegations were proven true at a hearing, there would be no genuine dispute as to any material fact pertinent to the Court's decision.

Furthermore, Respondents had the opportunity to present affidavit testimony and documentary evidence in support of their Motion for Summary Disposition and Opposition to the DOE's Motion. Respondents submitted no evidence to controvert any of the Division's summary-disposition facts. The only evidence Respondents submitted was the Declaration of Hollis Greenlaw, which does not provide any evidentiary support to Respondents on the relevant issues—Respondents' failure to file its periodic reports or to cure the deficiencies.

Finally, Respondents have not articulated what third-party evidence they are seeking, much less how it could be material to a decision in this matter. The Division assumes that Respondents are seeking to subpoena the third-party short seller. More information about what the short seller did or did not do to Respondents in 2015 and 2016 would have no impact on the application of the *Gateway* factors.[3]

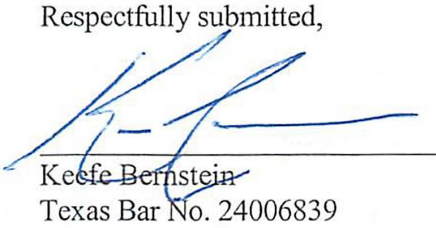
D. Conclusion

For the reasons set forth above and in the DOE's Motion and Opposition, the Division respectfully requests that the Commission grant its Motion for Summary Disposition and revoke the registration of each class of Respondents' securities registered under Section 12 of the Exchange Act.

[3] The Division suspects Respondents' request to subpoena the short seller in this proceeding may have more to do with UDF's pending civil litigation involving the short seller.

Dated: May 13, 2019

Respectfully submitted,



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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 May 13, 2019, by the method indicated:

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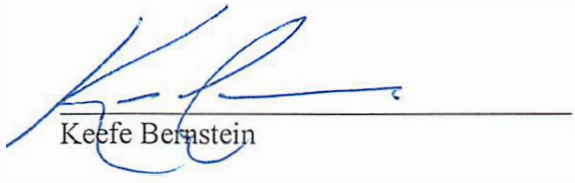
In addition, an electronic courtesy copy of this filing was emailed to APFilings@sec.gov.



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