

U.S. SECURITIES AND EXCHANGE COMMISSION

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Matter of

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

A.P. No. 3-18832

Respondents.

MOTION AND SUPPORTING MEMORANDUM

Dated: March 28, 2019

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MOTION AND SUPPORTING MEMORANDUM

Respondents move for summary disposition under Rule 250, as directed by the Commission's 2/26/2019 order. The points supporting this motion are set forth below and in the accompanying declaration of Hollis M. Greenlaw and exhibits.

I. Respondents Should Be Allowed to Become Current in Reporting

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. The Division of Enforcement seeks deregistration of Respondents' securities under Securities Exchange Act §12(j) for delinquency in reporting thereafter.

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 below, 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.

At the heart of any fair consideration of this matter is the indisputable fact that, 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 circumstances must be considered by way of both defense and mitigation, and they demonstrate that a suspension or revocation of registration is not necessary or appropriate in this matter. The Commission has made plain that not every late filing case requires a §12(j) sanction. Instead, in considering an appropriate remedy, the Commission "will consider, among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and 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). "These factors are non-exclusive, and no single factor is dispositive." *Id.*

We will discuss Hayman's false and misleading statements to federal law enforcement to perpetrate its manipulation (**Point II** below); Hayman's false and misleading statements to investors and auditors (**Point III**); Hayman's misconduct that effectively blocked Respondents' repeated efforts to get audits (**Point IV**); Respondents' current ability to obtain audits, which are presently underway (**Point V**); and finally the Commission's articulated factors that under these unprecedented circumstances should not result in deregistration, but should instead result in permitting Respondents to efficiently become current with the omnibus filing that is already in progress (**Point VI**).

II. Hayman's Misrepresentations to Federal Agencies While Secretly Building a Massive UDF Short Position

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 has no short position in UDF IV before 1/1/2015. But by 3/31/2015, Hayman has built a 1,215,964 share short position in UDF. [Ex.3]¹ (In building its short far beyond this initial position, Hayman works 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.)
- **3/19/2015:** Hayman delivers a 17-page presentation on UDF to FWRO and USAO. Hayman falsely states 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 sets up a 4/3/2015 call with FWRO, and internally discusses 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 meets with FWRO, FBI, USAO. [Exs.5, 10] Hayman delivers a misleading 80-page presentation on UDF that repeats the false statements in its 3/19/2015 presentation. But Hayman adds additional false claims, including that the “development sites which secure UDF IV loans” show that “the loans are significantly undercollateralized and would be impaired by potentially 50-75% under reasonable valuation parameters”; that the explanation is “the relationship (and conflict of interest) that exists 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 has a 5-hour meeting with FBI. After presenting “specific items” that Bass wanted conveyed, Hayman’s representative reports back that FBI is “very engaged.” Hayman’s short position reaches 1,767,471 shares (a \$30.6M position) through additional trading during the meeting with the FBI. [Ex.7] Hayman also emails a 61-page “revised presentation” to FWRO. [Ex.8]
- **6/2-6/15/2015:** Hayman meets at FWRO on 6/2/2015. [Ex.9] Hayman emails 13-page presentation to FWRO on 6/12/2015. [Ex.11] Hayman has an “update” call with FWRO on 6/15/2015, and misrepresents UDF V loan as an example of UDF’s Ponzi-like structure and sends the same false and misleading information to the FBI. [Exs.5, 13, 14, 78]

¹ Exhibits cited herein are identified and incorporated in, and furnished with, the accompanying 3/28/2019 Hollis M. Greenlaw Declaration.

- The 6/15/2015 communication illustrates 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 contrasts what it portrays as the "success" of the adjacent Wildridge development to make it appear that Shahan Prairie was headed for failure. Hayman falsely states that Wildridge is being developed in just 3 years when in truth it was already held for 11 years (like Shahan), and presents photos of a corner of the Shahan development to suggest no activity when available aerials show substantial grading for development at Shahan.
- **6/23-6/25/2015:** Hayman meets twice with FBI and provides additional false information. [Ex.5] Again Hayman is shorting around the meetings with the FBI, and by 6/30/2015, Hayman's short position jumps to 2,067,513 shares. [Ex.3]
- **7/31/2015:** Hayman's UDF short position reaches 2,242,513 shares. [Ex.3] Hayman separately begins shorting a "basket" of other securities that Hayman expects will be impacted by a negative UDF event." [Exs.16, 17]
- **8/18/2015:** Hayman internally reports that its "UDF basket" of short positions in non-traded REITs, expected to "react/trade in sympathy following a UDF event," has reached \$58.2M (5.6% of its AUM), and that it has 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 has call with FWRO on 8/26/2015. [Ex.5]
- **8/31/2015:** FWRO meets with UDF auditor Whitley Penn, questions whether UDF has misled Whitley Penn about a particular spreadsheet relating to one borrower, and prohibits Whitley Penn from asking UDF questions about the spreadsheet. Whitley Penn adds six additional procedures to its 3Q2015 review as a result of this meeting, but does not withdraw prior opinions.
- **9/20/2015:** Hayman planning for its DDO Fund to buy UDF assets after a negative UDF "event." Plan is 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 holds pitch meeting for its DDO Fund. Pitch premised on purchasing UDF assets cheaply after SEC puts UDF into bankruptcy/receivership. Hayman says its "well planned strategy" will 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 is filing its Forms 10-Q, Hayman provides FWRO with draft letter that Hayman plans to send anonymously to UDF's auditors, Whitley Penn. Draft letter given to FWRO misrepresents, 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 files its quarterly reports on Form 10-Q. Days later, Whitley Penn advises UDF that it will not stand for reappointment as UDF's auditor. UDF immediately begins approaching other audit firms to engage so that UDF can remain current in its periodic reporting. UDF ultimately selects Grant Thornton to be its new auditor.

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.

III. Hayman's Misrepresentations to UDF Investors and Auditors While Cashing in on Its Massive UDF Short Position

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 sends 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 sends a misleading presentation to a Dallas-based news magazine, and has a 90-minute follow-up call to the reporter on 11/20/2015. [Exs.26, 29]
- **12/4/2015:** Hayman delivers a revised version of its anonymous false and misleading letter to UDF's former auditor, Whitley Penn. Hayman copies Wall Street Journal, telling reporter that letter "will likely become public next week," and that the public release "will also be done anonymously." Also copies SEC and FBI. [Exs.31, 32, 33]
 - In the anonymous letter to Whitley Penn, Hayman challenges 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 questions whether auditor "intentionally, recklessly or negligently ignored obvious red flags." Hayman misrepresents, 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 stands at 3,437,250 shares [Ex.3], and it holds 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 publishes 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 sends the link to multiple media outlets. Hayman also anonymously posts its 12/4/2015 anonymous letter to the auditor Whitley Penn. [Exs.34, 35] UDF stock price immediately drops 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 previews an advance copy of the post to the FWRO, FBI and USAO. On the evening of 12/9/2015, the FWRO emails back “Thank you for the heads up.” (Hayman otherwise remains anonymous in its series of posts attacking UDF until Hayman launches its UDExposed 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 publishes four more anonymous posts and provides them to FWRO and FBI. Posts call UDF a “Ponzi scheme,” describe UDF as “underwater,” allege “potential misappropriation,” question whether UDF was a “legitimate lender,” claim UDF’s largest borrower “may be insolvent,” and question “veracity” of UDF’s auditors. [Exs.36, 40, 42]
 - Hayman’s 12/11/2015 post compares UDF’s “scheme” to “Enron, Madoff, and Stanford,” and contains multiple material misrepresentations about the status of several developments funded by UDF. Its 12/14/2015 post recaps prior misleading posts with links. Its 12/15/2015 post contains material misrepresentation about UDF and its largest borrower.
- **12/23/2015:** Hayman begins 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 suggests monitoring online and offline conversations to “control message.” [Ex.43]

- **1/2016:** Hayman begins 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 identifies existing outreach to FWRO and FBI to be used as what it calls “3rd Party Influencers.” Hayman registers “UDFExposed.com” site. [Exs.43, 44, 45]
 - **1/4/2016:** Hayman discusses 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 explains 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 planning detailed “media blitz” around “launch day” for Hayman’s UDFExposed website. [Ex.47]
- **1/29/2016:** Hayman previews the “udfexposed” website with the FBI and informs 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 goes live. Hayman’s “plan is to promote the website tomorrow and begin media outreach following Kyle’s appearance on CNBC.” Hayman has “communicated our plans to the SEC and FBI” (which executes a search warrant at UDF’s offices two weeks later, on 2/18/2016). [Exs.48, 49]
 - On its UDFExposed website, Hayman finally sheds its anonymity and refers to UDF as a “billion dollar house of cards” it is “exposing.” Says it is shorting UDF IV based on Hayman’s “research” showing it is a billion-dollar “Ponzi” preying in retail investors. Says UDF is a “significant bankruptcy risk” that is on the “verge of collapse.” Also posts several tabloid-style “research” reports that expand on its material misrepresentations. [Ex.50]
 - Hayman publicly states *for the first time* that it is short UDF IV stock and that it will profit if the price declines
 - Hayman kicks 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 expresses 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 begins what it calls its “massive push” against UDF, and instructs Hayman personnel to “make sure each and every plaintiffs attorney gets the website” UDFExposed.com. The “massive push” includes buying Google marketing links to drive UDF search traffic to Hayman’s UDFExposed website. [Ex.52]
- **2/5/2016:** Hayman succeeds in getting wide press coverage of its UDFExposed.com misrepresentations. The market reacts quickly as UDF stock drops in that single day from \$10.13 to a low of \$5.21, a further \$151M decline in market cap.
 - Hayman emails 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 comments “Bombs away.” [Tab 53]
- **2/12/2016:** Hayman’s Kyle Bass is quoted extensively in The Dallas Morning News. Claims Hayman made big profits shorting UDF IV, and that his actions stopped UDF V from completing a large capital raise, calling it his “civic duty.” Compares UDF’s denials of Hayman’s allegations to how Bernie Madoff would respond.
- **2/16/2016:** Hayman publishes 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 executes search warrant at UDF’s headquarters. Media is 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 appears on television news, in addition to print media coverage. Nasdaq suspends 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, advises UDF that it has determined not to move forward with its preparations to become UDF’s auditor.

- **5/12/2016:** Hearing that UDF has not yet been able to formally engage a new auditor, Hayman's Bass responds that this "is a great sign," and expresses frustration that UDF has not been delisted. [Ex.55]
- **6/8/2016:** UDF announces that it has engaged EisnerAmper as its new auditors. [Ex.57] Several days later, EisnerAmper gets an anonymous package containing Hayman's UDFExposed.com materials [Ex.59].
- **8/11/2016:** Hayman continues efforts to block UDF from getting audited financials needed for periodic reporting. Hayman's PR firm Edelman circulates 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 will 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 publishes 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 include, "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 prepare 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 writes 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 announces that Nasdaq has granted an extension to 10/17/2016. [Ex.85] Kyle Bass emails the Hayman analyst, "We will discuss UDF at 1 pm today Parker." [Ex.86] Kyle Bass then sends a calendar invitation with the subject, "KB, PL, JL to discuss UDF listing Status and next steps." [Ex.87]
- **9/29/2016:** FWRO issues Wells notices to UDF and individuals.

- **10/4-10/12/2016:** After UDF's Nasdaq deadline is extended to 10/17/2016, Hayman takes further actions to impede UDF's audit process and influence Nasdaq's listing decision.
 - **10/4/2016:** Hayman engages law firm Morgan Lewis to send a letter to Nasdaq on its behalf regarding the continued UDF halt. The letter makes 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 resumes 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 covers its short position, reaps approximately \$48M in profits, and ceases its campaign against UDF.

Hayman's campaign against UDF thus 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 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 FWDO on 4/12 and 4/26/2016, and to the FBI and USAO on 5/11/2016.

IV. Hayman Manipulation's Impact on UDF's Periodic Reporting

While Hayman made an illegal fortune at the expense of investors in UDF, Hayman's scheme also 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.

Just a few weeks later, in April, Grant Thornton responded to Hayman's above-described multi-faceted campaign against UDF. Grant Thornton's response was to advise UDF that it had made a determination not to move forward with the steps it had taken to become UDF's auditor. This left UDF without an auditor, which it would obviously be required to have in order 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 continued to interfere with 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 Hayman also 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 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, IDF 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 in 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.”

V. With Hayman’s Manipulation Campaign Concluded, the Audit UDF Has Consistently Sought Is Now Possible

On 6/2/2017, as part of UDF’s continuing efforts to become current in its periodic reporting, 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. Both EisnerAmper and Riveron Consulting remain engaged, and both are at work on the audit and related services.

VI. Under the Commission's Decisional Factors for §12(j) Cases, There Should Be No Deregistration of Respondents' Securities

Under the particular facts and circumstances described above, and with an audit underway, deregistration or suspension of Respondent's securities would be unnecessary and inappropriate. In deciding §12(j) cases, the Commission has said it "will consider, among other things, the seriousness of the issuer's violations, the isolated or recurrent nature of the violations, the degree of culpability involved, the extent of the issuer's efforts to remedy its past violations and ensure future compliance, and 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).

"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.

In the factors discussed in *Advanced Life Sciences* and other cases, the Commission has made plain that it does not view Section 12(j) as a strict liability provision. Instead, consistent with due process, the Commission requires each Section 12(j) case to be resolved based on a careful consideration and weighing of the particular evidence presented against clearly articulated factors. In this respect, the Commission has confirmed that its Section 12(j) cases are part of the Commission's and the courts' longstanding approach to administrative adjudication illustrated in cases like *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).

(1) Seriousness, Recurrence and Culpability Factors. Under the unique facts presented here, these three factors do not warrant deregistration. 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. After: the FWRO's Wells discovery (11/9/2016), 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), UDF could finally get an audit. But a few weeks later, on 9/24/2018, this §12(j) proceeding was instituted.

Under these circumstances, no issuer could have done more to get an audit and become current in its periodic reporting. These untiring efforts are the opposite of the “serious” and “recurrent” and “culpable” behavior that results in a §12(j) sanction. These unique facts and circumstances distinguish this case from *Matter of Eagletech Communications, Inc.*, 2006 WL 1835958 (2006), which may be the only other Section 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 then resulted in a Constitutional “taking” without due process. However the Commission observed, albeit without a formal finding, that the issuer there actually stopped its periodic reporting while itself “experiencing extreme financial difficulties at the time.” *Id.* at *1. Here as discussed in detail above, 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. Nothing like this has ever been seen in a Section 12(j) proceeding.

(2) Remedial Efforts Factor. Before and since this 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.

(3) Credibility of Assurances Factor. 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 grant Respondents' summary disposition motion. If Respondents' motion is not granted, they request that this matter be set for an evidentiary hearing in order to afford Respondents an opportunity to present testimony and exhibits to establish their defenses, and thus to show that it is neither necessary nor appropriate to suspend or revoke the registration of any securities issued by Respondents.

Dated: March 28, 2019

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Certificate of Compliance

The undersigned certifies that this brief contains 7482 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 March 28, 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