

IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN THE MATTER OF  
THE SEARCH OF UDF  
1301 MUNICIPAL WAY  
GRAPEVINE, TEXAS 76051

Case No. 3:21-mc-284-B-BT

**UNITED DEVELOPMENT FUNDING’S SECOND SUPPLEMENT TO ITS MOTION  
FOR RETURN OF PROPERTY PURSUANT TO  
RULE 41(g) OF THE FEDERAL RULES OF CRIMINAL PROCEDURE**

United Development Funding (“UDF”) files this second supplement to its motion for return of property pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure, based upon information discovered after the hearing on October 27, 2021. Specifically, UDF has now established that the Prosecution Team had access to and reviewed Fifth and Sixth Amendment private privileged material related directly to the defense of the indicted UDF executives. Moreover, despite the passage of more than five and one-half years post-search and the filing of UDF’s 41(g) motion, the government remains stubbornly opposed to outlining any plan or methodology that provides for the immediate return of UDF’s unlawfully withheld private privileged materials as required by the dictates of *Harbor Health*. With no practical way to efficiently or effectively search the electronic copies of the documents that the Prosecution Team reviewed in breach of protocol or Filter Team pre-review, materials which we now know contain protected Fifth and Sixth Amendment private privileged communications, this Court must order immediate return of ***all materials*** reviewed by the Prosecution Team during the consequential breach so that UDF, and its now-indicted executives, may continue to timely assert (and not

waive)<sup>1</sup> their Constitutional rights.

**I. The Government's Newly Disclosed Breaches Further Mandate Immediate Return of the Approximately 125 Boxes of Original Seized Evidence that was Unlawfully Accessed and Examined by the Prosecution Team**

On October 25, 2021, two (2) days before the hearing that had been set on UDF's Rule 41(g) motion, and more than five and one-half years after UDF had provided to the government a list of search terms to begin the process of taking prudent and required steps to prevent government access to UDF's private privileged materials, the government finally informed counsel for UDF that the Prosecution Team had in fact breached the privileged material.<sup>2</sup> In particular, the government affirmed that the Prosecution team had in fact accessed and reviewed, prior to any review by a Filter Team,<sup>3</sup> more than one hundred twenty-five (125) boxes of UDF's seized materials containing UDF's private attorney-client privileged communications with its outside counsel.<sup>4</sup>

Despite years of playing "rope-a-dope"<sup>5</sup> with defense counsel and having deflected and avoided admitting specific and pointed questions regarding whether the Filter Team had either completed its preliminary review or whether the Prosecution Team had viewed evidence prior to review by the Filter Team, UDF was finally told the truth: Lead Prosecution Team Attorney Nick

---

<sup>1</sup> As this Court is well aware, the government has, only recently, accused UDF of "waiving" its rights to private privileged documents despite the Prosecution Team's chicanery and deception as to the status of the government's filter team "search term" scan of the seized documents.

<sup>2</sup> In finding that the government's actions in not seeking express prior permission from the search warrant-authorizing magistrate to seize privileged documents constituted "callous disregard" the *Harbor Healthcare* Court was surely mindful that the government had "primed-the-pump" prior to execution of the search, *i.e.*, that the government had to understand that the lengthy civil investigation prior to the search would have produced volumes of attorney-client privileged information. *See generally, Harbor Healthcare System v. United States*, 5 F.4<sup>th</sup> 493 (5<sup>th</sup> Cir. 2021).

<sup>3</sup> The impropriety of the Filter Team itself reviewing or promoting privileged materials without first seeking Court review and approval is addressed in Section II *infra*.

<sup>4</sup> We will not address substantively herein that the Prosecution Team AUSA (Nick Bunch), despite repeated demands to identify whether any of the seized documents had been promoted to the Prosecution Team or whether the search term review had been completed, actively concealed his and the Lead Prosecution Team Case Agent's misconduct.

<sup>5</sup> Until the date of the Rule 41(g) the USAO NDTX had never confirmed to defense counsel when and if they had ever run the UDF provided privilege search review terms against the physical and electronic evidence.

Bunch, Lead Prosecution Team Agent Christine Edson and various other vital members of the Prosecution Team, on multiple occasions—*before the Filter Team had even reviewed the seized materials*—unlawfully invaded UDF’s private privileged communications by rummaging through more than a hundred boxes, thousands of files and millions of pages that had been removed from the offices of UDF’s executives who had been preparing, with outside counsel, UDF’s defense to the parallel SEC/DOJ investigation. It is now readily apparent that those files contained reams of privileged materials prepared in response to the SEC/DOJ parallel investigation.

UDF has now confirmed, after receiving the FBI FD-1057’s attached to the government’s sealed filing, that the Prosecution Team has in fact reviewed vital attorney-client privileged material.<sup>6</sup> An initial, but enormously taxing, electronic perusal of some of the scanned copies of the materials accessed in breach by the Prosecution Team from the offices<sup>7</sup> of UDF’s executives, without prior review by a Filter Team,<sup>8</sup> has revealed that they contain private communications with UDF’s outside counsel regarding UDF’s defense of the SEC/DOJ parallel investigation.

**a. Privilege Breach #1—Review of UDF’s Counsel’s Impressions of SEC Investigation**

Filed separately herewith, under seal and *in camera*, are four (4) tabs with exemplar copies of physical materials seized from UDF’s offices.<sup>9</sup> Generically, Tab 1 contains a list of notes seized, according to the flawed search inventory, from an office outside of UDF CEO Hollis Greenlaw’s

---

<sup>6</sup> The USAO NDTX, to this day, has, despite repeated requests, refused to provide to counsel an index of either the electronic or physical evidence that was promoted to the Prosecution Team.

<sup>7</sup> We use the word “allegedly” because both the scanned documents themselves and the government’s search inventory, at times, appears to be irreconcilable with the true location of the seizure of the materials. Because it is difficult, if not impossible to efficiently search the scanned copies provided by the government, we cannot either timely or effectively review the materials. We also cannot attest that the seizure locations notated on the FBI’s search inventory list are accurate. *See* Declaration of Stacey Dwyer, Exhibit A hereto.

<sup>8</sup> The government has admitted that no Filter Review Prosecutor was even assigned to the matter at the time of the breach.

<sup>9</sup> Because these materials contain attorney-client privileged information we are filing them with the Court under seal and *ex parte*. *See generally* FRE 501.

office, held in Box 285 and curiously labeled by the government as “SEC Matter.” Given the nature of the parallel investigation, this should have raised alarm bells by the seizing agent and the item never should have been seized. The notes in the “SEC Matter” file reflect a conversation by the note-taker with UDF Counsel Barrett Howell (“Howell”) recounting conversations with the SEC and Howell’s “impressions” of the SEC’s parallel investigation. These notes are unmarked with no identifying Bate Stamp number.

**b. Privilege Breach #2—Review of UDF’s Counsel’s Entire Chronology of Communications with SEC**

The next documents in Tab 1 were also found in Box 285 and every page is stamped “PRIVILEGED AND CONFIDENTIAL, ATTORNEY CLIENT PRIVILEGE, ATTORNEY WORK PRODUCT.” These documents are the original and a draft of the UDF Counsel’s “Chronology of the SEC Investigation”—classic Fifth and Sixth Amendment privileged material. *See, e.g., United States v. Pedersen*, 2014 WL 3871197 \*18-22 (D. OR 2014). These plainly marked privileged materials also should not have been seized during the execution of the search warrant. Exhibit 4 to the Government’s Notice reveals that Box 285 was reviewed by Lead Prosecution Team Agent Edsen, Prosecution Team Agent Minoski, Prosecution Team Forensic Accountant Martinez and Prosecution Team DOJ Contractor Bryant. As we now know, no Filter Team Attorney had cleared Box 285 for privilege.

**c. Privilege Breach #3—Review of UDF’s Confidential Communications with Counsel Regarding UDF’s Defense and Engagement of Auditors**

Attached as Tab 2 to the sealed *in camera* submission, are hand-written notes seized, according to the flawed inventory, from the office of UDF CFO Cara Obert’s office, held in Box 198 and labeled by the government as “Miscellaneous.” These hand-written notes reflect a conversation with “Barrett” Howell regarding the defense against the SEC parallel investigation.

Moreover, attached as Tab 3, are documents from Box 198 which contained a “Draft” K&L gates “Management Discussion and Analysis” regarding the “Determination of the Allowance for Loan Losses,” a question at the heart of the parallel SEC/DOJ investigation. At the bottom of the document is the marking: **“Privileged and Confidential-Attorney Work Product-Tentative and Preliminary-For Discussion Purposes Only.”** Also, attached as Tab 4, are documents from box 230 which contained an “envelope” with hand-written notes of a privileged conversation with “Barrett” Howell regarding UDF’s conversations regarding possible engagement of PWC. Putting aside whether these documents could have even been legitimately seized, Exhibit 2 to the Government’s Notice reveals that Boxes 198 and 230 were reviewed by Prosecution Team Agent Minoski, Prosecution Team Forensic Accountant Martinez and Prosecution Team DOJ Contractor Bryant.

At the Rule 41(g) hearing, the government neither proposed nor offered a practical method for either timely deciphering or returning UDF’s privileged documents to UDF—after holding them for more than five and one-half years. At this stage, and with the impending indictment of several UDF executives, *Harbor’s* holding and this Court’s equitable powers, at the very least, require that the government be required to immediately turn over all of the boxes of materials improperly reviewed by the Prosecution Team. *Harbor Healthcare System, L.P., v. United States*, 5 F.4<sup>th</sup> 593 (5<sup>th</sup> Cir. 2021) (“Harbor remains injured as long as the government retains its privileged documents. That injury can only be made whole by the government returning and destroying its copies of the privileged documents.”). UDF and its executives must have unfettered access to those documents to protect the privilege and assert their rights. And as the Declaration of Stacey Dwyer confirms, the material cannot be effectively searched in the format in which it currently exists at UDF.

**II. The Government’s Proposed and Actual Actions Since the 41(g) Hearing Confirm They Will Continue to Unlawfully Trample Upon UDF’s Attorney-Client Privilege**

In their Sealed Notice, the government articulated to the Court that they were “trying to determine . . . Whether the items segregated by the prosecution team are actually privileged.” (DE 19, p. 3). Furthermore, in an email from the Filter Team Lead Counsel *after the Rule 41(g) hearing*, the government confirmed that it had *actually reviewed* items that had been segregated by UDF’s counsel as privileged and had unilaterally concluded that “many of the documents are not privileged, such as an unsigned retainer letter from Sutherland and a signed retainer letter from Skadden.” *See* Copy of 10/28/21 email from AUSA Brasher attached hereto as Exhibit B. These continued brazen attempts by the government to unilaterally usurp UDF’s private privileged communications without intervention of a protocol approved by either UDF or the Court remain unlawful in this Circuit. *See, e.g., Harbor Healthcare (granting equitable relief to Harbor after noting, inter alia, that Harbor had “objected to the government’s filter team viewing e-mails that had been flagged as privileged); see also, In re Search Warrant Issued June 13, 2019, 942 F.3d 159, 177 (4<sup>th</sup> Cir. 2019) as amended (Oct. 31, 2019) (“The upshot is that—in failing to conduct adversarial proceedings prior to authorizing the Filter Team and its Protocol—the magistrate judge prematurely granted the ex parte request of the United States Attorney.”).* In the face of the recent *Harbor Healthcare* ruling, the recent actions of the United States here cannot be excused.

### III. Conclusion

For the reasons stated above, in UDF's prior pleadings, and during UDF's argument before the Court, UDF respectfully requests that this Court, sitting in equity, require the government and USAO-NDTX to return to UDF *forthwith* all originals of all documents identified in the attachments to their October 25, 2021, sealed notice to the Court. (DE 19). UDF further requests that this Court order that the United States cease and desist reviewing materials previously identified by any party as privileged until further order of the Court.

Dated: November 5, 2021

Respectfully submitted,

/s/ Paul E. Pelletier

Paul E. Pelletier, Esq. (*admitted pro hac vice*)

[pepelletier3@gmail.com](mailto:pepelletier3@gmail.com)

District of Columbia Bar No. 997145

3500 Morningside Drive

Fairfax, VA 22031

Telephone: 202.617.9151

Facsimile: 703.385.6718

Stewart H. Thomas

State Bar No. 19868950

[stthomas@hallettperrin.com](mailto:stthomas@hallettperrin.com)

Elizabeth A. Fitch

State Bar No. 24075777

[efitch@hallettperrin.com](mailto:efitch@hallettperrin.com)

Jesse F. Beck

State Bar No. 24097356

[jbeck@hallettperrin.com](mailto:jbeck@hallettperrin.com)

HALLETT & PERRIN, PC

1445 Ross Avenue, Suite 2400

Dallas, Texas 75202

Telephone: 214.953.0053

Facsimile: 214.922.4142

**ATTORNEYS FOR UNITED  
DEVELOPMENT FUNDING**

**CERTIFICATE OF SERVICE**

I hereby certify that on November 5, 2021, I filed this document with the Clerk's Office. I further provided an electronic copy of this document on counsel, as listed below, *via* electronic mail:

|                                 |  |                         |
|---------------------------------|--|-------------------------|
| United States Attorney's Office | Assistant U.S. Attorney<br>Doug Brasher                | doug.brasher@usdoj.gov  |
| United States Attorney's Office | Assistant U.S. Attorney<br>Steve Fahey, Criminal Chief | steve.p.fahey@usdoj.gov |

/s/ Paul E. Pelletier  
Paul E. Pelletier



IN THE UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF TEXAS  
DALLAS DIVISION

IN THE MATTER OF  
THE SEARCH OF UDF  
1301 MUNICIPAL WAY  
GRAPEVINE, TEXAS 76051

No. 3:21-mc-284-B-BT

**DECLARATION OF STACEY DWYER IN SUPPORT OF RULE 41(g) MOTION**

**EXHIBIT**  
**A**

I, Stacey Dwyer, hereby declare as follows:

1. I am an employee of UDF IV. I joined UDF IV in 2014 after spending two years in public accounting and 22 years in various accounting, finance and investor relation positions with a public national homebuilder. I earned a Bachelor of Science degree in Accounting from Southeastern Oklahoma State University and a Master of Science degree in Accounting from the University of Texas at Arlington. I am a Certified Public Accountant in the state of Texas. I submit this declaration in support of UDF's Rule 41(g) Motion. I have personal knowledge of the matters stated in this declaration and would testify truthfully to them if called upon to do so.

2. UDF has its corporate headquarters located at 1301 Municipal Way, Grapevine, Texas 76051.

3. On February 18, 2016, I was present when the FBI executed a broad search warrant at UDF's headquarters and seized computers, servers, company and personal phones, and over 700 boxes of material from UDF. My personal and business cell phones were seized.

4. In or about March of 2019, the Government provided UDF with scanned copies of seized physical documents in electronic folders; a document named "UDF.Search.Location.Diagram.pdf," which showed the alpha-numeric code assigned to each room in UDF's headquarters; and a document titled "UDF.Logs.xlsx" ("Log"), which listed an item number, a brief description, a location (desk, bookshelf, etc), package type (cardboard box, plastic, etc.) and an alpha-numeric room identifier for the items seized.

5. The electronic folder names for the scanned documents do not necessarily match an item number listed on the Log. UDF identified this issue by finding electronic folder names that were not even listed on the Log. UDF could only identify where the contents of the electronic folder had been seized by opening the folder and potentially finding a government-

generated document which then identified the item number from the Log (not present in all of the electronic folders). For example, the Government's notice dated October 23, 2021, identifies IB435, IB439 and IB743 as seized from Room 2II, Ben Wissink's office. In the Log, Item 435 is identified as seized from Room 1T, Todd Etter's office, and Item 439 is identified as seized from Room 1R, Paula Hoadley's office. UDF received electronic folders identified with those item numbers (labeled as Box 435 and Box 439). UDF did not have a way to determine to which item numbers from the Log IB435 and IB439 corresponded, and thus did not know from which office the documents were seized (and before the Government's notice, had assumed that those documents corresponded with Items 435 and 439). In addition, UDF was unable to locate IB743 on the Log or in the electronic folders provided by the Government.

6. There are instances where the scanned information appears to be incomplete, such as scans of only the front and back of notebooks—no contents of the notebook are copied. In many instances, the government has included a sheet of paper that states, "ITEM(S) CANNOT BE SCANNED." The contents of these notebooks have apparently not been provided to UDF as they are allegedly non-scannable.

7. Several boxes appear to be mislabeled in terms of the office from which they were seized. For example, information that pre-dates an employee's hire date is marked as coming from that employee's office. This exacerbates the challenge of accurately identifying the contents of any individual employee's office.

8. The seized documents sometimes appear to be copied in a haphazard fashion. Numerous documents are labeled "loose paper" or "miscellaneous" and contain hundreds of pages of documents which may or may not be related, with no description to facilitate identifying the scanned documents. Some items are scanned upside down.

9. Many of the seized documents are hand-written notes, including notes from conversations with various attorneys. Electronic searching for key words does not appear to work effectively for those hand-written notes.

10. The above factors render the format of the scanned copies of millions of pages of seized physical documents not readily searchable, disorganized, and functionally useless. Because of the lack of an effective and efficient manner to search the seized physical materials, it would likely take an inordinate amount of time and would tax UDF's resources to attempt to examine these electronic versions of the more than 125 boxes of records identified in Exhibits 1 through 6 attached to the Government's sealed notice to the court. (DE 19).

I declare under penalty of perjury that the foregoing is true and correct. Executed this 5<sup>th</sup> day of November 2021, in Grapevine, Texas.

  
\_\_\_\_\_  
Stacey Dwyer



From: Brasher, Douglas (USATXN) Douglas.Brasher@usdoj.gov  
Subject: UDF Filter Materials  
Date: October 28, 2021 at 6:02 PM  
To: Paul Pelletier pepelletier3@gmail.com  
Cc: Stewart H. Thomas sthomas@hplawdallas.com, Elizabeth A. Fitch EFitch@hallettperrin.com

DB

Paul,

The items that Barrett Howell claimed as privileged during his review of physical documents at the FBI will be ready to be picked up from the FBI in Dallas tomorrow after 10:00 a.m. As I told the Court yesterday, many of these documents are not privileged, such as an unsigned retainer letter from Sutherland and a signed retainer letter from Skadden. *Lawfinders Assocs., Inc. v. Legal Rsch. Ctr., Inc.*, 193 F.3d 517 (5th Cir. 1999) (“[T]he attorney-client privilege does not protect the type of information contained in the retainer letters.”). We are, nevertheless, going to return everything Mr. Howell flagged to you. Whoever picks them up will need to sign a property receipt. I will need a name and approximate arrival time of the person coming to get them so that we can alert security.

Thanks,  
Doug

---

Douglas B. Brasher  
Assistant United States Attorney  
Northern District of Texas  
1100 Commerce Street, Third Floor  
Dallas, Texas 75242-1699  
Telephone: 214-659-8604  
[douglas.brasher@usdoj.gov](mailto:douglas.brasher@usdoj.gov)

EXHIBIT  
B