UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
SHERMAN DIVISION

HOLLIS M. GREENLAW,
TODD F. ETTER,
CARA D. OBERT,
BENJAMIN L. WISSINK,
UMT HOLDINGS, L.P.,
UDF HOLDINGS, L.P.,
UNITED DEVELOPMENT FUNDING, L.P.,
UNITED DEVELOPMENT FUNDING III, L.P.,
UNITED DEVELOPMENT FUNDING IV,
UNITED DEVELOPMENT FUNDING INCOME FUND V,
UNITED MORTGAGE TRUST,
and
UNITED DEVELOPMENT FUNDING LAND OPPORTUNITY FUND, L.P.,

Plaintiffs,

v.

DAVID KLIMEK
JAMES NICHOLAS BUNCH,
CHRISTINE L. EDSON, a/k/a Christy Edson
and
DOES 1-10,

Defendants.

Case No. 4:20-cv-00311-SDJ

PLAINTIFFS' OPPOSITION TO DEFENDANTS' MOTION TO STAY PRETRIAL PROCEEDINGS

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I. INTRODUCTION

Defendants' Motion to Stay Pretrial Proceedings should be denied for two reasons. First, Defendants seek to improperly delay the inevitable—the discovery of additional facts that support Plaintiffs' Complaint—and are willing to violate orders from this Court to pursue that delay. Defendants' actions frustrate the very mission of the Department of Justice—the pursuit of the truth. Plaintiffs expect that this will be a recurring theme throughout this case, with Defendants raising unsupportable arguments on irrelevant collateral issues to try to avoid litigating the actual merits of the case. Second, Defendants are not entitled to receive qualified immunity here. Plaintiffs have adequately pled a violation of their clearly established constitutional rights in a manner consistent with well-established Fifth Circuit precedent. Defendants have no answer to that case law and will likely attempt to dodge it again in their reply brief.[1] Finally, if the Court cannot determine whether qualified immunity applies on the current record, Plaintiffs respectfully seek to conduct targeted discovery related to qualified immunity to address whatever issues the Court feels need further clarification.

II. ARGUMENT

A. Defendants Have Violated This Court's Order Governing Procedures

Defendants failure to produce their initial disclosures and refusal to participate in drafting the Rule 26(f) joint conference report violates the Court's Order, the Federal Rules of Civil Procedure, and the Court's Local Rules. The Court's Order Governing Procedures ("Order"),

[1] Defendants' gratuitous argument that they may seek a further stay if indictments are issued is premature. The government has been investigating UDF since early 2015 but has not sought any charges. While the absence of any evidence of criminal behavior is the most obvious reason for this interminable investigation, the government has begun using their investigation as a shield—to block UDF from discovering further evidence to support its claims. Plaintiffs will pursue this action even if suspect charges ensue and will oppose any future proposed stay. *Morrow v. City of Tenaha Deputy City Marshal Barry Washington*, No. 2-08-CV-288-TJW, 2010 WL 3057255, at *1 (E.D. Tex. July 30, 2010) ("[i]t is the rule, rather than the exception that civil and criminal cases proceed together.").

issued October 2, 2020 (Dkt. 37), states that initial mandatory disclosures must be made by October 26, 2020. The Court issued its Order two weeks ***after*** Defendants filed their Motion to Dismiss, which asserted their qualified immunity defense. But Defendants still refused to provide Plaintiffs their initial disclosures and contribute to the Rule 26(f) Conference Report. Plaintiffs, by contrast, timely provided their initial disclosures to Defendants and submitted the Rule 26(f) Conference Report. (Dkt. 43 and 45). Defendants' conduct also violates the Federal Rules of Civil Procedure and the Court's Local Rules. Rule 26 states that initial disclosures must be made unless "ordered by the court." Fed. R. Civ. P. 26. In addition, Local Rule CV-26 states that "[a]bsent a court order to the contrary, a party is not excused from responding to discovery because there are pending motions to dismiss" E.D. Tex. L.R. CV-26. The Court has not issued any order excusing Defendants from complying with their discovery obligations.[2]

In short, Defendants effectively granted themselves the relief they seek here—a limited stay of discovery pending the Court's ruling on their motion to dismiss—by ignoring the Court's Order and the applicable discovery rules. Although Plaintiffs remain concerned that Defendants will continue to attempt to frustrate Plaintiffs' ability to obtain discovery throughout this litigation, Plaintiffs do not request sanctions as is their right under the Court's Order. Instead, Plaintiffs request that the Court not reward Defendants for violating the Court's rules. Plaintiffs simply want to get to the merits of this action.

B. Defendants Are Not Entitled to Qualified Immunity

Defendants base their request for a stay of discovery on the mistaken notion that they "are entitled to qualified immunity because the plaintiffs have failed to adequately allege a

[2] While the local rule permits parties asserting a qualified immunity defense to "submit a motion to limit discovery to those materials necessary to decide the issue of qualified immunity," it does not state that a party is thereby excused from complying with their discovery obligations without a court order. *Id*.

clearly established constitutional violation." Motion at 4. Defendants' assumption ignores the well-pleaded allegations in Plaintiffs' Complaint. Unlike many civil complaints that are based on information and belief, Plaintiffs built their Complaint on hard evidence—facts derived from documents and internal emails Plaintiffs received from Bass/Hayman in discovery in another litigation. Compl. ¶ 72. Some of those documents have already been presented to this Court in a declaration from Plaintiffs' counsel. Dkt. 17-2. The state appellate court that reviewed this evidence concluded that UDF had established a prima facie case that "explained how and why Hayman's statements [about UDF] were false" and emphasized that these documents "illustrate and describe how and why Hayman made the false statements knowingly or recklessly." Compl. ¶ 204. In other words, this is not a typical *Bivens* complaint. Plaintiffs possess undisputed factual evidence from discovery from other parties establishing how Defendants violated their constitutional rights. Controlling Fifth Circuit precedent also confirms that Defendants are not entitled to qualified immunity on Plaintiffs' Fourth and Fifth Amendment claims.

1. The Legal Standard for Analyzing Qualified Immunity

When resolving qualified immunity, courts determine: (1) whether the facts, taken in the light most favorable to the plaintiff, show the officer violated a federal right, and (2) whether the right was clearly established when the violation occurred. *Winfrey v. Rogers*, 901 F.3d 483, 493 (5th Cir. 2018).

2. Plaintiffs' Fourth Amendment Claim

a. Plaintiffs Have Adequately Alleged a Violation of Their Fourth Amendment Rights

In their Complaint, Plaintiffs describe the material facts that Defendants misstated and omitted from their search warrant affidavit with detailed specificity. *See* Compl. ¶¶ 5–7, 165–87, 244–55. Defendants misled the Magistrate Judge in two critical respects. First, Defendants

knowingly provided false information to the Magistrate Judge in their search warrant affidavit. *Id.* at ¶¶ 167-68. For example, Defendants affirmatively misrepresented who had provided them the operative allegations about UDF that Defendants presented to the Magistrate Judge in their affidavit. *Id.* Defendants intentionally concealed that Bass/Hayman was their source because Bass/Hayman possessed significant credibility and bias issues that would have undermined Defendants' attempt to establish probable cause. *Id.*

At the time they presented their affidavit to the Court in February 2016, Defendants knew that Bass/Hayman was actively shorting UDF IV stock and, therefore, had a significant financial motive to present false and misleading information about UDF. *Id.* at ¶¶ 93, 158-59.[3] In addition, Defendants also knew that Bass/Hayman was actively executing an illegal "short and distort" fraud scheme against UDF—the target of the search warrant. In December 2015, Defendants learned that Bass/Hayman, while actively shorting UDF IV stock, intended to ***anonymously*** publish negative information about UDF to unsuspecting UDF investors under a fake name, "Ernest Poole." *Id.* at ¶ 135. As experienced white collar investigators, Defendants knew that it is illegal for investors in a stock to anonymously publish information about that stock without disclosing their conflict of interest. *Id.* at ¶¶ 80-85.[4] In short, Defendants misrepresented the identity of their source of information to prevent the Court from learning that Bass/Hayman (a) had a $60 million incentive to lie about UDF, and (b) had previously violated

[3] Kyle Bass also recently confirmed to a Bloomberg reporter that, in April 2015, he informed the government that he was shorting UDF and planned to short as many shares as he could get his hands on. Declaration of Neal J. Stephens, ("Stephens Decl."), ¶ 2, Exhibit A.

[4] *See also SEC v. Curshen*, 372 F. App'x 872, 875 (10th Cir. 2010) (the defendant's failure to disclose his compensation for promoting the stock makes all of his statements *per se* misleading because a reasonable investor would consider his compensation as bearing on his objectivity); *SEC v. Contrarian Press, LLC*, No. 16-CV-6964 (VSB), 2019 WL 1172268, at *5 (S.D.N.Y. Mar. 13, 2019) (same); *SEC v. Mandaci*, No. 00-CV-6635, 2004 WL 2153879 (S.D.N.Y. Sept. 27, 2004) (same).

the federal securities laws by executing an illegal "short and distort" fraud scheme against UDF, the target of Defendants' affidavit.

Second, Defendants also knowingly withheld material exculpatory information about the legitimacy of UDF's business model because providing an honest description of UDF's business would have led the Magistrate Judge to reject their request for a search warrant. *Id.* For example, Defendants failed to inform the Magistrate Judge that Defendant Klimek had approached UDF's external auditor in August 2015 and repeated Bass/Hayman's false and misleading allegations about UDF, including claiming that UDF was a "Ponzi scheme." In response, ***Whitley Penn examined those allegations in depth in November 2015 during its subsequent audit procedures and rejected all of Defendants' allegations***. *Id.* at ¶¶ 116-17, 123, 167. On November 24, 2015—more than a month before Defendants went to the Court with their search warrant affidavit—Whitley Penn publicly confirmed their findings when they announced that "***there were no disagreements between the Company and Whitley Penn on any matters of accounting principles or practices, financial statement disclosure or auditing scope of procedure.***" *Id.* at ¶ 123. Defendants omitted this exculpatory information because including it would have exposed that Defendants lacked probable cause to search UDF.

Defendants also failed to disclose to the Court that Street Watchdog Research had researched and debunked the false and misleading allegations about UDF's business model—that were first published anonymously by Bass/Hayman under the phony "Ernest Poole" moniker in December 2015. *Id.* at ¶¶ 138, 146-47, 167. In their article, Street Watchdog Research confirmed that a short seller violates the federal criminal securities laws by anonymously publishing negative information about a company while shorting the target stock. *Id.* at ¶¶ 146-47. Defendants reviewed the Street Watchdog Research story in December 2015 but failed to

disclose that exculpatory information. *Id.* at ¶¶ 146, 167. In short, Plaintiffs have adequately pled a Fourth Amendment violation because they identify the facts that Defendants either misstated or omitted to concoct probable cause where probable cause otherwise did not exist.

As a result, whether Defendants qualify for qualified immunity hinges on whether the controlling case law allows agents and prosecutors to knowingly misstate and omit material information to a federal judge to obtain a search warrant when probable cause is otherwise lacking. Not surprisingly, the Fifth Circuit has repeatedly held that prosecutors and agents cannot misrepresent and omit key facts when they present a search warrant affidavit to the Court.

b. Fifth Circuit Precedent Confirms that Defendants Violated Plaintiffs Clearly Established Fourth Amendment Rights

(i). *Hale v. Fish*

In *Hale v. Fish*, 899 F.2d 390 (1990), plaintiff Billy Hale sued a local detective, Major Jones, and an FBI Special Agent, Agent Magee, alleging that they arrested him without probable cause in violation of his Fourth Amendment rights. *Id.* at 398. An inmate, Shell, had claimed that Hale, an FBI informant, had kidnapped him thereby instigating the investigation of Hale led by Major Jones and Agent Magee. *Id.* at 394-95. The facts demonstrated that everyone interviewed by Major Jones and Agent Magee, with the exception of Shell, strongly indicated that no kidnapping occurred and that Hale was working for the FBI. *Id.* at 396.

Even though their investigation indicated that Hale had not kidnapped Shell, Major Jones and Agent Magee presented a flawed arrest warrant affidavit to the Court that contained no information regarding Shell's reliability as an informant even though Shell had ample motive to lie—given that lying helped Shell get out of jail. *Id.* at 398. The officers also failed to disclose to the Court that (a) Hale was actually working for the FBI at the time of Shell's alleged

kidnapping, and (b) every witness interviewed by Major Jones and Agent Magee, except for Shell, confirmed that Hale had not kidnapped Shell. *Id.*

The Fifth Circuit denied qualified immunity for Major Jones because he signed the affidavit. *Id.* at 402. Agent Magee contended that he was entitled to qualified immunity because he did not sign, prepare, assist in preparing, or even read the affidavit at issue. *Id.* at 401. The Fifth Circuit rejected Agent Magee's argument because he knew the exculpatory information and was present when the Court signed the affidavit. *Id.* at 401-02.

Hale stands for the basic, fundamental proposition that agents and prosecutors are not entitled to qualified immunity when they misstate or omit material information in a warrant affidavit to obtain probable cause. Moreover, *Hale* is relevant for three additional reasons. First, the Fifth Circuit emphasized the necessity for agents and prosecutors to disclose all known facts related to the credibility and bias of their source. Here, Defendants knowingly failed to disclose that Bass/Hayman was their source of information because Bass/Hayman had a significant motive to lie. Defendants knew that Bass/Hayman was unlawfully shorting UDF IV stock and stood to make millions if UDF's stock dropped. Compl. at ¶¶ 93, 158-59. As a result, Bass/Hayman was highly motivated to provide Defendants with false and misleading information about UDF to present to the Court because a public raid by the FBI at UDF's headquarters would crush UDF IV's stock price—which is exactly what happened. *Id.* at ¶¶ 169-75. Defendants also failed to disclose that they knew that Bass/Hayman had violated the securities laws with their anonymous "Ernest Poole" post—which demonstrated that Bass/Hayman was trying to destroy UDF for its own financial benefit. *Id.* at ¶¶ 167-68.

Second, Defendants failed to inform the Court that they knew that relevant percipient witnesses (Whitley Penn and Street Watchdog Research) had rejected their flawed theory of the

case—that UDF operated a Ponzi scheme. This is analogous to *Hale,* where the officers failed to disclose to the Court that witnesses had contradicted their theory that Hale had kidnapped Shell.

Third, *Hale* reinforces that officers who do not sign the warrant affidavit often do not qualify for qualified immunity. *Hale*, 899 F.2d at 401-02. Thus, given their otherwise extensive roles in violating Plaintiffs' constitutional rights, neither Defendant Bunch nor Defendant Klimek can escape liability by claiming that only Defendant Edson signed the flawed affidavit.

(ii). *United States v. Namer*

In *United States v. Namer*, 680 F.2d 1088 (1982), the Fifth Circuit reversed Namer's conviction because a prosecutor and her detective inserted a false statement in a search warrant affidavit. *Id*. at 1090. The prosecutor and detective contended that Namer had violated Louisiana's Blue Sky Law by failing to register as a broker-dealer. The Fifth Circuit criticized the government's theory of prosecution stating that it "can be characterized, at best, as novel, and, at worst, as frivolous." *Id.* at 1092. In their search warrant affidavit, the prosecutor and detective swore that a Deputy Commissioner at the Securities Commission had confirmed that Namer's loan offerings were "classified as securities." *Id.* That representation overstated what the Deputy Commissioner had told the prosecutor and detective. The Deputy Commissioner simply said that it was his ***opinion*** that the loan offerings were "securities"—but the Securities Commission had no formal procedure classifying offerings as "securities." *Id.* at 1092-93.

The holding in *Namer* is important for two reasons. First, the Fifth Circuit confirmed that misstating material facts in a search warrant affidavit to obtain probable cause violates the Fourth Amendment. Second, like the prosecutor in *Namer*, Defendants Bunch and Edson also presented a frivolous theory to the Magistrate Judge—namely, that UDF operated a Ponzi scheme. Defendants have subsequently acknowledged to UDF's counsel that they do not contend that

UDF operates a Ponzi scheme. In addition, every accounting professional who has reviewed UDF's operations has concluded that UDF absolutely does not operate any type of Ponzi scheme. Those accounting professionals include UDF's external auditor, Whitley Penn, who reviewed and publicly rejected the government's allegations in November 2015, months ***before*** the government sought the search warrant, and PwC, who performed an internal investigation with Thompson & Knight on these same accounting issues and found no irregularities. Compl. at ¶¶ 116-25, 216-18. Street Watchdog Research also agreed with Whitley Penn and PwC after it investigated and debunked the bogus allegations Bass/Hayman published in the phony "Ernest Poole" posts and published its findings in December 2015—again, months before Defendants approached the Court with their affidavit. *Id.* at ¶ 147.

(iii). *Winfrey v. Rogers*

In *Winfrey v. Rogers,* 901 F.3d 483 (5th Cir. 2018), law enforcement arrested Richard Winfrey, Jr. ("Junior") for capital murder based on a warrant affidavit that misstated and omitted material information. *Id.* at 489-90. Law enforcement's "botched investigation" was based on false information from a jailhouse informant, Campbell, and a "dubious adventure" called "scent lineups" where the police used dogs to acquire scents from four suspects and then went to the crime scene to see if the dogs alerted to any suspect's scent. *Id.*

Deputy Sherriff Johnson presented an arrest warrant for Junior's arrest which contained the following omissions and misstatements: (1) it omitted that Campbell's statements had been contradicted by the physical evidence; (2) it misstated that law enforcement used Junior's scent during the "scent lineup" when Deputy Sherriff Johnson knew that they had actually used another suspect's scent; and (3) it omitted that Campbell gave a second statement that exonerated

Junior because Campbell told law enforcement that Junior's father had killed the victim with someone other than Junior. *Id.* at 494-95.

In its analysis of qualified immunity, the Fifth Circuit determined that Deputy Sheriff Johnson violated Junior's Fourth Amendment rights by signing an objectively unreasonable arrest warrant affidavit. *Id.* at 491-92. The Fifth Circuit further held that it was clearly established that law enforcement cannot misstate facts and omit material exculpatory information to obtain probable cause. *Id.* at 494-95. As a result, the Fifth Circuit vacated the district court's order granting summary judgment on qualified immunity grounds. *Id.* at 488.

In sum, *Hale*, *Namer*, and *Winfrey* demonstrate that it is well-established that law enforcement officers are not entitled to qualified immunity when they do what Defendants did here—misstate facts and omit material exculpatory evidence in a warrant affidavit to obtain probable cause when probable cause is otherwise lacking. Compl. at ¶¶ 5-7, 165-87, 244-55.

3. Plaintiffs' Fifth Amendment Claim

a. Plaintiffs Have Adequately Alleged a Violation of Their Fifth Amendment Rights

Plaintiffs' Complaint likewise contains detailed allegations that Defendants deprived Plaintiffs of their Fifth Amendment due process right to liberty and property. Plaintiffs allege:

- Bass/Hayman executed an illegal "short and distort" fraud scheme against UDF to try to sink UDF IV's share price and obtain UDF's valuable assets at severely distressed sale prices (Compl. ¶¶ 1, 4, 8, 13, 86-164);
- "Short and distort" fraud schemes are well-known to federal law enforcement so it is unreasonable for experienced white collar investigators like the Defendants to not appreciate that Bass/Hayman was executing an illegal fraud scheme against Plaintiffs (Compl. ¶¶ 80-85);
- Defendants knew that Bass/Hayman was shorting UDF IV's stock during the execution of the illegal "short and distort" fraud scheme (Compl. ¶¶ 93, 158-59);

- Defendants provided material non-public confidential information about their investigation of UDF to Bass/Hayman and Bass/Hayman subsequently traded on that inside information, in violation of federal criminal securities laws (Compl. ¶¶ 2-3, 13, 94-115, 132-33, 164);

- It is illegal for an investor to publish information about a stock on an ***anonymous*** basis without disclosing the investor's interest in the target company's stock (Compl. ¶¶ 80-85, 137, 146-52);

- Defendants aided and abetted Bass/Hayman's ***anonymous*** publication of false and misleading information about UDF to unsuspecting UDF IV investors via the illegal "Ernest Poole" posts in mid-December 2015 (Compl. ¶¶ 135-40);

- Defendants aided and abetted Bass/Hayman's *UDFExposed.com* negative and unlawful media assault on UDF (Compl. ¶¶ 158-63);

- Defendants sought an unnecessary and improper search warrant knowing that it would generate negative media attention that would destroy Plaintiffs' reputations and ability to operate their businesses (Compl. ¶¶ 165-87); and

- Defendants' actions permanently destroyed Plaintiffs reputations and ability to operate their business, including losing access to credit facilities, investor equity, and future business opportunities (Compl. ¶¶ 20, 220-43).

Given the detailed factual allegations that lay out how Defendants improperly interfered with Plaintiffs' operation of their businesses, the qualified immunity analysis hinges on whether the controlling case law supports that improper government interference with an individual's pursuit of his or her chosen profession infringes their property and liberty interests under the Due Process Clause of the Fifth Amendment. Another trio of Fifth Circuit cases confirms that Defendants' actions violate Plaintiffs' Fifth Amendment rights. As a result, Defendants are not entitled to qualified immunity on Plaintiffs' Fifth Amendment claim.

b. Fifth Circuit Precedent Confirms that Defendants Violated Plaintiffs Clearly Established Fifth Amendment Rights

(i). *United States v. Briggs*

In *United States v. Briggs*, 514 F.2d 794, 797 (5th Cir. 1975), the Fifth Circuit confirmed that a person's good name, reputation, honor, and integrity are well established property interests

protected by the Due Process Clause. The plaintiffs were named as unindicted conspirators related to criminal charges brought against others who had protested outside the Republican Party National Convention in 1972. *Id.* at 797. After the named defendants were acquitted at trial, the plaintiffs filed suit because the government's actions damaged their reputations and impaired their ability to obtain employment. *Id.* The Fifth Circuit confirmed that "one's right to hold specific private employment and to follow a chosen profession free from unreasonable government interference comes within the 'liberty' and 'property' concepts of the Fifth Amendment." *Id.* at 798, *citing Greene v. McElroy*, 360 U.S. 474, 492 (1959).

(ii). *Marrero v. City of Hialeah*

In *Marrero v. City of Hialeah*, 625 F.2d 499 (5th Cir. 1980), the Fifth Circuit confirmed that the Marreros could pursue a claim for injury to their personal and business reputations because their claim implicated their constitutional property and liberty interests. In *Marrero*, police officers and a prosecutor executed a search warrant at a local jewelry business where the media, like the FBI raid at UDF, coincidentally arrived at the same time as the raid team. *Id.* at 502; Compl. at ¶ 17. The execution of the search warrant failed to uncover any of the items listed in the warrant. *Id.* Nonetheless, the prosecutor announced to the media that over $75,000 in stolen property had been recovered in the raid and the Marreros had been arrested. *Id.* The Marreros alleged that the negative media resulting from the prosecutor's actions destroyed their personal and business reputations thereby depriving their right to earn a living. *Id.* at 502-03. The Fifth Circuit found that the injury to the Marreros' reputations constituted a deprivation of liberty interests in violation of their due process rights. *Id.* at 519-20.

(iii). *Stidham v. Texas Com'n on Private Sec*

In *Stidham v. Texas Com'n on Private Sec.*, 418 F.3d 486 (5th Cir. 2005), the Fifth Circuit denied the defendants' request for qualified immunity because the defendants violated the plaintiff's Fifth Amendment right to engage in his chosen profession. Plaintiff Stidham operated a motorcycle funeral escort business that controlled traffic for funeral processions. *Id.* at 487. The defendants worked for the state regulator of private security firms. The defendants told Stidham that he needed a license to operate his business. *Id.* at 488. Stidham disagreed and refused to seek to obtain a license. *Id.* In response, Defendant Biggs obtained an arrest warrant and notified Stidham's customers that he was operating illegally because he did not have a license. *Id.* The District Attorney declined to prosecute Stidham and the Texas Attorney General ultimately agreed that he did not need a license. *Id.* The defendants, however, did not reach back out to Stidham's customers to inform them that he was operating legally. *Id.*

Stidham claimed that the defendants were not entitled to qualified immunity because they deprived him of his Fifth Amendment due process property and liberty interests by destroying his business by interfering with his relationship with his customers. *Id.* at 490. Defendants argued they had successfully prosecuted similar cases and had received legal guidance that Stidham's actions were illegal. *Id.* at 491-92. The Fifth Circuit rejected Defendants' arguments regarding qualified immunity and held that Stidham "has properly demonstrated the violation of a clearly established right by showing that the defendants deprived him of his liberty interest without due process of law." *Id.* at 491. The Court emphasized that it had previously "confirmed the principle that one has a constitutionally protected liberty interest in pursuing a chosen occupation." *Id.* (collecting cases). The Court also found that the liberty interest that the

defendants violated—the right to pursue one's chosen occupation—was "clearly established and should have been known to a reasonable officer." *Id.* at 493.

In sum, the Fifth Circuit's decisions in *Briggs*, *Marrero*, and *Stidham* confirm that it is well-established that law enforcement officers are not entitled to qualified immunity when they do what Plaintiffs have alleged that Defendants did here—improperly interfere with Plaintiffs' ability to pursue their chosen profession. Compl. at ¶¶ 5-7, 165-87, 244-55. As a result, Defendants are not entitled to qualified immunity.

C. Plaintiffs Are Entitled to Limited Discovery if Factual Clarification is Needed

If the Court believes that it needs more facts before ruling on qualified immunity, it can order limited discovery. *Zapata v. Melson*, 750 F.3d 481, 485 (5th Cir. 2014); *Backe v. LeBlanc*, 691 F.3d 645, 648 (5th Cir. 2012). Discovery is applicable where Defendants claim that qualified immunity attaches because they have exclusive control over the relevant facts. *See Crisp v. Dutton*, No. A-15-CV-0431-LY-ML, 2015 WL 7076483, at *2, 6 (W.D. Tex. Nov. 12, 2015) (finding the Fifth Circuit has never required a plaintiff to plead facts peculiarly within the knowledge of defendants because this "'heads I win, tails you lose' position is not the law.") Here, Defendants' claim that Plaintiffs cannot plead sufficient facts on their Fourth Amendment claim because they do not possess a copy of the search warrant affidavit. Motion to Dismiss at 26-29. As noted in *Crisp,* this type of "heads I win, tails you lose" argument fails and Plaintiffs should be given the opportunity to take limited discovery to demonstrate that qualified immunity does not apply here. Thus, if the Court believes it needs more information, Plaintiffs respectfully request permission to pursue the following limited discovery:

- Document requests to the three Defendants and their respective agencies to obtain documents regarding (a) Defendants misstated and omitted facts in their affidavit and the rationale regarding same; (b) Defendants' ability to obtain evidence via subpoena as opposed to a search warrant; (c) Defendants' knowledge that a search warrant

would generate negative media for UDF; (d) Defendants' awareness that Bass/Hayman was shorting UDF stock; (e) Defendants' actions related to the execution of Bass/Hayman's illegal "short and distort" and insider trading fraud schemes; (f) Defendants' awareness that Plaintiffs' Fourth and Fifth Amendment claims were clearly established; and

- Depositions of the three Defendants and FBI Special Agent David Mangelsen (who supervised Defendants Klimek and Edson) limited to these same topics.

III. CONCLUSION

For the foregoing reasons, the Court should deny Defendants' Motion to Stay.

Dated: November 9, 2020

Respectfully submitted,

By: */s/ Neal Stephens*

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CERTIFICATE OF SERVICE

I certify that on this 9th day of November, 2020, a true copy of this Opposition with the Declaration of Neal J. Stephens in Support of Plaintiffs' Opposition to Defendants' Motion to Stay Pretrial Proceedings was served on all counsel of record by way of the Court's CM/ECF system.

/s/ Neal Stephens
Neal J. Stephens