CAUSE NO. CC-17-06253-C

UNITED DEVELOPMENT FUNDING, L.P., A DELAWARE LIMITED PARTNERSHIP; UNITED DEVELOPMENT FUNDING II, L.P., A DELAWARE LIMITED PARTNERSHIP; UNITED DEVELOPMENT FUNDING III, L.P., A DELAWARE LIMITED PARTNERSHIP; UNITED DEVELOPMENT FUNDING IV, A MARYLAND REAL ESTATE INVESTMENT TRUST; UNITED DEVELOPMENT FUNDING INCOME FUND V, A MARYLAND REAL ESTATE INVESTMENT TRUST; UNITED MORTGAGE TRUST, A MARYLAND REAL STATE INVESTMENT TRUST; UNITED DEVELOPMENT FUNDING LAND OPPORTUNITY FUND, L.P., A DELAWARE LIMITED PARTNERSHIP; UNITED DEVELOPMENT FUNDING LAND OPPORTUNITY FUND INVESTORS, L.L.C., A DELAWARE LIMITED LIABILITY COMPANY	§	IN THE COUNTY COURT
Plaintiffs,	§	AT LAW NO. 3
v.	§	
J. KYLE BASS; HAYMAN CAPITAL MANAGEMENT, L.P.; HAYMAN OFFSHORE MANAGEMENT, INC.; HAYMAN CAPITAL MASTER FUND, L.P.; HAYMAN CAPITAL PARTNERS, L.P.; HAYMAN CAPITAL OFFSHORE PARTNERS, L.P.; HAYMAN INVESTMENTS, LLC	§	
Defendants.	§	DALLAS COUNTY, TEXAS

PLAINTIFFS' AMENDED OBJECTION TO SPECIAL MASTER ORDER

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Plaintiffs United Development Funding, L.P., et al. (collectively, "UDF") file this amended objection in order to amend and supplement their prior objection of May 11, 2018 to the Special Master Order dated May 9, 2018, which was issued pursuant to this Court's Order Appointing Special Master dated May 7, 2018.

I. INTRODUCTION

Two years ago, UDF moved to compel the production of documents on the privilege log of Defendants J. Kyle Bass, et al. (collectively, "Hayman"), with the hearing on Hayman's TCPA motion to dismiss looming on May 21, 2018. At the April 30 hearing on UDF's motion to compel, this Court acknowledged the importance of *in camera* review and how the "expedited" nature of TCPA motions made that difficult. The Court proposed the use of a special master for this *in camera* review. Hayman delayed execution of the order of reference until May 7, and then the Special Master (Justice Whittington, ret.) had to rush out a one-page order on May 9 that implicitly denied UDF's motion, but without any reasoning.

UDF filed a brief objection to the Special Master Order on May 11 and, at the outset of the TCPA hearing on May 21, this Court observed the order's lack of reasoning, stating: "But talk about not efficient is to have a special master look at it, and then he knows what's contained therein, and then he doesn't explain it or break it down." Indeed.

While under the time pressure of the TCPA proceedings, this Court was inclined to remand the matter to the Special Master. Since then, UDF has prevailed before the Court of Appeals in a devastating 47-page opinion and before the Supreme Court in a denial of Hayman's petition for review. Now, both efficiency and the interest of justice counsel that this Court perform the *in camera* review as it originally intended to do, but for the time constraints. As this Court must perform de novo review of the Special Master's *in camera* review, doing *in camera*

review twice would be a pointless extra step—especially given that the Special Master has undoubtedly forgotten the whole matter while Hayman's futile appeal wasted two years.

After *in camera* review, the Court should make the following findings:[1]

First, Hayman waived any privilege by sending them to at least ten employees at a giant public relations company, Edelman; disclosure to such non-clients waives any privilege. While no Texas case addresses waiver by disclosure to a public relations company, courts outside Texas have regularly found waiver—particularly where, as here, the PR firm was hired for general public relations, not to help outside counsel with pending litigation. The Special Master Order failed to address this issue.

Second, emails exclusively between Hayman's *non-attorney* employees, such as Parker Lewis and Kyle Bass, are not privileged absent a showing that the communication was made in connection with the rendering of legal advice. Here, the large number of emails between these two non-attorneys claimed as privileged is highly unusual, and neither Hayman's privilege log nor its affidavits provide any factual basis for the claim of privilege. The Special Master Order failed to address this issue.

Third, internal Hayman emails do not become privileged merely because a copy was sent to Chris Kirkpatrick. Two years ago, Bass swore that Kirkpatrick (who curiously submitted no affidavit) "served only in the capacity of a legal adviser." However, in interrogatory responses served post-remand, Hayman has belatedly revealed that Kirkpatrick was one of three employees (besides Bass and Lewis) who *contributed content to the anonymous posts and website at issue in this case*. As that is the subject matter of this case, his work on the disparaging posts should not be hidden behind a wall of privilege. The Special Master was not aware of this new evidence.

[1] In a separate motion, UDF is also moving to compel production of the allegedly privileged documents under the crime-fraud exception. The crime-fraud motion is being filed post-remand.

The Court of Appeal has found merit in UDF's claims, and this Court should ensure that the privilege log is not used improperly to shield evidence. Hayman has $60 million in reasons to cover up these emails; the Court should not let them get by with it.

II. BACKGROUND

A. Hayman aggressively avoided producing documents.

In response to court-ordered discovery, Hayman initially withheld more documents than it produced. *See* Declaration of Jonathan E. Sommer in Support of Plaintiffs' Amended Objection to Special Master Order ("Sommer Decl."), ¶ 1. When UDF filed a motion to compel, Hayman reluctantly produced more than half of the allegedly "privileged" documents. *Id.* Many of these were critically important in defeating Hayman's TCPA motion—and would have never been seen absent the motion to compel. *Id.*

B. Hayman frustrated *in camera* review by the Court.

Similarly, Hayman initially refused to tender any documents for *in camera* review by the Court. Sommer Decl. ¶ 2. Consequently, UDF was forced to file a second motion to compel that sought an order requiring Hayman to produce the documents to the Court for *in camera* review. *Id.* At the eleventh hour, Hayman relented and agreed to bring the privileged documents to the hearing set for April 30, 2018. *Id.*

At the hearing, Hayman shuffled the 318 documents into "four stacks" that no longer matched its privilege log or UDF's motion to compel, and muddled the hearing by creating two stacks involving an outside law firm not at issue in UDF's motion. *Id.* ¶ 3, Ex. A at 8:8-17. Hayman even tried to prevent a full *in camera* review by unilaterally selecting only one "exemplar" of each of the four new stacks. *Id.* at 10:24-11:7. Hayman selected these "exemplars" as the best four documents they had for claiming privilege, a "good one" as Hayman's counsel put it. *Id.* at 10:25. No effort was made to identify for the Court the "bad ones." *Id.*

Presented with this ad hoc mess, the Court issued no order on the motion to compel. *Id.*

C. Hayman frustrated the Special Master's *in camera* review.

During the hearing, the Court expressed concern that it was "going to have to look at each and every one of the" documents to evaluate Hayman's privilege assertions and that the parties needed "to do this kind of quick" due to the "expedited" TCPA motion. Sommer Decl. ¶ 3, Ex. A at 14:9-10, 37:4-5, 37:11-15, 38:19-21.

The Court recommended using a special master. *Id.* at 37:4-8. Hayman's counsel promised: "We'll do it first thing, Judge. We'll get together and see." *Id.* at 37:9-10.

Hayman did not "do it first thing"; instead, Hayman threw up numerous roadblocks and sought to confuse the Special Master. *Id.* ¶ 4. First, Hayman misrepresented to the Special Master that (a) UDF had agreed and this Court had concluded that all 318 documents "could accurately be described in the following four categories" and (b) "Judge Montgomery concluded that all four exemplars [of the four stacks] were covered by privilege." *Id.* ¶ 4, Ex. B. Neither UDF nor the Court had done either. *Id.* As a result, an order of reference was not signed until May 7, 2018, a week later, stating that the Special Master Order shall be "filed and served by May 8, 2018, but in no event later than May 10, 2018." *Id.*

On May 9, the Special Master issued a one-page order with no reasoning. *Id.* ¶ 6, Ex. D.

On May 11, UDF timely objected to the Special Master Order. *Id.* ¶ 7, Ex. E. UDF asked the Court to review the withheld documents *in camera* under a de novo standard of review. *Id.*; *see also* Tex. R. Civ. P. 171.

On May 21, at the TCPA hearing, the Court expressed its frustration at the conclusory nature of the Special Master Order and suggested remanding the matter back to the Special Master for a detailed order. *Id.* ¶ 8, Ex. F at 6:5-10. That never occurred because the Court denied the TCPA motion, and Hayman appealed—staying the action.

D. Hayman frustrated resolution of the motion to compel by a futile TCPA appeal that stayed proceedings for almost two years.

In a resounding affirmance of this Court's order, the Court of Appeals found that "the prodigious quantity of details and specific fact allegations in [UDF's] pleadings and affidavits" stated a prima facie case. Sommer Decl. ¶ 9, Ex. G; *see also Bass v. United Dev. Funding, L.P.*, 05-18-00752-CV, 2019 WL 3940976, at *2 (Tex. App.—Dallas Aug. 21, 2019, pet. denied). Indeed, the Court of Appeal, much like a customer facing a "restaurant menu with too many offerings," had difficulty in choosing "which examples, and what level of detail, to include" in its opinion. *Id.* In adducing evidence supporting a rational inference as to damages, UDF had "gone much further than necessary" to show the merit in its case. *Id.* at *24. To reach its decision affirming this Court, the Court of Appeals reviewed "over 2,000 pages of pleadings, affidavits, and evidence" (*id.* at *2), including over 75 pages of emails that Hayman had withheld as privileged until UDF filed its motion to compel. Sommer Decl. ¶ 9, Ex. H.

After the Court of Appeals affirmed this Court, Hayman petitioned the Supreme Court for review. The Supreme Court denied review on March 13, 2020, and, on April 23 the mandate returned the case to this Court for further proceedings, including this amended objection.

III. LEGAL STANDARDS FOR REVIEW OF SPECIAL MASTER'S REPORTS

A. The Court should review the documents *in camera*.

Trial courts review objections to a Special Master's report de novo. *See Young v. Young*, 854 S.W.2d 698, 701 (Tex. App.—Dallas 1993, writ denied); *Martin v. Martin*, 797 S.W.2d 347, 350 (Tex. App.—Texarkana 1990, no writ). De novo review of a Special Master's report concerning a privilege log can only be carried out by this Court reviewing *in camera* the same documents the Special Master reviewed *in camera*. After de novo review, "[t]he court may

confirm, modify, correct, reject, reverse or recommit the report, after it is filed, as the court may deem proper and necessary in the particular circumstances of the case." Tex. R. Civ. P. 171.

A prima facie showing of privilege by affidavit does not relieve the Court of its duty to review *in camera* because *in camera* review can rebut a prima facie showing. *In re E.I. DuPont de Nemours & Co.*, 136 S.W.3d 218, 226 n.4 (Tex. 2004). Thus, to settle the question of privilege, an *in camera* review is required even if the party claiming privilege has made a prima facie showing: "if a party asserting privilege claims makes a prima facie showing of privilege and tenders documents to the trial court, the trial court must conduct an in camera inspection of those documents before deciding to compel production." *Id.* at 223. "The trial court abuses its discretion in refusing to conduct an in camera inspection when such review is critical to evaluation of a privilege claim." *Id.*; *accord In re Silver*, 540 S.W.3d 530, 539 (Tex. 2018); *Arkla, Inc. v. Harris*, 846 S.W.2d 623, 631 (Tex. App.—Houston [14th Dist.] 1993, no writ).

B. There is no reason for this Court to remand the matter to the Special Master so that the Special Master and this Court would then conduct *in camera* review twice.

Judicial economy favors the Court undertaking an *in camera* review now, rather than first requiring the Special Master to provide reasons for his one-page order from nearly two years ago. The Court can thereby avoid the inefficiency of requiring the Special Master to start his work all over again, followed by the Court performing the same *in camera* review. In so doing, the Court will also avoid the need to grapple with the legal effect of Hayman's misrepresentations to the Special Master concerning his purported duty to follow the Court's (nonexistent) ruling on four "exemplars." With time now available for the Court's review, efficiency favors an immediate *in camera* review by the Court.

IV. ARGUMENT

A. Disclosure to a PR firm, Edelman, waived any privilege.

After UDF filed a motion to compel, Hayman produced some (but not all) of its communications with its public relations firm, Edelman, which claims to be the world's largest public relations firm. Sommer Decl. ¶ 10. Edelman was not Hayman's trusted advisor, but rather was hired in the middle of Hayman's public relations assault on UDF. *Id*. At least ten Edelman employees across multiple offices conversed with many Hayman employees on sprawling email chains including large numbers of people—a fact that does not square with Hayman's claim that it had an expectation of maintaining its confidential attorney-client secrets. *Id.*

Edelman's lengthy Statement of Work makes no reference to the provision of legal services. *Id.* ¶ 10, Ex. K. Edelman was hired for media strategies to "control the narrative"; in more earthy terms, Edelman was hired as a public relations attack dog to help Hayman trash UDF's business and its stock price so Hayman could profit. *Id.* As an example, after UDF filed a motion to compel, Hayman belatedly produced a document off its privilege log revealing that Hayman and Edelman planned to boil down "summary concepts" that UDF was a Ponzi scheme with insolvent borrowers, which was "key if we want to communicate ***how this all translates to the pending impact to UDF's share price.***" *Id.* ¶ 10, Ex. I (emphasis added). Such a document goes straight to Hayman's malicious intent, and one can only imagine what Hayman-Edelman communications are still being improperly withheld.

By disclosing purportedly privileged information to this separate public relations giant, Hayman waived the privileged for any such communication to that third party. *Axelson v. McIhany*, 798 S.W.2d 550, 553-54 (Tex. 1990) (holding attorney-client privilege and attorney work product protection waived because of disclosure to the FBI, IRS, and the Wall Street Journal); *see generally* Tex. R. Evid. 511.

This PR firm was not hired by outside counsel to assist with pending litigation; there was no pending litigation when the emails were exchanged. Instead, in the context of "announcing its involvement" in the anonymous online posts that cut UDF's stock price in half in just two days, ***a non-lawyer at Hayman, Parker Lewis, invited Edelman to make a pitch to the lead hedge fund manager at Hayman, Kyle Bass***: "I think it will also be helpful if your team can share how other activist investors have approached similar situations; I think this context and playbooks from past experiences ***will help sell Kyle and our team on Edelman's value proposition.***" Sommer Decl. ¶ 10, Ex. J (emphasis added). That "value proposition," as shown by Edelman's Statement of Work, included "messaging and communications strategy," including "tactical plans to respond to information released by [UDF]," "[l]ocal and national media outreach to support Hayman Capital's position (on or off record)" and development of the website that would later become "UDFEXPOSED.COM." *Id.* ¶ 10, Ex. K. Thus, Edelman was pitching its public relations services directly to Kyle Bass, who is Hayman's hedge fund manager (not a lawyer) who led the efforts to disparage UDF's business.

Under these facts and Texas law, waiver should apply because: (1) Hayman hired Edelman to carry out its public attack on UDF, not to render legal services or assist in the rendering of legal services; (2) Edelman was pitching its services to the hedge fund manager, Bass, not to counsel, (3) no litigation existed, (4) the allegedly privileged material was not confined to one or two persons outside Hayman, but instead was widely disseminated to at least ten employees at Edelman spread across multiple offices in the United States, and (5) Edelman was not a longstanding trusted advisor, but instead "pitched" its services to Hayman for the first time in connection with and in the middle of the attack on UDF.

No Texas court has specifically considered whether disclosure of allegedly privileged material to a public relations firm waives privilege. In their opposition two years ago, Hayman cited *In re Monsanto Co.*, but that case did not concern any disputed question of waiver by disclosure to a public relations firm: "Because these affidavits were ***unchallenged***, we will not disclose these documents which were sent to an outside firm." *In re Monsanto Co.*, 998 S.W.2d 917, 932 & n.21 (Tex. App.—Waco 1999, no pet.) (emphasis added).

When confronted with similar facts, courts in other jurisdictions have regularly found waiver of privilege because public relations firms are not needed for a lawyer to render legal services; rather, public relations firms are hired to engage in media activities to burnish the client's image or assist in spreading the client's message to the public. *See*, *e.g.*, *Behunin v. Superior Court*, 9 Cal.App.5th 833, 848 (2017) (discussing cases from around the country and finding that "[t]he 'necessity' element means *more than just useful and convenient*, but rather requires that the involvement of the third party *be nearly indispensable or serve some specialized purpose* in facilitating the attorney-client communications") (emphasis added, citation omitted); *Egiazaryan v. Zalmayev*, 290 F.R.D. 421, 431 (S.D.N.Y.2013) (no privilege because public relations consultant "was not called upon to perform a specific litigation task that the attorneys needed to accomplish in order to advance their litigation goals—let alone a task that could be characterized as relating to the 'administration of justice.' Rather, *it was involved in a wide variety of public relations activities aimed at burnishing [client's] image*.") (emphasis added).

Nor does work product apply to public relations activities: "[T]he materials must result from the conduct of investigative or analytical tasks to aid counsel in preparing for litigation. Thus, public relations advice, even if it bears on anticipated litigation, [generally] falls outside the ambit of the work product doctrine. Additionally, the work product doctrine does not extend

to public relations activities even if they bear on the litigation strategy because *the purpose of the rule is to provide a zone of privacy for strategizing about the conduct of litigation itself, not for strategizing about the effects of the litigation on the client's customers, the media, or on the public generally*." *Egiazaryan*, 290 F.R.D. at 435 (emphasis added) (quotations marks and citations omitted). Under general Texas law, attorney work product protection is waived by disclosure. *See, e.g., Axelson*, 798 S.W.2d at 553-54 (waiver applied to assertion of attorney-client privilege and work product protection).

Not only is there waiver by disclosure, there is, of course, the threshold question of whether any privilege or protection attached in the first instance, before disclosure to Edelman. An *in camera* review will show that the Edelman emails were not intended as confidential attorney-client communications, and the primary motivating purpose for the Edelman emails was not anticipation of litigation such that work product protection would apply. Tex. R. Civ. P. 192.5(a)(2); *In re Maher*, 143 S.W.3d 907, 912 (Tex. App.—Fort Worth 2004, no pet).

In sum, the Court should find, for all Edelman emails, that Hayman waived any privilege or protection by unnecessary disclosure to at least ten Edelman employees across multiple offices—persons who Hayman had just met—in aid of Hayman's media assault on UDF. Edelman was engaged in general public relations work, and there is no evidence Edelman was indispensable to any lawyer rendering legal advice or involved in strategizing about the conduct of litigation. Indeed, there is no meaningful explanation at all about how Edelman was "necessary" for counsel to advise Hayman. If the Court does not find waiver for all Edelman emails, then it should review these emails *in camera* to consider whether the messages in each reflect that Edelman was obtaining legal services for Hayman or acting for Hayman based on legal advice rather than its own expertise in public messaging for which it was being paid.

B. Hayman's internal communications without a lawyer are not privileged.

Hayman has produced some (but not all) internal communications on which no lawyer was copied, but withheld many others. Hayman belatedly produced "privileged" documents that should never have been withheld, which raises troubling questions about why such improper privilege claims were made and what is still being withheld. Sommer Decl. ¶ 11, Ex. L.

Hayman's privilege log still contains many entries involving no lawyer, with typical entries such as:

1. "Priv 00003-00006; 2/21/15; Parker Lewis to Kyle Bass, copying Andy Jent; Email containing substance of legal advice re: investigation and publication";
2. "Priv 00213-00215; 12/17/2015; Parker Lewis to Kyle Bass; Email containing substance of legal advice re: investigation and publication";
3. "Priv 00680-00682; 2/7/16; Parker Lewis to Kyle Bass; Email re: UDF in anticipation of litigation and necessary for the facilitation and rendition of legal advice"; and
4. "Priv 00774-00776; 2/16/16; Kyle Bass to Parker Lewis at 9:50 a.m. and Lewis to Bass at 3:50 p.m.; Email re: UDF in anticipation of litigation."

Id. ¶ 11, Ex. M. Bass and Lewis were hedge fund managers attacking UDF, not rendering legal services.

In *In re E.I. DuPont de Nemours & Co.*, ***the Texas Supreme Court affirmed an order requiring production of all internal documents without a lawyer or paralegal***, even as it reversed part of the same order requiring production of documents that included lawyers (holding that in camera review was required before documents ***including*** lawyers or paralegals could be ordered produced). 136 S.W.3d at 226. The Texas Supreme Court found there was "no evidence to justify privilege assertions concerning these documents." *Id*.

Here, the scale of withholding is remarkable and far greater than *DuPont*. Hayman seeks to withhold as privileged hundreds of emails from its small document production, and many of these communications were between non-lawyers. In *DuPont*, the Supreme Court denied privilege claims that involved only a tiny fraction of 55,000 pages of documents that had been produced, spanning 60 years of work at DuPont. *Id.* at 221, 226.

Here, there is no description of what is being withheld, unlike *DuPont*. In *DuPont*, the Supreme Court acknowledged that the party claiming privilege had provided meaningful descriptions such as: "Memo between DuPont counsel requesting legal advice and comments re: proposed amendments to regulations concerning national emissions standards for hazardous air pollutants." *Id.* at 221 n.1, 223 n.2. The Court of Appeal had listed many of these descriptions, such as: "Memo prepared at request of and forwarded to DuPont counsel analyzing suggested comments on proposed asbestos standards." *In re E.I. DuPont De Nemours & Co.*, 133 S.W.3d 677, 679 (Tex. App.—Beaumont 2003, no pet.) (McKeithen, C.J., dissenting). In stark contrast, Hayman's descriptions are nearly uniform and consistently vague and meaningless. Hayman could have, but did not, submit meaningful descriptions such as: "Email from Bass to Lewis forwarding Memo from Counsel, Chris Kirkpatrick, Concerning Potential Liability for Posting of Website." Instead, the nature of the contents of the "privileged" documents is a mystery.

Here, neither of Hayman's two affiants attests to ever having reviewed the actual documents, i.e., the internal communications without a lawyer that are being withheld as privileged, likely because neither of them did. In contrast, ***the affiant in DuPont swore that he had personally reviewed every document on the privilege log and that the documents he reviewed were privileged***, as reflected in the lower court's dissenting opinion with which the Supreme Court later agreed. *Id.* (McKeithen, C.J., dissenting); *see also* Sommer Decl. ¶ 12

(explaining lack of testimony in the Bass and Jones affidavits regarding review of the "privileged" documents).

Given the rejection of such claims of privilege in *DuPont* and Hayman's failure to justify its claims of privilege for communications among non-lawyers, the Court should review these documents *in camera* and order them produced if these communications were not made for the purpose of assisting legal counsel in rendering legal advice.

C. Merely copying in-house counsel on emails does not make them privileged.

In opposing UDF's motion to compel, Hayman swore its in-house counsel, Chris Kirkpatrick, "served only in the capacity of legal advisor." Bass Aff. ¶ 8; Jones Aff. ¶ 7. Bass swore that "[a]ll communications to which Kirkpatrick was a party were made for the purpose of seeking or providing legal advice."[2] Bass Aff. ¶ 8. Now, in interrogatory responses served post-remand on May 18, 2020, Hayman revealed that those affidavits were false: Kirkpatrick was one of only three people (Kirkpatrick, Bass and Lewis) who "contributed content" to (1) the anonymous internet posts, (2) the anonymous letter to UDF's auditor, and (3) the website, all of which were used to attack UDF's business and are the foundation of this lawsuit. Sommer Decl. ¶ 13, Ex. N. Not only did Kirkpatrick, Bass and Lewis create the content that is the subject matter of this business disparagement lawsuit, Kirkpatrick, Bass and Lewis also are the three persons who are included in the most emails produced by Hayman, with Kirkpatrick appearing in 442 documents, nearly 20% of the documents produced. *Id.* ¶ 14.

In other words, Kirkpatrick, Bass and Lewis were the triumvirate that wrecked UDF's business, and an asserted privilege "does not apply if the attorney is acting in a capacity other than that of an attorney." *In re Texas Farmers Ins. Exch.*, 990 S.W.2d 337, 340-41 (Tex. App.—

[2] Strikingly absent is any testimony from Kirkpatrick as to his work on UDF. Unlike the *DuPont* case, the documents here do not stretch back 60 years and involve deceased counsel. Kirkpatrick is still very much alive and practicing law in a Dallas law firm, Wick Phillips.

Texarkana 1999, no pet.) (holding that "the evidence shows that Scott was acting as an investigator for Farmers and not as an attorney [and therefore] communications made in that capacity are not privileged"). When reviewing emails that have been produced, it is apparent that Kirkpatrick was involved in communications that had nothing to do with legal advice. Sommer Decl. ¶ 15, Ex. O.

Even if Kirkpatrick may have acted as an attorney at times, merely copying an attorney does not create privilege. "[A] party may not cloak a document with the attorney-client privilege simply by forwarding it to his or her attorney." *Nat'l Union Fire Ins. Co. of Pittsburgh, Pennsylvania v. Valdez*, 863 S.W.2d 458, 460 (Tex. 1993) (citing *Methodist Home v. Marshall,* 830 S.W.2d 220, 224 (Tex. App.—Dallas 1992, orig. proceeding). The attorney must be actively involved in rendering legal advice; otherwise, parties could hide their relevant communications by the simple expedient of copying a lawyer.

Jones testifies that Kirkpatrick was included on emails "to keep Kirkpatrick informed." Jones Aff. ¶ 9. Again, such a practice of keeping in-house counsel "in the loop" in case there *might* be some need for legal advice in the future is not a communication needed to facilitate the rendering of legal services; otherwise, counsel could always be copied, and all evidence would be privileged. Jones does not testify to an *existing* need for legal services; instead he refers to keeping Kirkpatrick informed in the event of "possible ramifications" of Hayman's actions. Jones Aff. ¶ 9. Hayman's vague privilege claims are in stark contrast to the specificity approved in *DuPont*, where there was a "Memo between DuPont counsel requesting legal advice and comments re: proposed amendments to regulations concerning national emissions standards for hazardous air pollutants." 136 S.W.3d at 221 n.1.

Just as copying Kirkpatrick does not create privilege, the mere inclusion of Kirkpatrick in communications does not reveal his core work product, and Kirkpatrick is rarely sending any emails that might contain his own legal opinions. Because the Texas Supreme Court has acknowledged that even "a file memorandum … prepared by a lawyer" is "not necessarily attorney work product," this Court can order production of documents that reflect no mental processes by Kirkpatrick. *See Valdez*, 863 S.W.2d at 460. When neither the author nor the recipient of a document was an attorney and the document lacks mental impressions, opinions, or legal conclusions, a court does not abuse its discretion to order that document produced—even where "an inhouse attorney received a copy of it." *Owens-Corning Corp. v. Caldwell*, 01-92-00381-CV, 1992 WL 190792, at *6, 11 (Tex. App.—Houston [1st Dist.] Aug. 7, 1992) (not designated for publication), *subsequent mandamus proceeding sub nom. Owens-Corning Fiberglas Corp. v. Caldwell*, 01-93-00154-CV, 1993 WL 132960 (Tex. App.—Houston [1st Dist.] Apr. 23, 1993, orig. proceeding) (not designated for publication). UDF's "narrowly tailored request for information relevant to an issue in a pending case that does not invade the attorney's strategic decisions or thought processes" is well within the Court's authority to order produced. *In re Nat'l Lloyds Ins. Co.*, 532 S.W.3d 794, 806 (Tex. 2017).[3] Emails copying Kirkpatrick in which Hayman employees and Edelman discuss public relations strategies or disparaging attacks on UDF do not reflect "the attorney's thought process" relating to anticipated litigation. *See Occidental Chem. Corp. v. Banales*, 907 S.W.2d 488, 490 (Tex. 1995); Tex. R. Civ. P. 192.5(b)(3).

[3] "The primary purpose of the work product rule is to shelter the mental processes, conclusions, and legal theories of the attorney, providing a privileged area within which the lawyer can analyze and prepare his or her case." *Owens–Corning Fiberglas Corp. v. Caldwell*, 818 S.W.2d 749, 750 (Tex. 1991).

In addition, Hayman failed to provide evidence of an objective and subjective fear of litigation.[4] Bass fails to mention any fear of litigation in his affidavit. *See generally* Bass Aff. Jones, who was not employed by Hayman at the relevant times, makes the conclusory statement in his affidavit that "Hayman considers December 13, 2013[sic] the date by which litigation was reasonably anticipated …." Jones Aff. ¶ 13. During the course of the April 30 hearing, the Court did find, unequivocally, that Hayman had failed to support its claims of work product protection with proper affidavits. Sommer Decl. ¶ 3, Ex. A at 22:8-10; *see also id.* 21:19-23:25. Hayman initially offered to put Jones on the stand to testify, but then Hayman reneged. *Id.* at 25:8-9. And the mere possibility of litigation is not enough, as even where an affiant "states that he believed litigation to be more likely than not and that this was at least one reason for [company's] investigation," that testimony does not show that litigation was the primary purpose. *Henry P. Roberts Investments, Inc. v. Kelton*, 881 S.W.2d 952, 957 (Tex. App.—Corpus Christi 1994, no writ) (holding trial court did not abuse discretion in determining report was not prepared in anticipation of litigation); *accord*, *In re Maher*, 143 S.W.3d at 912 (must show "preparation for litigation [was] the primary motivating purpose underlying the creation of the document.").

In sum, copying Kirkpatrick on emails does not create attorney-client privilege or work product protection. An *in camera* review will show that the emails including Kirkpatrick do not reveal attorney-client communications or Kirkpatrick's attorney work product, i.e., his mental processes and opinions. *See DuPont*, 136 S.W.3d at 223, 226 n.4. Generally keeping an attorney in the loop does not make communications privileged or protected.

[4] For the protection to apply, courts require that "a reasonable person would have concluded from the totality of the circumstances that there was a substantial chance that litigation would ensue and the party asserting the work product privilege subjectively believed in good faith that there was a substantial chance that litigation would ensue." *In re Baytown Nissan Inc.*, 451 S.W.3d 140, 148 (Tex. App.—Houston [1st Dist.] 2014, orig. proceeding) (citing *Nat'l Tank Co. v. Brotherton*, 851 S.W.2d 193, 204, 207 (Tex. 1993)).

V. CONCLUSION

For the foregoing reasons, the Court should review the documents *in camera* and find that (1) for Edelman documents, disclosure to at least ten Edelman employees waived any privilege, (2) for internal communications among non-lawyers, the communications are not privileged, and (3) for emails copying Kirkpatrick, messages among business executives are not privileged merely because one of them was a lawyer. The Court should order all documents not entitled to protection to be produced.

DATED: June 2, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on this 2nd day of June, 2020, a true and correct copy of the above and foregoing document has been served in accordance with the Texas Rules of Civil Procedure on the following counsel of record:

Cole B. Ramey
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/s/ Jonathan E. Sommer
Jonathan E. Sommer

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Status as of 06/02/2020 12:53:10 PM -05:00

Associated Case Party: UNITED DEVELOPMENT FUNDING II, L.P, A DELAWARE LIMITED PARTNERSHIP

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Andrea Broyles		Andrea.Broyles@bracewell.com	6/2/2020 12:31:04 PM	SENT
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Associated Case Party: WATERFALL ASSET MANAGEMENT, LLC

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