

CAUSE NO. CC-17-06253-C

UNITED DEVELOPMENT FUNDING, L.P.,	§	IN THE COUNTY COURT
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	§	AT LAW NO. 3
LAND OPPORTUNITY FUND, L.P., A	§	
DELAWARE LIMITED PARTNERSHIP;	§	
UNITED DEVELOPMENT FUNDING	§	
LAND OPPORTUNITY FUND	§	
INVESTORS, L.L.C., A DELAWARE	§	
LIMITED LIABILITY COMPANY	§	

Plaintiffs,

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

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Plaintiffs United Development Funding, L.P., et al. (collectively, “UDF”) file this motion under the crime-fraud exception to obtain hundreds of documents improperly designated as attorney-client privileged or protected by the attorney work product doctrine and thus withheld from production by Defendants J. Kyle Bass, et al. (collectively, “Hayman”).

I. INTRODUCTION

In 2018, Hayman withheld over 300 emails that were responsive to the agreed-upon discovery order on the grounds of attorney-client privilege and/or attorney work product.¹ But these emails, which reflect Hayman’s criminal and fraudulent “short-and-distort” scheme to drive down UDF’s stock price, buy up UDF’s assets in bankruptcy, and reap a \$100 million profit, are not protected from disclosure under Texas law.

Texas courts apply the crime-fraud exception to the attorney-client privilege and the attorney work product doctrine where, as here, a party makes a prima facie showing of a contemplated fraud or crime and 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). UDF easily meets that test here.

The Court of Appeals has already found a prima facie case of fraud by Hayman, and Hayman’s actions in carrying out that fraud also constitute criminal conduct under federal and state laws. The emails on Hayman’s privilege log took place during this fraudulent and criminal

¹ UDF set forth the procedural history of Hayman’s ever-evolving privilege log in UDF’s Amended Objection to Special Master Report. UDF is filing this motion separately because the arguments herein were not raised in UDF’s original motion to compel compliance with court-ordered discovery, and thus were not considered by the Special Master and were not the subject of UDF’s prior objection to the Special Master Order.

scheme, and each of the emails necessarily relates to that scheme because Hayman had no other reason to discuss UDF. As such, none of the emails on Hayman's privilege log is privileged.

II. ARGUMENT

A. Texas courts apply a two-part test to determine whether the crime-fraud exception applies.

The crime-fraud exception is codified in Texas Rule of Evidence 503(d)(1), which states that the attorney-client privilege does not apply “[i]f 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.” (emphasis added); *see also Freeman v. Bianchi*, 820 S.W.2d 853, 861 (Tex. App.—Houston [1st Dist.] 1991), *aff’d sub nom. Granada Corp. v. Hon. First Court of Appeals*, 844 S.W.2d 223 (Tex. 1992) (holding that the crime-fraud exception also applies to claims of work product protection under Tex. R. Civ. P. 192.5(c)(5)). 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.).

A party asserting the crime-fraud exception must satisfy a two-part test. First, the proponent must show a prima facie case of a contemplated fraud or crime. *Granada Corp. v. Honorable First Court of Appeals*, 844 S.W.2d 223, 227 (Tex. 1992). Second, there must be a relationship between the document and that prima facie evidence. *Id.*

To establish a prima facie case, the party asserting the crime-fraud exception must put forth sufficient evidence that, “if believed by the trier of fact, would establish the elements of a fraud [or crime] that was ongoing or about to be committed when the document was prepared.”

Freeman, 820 S.W.2d at 861-62; *see also Granada Corp.*, 844 S.W.2d at 227 (stating that the evidence need only show a mere “possibility of fraud”).

In considering whether there is a prima facie case, Texas courts apply an expansive definition of “fraud.” For example, “fraud” is sometimes defined as “[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 “com[es] 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 may review and consider the allegedly privileged documents at issue, as well as other evidence, to assess if the challenger has established a prima facie case. *Freeman*, 820 S.W.2d at 862.

B. Part One: UDF has established a prima facie case that Hayman was engaged in a criminal and fraudulent “short-and-distort” scheme that falls within the crime-fraud exception.

UDF has already established that Hayman made false statements of fact to enrich itself at UDF’s expense, using a well-established form of manipulation that, unfortunately, human ingenuity has devised. As detailed in UDF’s petition and its opposition to Hayman’s TCPA motion to dismiss, Hayman engaged in a fraudulent and illegal “short-and-distort” scheme whereby Hayman widely disseminated false information about UDF’s business in order to destroy UDF and enrich Hayman by over \$100 million. Those pleadings and evidence are adopted by reference. *See* Tex. R. Civ. P. 58.

To refresh the Court, an investor may choose to “short” a stock when the investor believes that the price of the stock is going to drop, not rise. At a high level, short selling involves a three-step process: (a) the short seller borrows shares of the stock by paying a fee to a lender, (b) the short seller then sells the shares immediately at the market price, and (c) the short seller repurchases the shares and returns the repurchased shares to whoever lent the shares to the short seller.

Generally speaking, if the stock price goes down, the short seller makes money. That creates a dangerous incentive for a short seller to *make* the stock go down. Not only does the short seller want to earn a profit, the short seller wants to avoid the two major risks of selling short. First, unlike a traditional stock purchase, shorting a stock exposes the short seller to the possibility of unlimited losses because the price of a stock can keep rising indefinitely (thus, if the stock price goes up, the short seller can go broke). Second, the short seller also has to pay a daily “carry cost”—the fee paid to the lender—for so long as the short position is maintained. Thus, if the short seller has to pay a high carry cost, the short seller can lose money even if the stock price goes down. That risk further incentivizes the short seller to *make* the stock price go down, and go down fast, which is a great temptation for wrongdoing.

Here, Hayman built up a \$60 million short position in UDF, which created a great incentive for fraudulent conduct. *See* Declaration of Jonathan E. Sommer in Support of Plaintiffs’ Motion to Obtain Documents Improperly Designated as Privileged Pursuant to the Crime-Fraud Exception (“Sommer Decl.”), Ex. A at 7-8, 39, Ex. 45. On top of that, Hayman had already paid \$10 million in carrying costs, such that Hayman was \$10 million in the hole on its short position at the time of its anonymous posts about UDF—further incentivizing fraudulent conduct. *Id.*, Ex. 45. Even more sinister, Hayman had a plan to cause UDF’s collapse and then

acquire UDF-financed real estate on the cheap from UDF's banks—further incentivizing fraudulent conduct. *Id.*, Ex. A at 37, Exs. 23, 28. And, on top of that, Hayman had shorted other stocks that it considered to be part of the “UDF basket” such that these other stocks would drop when Hayman caused UDF stock to drop—further incentivizing fraudulent conduct. *Id.*, Exs. 19, 23. None of Hayman's positions was known to UDF or the market when Hayman began publishing its anonymous posts in December 2015.

With so much money secretly at stake, Hayman decided to execute a classic “short-and-distort” scheme, which is both criminal and fraudulent, by launching a false and misleading attack on UDF's business as a Ponzi scheme (the “distort”) for the purpose of panicking UDF investors so that Hayman could profit from its stock position (the “short”). Hayman purposefully hid its identity (and therefore its extreme bias against UDF) by publishing under a false name, on a website that agreed to lie about Hayman being the author of the posts, and agreed to rig the website so that no reader could make any comments warning investors this was a “short and distort” scheme. Sommer Decl., Ex. B at 13-15. Hayman started publishing its hit pieces under the name “Ernest Poole” on December 10, 2015, and UDF's stock price dropped 50% in two days. *Id.* at 16. In the buildup to December 10, Hayman had instructed its traders to “short as much [UDF stock] as you can” in order to maximize Hayman's profit from its criminal and fraudulent short-and-distort scheme. *Id.* at 14.

In affirming this Court's denial of Hayman's TCPA motion to dismiss, the Court of Appeals found that UDF had established a prima facie case of “short-and-distort” fraud. Specifically, 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 Sommer Decl., Ex. A at 5. The Court of Appeals further found “voluminous” evidence that (1) Hayman made multiple false statement 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.

These findings by the Court of Appeals constitute more than sufficient prima face evidence to satisfy the first prong of the two-part test for the crime-fraud exception: Hayman committed a fraud. See *Volcanic Gardens*, 847 S.W.2d at 347 (“fraud” for purposes of the crime-fraud exception includes “all multifarious means which human ingenuity can devise”); see also *id.* at 347-48 (using false suggestions and suppressing the truth to cheat Plaintiffs for Defendants’ personal advantage falls within the crime-fraud exception).

Furthermore, even though it is enough for UDF to have shown that Hayman committed a fraud, Hayman’s “short-and-distort” scheme is also a criminal violation of federal and state securities laws because Hayman sought to manipulate the price of UDF stock by making false statements. See, e.g., *United States v. Royer*, 549 F.3d 886, 899-900 (2d Cir. 2008) (affirming conviction of FBI Agent and short seller charged with criminal RICO and securities fraud violations for executing an illegal “short-and-distort” fraud); see also *SEC. v. Lemelson*, 355 F.Supp. 3d 107 (2019) (SEC charging fraud in relation to short and distort scheme).² Numerous

² The SEC also issued a press release in the *Lemelson* case that summarizes well the nature of short-and-distort: “After establishing his short position, the complaint charges that [the short seller] made a series of false statements to shake investor confidence in [the target company],

investor watchdog websites also describe “short and distort” fraud schemes as “obviously extremely illegal” and a scheme that “constitutes securities fraud.” Sommer Decl., Exs. 1-3.

The federal government prosecutes short sellers who conduct “short-and-distort” schemes under the federal securities fraud laws.³ For example, the Department of Justice recently convicted a fraudster named Barry Minkow for violating Title 18 U.S.C. § 371 (conspiracy to defraud) for conducting an illegal “short and distort” fraud scheme involving public misrepresentations regarding a land development business conducted by Lennar Corporation, a home builder. Sommer Decl., Exs. 4-5. In addition, Hayman’s conduct also violates state fraud statutes, including Texas Securities Act 581-29(C)(1), which prohibits the use of fraud or fraudulent practices in connection with the sale or offer of securities, as well as Texas Penal Code § 32.32, which prohibits false statements to obtain property.

In sum, based on the Court of Appeals’ opinion and the evidence submitted herein, UDF has more than satisfied the requirement to show a prima facie case of Hayman’s criminal or fraudulent conduct.

C. Part Two: Each of the documents Hayman withheld is related to its criminal and fraudulent “short-and-distort” scheme.

Each document Hayman alleges is protected from disclosure by the attorney-client privilege or the attorney work product doctrine has some nexus to Hayman’s criminal and

lower its stock price, and increase the value of his position.”
<https://www.sec.gov/litigation/litreleases/2018/lr24267.htm>.

³ An illegal short and distort fraud scheme typically violates a host of federal securities fraud laws designed to protect innocent investors from illegal market manipulation schemes, including Title 18 U.S.C. § 1348 (Securities Fraud); Title 18 U.S.C. § 1349 (Conspiracy to Commit Securities Fraud); Title 18 U.S.C. § 1341 (Mail Fraud); Title 18 U.S.C. § 1343 (Wire Fraud); Title 18 U.S.C. § 371 (Conspiracy to Defraud); Title 18 U.S.C. § 1962 (Criminal RICO); and Title 15 U.S.C. § 78j (Securities Fraud). *See United States v. Royer*, 549 F.3d 886 (2d Cir. 2008) (affirmed conviction of defendants charged with criminal RICO, securities fraud, and wire fraud related to the execution of a short and distort scheme).

fraudulent “short-and-distort” scheme. *See Granada Corp.*, 844 S.W.2d at 227; *see also In re JDN Real Estate-McKinney L.P.*, 211 S.W.3d 907, 924 (Tex. App.—Dallas 2006, no pet.) (explaining that there must be “a finding that a nexus exists between the privileged documents and the alleged fraud” and that the “nexus must be established for each privileged document”). The emails Hayman previously produced demonstrate that *all* of Hayman’s communications about UDF relate to Hayman’s illegal “short and distort” fraud scheme—Hayman had no discussions involving UDF between January 2015 and October 2016 other than discussions related to advancing the illegal “short and distort” fraud scheme. Sommer Decl., Ex. B. That makes sense because there is simply no other reason Hayman would be discussing UDF.

Hayman’s plan was to build an enormous short position in UDF, as well as a plan to buy UDF’s assets, and then collapse UDF with a false charge that it was a Ponzi scheme. Hayman’s communications reflect the development of this plan, which came to fruition on December 10, 2015. Then, when UDF was damaged, but not fully collapsed, Hayman further implemented its plan of fraud by moving its false “Ponzi scheme” charge onto a glossy website. That website further harmed UDF. The subsequent communications involve Hayman’s efforts to close out its position in UDF stock and reap the illicit profits. *See Sommer Decl.*, Ex. A at 6-16, 35-39. Whether or not counsel knew it, Hayman’s communications were made in connection with this plan of fraud and to further it, as Hayman had no other reason to discuss UDF.

Attached as Exhibit B to the Sommer Declaration is an Addendum to this motion that summarizes the existing evidence of Hayman’s fraudulent scheme (which formed the basis for the Court of Appeals’ Opinion).⁴ Attached as Exhibit C to the Sommer Declaration is a copy of

⁴ Because Hayman’s fraudulent scheme runs for more than 18 months, and covers over 300 documents, the summary is lengthy, which is why UDF is providing that detail in its Addendum.

Hayman's privilege log with another column added where UDF describes how the document Hayman withheld relates to this illegal "short and distort" fraud scheme. Collectively these two documents show that the crime fraud exception applies to every document on Hayman's privilege log.

When the Court reviews the emails *in camera*,⁵ the Court will see that they bear a nexus to Hayman's fraudulent short-and-distort scheme and occurred during the same time period of that scheme (January 2015 to October 2016). Sommer Decl., Ex. C.

Hayman's privilege log further shows that Hayman has suspicious clusters of "privileged" emails around critical events in its criminal and fraudulent "short-and-distort" scheme, thereby illustrating that these emails were in furtherance of that scheme. Hayman cannot claim privilege to avoid having to produce more damaging documents further establishing the nature and extent of this fraudulent scheme. These clusters are outlined below:

First, Hayman claims privilege over 42 emails in December 2015, when Hayman launched the phony "Ernest Poole" posts that the Court of Appeals found were part of the fraud (*see* Sommer Decl., Ex. A at 8-10, 38-39), and when Hayman had to react to the Street Watchdog Research report that the short seller who authored the post would face jail time. *See* Sommer Decl., Ex. B at 16-18, Ex. C, Nos. 52-92, 254, PRIV00134-266, PRIV01072.

Second, Hayman claims privilege over 113 emails from January 1, 2016 to February 26, 2016, when Hayman planned and then launched its UDFEXPOSED.COM media assault, which

This detail is being provided so that the Court has the relevant evidence to rule on each document.

⁵ In analyzing step two of the crime-fraud exception analysis under *Granada Corp.* the Court is allowed to consider the information contained in the privileged documents at issue in making its determination. *See Freeman*, 820 S.W. 2d at 862.

the Court of Appeals also found was part of Hayman’s fraud (*id.*, Ex. A at 11-12, 38-39), and when Hayman pressed the government to execute a search warrant at UDF based on its false Ponzi scheme accusations, which happened on February 18. *See* Sommer Decl., Ex. B at 22-23, Ex. C, Nos. 93-201, 254-57, PRIV00295-924, PRIV01072-1075.

Third, Hayman claims privilege over multiple emails between February 12, 2015 and March 20, 2015 (many not including an attorney) surrounding the creation and promotion of the false and misleading “UDF is a Ponzi-like Scheme” presentation, which the Court of Appeals also found was part of Hayman’s fraud (*see id.*, Ex. A at 11-12, 38). *Id.*, Ex C, Nos. 1, 3-18, PRIV00001-002, PRIV00007-039. UDF believes the withheld documents will show Hayman sought “the assistance of an attorney [i.e., Chris Kirkpatrick] in order to make a false statement or statements of material fact ... for personal advantage.” *Volcanic Gardens*, 847 S.W.2d at 348. Indeed, in recent discovery responses, Hayman admitted that Kirkpatrick, an attorney who worked at Hayman and whose existence on internal communications forms the basis for many privilege log entries, assisted in generating content for the fraudulent posts. Sommer Decl., Ex. 100 at 11-12. Furthermore, Kirkpatrick was a fundamental player in Hayman’s efforts to get the government to take action against UDF, which was also a part of the criminal and fraudulent “short-and-distort” scheme. Sommer Decl., Ex. B at 5-6, 8.

Fourth, Hayman claims privilege over emails with its lawyers at Cahill Gordon, including many emails between December 10, 2015 and February 4, 2016. Hayman used Cahill to help cover up his prior crimes,⁶ and the scheme also continued. Subsequent to Hayman’s December

⁶ Discussions with counsel related to the cover up and continued execution of an ongoing fraud scheme are not privileged, even though criminal prosecution and/or civil litigation might be on the horizon following the public disclosure of the fraud scheme. *See In Re Nat. Gas Pipeline Co. of Am.*, 2000 WL 1644361 at *2-3 (Tex. App.—Amarillo Nov. 2, 2000, no pet.) (not designated for publication) (crime-fraud exception applied where documents related to after-the-fact

10, 2015 post attacking UDF as a Ponzi scheme and an article published by *Street Watchdog Research* the next day suggesting the anonymous short sellers would end up in jail, Hayman retained two lawyers at the law firm of Cahill & Gordon, Sean Tonolli and Landis Best.

According to their website biographies, Tonolli is a “former federal prosecutor” whose focus is “on white-collar criminal defense”; Landis Best is a general commercial litigator who identified her first practice area as “securities litigation.”

Having made anonymous statements about UDF on December 10, 2015 that caused its stock price to drop 50% in two days, Hayman’s retention of criminal and securities fraud defense lawyers at Cahill Gordon shows that Hayman was planning to continue (and indeed, amplify) its market manipulation scheme of fraud with an eye towards trying to exculpate itself from liability, i.e., adding a disclaimer purporting to deny any intent to manipulate the market while at the same time planning to publish an inflammatory website, UDFEXPOSED.COM, that was intended to manipulate the market by blaring in large headlines that UDF’s business was a Ponzi scheme. Hayman did not refrain from its continuing course of fraud that began with the anonymous posts on Harvest.com;⁷ it merely added more lawyers to aid in perpetuating the

conversations between counsel and oil pipeline company executives following executives’ prior determination that pipeline company was trespassing on landowner’s property).

⁷ The SEC has consistently stated that such anonymous posts are fraudulent because innocent investors get duped by the false and misleading information. *SEC v. Curshen*, 372 F. Appx. 872, 875 (10th Cir. 2010) (court agrees with SEC argument that the defendant’s failure to disclose the fact that he was being compensated 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. Saltsman*, No. 07CV4370NGGRML, 2016 WL 4136829 (E.D.N.Y. Aug. 2, 2016) (same); see also *In re Credit Suisse First Bos. Corp. Sec. Litig.*, No. 97 CIV. 4760 (JGK), 1998 WL 734365 (S.D.N.Y. Oct. 20, 1998) (defendants failure to disclose their short position in report on a stock held to be material to investors due to defendants’ self-interest in the stock). Knowing the true identity of the author of either positive or negative information about a stock is material information to investors because it allows the

scheme via its subsequent website, UDFEXPOSED.COM. But crimes and frauds cannot be disclaimed, and Cahill Gordon's assistance in setting up the website, with all of its manipulative falsehoods, cannot be privileged.

Hayman alleges it consulted Cahill Gordon in connection with the creation of UDFEXPOSED.COM on February 4, 2016. Sommer Decl., Ex. 99 (Bass Aff., ¶ 25). Notably, that website contains a disclaimer of liability that was not contained in Hayman's original, anonymous internet post on December 10, 2015. As testified to by Kyle Bass in paragraph 29 of his affidavit, the website contained a disclaimer which reads: "Although Hayman believes the statements it makes in the Website are substantially accurate in all material respects and do not omit to state material facts necessary to make those statements not misleading, Hayman makes no representation or warranty, express or implied, as to the accuracy or completeness of those statements or any other written or oral communication it makes with respect to UDF or any other companies or persons mentioned, and Hayman expressly disclaims any liability relating to those statements or communications (or any inaccuracies or omissions therein)." By way of comparison, Rule 10b-5, which is the prime basis for liability under the federal securities laws, makes it illegal "to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in the light of the circumstances under which they were made, not misleading." 17 CFR 240.10b-5. Thus, it appears that Hayman sought legal advice as part of a fraudulent scheme to have it both ways: intentionally misrepresenting UDF's business and financial position while at the same time trying to avoid potential liability for

investors to accurately assess the bias and credibility of the author before making a trading decision.

market manipulation based on false statements about UDF being a Ponzi scheme that it planned to use on February 4, 2016, when the Ponzi scheme lie was reposted on UDFEXPOSED.COM.⁸

Fifth, Hayman claims privilege over a series of emails from June 19, 2015 through June 24, 2015, the exact time period Hayman was providing false and misleading information to the government as part of Hayman's scheme and shorting UDF stock based upon the inside information they extracted from the government about its investigation of UDF. *See Sommer Decl.*, Ex. C, Nos. 25-27, PRIV00057-063; *see also id.*, Ex. B at 7.

Sixth, Hayman claims privilege over a series of emails reflecting internal and external communications on August 19, 2015, immediately after Hayman had provided a false and misleading presentation to the government as part of Hayman's scheme. *Sommer Decl.*, Ex. 23. The allegedly privileged documents include an unusual external email to/from "Blake Doyle@heightll." Peter Hans, the co-founder and CEO of Harvest Exchange, is also a founder of Height Capital. Hans played an active role in helping Hayman provide false information to innocent investors in early December 2015 related to the phony "Ernest Poole" posts that the Court of Appeals found were part of the fraud (*see Sommer Decl.*, Ex. A at 38-39) and lied to the media to cover for Bass. *See Sommer Decl.*, Ex. C, Nos. 28-29, PRIV00064-070; *see also id.*, Ex. B at 14-15.

Seventh, Hayman claims privilege over 7 emails in September 2015 when Hayman was increasing its short position following meetings with the government and plotting to interfere with UDF's auditor, Whitley Penn as part of Hayman's scheme. *See Sommer Decl.*, Ex. C. at Nos. 30-36, PRIV00071-094.

⁸ For the crime fraud exception "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.*,

Eighth, Hayman claims privilege over 15 emails in November 2015 when Hayman had to reassess its strategy because there was no government “event” in October 2015, UDF III and IV had released their financial statements for 3Q15, and the carrying cost of Hayman’s short position was about to exceed \$10 million. *See Sommer Decl.*, Ex. C at Nos. 37-51, PRIV00095-133; *see also id.*, Ex. B at 10-12.

Ninth, Hayman claims privilege over virtually all of their internal emails during the Spring/Summer of 2016, including numerous external communications with its public relations firm Edelman. Edelman’s role was to help produce and promote Hayman’s fraudulent content. *Sommer Decl.*, Ex. C, Nos. 209-10, 222-23, 258-63, 266-300, 314-15, 317-18, PRIV01076-1092, PRIV01104-1111, PRIV1141-1146, PRIV1168-1235, PRIV952-953, 983, 987, PRIV1441-1453, PRIV1473-1479; *see also id.*, Ex. B at 23-25.

Tenth, Hayman claims privilege over numerous internal and external emails, many with Edelman, in October 2016 when Nasdaq delisted UDF and trading resumed on the OTC stock exchange, something Hayman also worked to influence as part of its scheme to close out its short position and profit. *Sommer Decl.*, Ex. C at Nos. 195-201, 206; *see also id.*, Ex. B at 23-25.

In conclusion, UDF has demonstrated a prima facie case that all of the documents on Hayman’s privilege log relate to and have a nexus with Hayman’s criminal and fraudulent scheme against UDF. *Granada Corp*, 844 S.W.2d at 227; *Freeman*, 820 S.W.2d at 861-62.

III. CONCLUSION

As part of its efforts to profit at UDF’s expense, Hayman engaged in criminal and fraudulent conduct that violated numerous federal and state laws. Based on the overwhelming evidence of Hayman’s criminal and fraudulent conduct, as well as the lack of any other

347 S.W.3d 924, 927 (Tex. App. 2011). The Court need only find Hayman sought to use Cahill to cover up or further its fraud. *Id.*

legitimate reason for Hayman to be discussing UDF, all of the emails on Hayman's privilege log are discoverable under the crime-fraud exception. No reported case in Texas has ever possessed so compelling a combination of facts as UDF has established here: (1) the Court of Appeals has already found that UDF has established a prima facie case that Hayman intentionally spread false and misleading information about UDF to gain a personal advantage, (2) the limited documents Hayman has already produced confirm that Hayman perpetrated a criminal and fraudulent scheme against UDF; (3) Hayman's criminal and fraudulent scheme spans the entire time frame covered by the withheld emails identified on Hayman's privilege log; and (4) Hayman had no reason to discuss UDF with its attorneys, its public relations firm, or any of the other parties identified on its privilege log outside of this criminal and fraudulent scheme. This Court should thus find that the crime-fraud exception applies here and order Hayman to produce all documents on its privilege log to UDF.

DATED: June 2, 2020

Respectfully submitted,

By: /s/ Ellen A. Cirangle

Ellen A. Cirangle

CA Bar No. 164188

ecirangle@lubinolson.com

(admitted pro hac vice)

Jonathan E. Sommer

State Bar No. 24002974

jsommer@lubinolson.com

Kyle A. Withers

CA Bar No. 269459

kwithers@lubinolson.com

(admitted pro hac vice)

LUBIN OLSON & NIEWIADOMSKI LLP

Transamerica Pyramid

600 Montgomery Street, 14th Floor

San Francisco, California 94111

Telephone: (415) 981-0550

Facsimile: (415) 981-4343

Leland C. de la Garza
State Bar No. 05646600
ldelagarza@hallettperrin.com
Stewart H. Thomas
State Bar No. 19868950
stthomas@hallettperrin.com
Elizabeth A. Fitch
State Bar No. 24075777
Joshua C. Rovelli
State Bar No. 24110301

HALLETT & PERRIN, P.C.
1445 Ross Avenue, Suite 2400
Dallas, Texas 75202
Telephone: (214) 953-0053
Facsimile: (214) 922-4142

ATTORNEYS FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

I hereby certify that, on this 2nd day of June, 2020, I contacted counsel for Defendants to discuss the items presented in this Motion, and counsel for Defendants indicated that they are opposed to this Motion.

/s/ Jonathan E. Sommer
Jonathan E. Sommer

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
Karly Rodine
Patrick J. Carew
Raymond T. Fischer
Kilpatrick Townsend & Stockton LLP
2001 Ross Avenue, Suite 4400
Dallas, Texas 75201

/s/ Jonathan E. Sommer
Jonathan E. Sommer

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Gloria Beasley on behalf of Jonathan Sommer
Bar No. 24002974
gbeasley@lubinolson.com
Envelope ID: 43422289
Status as of 06/03/2020 09:05:56 AM -05:00

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

Name	BarNumber	Email	TimestampSubmitted	Status
Leland C.de la Garza		ldelagarza@hallettperrin.com	6/2/2020 5:36:41 PM	SENT
Stewart H.Thomas		sthomas@hallettperrin.com	6/2/2020 5:36:41 PM	SENT
Elizabeth A.Fitch		efitch@hallettperrin.com	6/2/2020 5:36:41 PM	SENT
Joshua C.Rovelli		jrovelli@hallettperrin.com	6/2/2020 5:36:41 PM	SENT

Associated Case Party: HAYMAN CAPITAL MANAGEMENT, L.P.

Name	BarNumber	Email	TimestampSubmitted	Status
Cole B.Ramey		cramey@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
Karly Rodine		krodine@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
Raymond T.Fischer		rfischer@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
Patrick Carew		pcarew@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT

Case Contacts

Name
Jim Bradbury
John Wander
Richard KentPiacenti
Karly Rodine
Courtney CoxSmith
JOSEPH M.COX
Lindsey Pryor
Cole B.Ramey

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Gloria Beasley on behalf of Jonathan Sommer
Bar No. 24002974
gbeasley@lubinolson.com
Envelope ID: 43422289
Status as of 06/03/2020 09:05:56 AM -05:00

Case Contacts

Raymond T.Fischer		rfischer@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
Shannon Vanvickle		svanvickle@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
C. GregoryShamoun		g@snlegal.com	6/2/2020 5:36:41 PM	SENT
Stephan A.Khoury		SAKhoury@kelsoe-law.com	6/2/2020 5:36:41 PM	SENT
Douglas Kilday		dkilday@gdhm.com	6/2/2020 5:36:41 PM	SENT
Ellen Cirangle		ecirangle@lubinolson.com	6/2/2020 5:36:41 PM	SENT
Kyle Withers		kwithers@lubinolson.com	6/2/2020 5:36:41 PM	SENT
Theodore A.Griffinger, Jr.		TGriffinger@lubinolson.com	6/2/2020 5:36:41 PM	SENT
Jonathan Sommer		JSommer@lubinolson.com	6/2/2020 5:36:41 PM	SENT
David Anderson		danderson@wickphillips.com	6/2/2020 5:36:41 PM	SENT
Todd Phillips		todd.phillips@wickphillips.com	6/2/2020 5:36:41 PM	SENT
Brooke Floyd		bfloyd@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
Alan Wright		alan.wright@kilpatricktownsend.com	6/2/2020 5:36:41 PM	SENT
Amy TankersleyPerry		aperry@velaw.com	6/2/2020 5:36:41 PM	ERROR
Brian K.Norman		bkn@snlegal.com	6/2/2020 5:36:41 PM	SENT
J. BlairNorris		bn@snlegal.com	6/2/2020 5:36:41 PM	SENT
Eric D. Walker		ewalker@mwtrialfirm.com	6/2/2020 5:36:41 PM	SENT

Associated Case Party: WATERFALL ASSET MANAGEMENT, LLC

Name	BarNumber	Email	TimestampSubmitted	Status
Managing Attorney'sOffice		courtnotices@kasowitz.com	6/2/2020 5:36:41 PM	SENT