

EXHIBIT T

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SUBMITTED ELECTRONICALLY

Securities and Exchange Commission
Office of FOIA Services
Station Place
100 F Street NE
Mail Stop 2465
Washington, DC 20549

FREEDOM OF INFORMATION ACT

APPEAL

Re: FOIA Request No. 23-00207-FOIA dated November 1, 2022

Dear Sir or Madam:

On behalf of United Development Funding (“UDF”), and pursuant to 5 U.S.C. §552(a)(6), undersigned counsel submits this **second** appeal of the Securities and Exchange Commission’s (“SEC”) adverse determination of UDF’s Freedom of Information Act (“FOIA”) request dated November 1, 2022. On January 17, 2023, UDF filed an appeal after forty-nine (49) business days had passed since its November 1, 2022 FOIA Request, which was well beyond the statutory time limits. Despite numerous requests for status updates and follow-ups, the Fort Worth Regional Office has, at every turn, thwarted, stymied, and stonewalled UDF’s right to access materials that are clearly subject to FOIA. As of the date of this submission, it has been ***one hundred and sixty seven business (167) days*** since UDF submitted its November 1, 2022 FOIA request. The SEC’s Office of FOIA Services, however, has not provided a response determination to UDF’s FOIA request, within the statutory time limit in pursuant to 17 C.F.R. § 200.80(d).

The Fort Worth Regional Office, which possesses the information responsive to UDF’s FOIA request, continues to refuse to cooperate with the applicable rules and deadlines in an effort to stonewall any attempt by UDF to obtain the records requested. There is absolutely no justification for withholding these records, nor has the Fort Worth Regional Office or the SEC’s Office of FOIA Services even raised the possibility of an applicable exemption.

I. Background

In June 2018, UDF and five of its executives entered into settlement agreements with the SEC.¹ The settlements, once approved by the Court, resolved an investigation by the SEC, which the SEC commenced on or around April 2014. The SEC's investigation culminated in the filing of a settled complaint, which the SEC filed in the U.S. District Court for the Northern District of Texas, alleging that UDF had made untrue material statements, or omitted material facts, from January 2011 through December 2015 in connection with a series of investment funds (United Development Funding III, L.P. ("UDF III") and United Development Funding IV ("UDF IV")) that UDF operated during that period.² UDF and the individuals neither admitted nor denied the allegations contained in the settled complaint. The district court entered consent judgments against UDF and the executives on July 31, 2018, resolving all outstanding issues as to all parties, and completely resolving the SEC's enforcement investigation and proceeding.³

In 2014, around the same time that the SEC was investigating UDF, UDF became the target of a protracted campaign by Hayman Capital Management L.P. ("Hayman Capital"), led by founding principal Kyle Bass ("Bass"), to drive UDF's stock price as low as possible in order to maximize Hayman's and Bass's massive short position in UDF IV's NASDAQ traded shares.⁴ As a result of its short position, Hayman Capital stood to profit from a decline in UDF IV's stock price.⁵

On November 28, 2017, UDF filed a lawsuit against Hayman Capital and certain of its executives in Texas state court for disparagement and tortious interference arising from Hayman

¹ See Mots. for Entry of Judgment, *Securities and Exchange Commission v. United Development Funding III, et al.*, No. 18-cv-1735 (filed July 3, 2018 N.D. Tex.), ECF. Nos. 4-6.

² See Compl., *Securities and Exchange Commission v. United Development Funding III, et. al.*, No. 18-cv-1735 (filed July 3, 2018 N.D. Tex.), ECF. No. 1.

³ See Final Judgments, *Securities and Exchange Commission v. United Development Funding III, et. al.*, No. 18-cv-1735 (filed July 31, 2018 N.D. Tex.), ECF. Nos. 11, 13, 15.

⁴ UDF IV is one of the family of UDF Funds. UDF IV was listed on the National Association of Securities Dealers Automated Quotations ("NASDAQ") exchange in July 2014.

⁵ Hayman Capital eventually disclosed its short position in February 2016, nearly a year after it began to accumulate its short position, in a website it managed, called UDF Exposed. See <https://udfexposed.com/disclaimer> ("Hayman currently maintains a short position in the common stock of United Development Funding IV ('UDF'). Hayman will profit if the market price for common shares of UDF decline and, conversely, Hayman will lose money if the market price increases for the common shares of UDF.") (last visited January 25, 2019).

Capital's extended campaign to undermine UDF's reputation and market value.⁶ Through discovery in that proceeding, UDF learned that employees and agents from Hayman Capital had extensive communications with the Staff of the SEC (the "Staff") concerning UDF during the same period that Hayman Capital was seeking to damage UDF's market value. Moreover, certain of those communications make clear that information Hayman Capital provided to the Staff related to the SEC's investigation of UDF; indeed, the communications concerned the same UDF funds and issues that were the subject of the SEC's aforementioned enforcement proceeding against UDF.

a. UDF's April 2022 Request for FW-4313 Documents and Communications.

On April 26, 2022 UDF, through undersigned counsel at Katten Muchin Rosenman LLP, submitted a FOIA request to the SEC seeking materials related to the Fort Worth Regional Office's investigation styled In the Matter of Hayman Capital (FW-4313) (the "SEC's Hayman Capital Investigation"). See Ex. A. UDF's FOIA request centrally focused on communications between the Staff and Hayman Capital relating to the SEC's Hayman Capital Investigation. In addition, UDF requested all testimony transcripts and exhibits related to the SEC's Hayman Capital Investigation.

UDF's April 26, 2022, FOIA request was assigned to FOIA Research Analyst Tina L. Churchman in the Office of Support Operations. UDF's counsel promptly established a line of communication with Ms. Churchman, and has corresponded with her by email and by phone over a dozen times since submitting UDF's FOIA request on April 26, 2022. See *e.g.*:

- Ex. B – August 2, 2022 email from Ms. Churchman to Fort Worth Regional Office enforcement attorney Dwight (Tom) Keltner requesting a status update and stating that "the FOIA office is still consulting with other staff regarding the request, and unfortunately, I could not provide a completion date."
- Ex. C – September 2, 2022 email from Ms. Churchman stating, "We are still consulting with the regional office. I reached out to our liaison for a status / tentative response date and am awaiting a response."
- Ex. D – October 13, 2022 letter from Ms. Churchman informing UDF's counsel that the Office of FOIA Services "will be unable to respond to the request within the twenty day statutory time period, **as there are unusual circumstances which impact on our ability to quickly process your request.**" (emphasis added) "Investigatory records generally consist of transcripts of testimony, exhibits, and miscellaneous evidentiary materials." The letter further informed UDF's counsel

⁶ See Pl.'s Original Petition, *United Development Funding, L.P. v. Bass, et al.*, No. CC-17-06253-B (filed Nov. 28, 2017 Dallas Cnty. Ct. Tex.).

that the Office of FOIA Services had identified 7.6 GB of electronically stored records that may be responsive to UDF's FOIA request. And went on to say that, "you may want to consider narrowing the scope of your request. At present we anticipate that it may take *thirty-six months or more before we can begin to process a request placed in our Complex track.*" (emphasis added).

- Ex. E – November 1, 2022 email from Ms. Churchman informing UDF's counsel, among other things, that there are two testimony transcripts responsive to UDF's FOIA request for records in connection with In the Matter of Hayman Capital (FW-4313). Ms. Churchman and UDF counsel discussed by phone the likelihood that the Fort Worth Regional Office maintained some form of document listing that would be instrumental in assisting UDF's counsel narrow the scope of the requests in order to avoid Complex Track designation and have to wait at least three years before the Office of FOIA Services even began its review of the potentially responsive information.

b. UDF's Narrow November 2022 Request for FW-4313's Two Transcripts.

Knowing that the Fort Worth Regional Office had two transcripts of testimony taken in connection with the SEC's Hayman Capital Investigation, UDF, through undersigned counsel, submitted a second FOIA request on November 1, 2022 requesting *only* the two transcripts from the SEC's Hayman Capital Investigation. *See Ex. F.* Based on the information provided by the Office of FOIA Services, this should have resulted in the production of just two (2) documents.

On that same day, the SEC sent an acknowledgement letter stating that it received UDF's FOIA Request, which had been assigned Case # 23-00207. The acknowledgement letter further stated:

Your request will be assigned to a Research Specialist for processing and you will be notified of the findings as soon as possible. If you do not receive a response after thirty business days from when we received your request, you have the right to seek dispute resolution services from an SEC FOIA Public Liaison or the Office of Government Information Services (OGIS). *See Ex. G.*

On January 5, 2023, UDF counsel once again reached out to Ms. Churchman requesting a status update. Ms. Churchman responded that she had no update. *See Ex. H.*

b. UDF's January 17, 2023 Appeal of its November 1, 2022 FOIA Request.

On January 17, 2023, after forty-nine (49) business days since UDF's counsel submitted the November 1, 2022 FOIA request seeking transcripts in connection with the SEC's Hayman Capital Investigation, UDF counsel filed an appeal to the Office of FOIA Services. *See Ex. I.* Nevertheless, the SEC and the Office of FOIA Services continue to stonewall UDF by denying UDF's appeal on February 14, 2023 and referring the request back to the Office of FOIA Services for further review and consultation. *See id.* UDF's counsel promptly established a line of communication with Sonja Osborne⁷ and has corresponded with her by email and by phone over a dozen times since UDF's FOIA Appeal was denied and Request No. 23-00207-FOIA was returned to the Office of FOIA Services. *See e.g.:*

- Ex. J—On February 16, 2023, Ms. Osborne and UDF counsel discussed by phone that the requested transcripts would be received on or before March 16, 2023.
- Ex. K—March 23, 2023 email from Ms. Osborne, stating “I apologize for the delay in our response. Your request is actively being processed. My best estimate for a date of completion would be April 21, 2023.”
- Ex. L—March 30, 2023 email from Ms. Osborne, stating “I am processing your request.”
- Ex. M—April 11, 2023 email from Ms. Osborne, stating “no change at this time.”
- Ex. N—April 20, 2023 email from Mark Tallarico, Senior Counsel in the SEC's Office of the General Counsel, stating “I will reach out to the FOIA staff about your timing concerns and ask that they complete their review of the transcripts as expeditiously as possible.”
- Ex. O—May 4, 2023 email from Carmen Mallon, Branch Chief Office of FOIA Services for the SEC, stating “at this point we are still in review and consultation and are working toward the May 24, 2023 deadline.”
- Ex. P—On May 25, 2023, the SEC issued a Final Reference letter regarding UDF's related FOIA Request No. 22-01760-FOIA, but did not make any reference to the November 1, 2022 FOIA Request or the transcripts.
- Ex. Q—June 6, 2023 email from Ms. Osborne, stating “we are still in the consultation process and are working toward finalizing your request.”
- Ex. R—June 13, 2023 email from Ms. Osborne, stating “we are still in the consultation process. Although, at this time I am unable to provide an anticipated completion date, we are working towards finalizing your request.”

⁷ On February 16, 2023 date, UDF's counsel was informed that Sonja Osborne was now handling FOIA Request 23-00207-FOIA and not Ms. Churchman.

To date, there has been no other communication from the Office of FOIA Services, much less any sort of determination, in response to UDF's November 1, 2022 FOIA request for two (2) testimony transcripts. Though the SEC's Office of General Counsel ordered that the "FOIA Officer process this request as expeditiously as possible" on February 14, 2023, the Office of FOIA Services' and the Fort Worth Regional Office's continue to violate the applicable statutory deadlines, which constitute a constructive adverse determination. *See* Ex. I. Indeed, twenty-six (26) business days have elapsed from the Office of FOIA Services most recent estimated deadline of May 24, 2023 (which was before the Office simply gave up estimating when it could ever produce two transcripts). UDF's counsel appeals this baseless constructive adverse determination and requests that the appellate review board order the production of the requested testimony transcripts within no less than two business days.

II. The SEC Failed to Provide a Determination Whether to Comply With UDF's FOIA Request Within Statutory Time Limits in Violation of 17 C.F.R. § 200.80(d).

Pursuant to 17 C.F.R. §200.80(f)(1), a FOIA requester may appeal an adverse determination by the SEC's Office of FOIA Services to the Office of General Counsel. The Office of General Counsel has authority to grant appeals where the determination of the Office of FOIA Services was in error. *Id.* §200.80(f)(5).

Under FOIA, "[t]he strong presumption in favor of disclosure places the burden on the agency to justify the withholding of any requested documents." *People for the Ethical Treatment of Animals v. United States Dep't of Health and Human Servs.*, 901 F.3d 343, 349 (D.C. Cir. 2018) (quotations omitted). Here, the Office of FOIA Services failed to meet that burden because the SEC has yet to make a response determination. Specifically, it has been more than the statutory time limit of twenty business days (20) from the date of Office of FOIA Services received UDF's FOIA request.

As a general matter, a FOIA requester has the right to appeal any adverse determination denying a request. 5 U.S.C. §552(a)(6). Not providing a response determination to a FOIA request within the statutory time limits is considered an adverse determination. 17 C.F.R. 200.80(d); *see also Machado Amadis v. U.S. Dep't of State*, 971 F.3d 364, 371 (D.C. Cir. 2020); *Bickel & Brewer v. I.R.S.*, 2008 WL 4966655 at *4 n. 2 (N.D. Tex. 2008). Pursuant to 17 C.F.R. § 200.80(d), a determination whether to comply with a FOIA request shall be made within twenty (20) business days from the date the Office of FOIA Services received a request for a record. *Id.*

The Office of FOIA Services received UDF's request on November 1, 2022. As of the date of this appeal, one-hundred-and-sixty-two (162) business days have transpired since the original request, meaning the Office of FOIA Services and the Fort Worth Regional Office have

been in violation of their respective statutory requirements for one-hundred-and-forty-two (142) days.

III. Conclusion

Given that the SEC has grossly and inexplicably exceeded the statutory time limit for responding to UDF's FOIA request and has repeatedly demonstrated a pattern of unreasonable delay, UDF respectfully requests that the SEC promptly release the records requested in its November 1, 2022 FOIA request, or, in the alternative, for those responsive records that are not produced, adequately substantiate the basis for its decision to withhold those specific records.

If any of the information sought herein is deemed to be nonpublic under FOIA or the SEC's implementing regulations, please identify the specific exemption and provide any reasonably segregable portion of such information after deletions of the portions which are considered nonpublic. Please clearly delineate any and all redactions in such a manner so that the justification for each redaction is apparent. If you withhold any documents in whole or in part, I request that you provide an estimate of the volume of records that are being withheld, as required by 17 C.F.R. §200.80(e)(5)(iv), as well as a log of those documents or portions of documents withheld.

I agree to pay all reasonable fees for the searching and reproduction of all documents and records falling within the scope of this request, up to \$20,000. If you anticipate that the fees will exceed \$20,000, please notify me before exceeding that amount. If any expenses incurred by you in duplicating these documents must be covered by the requesting party under FOIA, please send the bill directly to me at the above address.

As we first indicated in our January 2023 appeal, this is an extremely time sensitive matter because the UDF executives' criminal convictions are currently on appeal to the United States Court of Appeals Court for the Fifth Circuit with the appellate panel still determining its ruling. Because of the extremely time-sensitive nature of this request, and the gross delay suffered by UDF thus far, I ask that you provide all documentation before July 14, 2023. If, for any reason, you do not anticipate providing a complete response to this request by July 14, 2023, please notify the undersigned as soon as possible via telephone or email.

Respectfully Submitted,

/s/ Ryan J. Meyer

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