

***United Development Funding, L.P., et al.,
v.***

J. Kyle Bass, et al.

Cause No. CC-17-06253-C

**PLAINTIFFS' MOTION TO OBTAIN DOCUMENTS
IMPROPERLY DESIGNATED AS PRIVILEGED
PURSUANT TO THE CRIME-FRAUD EXCEPTION**

Hearing Date: July 6, 2020

Texas Rules of Evidence, Rule 503(b)

- “A client has a privilege to refuse to disclose and to prevent any other person from disclosing confidential communications ***made to facilitate the rendition of professional legal services to the client***”

Texas Rule of Evidence 503(d)(1) “Crime-Fraud Exception”

- “This privilege does not apply:
(1) Furtherance of Crime or Fraud. If the lawyer’s services were sought or obtained to enable or aid anyone to commit or plan to commit what the client knew or reasonably should have known to be a crime or fraud.”

Showing Required for Crime-Fraud Exception

Texas courts apply the crime-fraud exception to the attorney-client privilege and the attorney work product doctrine where:

- 1) a party makes a ***prima facie*** showing of a contemplated fraud ***or*** crime and
- 2) there is a relationship between the withheld document and the underlying fraudulent or criminal conduct.

See Granada Corp. v. Honorable First Court of Appeals, 844 S.W.2d 223, 227 (Tex. 1992).

Texas Courts Define “Fraud” Expansively For Purposes of the Crime-Fraud Exception

- Fraud is “[a] generic term, embracing all multifarious means which human ingenuity can devise, and which are resorted to by one individual ***to get advantage over another by false suggestions or by suppression of truth, and includes all surprise, trick, cunning, dissembling, and any unfair way by which another is cheated.***” *Volcanic Gardens Mgmt. Co. v. Paxson*, 847 S.W.2d 343, 347 (Tex. App.—El Paso 1993, no pet.) (emphasis added).
- More generally, the crime-fraud exception “comes into play when a prospective client seeks the assistance of an attorney in order to make a false statement or statements of material fact or law to a third person or the court *for personal advantage.*” *Id.* at 348. (emphasis added).

The Court of Appeals Already Found A Prima Facie Case of Hayman's Fraud

- The Court of Appeals found that UDF had established a prima facie case that “Hayman published and disseminated ... false and misleading statements about UDF’s business in order to drive down UDF’s stock price and profit from several large short positions it had taken in UDF stock.” See August 23, 2019 Memorandum Opinion, *J.Kyle Bass, et al., v. United Development Funding, L.P., et al.* (“COA Opinion”), Sommer Decl., Ex. A at 5.

The Court of Appeals Already Found A Prima Facie Case of Hayman's Fraud

- The Court of Appeals found “voluminous” evidence that (1) Hayman made multiple false statements about UDF (*id.* at 12, 28-35), (2) Hayman acted with actual malice (*id.* at 35-40), and (3) Hayman’s false statements were made as part of Hayman’s “plan to profit from the extraordinary short positions it took against UDF” (*id.* at 36-37).
- The Court of Appeals also found that UDF produced sufficient evidence that “Hayman did not want to be identified as the publisher of the posts ... so that its statements would be more certain to plunge UDF’s stock value, resulting in a huge profit to Hayman, which, in fact, is what happened.” *Id.* at 38-39.

“Prima Facie” Requirement For Crime-Fraud Showing

- *Volcanic Gardens Management Co., Inc. v. Paxson*, 847 S.W.2d 343, 347–48 (Tex. App. El Paso 1993); “A prima facie showing is made by setting forth evidence that, if believed by the jury, would establish that the client was about to commit, or was engaging in an ongoing fraud.”
- *Coats v. Ruiz*, 198 S.W.3d 863, 876 (Tex. App.—Dallas 2006, no pet.) “A prima facie showing is made when the privilege opponent sets forth evidence that would establish the elements of a fraud...”
- The leading Texas Supreme Court case found that documents offered by the privilege opponent “[t]aken together, . . . suggest the possibility of fraud” and thus, were enough to overcome the privilege. *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992) (emphasis added).

Prima Facie Case in Order to Defeat Defendants' TCPA Motion

- To defeat a Motion to Dismiss under the TCPA, a Plaintiff must “establish[] by clear and specific evidence a prima facie case for each essential element of the claim in question.” Tex. Civ. Prac. & Rem. Code Ann. § 27.005(c).
- A “prima facie case” under the TCPA refers to “the amount of evidence necessary for a plaintiff to carry its minimal factual burden to support a rational interference establishing each essential element of its claim.” August 23, 2019 Memorandum Opinion, J.Kyle Bass, et al., v. United Development Funding, L.P., et al. (“COA Opinion”)

The Court of Appeals' Finding of a Prima Facie Case Was Based on Evidence, Not Merely Allegations

- UDF provided “detailed allegations **and evidence** far exceeding the minimum quantum of evidence necessary to state a prima facie case under the TCPA.” (COA Opinion at 3).
- “[T]he prodigious quantity of details and specific fact allegations in UDF’s pleadings **and affidavits** that support a rational inference establishing the challenged elements is much like a restaurant menu with too many offerings – the difficulty lies in choosing which examples, and what level of detail to include in our opinion” (*Id.* at 3-4).
- “UDF’s pleadings **and affidavits** explain how and why Hayman’s statements were false; illustrate and describe how and why Hayman made the false statements knowingly or recklessly; and chronicle the economic and business damages and losses UDF sustained as a direct result of Hayman’s statements.” (*Id.* at 4).

The Court of Appeals' Finding of a Prima Facie Case Was Based on Evidence, Not Just Allegations

- “**Evidentiary documentation supporting UDF’s fact allegations and affidavit testimony** was attached to UDF’s response to Hayman’s motion to dismiss. (*Id.* at 4).
- “UDF’s pleadings, **affidavits and SEC filings provide voluminous detailed fact allegations and evidence**... [I]n this opinion, we describe only some of those copious fact allegations **and evidence**.” (*Id.* at 12).
- The Court reviewed all of the evidence in detail. (*Id.* at 13-25)
- “UDF offered sufficient evidence to support a fact finding that Hayman did not want to be identified as the publisher of the posts...so that its statements would be more certain to plunge UDF’s stock value, resulting in huge profits to Hayman, which, in fact, is what happened.” (*Id.* at 38-39).

Hayman's "Evidence" of No Fraud

- SEC Settlement – Inadmissible. Tex. R. Evid. 408(a), 410(a); *Lipsky v. Commonwealth United Corp.*, 551 F.2d 887, 893 (2d Cir. 1976).
 - Even if it were admissible it's not rebuttal to Hayman's false Ponzi scheme allegations – Whereas Hayman alleged a Madoff-like Ponzi scheme involving a co-conspirator borrower and a complicit accountant, the SEC alleged inadequate disclosure ***of otherwise lawful business practices***.
- Self-serving Affidavit of Parker Lewis with no documentary support

Step 2: Hayman Used Attorneys to Further Its Short and Distort Scheme

- Step 2 looks at whether “there is a relationship between the withheld document and the underlying fraudulent or criminal conduct.” *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992).
- “Privileges are waived” as to documents that “relate to the prima facie proof of fraud and tend to support...allegations of fraud.” *Id.* at 228.
- There is no privilege if Hayman “sought the assistance of an attorney in order to made a false statement or statements of material fact...for personal advantage.” *Volcanic Gardens*, 847 S.W.2d at 348.

Step 2 Does Not Require a Showing of Complicity in the Fraud by the Attorney

- The rule focuses on the client's knowledge—not the attorney's knowledge—as “the attorney need not be aware his services were obtained to further the commission of a crime or fraud by the client.” *Rodriguez v. MumboJumbo, L.L.C.*, 347 S.W.3d 924, 927 (Tex. App.—Dallas 2011, no pet.).

UDF's Showing That the Documents on Hayman's Privilege Log Relate to Hayman's Short and Distort Scheme

- Court of Appeals' Opinion discussing Hayman's fraud. (Sommer Declaration Exhibit A).
- Summary of Hayman's Short and Distort Scheme and select pieces of evidence to also refresh the Court on the details of the scheme. (Sommer Declaration Exhibit B and Exhibits 1-105).
- Hayman's privilege log with a description added to each document which sets forth where the document fits in Hayman's short and distort scheme. (Sommer Declaration Exhibit C).

The Court May Also Consider the Withheld Documents Themselves in Deciding Whether They Bear a Relationship to the Fraud

- In analyzing step two of the crime-fraud exception analysis, the Court is allowed to consider the information contained in the privileged documents at issue in making its determination. See *Freeman v. Bianci*, 820 S.W. 2d 853,862 (Texas App.-Houston [1st Dist.] 1991, *aff'd sub nom. Granada Corp. v. Hon. First Court of Appeals*, 844 S.W.2d 223 (Texas 1992).

Hayman's Short and Distort Scheme

- Hayman's scheme was to take out massive short positions in UDF and related stocks, put together a fund to buy out UDF's assets, all while setting in motion a plan to blow up UDF by falsely stating it was a Ponzi scheme and spreading that lie all over the place.

Hayman Sought the Assistance of Attorneys in Order to Carry Out its Short and Distort Scheme

- Hayman worked with its in-house counsel, Chris Kirkpatrick to put together false materials and approach the Government to falsely convince it UDF was a Ponzi scheme that should be shut down. (UDF's Motion at 10, 13).
- When that failed, Hayman strategized to publish its false statements and even sought Kirkpatrick's assistance in drafting the false posts to circulate on the internet. (UDF's Motion at 9).

Hayman Sought the Assistance of Attorneys in Order to Carry Out its Short and Distort Scheme

15. Identify every person who had any involvement in drafting the First Anonymous Post.

RESPONSE: Hayman objects to this interrogatory on the grounds that the information sought is vague, as the phrase “any involvement in drafting” is impermissibly undefined; Hayman has no way of determining, through the interrogatory or definitions, the specific parties with whom this interrogatory is concerned. Hayman will limit its response to the persons who contributed content to the posting you have titled the First Anonymous Post.

Subject to and without waiving the foregoing objections, to the best of Hayman’s recollection, Kyle Bass, Parker Lewis, and Chris Kirkpatrick contributed content to the posting you have titled the First Anonymous Post.

Hayman Sought the Assistance of Attorneys in Order to Carry Out its Short and Distort Scheme

- When that didn't completely destroy UDF, Hayman planned its UDFEXPOSED.com media assault on UDF and again utilized its in-house attorney to draft the false content. (UDF's Motion at 9).

17. Identify every person who had any involvement in drafting any of the content of the Website.

RESPONSE: Hayman objects to this interrogatory on the grounds that the information sought is vague, as the phrase “any involvement in drafting” is impermissibly undefined; Hayman has no way of determining, through the interrogatory or definitions, the specific parties with whom this interrogatory is concerned. Hayman further objects in that the “contents” of the Website include numerous third party documents, and Hayman cannot identify all those who had involvement in “drafting” same. Hayman will limit its response to the persons who actually contributed content to the Hayman-authored postings on the Website.

Subject to and without waiving the foregoing objections, Kyle Bass, Parker Lewis, and Chris Kirkpatrick were involved in drafting content for the Website. Hayman has no further independent recollection of specific individuals who might have contributed content to the Website but directs Plaintiffs to the documents produced in response to Discovery Requests in Agreed Order on Plaintiffs’ Motion for Discovery under the TCPA, as well as any supplemental document production made by Defendants, which may provide additional detail.

Hayman's Lead Counsel Has Stated Bass and Kirkpatrick Have Previously Worked Together to Deceive and Steal

- “Kirkpatrick and Bass’s Greed” fueled them to work together, and together “Bass and Kirkpatrick built a foundation of deception” in order to “steal” from a widow and her children. Mr. Kirkpatrick made “blatant misrepresentations” and “false statements” to the Court. September 30, 2014 Motion for Sanctions filed by Larry Friedman in *The Estate of Chris Kyle and Taya Kyle v. Chris Kirkpatrick, Esq.*, Cause No. DC14-08840 (Dallas County).

1. Kirkpatrick and his Counsel have filed groundless pleadings in this Court and false affidavit of Defendant Kirkpatrick that set forth blatant misrepresentations and false statements to this Court, in what Plaintiffs believe to be a concerted attempt to bully and intimidate Chris Kyle's widow and young children and keep them from seeking their legal rights in this case.

Kirkpatrick and Bass' Greed Have Caused them to Attempt to Steal Chris Kyle's Name, Likeness and Image from his Widow and Young Children

33. While grieving the loss of her husband, and grieving with her young fatherless children, Taya Kyle has been forced to spend countless days, nights, and waking moments having to deal with (and further uncover) the deception caused by Kirkpatrick, Craft executives and Bass. Taya Kyle lost her husband, her best friend, and her children's father, and yet, Bass and Kirkpatrick built a foundation of deception during Chris Kyle's lifetime. They continue to lie, cheat, and steal from Chris Kyle and his family, simultaneously threatening to destroy the legacy of a legend if they are not successful in stealing it. Chris Kyle's image, likeness,

Hayman Sought the Assistance of Attorneys in Order to Carry Out its Short and Distort Scheme

- Hayman strategized how to continue to destroy UDF until it could close out its short position and/or drive it into bankruptcy with Hayman's lies. (UDF's Motion, at 10, 14).
- Hayman utilized outside counsel to try and cover up its past fraud (UDF's Motion, at 10-13).
- There was no other reason for Hayman and his attorneys to be taking about UDF other than in context of the short and distort scheme – that was Hayman's only relationship to UDF. Hayman had targeted UDF to destroy it and these communications all took place to further that scheme.

Message

From: Brandon Osmon [bo@haymancapital.com]
Sent: 7/26/2016 2:23:14 PM
To: J. Kyle Bass [k@haymancapital.com]
CC: Dan Babich [DB@haymancapital.com]; Parker Lewis [PL@haymancapital.com]; Davis Hostetter [dh@haymancapital.com]
Subject: RE: Highest New Home Sales since Feb'08 (chart below) -- this bodes well for the MI space

Very true. We rolled a total of \$350 mln HKD (last night and this morning) for HCMF and the full amount of \$40 mln for quantum. All at flat (zero spread) or better.

From: J. Kyle Bass
Sent: Tuesday, July 26, 2016 9:21 AM
To: Brandon Osmon
Cc: Dan Babich; Parker Lewis; Davis Hostetter
Subject: Re: Highest New Home Sales since Feb'08 (chart below) -- this bodes well for the MI space

We need this to keep going before your VAR shock takes place. It's funny because we need it to die to kill off UDF.

J. Kyle Bass
Chief Investment Officer
Hayman Capital Management

On Jul 26, 2016, at 7:12 AM, Brandon Osmon <bo@haymancapital.com<mailto:bo@haymancapital.com>> wrote:
<image001.png>

Message

From: J. Kyle Bass [k@haymancapital.com]
Sent: 10/17/2016 1:41:03 PM
To: Steele Schottenheimer [ss@haymancapital.com]
CC: Brandon Osmon [jbo@haymancapital.com]; Dan Babich [DB@haymancapital.com]; Kathryn E. Mueller [KM@haymancapital.com]; Lauren Schweiger Dillin [ld@haymancapital.com]; Debby LaMoy [dl@haymancapital.com]; Juneau Lee [JL@haymancapital.com]
Subject: Re: Google Alert - "hayman capital"

Damn it feels good to be a gangsta...

J. Kyle Bass

Chief Investment Officer
Hayman Capital Management

On Oct 17, 2016, at 6:32 AM, Steele Schottenheimer <ss@haymancapital.com> wrote:

<http://www.nasdaq.com/article/troubled-kyle-bass-reduces-stake-in-nmi-holdings-cm693790>

Troubled Kyle Bass Reduces Stake in NMI Holdings
October 14, 2016, 01:47:28 PM EDT By Sydnee Gatewood, GuruFocus<<http://www.nasdaq.com/author/gurufocus>>

Hayman Capital Management's Kyle Bass<<http://www.gurufocus.com/StockBuy.php?GuruName=Kyle+Bass>> (Trades<<http://www.gurufocus.com/StockBuy.php?GuruName=Kyle+Bass>> , Portfolio<<http://www.gurufocus.com/holdings.php?GuruName=Kyle+Bass>>) reduced his stake in NMI Holdings Inc. (NMII<<http://www.nasdaq.com/symbol/nmii>>) by -7.4% on Oct. --. Bass founded Hayman Capital in --5. The Dallas-based hedge fund has been struggling recently due mostly to the state of oil prices<<http://www.nasdaq.com/markets/crude-oil.aspx>> . While the firm prospered with Bass' shorting of the subprime mortgage crisis leading up to the Great Recession, he was not so fortuitous in regard to predicting oil prices.

In --5, Bass began buying into oil companies such as Concho Resources (CXO<<http://www.nasdaq.com/symbol/cxo>>) and Whiting Petroleum (WLL<<http://www.nasdaq.com/symbol/wll>>) with the expectation crude oil prices<<http://www.nasdaq.com/markets/crude-oil.aspx>> would rebound in --5 and --6. They did rise at the beginning of --6 but have since fallen. As of Oct. --, crude oil was \$5-.- a barrel.

According to the Wall Street Journal, as of May -, Bass' main fund had experienced a 7% loss so far this year, the biggest losing streak in the firm's history.

In addition to his success during the Great Recession, Bass has also correctly predicted Greece's economic woes and the devaluation of the Japanese yen.

The firm also targeted United Development Funding IV (UDF<<http://www.nasdaq.com/symbol/udf>>) earlier this year, claiming the company was operating like a Ponzi scheme. It was cleared of fraud on May -7. Bass' latest bet is in regard to Chinese and Hong Kong currency. Bass said he expects the currencies to depreciate approximately 4% over the next three years. Due to China's heavy debt levels, Bass believes the Chinese government will be forced to inject cash into the system, thus driving down the value of the yuan.

In NMI, the guru sold -,446,995 shares for \$8.-' per share. The transaction had an impact of -9.7% on the portfolio, and he now holds ',865,657 shares.

NMI Holdings provides private mortgage guaranty insurance through its subsidiaries. It offers primary mortgage insurance and pool insurance. The company was incorporated in --- and is based in Emeryville, California.

The company has a market cap of \$467.- million with an enterprise value of \$5-8.- million. It has a forward price-earnings (P/E) ratio of 8.-, a price-book (P/B) ratio of -. and a price-sales (P/S) ratio of 5.4.

GuruFocus ranked the company's financial strength 6 of --. Its Piotroski F-Score of 4 indicates the business is in stable financial condition. The company's equity to asset ratio is -.59, well above the industry median of --.6. The cash-debt ratio of --.' is far below the industry median of -.4.