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

IN THE MATTER OF THE SEARCH OF UDF 301 MUNICIPAL WAY GRAPEVINE, TEXAS 76051	Case No.

MOTION FOR RETURN OF PROPERTY
PURSUANT TO RULE 41(g) OF THE
FEDERAL RULES OF CRIMINAL PROCEDURE

I. INTRODUCTION

United Development Funding ("UDF")[1] files this motion pursuant to Rule 41(g) of the Federal Rules of Criminal Procedure seeking the return of all property seized during the execution of a search warrant at UDF's Grapevine, Texas headquarters on February 18, 2016.[2] The FBI's unconstitutionally overbroad search resulted in the seizure of virtually every paper and electronic document at UDF's headquarters.[3] UDF now seeks the return of the seized materials, including its privileged documents, in accordance with the Fifth Circuit's recent ruling in *Harbor Healthcare System, L.P. v. United States,* No. 19-20624, 2021 WL 3009732 (5th Cir. July 15, 2021). In *Harbor Healthcare,* the Fifth Circuit confirmed that a company—like UDF — "remains injured as long as the government retains its privileged documents" due to the "ongoing intrusion into its privacy and the continued possession [by DOJ] of attorney-client privileged documents." *Id.* at *6. That is precisely the unabated injury sustained here.

The magnitude of the injury to UDF cannot be understated. Throughout 2015, the Securities and Exchange Commission ("SEC") was conducting a parallel investigation of UDF in

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[1] United Development Funding (UDF) represents a family of funds which are designed primarily to provide financing to seasoned and accomplished developers for the acquisition of land and the phased development of single family residential communities. This family of funds includes, *inter alia*, UMTH Land Development LP, United Development Funding LP; United Development Funding II LP; United Development Funding III LP; United Development Funding IV; United Development Funding V; United Mortgage Trust; UMT Services, Inc.; UMT Holdings, LP; UMT Home Finance LP; UMT Home Finance II, LP; UMT Properties LP; UMTH General Services LP; UMTH Funding Services LP; UMTH Lending Company LP; UDF Holdings LP; UDF Services LLC; UDF Gen Par LLC; UDF Paramount MOF Investors LLC; UDF Texas Two LP; UDF Mutli-Family Opportunities GenPar LLC; UDFH General Services LP; UDFH Land Development LP; UMTH Loan Servicing LP; United Development Funding, Inc; United Development Funding II, Inc.; United Development Funding IV Operating Partnership LP; UDF IV Acquisitions Manager LLC; and United Development Funding X.

[2] The Federal Bureau of Investigation ("FBI-Dallas") and United States Attorney's Office for the Northern District of Texas ("USAO-NDTX" and collectively "DOJ") prepared the search warrant affidavit that resulted in the issuance and execution of the warrant that caused FBI-Dallas to seize the paper and electronic documents at issue here.

[3] On January 15, 2019, various UDF entities filed a sealed motion in Case No. 3-19MC-004-B. That sealed motion did not seek the relief sought herein.

close coordination with the USAO-NDTX and FBI-Dallas. The SEC requested and received voluminous documents and testimony from UDF and various UDF employees on a broad array of issues related to UDF's business. UDF retained outside counsel to advise with respect to the SEC investigation. The USAO-NDTX was aware that UDF had retained outside counsel with respect to the SEC investigation and that UDF's Board of Trustees had established an Independent Committee, which had retained counsel at the law firm of Thompson & Knight to conduct an internal evaluation and review of UDF executive management's business-related activity and UDF's accounting during the relevant time period encompassed by the SEC inquiry. The USAO-NDTX also had access to the voluminous documents and testimony UDF had provided to the SEC.

Naturally, UDF, with a publicly traded REIT, had voluntarily cooperated in the SEC investigation, and those efforts generated substantial volumes of privileged materials both internally within UDF and between UDF and its outside counsel handling the SEC and Independent Committee matters. UDF also utilized Melissa Youngblood, an attorney and COO of UDF's manager, and CEO Hollis Greenlaw, also an attorney, to advise internally on legal matters and the multitude of daily dealings with UDF's outside counsel and other attorneys in UDF's real estate finance operations. These communications resulted in additional privileged material on a regular basis.

Nevertheless, on February 18, 2016, without even a modicum of apparent consideration of UDF's obvious generation and retention of vast quantities of privileged materials, and without alerting the U.S. Magistrate Judge as to the presence of such an array of privileged materials, FBI Dallas raided UDF's headquarters and seized terabytes of electronic data and over 700 boxes of

paper documents and physical items, including voluminous privileged materials[4] on UDF's server and from the offices of attorney Melissa Youngblood, UDF's CEO attorney Hollis Greenlaw, and UMT Holdings' Chairman Todd Etter. The government did so without any apparent consideration of UDF's retention of vast amounts of privileged materials and apparently without preclearing a privilege protocol with the Magistrate Judge who issued the warrant. Further, FBI Agent Christine Edson, the Prosecution Team's lead agent, led the UDF search as well as the seizure of material from Ms. Youngblood's office – including the seizure of materials plainly marked "privileged."

Now, more than five and one-half full years after the seizure of UDF's privileged documents and despite repeated demands, the Government has refused to return either the privileged or out of scope documents and has refused to share the following basic and essential information to evaluate the alarming scope and depth of their dereliction:

(1) Whether the USAO-NDTX obtained judicial preauthorization to seize UDF's privileged materials during the search;

(2) The filter protocol, if any, established and utilized to protect UDF's privileged materials;

(3) The process, if any, used to ensure the Prosecution Team did not get access to UDF's privileged materials or that such materials were not promoted to them;

(4) A description of all materials already provided to the Prosecution Team;

(5) A list of the agents who executed the search sufficient to determine whether any Filter Team agent was present; and,

(6) Information sufficient to determine whether the Prosecution Team has been contaminated by access to privileged materials, given that, as described below, the USAO-NDTX did not have ***any*** privilege-review Assistant United States Attorney assigned to supervise the Filter Team for approximately two years.

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[4] For the purpose of this motion "attorney-client privileged material" or "privileged material" includes attorney work product.

Importantly, since seizing these materials more than five and one-half years ago**,** the USAO-NDTX has not filed any criminal charges in this matter and, has repeatedly expressed its lack of intention to charge any UDF entity.

Absent the implementation and use of a legitimate filter team protocol prior to and following the search, the contamination of a prosecution team cannot be cured. Here, it appears that the Prosecution Team first knowingly and purposefully seized privileged materials and, then, failed to follow a legitimate Filter Team protocol designed to protect the integrity of the vast quantity of UDF's privileged materials. The USAO-NDTX's refusal to provide basic information relevant to its search, seizure and subsequent handling of large quantities of privileged and work product materials—from a search that occurred more than a half decade ago—necessitates this motion and the Court's intervention.

II. SUMMARY OF THE ARGUMENT

Under the present facts, the Court can consider a Rule 41(g) motion for return of property, even though no indictment has been returned and prosecution of UDF, as the directly aggrieved entity, is improbable here. *Harbor Healthcare,* 2021 WL 3009732 at **4-6 (reversing district court's refusal to exercise equitable jurisdiction on a pre-indictment Rule 41(g) motion related to a Filter Team's refusal to return privileged material seized via a search warrant). The misuse of Filter Teams has received increasing scrutiny in recent years as courts have criticized DOJ's mishandling of potentially privileged documents. Several of those criticisms apply here and demonstrate why this Court should grant UDF's requested relief.

First, the USAO-NDTX's misuse of its Filter Team constitutes a *per se* intrusion on UDF's attorney client privilege as "the government's fox is left in charge of the [] henhouse" and the

Filter Team, through neglect or malice, may have promoted privileged documents to the Prosecution Team. *In re Search Warrant Issued June 13, 2019,* 942 F. 3d 159, 177 (4th Cir. 2019), as amended (Oct. 31, 2019); *In re Grand Jury Subpoenas,* 454 F.3d 511, 523 (6th Cir. 2006).

Further, a party remains injured from DOJ's intrusion into their right to privacy in their privileged communications so long as DOJ continues to keep any copies of their privileged documents. *Harbor Healthcare,* 2021 WL 3009732 at *6. Here, the USAO-NDTX has refused to return all originals and copies of UDF's privileged and out-of-scope documents.

Accordingly, in February 2016, the USAO-NDTX should have provided UDF any Filter Team protocol the USAO-NDTX used to govern its review of UDF's privileged material. *United States v. Pedersen*, No. 3:12-CR-004310HA, 2014 WL 3871197, at *31 (D. Or. Aug. 6, 2014) ("defense counsel should be provided with a copy of the filter team protocol at the earliest possible opportunity, preferably before the protocol is employed and a copy should be filed with the court[.]"). Here, the USAO-NDTX refuses to provide UDF a copy of any Filter Team protocol, if any protocol even exists.

Under long established protocol, DOJ must have Filter Team agents on site when investigating agents execute a search warrant, ensuring that FBI agents on the Prosecution Team are not contaminated during the collection of any privileged materials. *Heebe v. United States*, No. CIV.A. 10-3452, 2012 WL 3065445, at *5 (E.D. La. July 27, 2012) (a filter team process is corrupted when non-filter team members handle potentially privileged materials during the on-site search). Here, the lead Prosecution Team agent and warrant affiant, FBI Agent Edson, led the search of the office of UDF's in-house counsel, where she directed the seizure of privileged documents. It is axiomatic that Filter Team protocols must have been in place to wall off Agent

Edson from even being present during the search of any UDF attorney, never mind allowing her to direct those searches.

DOJ's Filter Team must also confer with the Court and UDF ***before*** promoting any documents to the Prosecution Team. *Heebe*, 2012 WL 3065445, at *4 (E.D. La. July 27, 2012) (any "dispute should be heard before a court before the document is turned over to any prosecution team"); *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 176 (stating that resolving disputes of attorney-client privilege are a judicial function that cannot be delegated to the executive branch, "especially when the executive branch is an interested party in the pending dispute."). Here, the USAO-NDTX refuses to provide any index that identifies the documents the Prosecution Team has reviewed—thereby raising, at a minimum, the presumption that the Filter Team promoted documents to the Prosecution Team without notifying UDF or the Court.

III. STATEMENT OF FACTS

A. UDF

UDF is a successful family of funds that finance residential real estate development and has funded some of the most successful single family home communities in North Texas and Austin for over seventeen (17) years. UDF was founded in 2003 to provide investors with investments in affordable residential real estate. UDF IV was a publicly traded REIT which was formed in 2008 primarily to make loans for the acquisition and development of real property into single-family residential lots or mixed-use master planned communities, acquisition of finished lots, and construction of single-family homes.

B. The Filter Team Failures

On February 18, 2016, rather than issue subpoenas to UDF or accept access to the necessary documents that had been offered by its outside counsel, the FBI chose to execute a search warrant at the principal offices of UDF in Grapevine, Texas, and, in turn, corruptly[5] and heavy-handedly seized terabytes of data comprised of over 700 boxes of paper documents, all of UDF's electronic server based document, and electronic items from many key UDF personnel. This massive and virtually unchecked document grab by the Prosecution Team included volumes of privileged materials—items that in many cases were plainly and openly labeled "Privileged." Further, the FBI also took personal cell phones containing privileged material from various UDF executives and employees, demanded the pass codes, and imaged the hard drives of certain desktop computers. In short, the FBI seized virtually every document and piece of electronic media at UDF. *See* Declaration of Paul E. Pelletier, ("Pelletier Decl.") at ¶ 7.

1. The Filter Team Fails to Confer with UDF and the Court Before Promoting Documents to the Prosecution Team

Shortly after the execution of the search, the USAO-NDTX informed UDF that it had a Filter Team that would conduct a review of the materials, led by Filter Team AUSA 1. In 2016, UDF's counsel provided Filter Team AUSA 1 with a list of approximately thirty-five (35) law firms and additional individual attorneys who would be involved in privileged communications with UDF. Pelletier Decl. at ¶ 24. Filter Team AUSA 1, however, never met or otherwise

[5] The illicit relationship between the Prosecution Team and infamous predatory short seller Kyle Bass is cataloged in a *Bivens* action filed in the Eastern District of Texas against the two FBI case agents and the AUSA on the Prosecution Team in the case of *Hollis M. Greenlaw, et al., v. David Klimek, et al*, Case No, 4:20-civ-00311-SDJ. Since the filing of that action UDF has discovered that a member of the Prosecution Team leaked to Bass the date and time of the execution of the Search Warrant on UDF. *See* Pelletier Decl. at ¶¶ 8-20.

conferred with UDF before presumptively promoting documents through to the Prosecution Team. Thus, UDF was denied the opportunity to raise any objections to the Court ***before*** the Prosecution Team reviewed seized materials. *Heebe*, 2012 WL 3065445, at *4 (E.D. La. July 27, 2012) (any "dispute should be heard before a court before the document is turned over to any prosecution team"); *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 176 (stating that resolving disputes of attorney-client privilege are a judicial function that cannot be delegated to the government, "especially when the executive branch is an interested party in the pending dispute").

2. The USAO-NDTX Continued its Investigation for Years with No Filter Team AUSA Assigned to Protect UDF's Privileged Material

Filter Team AUSA 1 left the USAO-NDTX in 2018. For reasons unknown to UDF, and the USAO-NDTX refuses to explain, it did not assign another AUSA to oversee the Filter Team for approximately two years following the departure of Filter Team AUSA 1, but during which time the government continued its hold over UDF's privileged material. The Prosecution Team's investigation, however, remained ongoing throughout that entire period—simply plugging along without any Filter Team AUSA.

In March 2020, counsel for Cara Obert, Chief Financial Officer for UDF IV, initiated a meet and confer process to determine what the Filter Team had done to protect the privileged material the FBI seized. Declaration of Neal Stephens ("Stephens Decl.") at ¶¶ 2-3. Only then—after a nearly two-year hiatus with no Filter Team AUSA to prevent the Prosecution Team from reviewing UDF's privileged material—did the USAO-NDTX admit that there was no Filter Team AUSA overseeing of the review of evidence by Prosecution Team. ***None***.

After disclosing this glaringly consequential lapse, the USAO-NDTX finally assigned another AUSA (Filter Team AUSA 2) to try to salvage an already contaminated and

unconstitutional Filter Team process. *Id.* at ¶¶ 2-4. There are no reported cases where any United States Attorney's Office or Justice Department Trial Attorneys failed to keep a continuous Filter Team prosecutor in place to ensure that a Prosecution Team did not become contaminated by access to privileged material. But it certainly occurred here.

These issues, however, are not complex. The USAO-NDTX must, at a minimum, (1) establish that Filter Protocols were in place and precleared by the magistrate judge who issued the warrant, (2) demonstrate its efforts (if any) to ensure UDF's privileged documents were not shared with the Prosecution Team, and (3) show that the Prosecution Team was not contaminated by this apparently protocol-free search. Only after the propriety and implementation of the Filter Protocols enter the purifying light of judicial scrutiny can the legitimacy of the Government's efforts be judged. Here, the USAO-NDTX had no functioning Filter Team for approximately two (2) years while they reviewed evidence and continued their investigation. *See In re Search Warrant Issued June 13, 2019*, 942 F.3d at 177 (requiring a Filter Team AUSA to make all privilege determinations). Given that courts have been harshly—and increasingly—critical of Filter Team AUSAs due to the cozy office relationship between fellow AUSAs that lacks the level of independence needed to adequately protect a third party's privileged communications, the USAO-NDTX's conduct here defies logic. During this two-year hiatus from protocol, the Prosecution Team had unfettered access to UDF's privileged documents–plainly the proverbial "government's fox in charge of guarding the [] henhouse." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 178.

Given USAO-NDTX's abject neglect in failing to maintain a Filter Team for years while in possession of UDF's privileged documents, the burden rests on the government to demonstrate

that UDF's privileged documents were not improperly promoted to, or accessed by, the Prosecution Team. *Id.* This is a tall order considering the facts at issue, especially that there were no protocols in place preventing the seizure of plainly privileged materials, and that the lead case agent and witness who secured the warrant itself was present for and directed the search and seizure of UDF's in-house counsel's office.

3. The USAO-NDTX Refuses to Return the Privileged Documents or Identify Any Documents Determined to be Not Privileged

UDF's repeated requests for the return of its privileged materials have been denied. Indeed, DOJ still—more than five years after executing the warrant at UDF—maintains custody of all the privileged documents that FBI-Dallas seized during the execution of the warrant. As set forth below, the courts have made it abundantly clear that the USAO-NDTX may not indefinitely keep UDF's privileged materials.

USAO-NDTX has also refused to provide UDF with an index of seized documents reviewed by members of the Prosecution Team, raising serious questions about its handling of UDF's privileged materials and whether, as a single example, any filter protocol breaches occurred during the inexplicable ***two-year*** hiatus without a Filter Team in place. USAO-NDTX has also failed to reveal the breadth, time and duration of whatever protocols were in place.

On March 10 and March 25, 2020, as part of an attempt to determine the severity of the contamination that every reasonable inference shows infects or can be presumed to infect the Prosecution Team, UDF's counsel requested the following information and provided relevant case law to support these basic requests:

- The return of all originals and copies of all privileged materials—both paper documents and electronic documents;

- A copy of any Filter Team protocol and confirmation that the USAO-NDTX presented the protocol to the Court;

- The identity and responsibilities of any Filter Team agent at the search location;

- The status of the Filter Team's review; including whether the Filter Team finished its work, had provided any seized material to the Prosecution Team, had an index memorializing what the Filter Team provided to the Prosecution Team, and what the Filter Team did to allow defense counsel to object to the Court before providing seized information to the Prosecution Team; and

- The location(s) where the seized documents are stored, including what the Filter Team has done to prevent the Prosecution Team from accessing potentially privileged documents at that location(s).

Stephens Decl. at ¶¶ 4-5.

Filter Team AUSA 2 responded on March 26, 2020 but refused to answer counsel's questions. *Id.* Instead, without citing any relevant legal authority in response, Filter Team AUSA 2 astonishingly informed counsel that (a) despite the USAO-NDTX's consequential choice to proceed with a search warrant rather than a subpoena, ***it was UDF's burden*** to identify any privileged materials in DOJ's possession, (b) the USAO-NDTX expected UDF to review terabytes of material seized by the DOJ to identify the privileged material, and (c) each privilege holder was required to provide a privilege log to the USAO-NDTX so the Filter Team could determine if the material was privileged. *Id.* In other words, more than five and one-half years after the privileged material was seized, the USAO-NDTX now insists on starting a brand new time and labor-intensive process in which, incredibly, UDF would be required to shoulder the burden and expense of all the work. No authority supports such an absurd proposal. When the Government chooses, albeit improperly, to execute a search warrant and seize terabytes of sensitive data, it is the

Government that must be held to account by ensuring, at its own expense, processes to ensure that the attorney-client privilege is honored.

On March 31, 2020, UDF's counsel responded by answering all of DOJ's questions. *Id.* On April 3, 2020, the USAO-NDTX responded but again refused to answer counsel's substantive questions. *Id.* On July 13, 2021, Filter Team AUSA 3 surfaced and sent a similar email to UDF's counsel, cavalierly insisting *again* that it was *UDF's responsibility*, not DOJ's, to protect the privilege in the materials seized by DOJ and in the USAO-NDTX's possession. *Id.* at ¶ 6. On July 26, 2021, UDF's counsel responded and again demanded return of privileged materials and laid out the series of Filter Team violations that had occurred and again sought answers to important questions about methodology. *Id.* In response, Filter Team AUSA 3 again refused to turn over privileged materials or answer these basic questions even though the Fifth Circuit had recently endorsed UDF's position regarding their constitutional right to privacy in the seized privileged documents. Pelletier Decl. at ¶ 25; *see also Harbor Healthcare,* 2021 WL 3009732 at **5-6 (5th Cir. July 15, 2021).

The pertinent questions presented here remain unanswered and the privileged and out of scope documents remain in the possession of the DOJ. The troubling answers to those questions lie in the disturbing facts and lapses surrounding the Prosecution Team's problematic investigation and search.

4. Prosecution Team Members Review and Seize Privileged Documents When Executing the Warrant

On the day of the raid, FBI Agent Edson, a member of the Prosecution Team, spearheaded the collection of paper and electronic documents at UDF, including privileged materials. Declaration of Hollis Greenlaw ("Greenlaw Decl.") at ¶¶ 4-7; Declaration of Todd Etter ("Etter

Decl.") at ¶¶ 2-4; Pelletier Decl. at ¶ 7. As just one glaring example of malfeasance, FBI Agent Edson entered the office of attorney Youngblood, and reviewed documents in her office that were clearly labeled as privileged materials. Agent Edson actually then directed some of her FBI colleagues to seize the privileged materials. In addition, the FBI seized numerous privileged documents, in both hard copy and electronic form, from the offices of UDF's CEO, Mr. Greenlaw, who was leading UDF's response to the ongoing investigations/litigation and communicating with outside counsel continuously for more than a year. Greenlaw Decl. at ¶¶ 4, 6-7. And the same was true for Mr. Etter. Etter Decl. at ¶¶ 2-4.

Absent sheer contempt for the privilege and the most basic search warrant protocols, Agent Edson could not have been on the Filter Team, much less been afforded access to the presumptively privileged materials she took control over. Indeed, there may not have even been a Filter Team agent at UDF at the time of the raid. On day 1 of DOJ's Filter Team process, FBI Agent Edson's Prosecution Team, which had been previously aware of the SEC investigation and the privileged work of UDF's Independent Committee, knowingly contaminated itself through its intentional exposure to UDF's privileged materials. *Heebe*, 2012 WL 3065445, at *5 (the Filter Team process is corrupted when non-Filter Team members handle potentially privileged materials during the on-site search). Instead, the Filter Team should have had agents on site to screen all Prosecution Team members—including Agent Edson—from any potential exposure to UDF's privileged materials. Agent Edson acted as the proverbial "fox in the hen house." For reasons the USAO-NDTX refuses to explain, the Prosecution Team behaved unconstitutionally and irresponsibly. Yet, the USAO-NDTX continues to refuse to return to UDF the privileged material or provide any Filter Team

protocol. UDF believes that the protocol either does not exist or it will be immediately clear that FBI-Dallas knowingly violated its protocol on the very first day they seized documents from UDF.

5. The Search Violated DOJ Policy Directing the USAO to Obtain the Documents by Grand Jury Subpoena

On February 12, 2016, when AUSA Nick Bunch and FBI Agent Edson presented their search warrant application packet to the Court, they knew (but to UDF's knowledge withheld from the Court) the following information, all of which supported the use of a less intrusive grand jury subpoena in lieu of the search warrant they sought:[6]

- Between April 2014 and January 2016, UDF had produced over 800,000 pages of documents to the Government regarding the Government's investigation of UDF that were fully accessible by the Prosecution Team;
- On multiple occasions, counsel for UDF invited AUSA Bunch to come to UDF's corporate headquarters to obtain whatever documents DOJ desired;
- AUSA Bunch and FBI Agent Edson used subpoenas, not search warrants, to obtain documents from UDF's offices in other pertinent locations, Austin, Texas and Boulder, Colorado, on the very day that they requested the search warrant for UDF's Grapevine office;
- UDF's Independent Committee had previously retained Thompson & Knight and PwC to conduct an independent internal investigation in coordination with the SEC so the USAO-NDTX knew it had the ability to work directly with an independent law firm to obtain whatever non-privileged documents the prosecution team desired from UDF; and,
- UDF had been aware of the Prosecution Team's investigation for months, and UDF's counsel had been in contact with and offered UDF's complete cooperation with AUSA Bunch concerning anything he might need for the investigation, so there were no exigent circumstances to conduct the UDF raid in February 2016. The Government has never expressed any concern as to the defalcation of evidence or the improper withholding responsive documents requested by Government subpoena.

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[6] *See* Pelletier Decl., ¶¶ 3-6.

Section 9-13.420 of the Justice Manual applies to searches of business organizations. It instructs prosecutors to "take the least intrusive approach" consistent with vigorous and effective law enforcement "to avoid impinging on valid attorney-client relationships."[7] Thus, in a section titled "Alternatives to Search Warrants," prosecutors are directed to "[c]onsider[] . . . obtaining information from other sources or through the use of a subpoena" except where it would otherwise compromise the investigation. No such circumstances applied here.[8]

In short, the USAO-NDTX not only ignored the specific history of UDF's consistent cooperation with the Government in its parallel investigation of UDF, it also plainly violated DOJ's own policy requiring it to use a subpoena, rather than a search warrant, to obtain the information it sought, most of which was already in the Government's possession.

6. The Warrant is Calculatedly Overbroad and Lacking Particularity with Respect to the Items to be Seized

Mr. Greenlaw is an attorney licensed to practice law in Texas who routinely gives and receives legal advice. Greenlaw Decl. at ¶ 2. In seizing virtually every document from Greenlaw's office, the Prosecution Team, with no evident protocols, encountered and seized a vast array of privileged business and personal materials from his office and electronic media. Those items have never been returned. The same is true with respect to the items seized from the office of attorney Youngblood. Because the search warrant permitted limitless seizure of virtually every paper and

[7] This policy applies to searches of business organizations where, as here, they involve materials in the possession of individuals serving in the capacity of legal advisor to the organization. As the USAO-NDTX knew before the search, attorney Youngblood served in precisely such capacity.

[8] The Government's investigations into UDF—by both the SEC and USAO-NDTX—were already overt before the search warrant was executed on UDF. There was thus no law enforcement justification for proceeding via search warrant rather than subpoena.

electronic document from UDF, and because there were no privilege protocols in place at the time of execution of the search warrant, the search fails on both constitutional and privacy grounds.

Attachment B to the Search Warrant broadly identified the scope of the "Items to be Seized" as "any and all records, documents, files, or materials" that "constitute evidence, instrumentalities or fruits of Securities Fraud" or "conspiracy to Commit Securities Fraud" by "UDF; Buffington; and CADG."[9] The Prosecution Team agents, in this investigation involving complex accounting and financial standards, would then be forced to rely solely on their unmoored judgment as to whether any particular document or electronic file somehow advanced an amorphous and undefined statutory violation. Because of the insidiously broad scope of the search warrant (it is impossible to identify any documents that the agents would have been prohibited from seizing), it was incumbent upon the Government to identify with particularity the non-privileged documents that were linked to their putative probable cause showing. *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 183 (4th Cir. 2019), as amended (Oct. 31, 2019); *see also, United States v. Sullivan*, No. CR 17-00104 JMS-KJM, 2020 WL 1815220, at *8 (D. Haw. Apr. 9, 2020) (DOJ's responsibility to protect the attorney client and work product privileges is particularly important when DOJ chooses to use a Filter Team in a criminal proceeding). It did not.

[9] *See* Pelletier Decl. at ¶ 6.

IV. ARGUMENT

A. Protection from *Any* Disclosure is the Primary Purpose of the Attorney-Client Privilege

"The attorney-client privilege is the oldest of the privileges for confidential communications known to the common law." *Upjohn Co. v. United States*, 449 U.S. 383, 389 (1981). The Fifth Circuit recognizes that the benefits of the privilege "accrue only if clients remain 'free from the consequences or the apprehension'" of involuntary disclosure of those confidential communications. *In re Itron, Inc.*, 883 F.3d 553, 561 (5th Cir. 2018) (quoting *Hunt v. Blackburn*, 128 U.S. 464, 470 (1888)). The privilege empowers the privilege holder with the right to "prevent ***any*** other person from disclosing confidential communications between him and his attorney." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 173 (4th Cir. 2019) (quoting Black's Law Dictionary 129 (6th ed. 1990)).

Courts have routinely confirmed that confidentiality and protection from any disclosure is the primary purpose of the privilege. "Mandatory disclosure of the communications is the exact harm the privilege is meant to guard against, and this disclosure is not remedied merely because a disclosed confidence is not used against the holder in a particular case." *In re Lott*, 424 F.3d 446, 451-52 (6th Cir. 2005); *see also Bogosian v. Gulf Oil Corp.*, 738 F.2d 587, 591 (3d Cir. 1984) (forcing a party to comply with a discovery order while it appealed a claim of privilege destroys the right sought to be protected). That is why courts have found that a privilege holder suffers irreparable harm when the Government seizes their attorney-client privileged materials. *In the Matter of 636 S. 66th Terrace, Kansas City, Kan.*, 835 F. Supp. 1304, 1306 (D. Kan. 1993) (with the privileged materials in the hands of the Government, any confidentiality of the privileged materials was lost and the movants were "effectively denied the protection of the privilege."). The

immediate loss of confidentiality when the Government seizes privileged materials cannot be cured "even though communications later deemed to be privileged will be inadmissible at trial." *Chase Manhattan Bank, N.A. v. Turner & Newall, PLC*, 964 F.2d 159, 165 (2d Cir. 1992).

B. DOJ Bears the Responsibility of Protecting the Privilege of Materials it Elects to Seize

Numerous courts confirm that DOJ is obligated to protect the privileged materials that DOJ elects to seize. As the Fourth Circuit noted recently, "[F]ederal agents and prosecutors rummaging through [legal] materials that are protected by attorney-client privilege and the work-product doctrine is at odds with the appearance of justice." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 183 (4th Cir. 2019), as amended (Oct. 31, 2019); *see also United States v. Sullivan*, No. CR 17-00104 JMS-KJM, 2020 WL 1815220, at *8 (D. Haw. Apr. 9, 2020) (DOJ's responsibility to protect the attorney client and work product privileges is particularly important when DOJ chooses to use a Filter Team in a criminal proceeding); *Pedersen*, 2014 WL 3871197, at *29 (recognizing that the paramount purpose of DOJ's Filter Team is to prevent the disclosure of privileged information to the Prosecution Team and to protect the attorney-client privilege).

C. Courts Have Repeatedly Expressed Skepticism Regarding DOJ's Use of Filter Teams Rather than Seeking Independent Reviews

Several courts have concluded that the mere use of Government Filter Teams is a *per se* intrusion into the attorney-client privilege. *In re Search Warrant Issued June 13, 2019,* 942 F.3d at 175; *Klitzman, Klitzman & Gallagher v. Krut*, 744 F.2d 955, 961 (3d Cir. 1984); *United States v. Neill*, 952 F.Supp. 834, 840-41 (D.D.C. 1997); *Pederson*, 2014 WL 3871197, at *29. Courts have also recognized that "an adverse party's review of privileged materials seriously injures the privilege holder." *In re Search Warrant Issued June 13, 2019*, 942 F.3d at 175. Here, the USAO-

NDTX has gone even further by failing even to properly implement any real Filter Team process, if it had one at all. As discussed above, the USAO-NDTX first failed to have Filter Team agents prevent Prosecution Team agents, like FBI Agent Edson, from seizing and reviewing UDF's privileged materials on the day of the search and later proceeded with the investigation for two years without any Filter Team in place at all.

D. Pursuant to Federal Rule of Criminal Procedure 41(g), the Court Should Order the USAO-NDTX to Return UDF's Property

A district court must consider four factors when deciding whether to grant a pre-indictment motion for return of property: (1) whether the motion for return of property accurately alleges that the Government agents … displayed "a callous disregard" for the rights of the plaintiff; (2) whether the plaintiff had an individual interest in and need for the material whose return he seeks; (3) whether the plaintiff would be irreparably injured by the denial of the return of property; and (4) whether the plaintiff has an adequate remedy at law for the redress of his grievance. *Richey v. Smith,* 515 F.2d 1239, 1243-44 (5th Cir. 1975). As demonstrated by the Fifth Circuit's recent *Harbor Healthcare* decision, UDF meets all of the four factors listed above.

In *Harbor Healthcare*, the United States Attorney's Office for the Eastern District of Texas ("USAO") was conducting a parallel investigation of Harbor Healthcare with the Department of Health and Human Services and the Civil Division at DOJ. 2021 WL 3009732, at *2. The Civil Division issued a Civil Investigative Demand seeking documents. Harbor retained attorneys and generated privileged material related to the defense of the civil investigation. *Id.* Following these actions, the USAO sought a warrant to search Harbor's offices and executed the warrants in May 2017. *Id.* at *1. The USAO seized terabytes of electronic documents and hundreds of boxes of paper documents. *Id.* It then assembled a Filter Team to review the seized materials for privileged

materials. *Id.* Unlike the facts here, the USAO actually provided Harbor a list of documents that the Filter Team had promoted to the Prosecution Team. *Id.* at *5. From that list, Harbor identified a significant number of privileged documents that the USAO's Filter Team had promoted to its Prosecution Team. *Id.* Harbor repeatedly attempted, but ultimately failed, to get the Filter Team to return Harbor's privileged material. *Id.* As a result, Harbor filed a pre-indictment Rule 41(g) motion for the return of its property. *Id.* at **3-4. Harbor asked the district court for an order requiring DOJ to return all seized documents to Harbor. *Id.* at *5.

The district court granted the Government's motion to dismiss stating that it would not exercise its equitable jurisdiction over Harbor's pre-indictment Rule 41(g) motion because DOJ had adequate processes in place to protect Harbor's privileged information. Harbor appealed. The Fifth Circuit held otherwise and reversed the district court. *Id.* at *4-6.

As to *Richey's* first factor—callous disregard—the Fifth Circuit held that DOJ showed callous disregard for several reasons that also apply here. First, DOJ failed to seek express prior authorization from the issuing Magistrate Judge for the seizure of attorney-client materials. *Id.* at *4. Second, the USAO knew that Harbor's offices would contain privileged materials. *Id.* Third, the USAO refused to return Harbor's privileged materials. *Id.* at *5.

Those same facts exist here. First, it does not appear that the USAO-NDTX notified the Magistrate Judge who authorized the search that the Prosecution Team would be seizing attorney-client privileged material from UDF. Pelletier Decl. at ¶ 6; *see Harbor Healthcare,* 2021 WL 3009732, at *4 (criticizing the USAO for failing to "seek express prior authorization from the issuing Magistrate Judge for the seizure of attorney-client privileged materials."). Second, the USAO-NDTX cannot dispute that the Prosecution Team knew that UDF's office contained

privileged materials. As a publicly traded company, UDF IV regularly communicated with its outside counsel on various corporate and litigation matters. In addition, the USAO-NDTX also knew that UDF was working with outside counsel on the parallel investigation that the SEC was conducting and that UDF's Independent Committee had retained counsel at the law firm of Thompson & Knight to review UDF's operations. Pelletier Decl. at ¶ 4. Third, UDF has repeatedly asked the USAO-NDTX to return of all of its privileged material—to no avail. *Id.* at ¶ 25.

As to *Ritchey*'s second factor—need for the seized material—the Fifth Circuit held that Harbor had a need for the seized documents because Harbor had a need to protect the privacy of the privileged material in its documents. *Harbor Healthcare,* 2021 WL 3009732, at *5. The Court criticized the USAO for retaining Harbor's privileged documents for approximately four years—since the search on May 18, 2017. *Id.* at 10. UDF, likewise, has a need to protect the privacy of the privileged materials FBI-Dallas seized ***more than five and one-half years ago*** during the search of UDF's offices.

As to *Ritchey's* third factor—irreparable injury—the Fifth Circuit emphasized that "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 material." *Id.* at *6. Similarly, UDF has demonstrated irreparable injury here because the USAO-NDTX retains its privileged documents, refuses to return its privileged documents, refuses to disclose its protocols for the handling of privileged materials, refuses to recognize its responsibility to protect UDF's privileges, and has taken affirmative steps to violate UDF's right to privacy.

As to *Ritchey's* fourth factor—adequate remedy at law—the Fifth Circuit held that a motion to suppress was inadequate because it was not certain that charges would ever be filed against

Harbor—so Harbor may never have an opportunity to file a motion to suppress. *Id*. In addition, the Fifth Circuit emphasized that suppression motions vindicate an interest entirely different from a Rule 41(g) motion because a suppression motion does not force the Government to return the seized material to the defendant. *Id.* Here, the USAO-NDTX has advised UDF that it will not be charged. *See* Pelletier Decl. at ¶ 23. Under these circumstances, UDF's situation with the USAO-NDTX demonstrates that UDF has no adequate remedy at law to protect its privacy rights in its privileged documents. Like Harbor, UDF may never have the ability to file a post-indictment motion, and a post-indictment motion would address a different interest—the right to not have illegally obtained evidence used at trial—than the right that this motion addresses—UDF's right to privacy.

E. The Failure of the Prosecution Team to Review and Return all Privileged and Non-Responsive Materials in a Timely Manner Warrants Broad Relief

The search here was conducted more than a half-decade ago. The overbroad electronic and physical search, which included the seizure of extensive privileged material as well as volumes of out-of-scope records, has not yet been completed as no privileged documents or out-of-scope documents have been returned to UDF. Nevertheless, and despite the constant and substantial economic disruption to UDF's ongoing operations, the Prosecution Team continues to shirk and attempt to offload its lawful responsibilities resulting from its flawed and corrupt search and retention of the material seized from UDF's offices. By choosing to execute a search warrant rather than issue a subpoena, the Prosecution Team opted to assume the responsibility and consequences of deciphering the privileged status and proper scope of the material seized. The Prosecution Team has grossly failed at that task. Now, more than five and one-half years hence, equity demands that everything seized be returned to UDF. *See, e.g., United States. v. Metter*, 860 F. Supp. 2d 205,

215 (E.D.N.Y. 2012) ("The Fourth Amendment requires the government to complete its review, *i.e.,* execute the warrant, within a 'reasonable' period of time. Numerous cases hold that a delay of several months between the seizure of electronic evidence and the completion of the government's review of that evidence as to whether it falls within the scope of the warrant is reasonable."); *see also, United States v. Wey,* 256 F. Supp. 3d 355, 405 (S.D.N.Y. 2017) (suggesting it may have violated the Fourth Amendment where the Government conducted searches of electronically stored information three-plus years after the warrants were executed).

V. CONCLUSION

For the reasons stated above, UDF respectfully requests that this Court direct the Government to respond to the six unanswered questions posed in the ***Introduction*** above so the Court may fashion the broadest and most appropriate form of relief to UDF. Moreover, given the privilege breaches, the overbreadth of the search, and the Government's utter failure to complete its review within a reasonable period of time, the only appropriate remedy would be an order requiring the USAO-NDTX to return all originals and copies of all materials seized from UDF's headquarters on February 18, 2016.

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Respectfully submitted,

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ATTORNEYS FOR UNITED DEVELOPMENT FUNDING

CERTIFICATE OF CONFERENCE

On July 26, 2021, an email conference was held between Paul E. Pelletier, as counsel for United Development Funding, and Douglas Brasher with the U.S. Attorney's Office for the Northern District of Texas, as counsel for the U.S. Government. An agreement could not be reached because Mr. Brasher would not agree to the relief requested.

/s/ Stewart H. Thomas
Stewart H. Thomas

CERTIFICATE OF SERVICE

I hereby certify that on August 23, 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:

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