IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

UNITED STATES OF AMERICA	§	
	§	
v.	§	**Case No. 4:21-CR-289-O**
	§	
HOLLIS GREENLAW (01)	§	

DEFENDANT HOLLIS M. GREENLAW'S MOTION FOR A NEW TRIAL AND REQUEST TO INCORPORATE CO-DEFENDANTS' ARGUMENTS FOR NEW TRIALS

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Pursuant to Rule 33 of the Federal Rules of Criminal Procedure, Defendant Hollis M. Greenlaw moves for a motion for a new trial. There are three different bases for this Court to grant a new trial, which each are discussed below.

I. This Court should grant a new trial in view of the multiple legal errors before and during trial.

There was "mosaic of cumulative error"[1] that undermined the fairness of the trial for Mr. Greenlaw and his three codefendants. The errors, which affected all four codefendants, include:[2]

1. This Court's denial of the defendants' motion for continuance, which forced him to go to trial in highly complex case with a massive amount of discovery only three months after the indictment was returned by the grand jury;

2. This Court's unconstitutional imposition of a 15-hour limit on the four codefendants' cross-examination of the government's witnesses and presentation of all four codefendants' cases;

3. This Court's denial of the defendants' pretrial motion to suppress under the Fourth Amendment (including the agents' violation of *Franks v. Delaware*, 438 U.S. 154 (1978));

4. The jury instruction's erroneous definition of "intent to defraud," which permitted the jury to find such a *mens rea* based on an "intent to deceive ***or*** cheat someone";

5. The jury instructions' flawed definition of "scheme to defraud" as meaning "any plan, pattern, or course of action" intended ***either*** to "deprive another of money or property" ***or*** to "bring about some financial ***gain*** to the person";

6. The jury instructions' failure to include the defendants' proposed unanimity instruction concerning the government's multiple theories of liability;

7. This Court's refusal to submit the defense instruction that "a reasonable opinion cannot be a false statement," which was not substantially covered elsewhere in the jury charge;

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[1] *State v. R.B.*, 873 A.2d 511, 526 n.4 (N.J. 2005); *see also United States v. Delgado*, 672 F.3d 320, 343-44 (5th Cir. 2012) (en banc) ("[T]he cumulative error doctrine ... provides that an aggregation of non-reversible errors . . . can yield a denial of the constitutional right to a fair trial, which calls for reversal. . . . 'Cumulative error' justifies reversal only when errors so fatally infect the trial that they violated the trial's fundamental fairness."). Although several of the individual errors identified in this motion themselves justify a new trial, the cumulative effect of the errors, at the very least, does, as discussed further below.

[2] Mr. Greenlaw's Rule 33 motion addresses the errors set forth in numbers 1, 2, 8, 12-13, and 15. The remaining errors are addressed in the other three defendants' Rule 33 motions and are incorporated herein.

8. The jury instruction's erroneous definition of "affiliate," which came from the 1933 Securities Act (with which the defendants were not charged);

9. The government's improper opening statement and closing argument;

10. This Court's erroneous exclusion of defense exhibits;

11. This Court's rulings prohibiting the defendants from introducing evidence about Kyle Bass's role in the investigation and prosecution of the codefendants – for purposes of challenging the integrity of the investigation and prosecution in this case, for explaining why UDF was delisted from the Nasdaq, and to impeach FBI Forensic Accountant Scott Martinez;

12. This Court's denial of the defendants' motion to dismiss the indictment as a vindictive prosecution (based on the U.S. Attorney's office's decision to refuse further negotiation about a nonprosecution agreement based on the defendants' *Bivens* and FTCA claims against AUSA Nicholas Bunch);

13. The United States Attorney's Office for the Northern District of Texas should not have participated in this case after the entanglement between the office, AUSA Bunch and Kyle Bass was revealed, particularly after AUSA Bunch departed the U.S. Attorney's Office to work for Haynes & Boone (which defends Kyle Bass in the defendants' civil lawsuit against him).

14. The government's constructive amendment to the indictment by prosecuting the defendants based on theory of fraud not set forth in the indictment;

15. The government's blatant violation of the attorney-client privilege; and

16. The government's presentation of perjured testimony at trial.

In ruling on a motion for a new trial based on asserted legal error, this Court effectively acts as an appellate court assessing whether the legal error requires a new trial. *United States v. Wall*, 389 F.3d 457, 474 (5th Cir. 2004).

A. This Court erred by denying the Defendants' December 26, 2021 Motion for Continuance.

The defendants were indicted on October 12, 2021. They filed their first (unopposed) motion for continuance on November 10, 2021. This Court granted it and scheduled the trial for January 3, 2022. On November 21, 2021, the defendants and government then filed a ***joint*** motion

for a further continuance. (ECF 82). That joint motion, which asked that this Court declare the case "complex" under the Speedy Trial Act, explained that there was "voluminous" discovery – including dozens of terabytes of e-discovery – and that the case was "factually and legally complex." *Id.* at 2, 4. The parties ***jointly*** requested an additional continuance of at least 90 days. *Id.* at 3.

This Court partially granted the parties' joint motion by extending the existing trial date by 9 (rather than 90) additional days, from January 3, 2022, to January 12, 2022. Order (ECF 70, at 2), at 2. On December 26, 2021, after receiving even more voluminous e-discovery, the defendants then moved again for a continuance – this time opposed by the government (despite previously having joined the defendants in requesting an April 2022 trial date). (ECF 193). The defendants' motion contended that they would be put in the position of providing ineffective assistance of counsel, for lack of sufficient preparation, if they had to go to trial on January 12, 2022. (ECF 190, at 7) (citing, *e.g.*, *Ungar v. Sarafite*, 376 U.S. 575 (1964)). The motion also noted that the government had produced 58 terabytes of e-discovery from non-UDF sources. *Id.* at 6. This Court denied the defendants' motion, and trial commenced on January 12, 2022 – exactly three months from the date of the indictment's return, a fraction of the typical time between the return of an indictment and the commencement of a jury trial in a federal criminal fraud case (even before the onset of the pandemic in early 2020, which has slowed the pace of the federal criminal justice system).[3]

[3] Nationally, in the last year before the pandemic began, the average amount of time between the return of an indictment and judgment in all 308 federal fraud cases that had jury trials was **20.8 months** (and **24.5 months** in the 26 wire fraud cases that had jury trials). *See* Administrative Office of the United States Courts, *U.S. District Courts—Median Time Intervals From Commencement to Termination for Criminal Defendants Disposed of, by Offense, During the 12-Month Period Ending September 30, 2019*, https://www.uscourts.gov/sites/default/files/data_tables/jb_d10_0930.2019.pdf (Table D-10, at 2).

Some of that time in those 308 cases was the interval between conviction at trial and sentencing, but that amount of

In its order granting a 9-day additional continuance (ECF 91) and denying the defendants' third continuance motion (ECF 199), this Court stated that "Defendants have been aware of the investigation for a number of years, during which they have had access to Government's evidence" (most of which were documents seized from the defendants' company) (ECF Doc. 91, at 1), and also that "Defendants have had the representation of very experienced counsel on these issues [raised by the indictment] well before the return of the indictment" (ECF Doc. 199, at 2).

This Court's key assumption in denying the third request for a continuance – that the defendants were already familiar with the evidence and legal issues in the case based on the government's pre-indictment investigation and defense counsel's pre-indictment access to evidence – proved untenable based on the way the trial unfolded. At trial, the government did not simply offer the evidence and arguments that were extensively previewed by the defendants and defense counsel before the indictment. Rather, the government took a significantly different and unexpected path from its pre-indictment focus in 2015-2020 by offering different evidence and new arguments, most significantly new arguments about UDF V. (ECF 126) (Defendants' motion to dismiss based on a vindictive prosecution), at 8-9 (noting there was no indication in the government's investigation about UDF V until March 2021 and, even then, the government did not appear to focus on it). Furthermore, during trial, the government shifted its focus from the allegations in the indictment by adding new legal theories and evidence – prompting an objection from the defense that there had been a constructive amendment to the indictment. *See Defendant Wissink's Motion for a New Trial*, at 6-8. Therefore, a significant part of the trial did not unfold as the defendants had reason to anticipate.

time typically is only between 3-6 months in a case in which a defendant did not plead guilty (and cooperate with the government). Thus, in 2019, the Administrative Office's data shows that the average jury trial in a federal fraud prosecution occurred ***well over a year after indictment*** – not a mere three months, as in this case.

Therefore, Mr. Greenlaw and his three codefendants were significantly prejudiced by being forced to go to trial under these circumstances without sufficient time to prepare. Defense counsel were hamstrung by the severe time constraints in preparing for trial, particularly in view of the government's unexpected focus on evidence and legal theories not clearly raised before the indictment.

This Court's refusal to grant a continuance beyond January 3, 2022, adversely affected defense counsel's ability to defend against the charges. *See Ungar v. Sarafite*, 376 U.S. 575, 589 (1964) ("[A] myopic insistence upon expeditiousness in the face of a justifiable request for delay can render the right to defend with counsel an empty formality."); *see also Morris v. Slappy*, 461 U.S. 1, 11-12 (1983) (stating that "an unreasoning and arbitrary insistence upon expeditiousness in the face of a justifiable request for delay violates the right to the assistance of counsel") (citation and internal quotation omitted).

B. This Court erred by imposing a 15-hour time limit on the four Defendants.

After this Court entered its pretrial order providing that, "[t]he Defendants will share 15 hours to present their case and cross examine the Government's case," (ECF 230), the defendants objected that such a limited amount of time among the four of them was arbitrary and unreasonable and would violate their constitutional right to present a defense. (ECF 244, at 2-5). They also requested 15 hours per defendant. *Id.* This Court nevertheless proceeded with its 15-hour cumulative time limit, leaving each defendant with just 3.75 hours on average both to cross-examine the government's witnesses and also present their cases (including, in the case of three of the defendants, to testify on their own behalf).

The limits that this Court imposed resulted in the four defendants' being unable to present the testimony and evidence necessary for an adequate defense. Attached to this motion are proffers

of the testimony of witnesses and evidence would have been offered if the 15-hour time limit had not been imposed. *See* Appendix A. The proffers make it clear that, if the defendants would have more time to defend themselves, they would have presented a more vigorous defense. In addition, the defense did not expect that the government would repeatedly misrepresent evidence to the jury, which required additional witnesses to correct the misstatements.

Significantly, even with the truncated defense presentation, the jury originally was unable to reach a verdict – an indication that additional testimony and evidence from the defense very well could have tipped the scale to an acquittal or at least a hung jury.

C. The Government's decision to bring criminal charges after originally expressing a willingness to enter into a Nonprosecution Agreement was tainted by prosecutorial vindictiveness.

The defendants moved to dismiss the indictment on the ground that the government's change of position about entering into a nonprosecution agreement after the defendants refused to drop the civil and administrative actions against AUSA Nicholas Bunch and FBI agents reflected prosecutorial vindictiveness. ECF Doc. 126. The motion also noted that the government decided to pursue additional allegations about UDF V following the defendants' refusal to drop their administrative and civil claims. *Id.* The defendants requested discovery concerning their motion, contending it had raised a prima facie case of actual and presumptive vindictiveness to justify further inquiry. *Id.* at 16-17.

This Court denied the motion without the requested discovery or an evidentiary hearing. Order (ECF 186). This Court reasoned that a finding of actual or presumptive vindictiveness was unwarranted because the negotiations between the parties simply fell through when the defendants refused to withdraw their administrative and civil claims. *Id.* at 4, 6. This Court further reasoned that the government's decision to add a focus on new allegations concerning UDF V after the

negotiations fell through was not evidence of actual or presumptive vindictiveness. *Id.* at 6. This Court also refused to order the requested discovery on the ground that the defendants had not offered any evidence "tending to show the essential elements" of a prosecutorial vindictiveness claim. *Id.* at 7.

This Court erred in denying the defendants' motion without first ordering the requested discovery. The defendants did offer at least a "prima facie" basis or "colorable" claim warranting discovery.[4] In determining whether a defendant has made out a prima facie case or colorable claim of a vindictive prosecution, a court must determine whether there is some evidence offered of the two elements of a vindictive prosecution claim. "There are two factors which must be considered in the determination of the issue of 'realistic likelihood of vindictiveness.' First, the prosecutor's stake in deterring the exercise of some right. Second, was the conduct of the prosecutor vindictive in its nature? The standard of realistic likelihood of vindictiveness is an objective one – a reasonable person, not a defendant's subjective impressions." *United States v. Adams*, 832 F. Supp. 1138, 1143 (W.D. Tenn. 1993).

Regarding the first factor, AUSA Bunch unquestionably had a significant "personal stake" in assuring that the civil and administrative claims against him were dismissed. Regarding the second factor, for the reasons discussed immediately below concerning why AUSA Bunch should have been disqualified from this case, there is at least a prima facie case or colorable claim of

[4] *See United States v. Dwyer*, 287 F.Supp.2d 82, 88 (D. Mass. 2003) ("Defendant need only advance some objective evidence tending to show prosecutorial vindictiveness for discovery to be allowed."); *United States v. Jarrett*, No. 1:03-CR-087, 2008 WL 323411, at *2 (N.D. Ind. Feb. 4, 2008) ("[T]o obtain discovery into a vindictive prosecution allegation a defendant need only present a 'colorable basis' for the claim."); *see also United States v. Adams*, 870 F.2d 1140 (6th Cir. 1989) (concluding that the district court erred in refusing to order pretrial discovery on the defendant's vindictive prosecution claim based on the allegation that she was criminally prosecuted for perjury during EEOC proceedings in retaliation for a civil suit that she, as a former EEOC employee, had filed against the agency); *see also id.* at 1146 ("'Some evidence' of vindictive prosecution has been presented here. It is hard to see, indeed, how the defendants could have gone much farther than they did without the benefit of discovery on the process through which this prosecution was initiated.").

vindictiveness from a reasonable person's perspective. Bunch was "personally embroiled" in a dispute with the four UDF executives whom he was investigating – indeed, they had sued him. Under those circumstances, a reasonable person would conclude that his decision to take the non-prosecution offer off the table when the four UDF executives refused to drop the civil and administrative claims against him was motivated by vindictiveness. In addition, Bunch's threat to proceed with criminal charges if the civil and administrative claims were not dismissed was a blatant ethical violation.[5]

Because the defendants offered at least a prima facie case or colorable claim concerning those two factors, this Court erred by denying the motion without ordering pretrial discovery and later conducting an evidentiary hearing on the prosecutorial vindictiveness motion. At this juncture in the case, the appropriate remedy is to vacate the defendants' convictions and order discovery as requested by the defendants.

D. The United States Attorney's Office for the Northern District of Texas should not have participated in this case after the entanglement between the office, AUSA Bunch, and Kyle Bass was revealed, particularly after AUSA Bunch departed the U.S. Attorney's Office to work for Haynes & Boone (which defends Kyle Bass in the Defendants' civil lawsuit against him).

"A criminal defendant is entitled to an impartial prosecutor who can make an unbiased use of all the options available to the prosecutor's office." *Gallo v. Kernan*, 6933 F. Supp. 878, 885 (N.D. Cal. 1996). The defendants in this case received no such impartiality – particularly at the critical stage of plea negotiations with AUSA Bunch, who originally had agreed to a non-

[5] *See, e.g.*, *In re Holste*, 358 P.3d 850, 890 (Ka. 2015) ("Respondent's misuse of his position as county attorney by attempting to effect a civil litigation settlement by threatening criminal prosecution strikes this court as especially egregious. The public's trust in the appropriate, good-faith exercise of that discretion is seriously challenged by respondent's bullying of his opposing counsel by writing: 'Anyway, if you guys want to keep pushing the issue of default judgment, I will just dismiss the [civil] case and file two felony theft charges against [the civil defendant] instead.'").

prosecution agreement but changed his mind after his illicit entanglement with Kyle Bass was revealed and the four defendants refused to drop their civil and administrative constitutional claims against him. As noted above, Bunch's demand that the defendants drop their civil and administrative claims, or he would proceed with criminal charges was also a blatant ethical violation.

The fact that AUSA Bunch remained on the prosecution team after his illicit conduct in assisting Bass to effectuate his unlawful short and distort scheme against UDF was revealed in defendants' *Bivens* action and FTCA claim – and thereafter worked on the prosecution team throughout the investigation with the eventual lead trial prosecutors – violated the Due Process Clause. *Cf. Offutt v. United States*, 348 U.S. 11 (1954) (trial judge should have recused himself from contempt action against one of the attorneys in a case after the judge "had become personally embroiled with counsel throughout trial"); *see also id.* at 14 ("The vital point is that in sitting in judgment on such a misbehaving lawyer the judge should not himself give vent to personal spleen or respond to a personal grievance. These are subtle matters, for they concern the ingredients of what constitutes justice. Therefore, justice must satisfy the appearance of justice."). A prosecutor, just like a trial judge,[6] must "represent the impersonal authority of law." *Id.* at 16; *see also Mayberry v. Pennsylvania*, 400 U.S. 455, 465 (1971) (due process is violated when a trial judge becomes so "personally embroiled with a lawyer in the trial as to make the judge unfit to sit in judgment on the contempt charge").

Bunch should not have remained on this prosecution team because he clearly was "personally embroiled" with the defendants about substantially related civil and administrative

[6] Other courts have cited analogous cases concerning whether a judge should have recused herself in deciding whether a prosecutor was disqualified based on a similar conflict or appearance of impropriety. *See, e.g.*, *United States v. Farrell*, 115 F. Supp.3d 746, 763 (D. W. Va. 2015) (citing, e.g., *United States v. Jordan*, 49 F.3d 152 (5th Cir. 1995)).

claims. Indeed, he was being sued by the very people he was criminally investigating about a substantially related case. Nor should the United States Attorney's Office for the Northern District of Texas (USAO) remained on the case. No one on the prosecution team was "screened" from Bunch at any point prior to his departure to go to work for Haynes & Boone, very close in time to the grand jury's return of the indictment in this case[7] – the law firm who had advised Kyle Bass during the execution of his anonymous short and distort scheme against UDF and who was defending Kyle Bass against UDF's state court lawsuit against Bass.[8] Even before the indictment was returned, the defendants attempted to recuse Bunch, but the Department of Justice refused to remove him. *See* ECF 165-9, Gov't Exhs. 9 & 10. Although Bunch ultimately did not serve as trial counsel, his unauthorized review of privileged materials, his active involvement in the many months leading up to the indictment – including his decision to withdraw the non-prosecution agreement – and the fact that he remained on the prosecution team before his departure from the U.S. Attorney's Office injected constitutional error into the trial proceedings.

E. This Government corruptly violated the four Defendants' attorney-client privilege.

In pretrial filings, the defendants demonstrated that the government blatantly and extensively violated their attorney-client privilege[9] by seizing voluminous privileged documents

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[7] Haynes & Boone announced its hiring of Bunch on October 18, 2021 – https://www.haynesboone.com/news/press-releases/new-partner-nick-bunch – less than a week after the indictment was returned in this case.

[8] *See In Re* Bass, No. 05-21-00102-CV, 2021 WL 3276879 (Tex. App.-Dallas July 30, 2021) (listing Bass's counsel as including attorneys with Haynes & Boone).

[9] The defendants also characterized the issue in Sixth Amendment terms. This Court rejected the Sixth Amendment argument on the ground that, at the of the government's actions, the defendants had not yet been charged and, thus, their Sixth Amendment right to counsel had not "attached." Order (ECF Doc. 206), at 4. The defendants do not abandon that argument, but instead focus on the attorney-client privilege (which applies before and after a defendant is formally charged) for purposes of this motion.

and failure to use appropriate "filter" counsel in accordance with well-established DOJ protocols. (ECF 129, at 3-15; ECF 187, at 2-6).

This Court should reverse the convictions of Mr. Greenlaw and his three codefendants in view of the "manifestly and avowedly corrupt" violation of the attorney-client privilege in this case, which requires a presumption of prejudice. *See United States v. Landji*, No. 18-cr-601, 2021 WL 5402288, at *23 (S.D.N.Y. Nov. 18, 2021) ("Absent a Government intrusion into the attorney-client relationship that is *manifestly and avowedly corrupt*, a defendant must ordinarily demonstrate prejudice stemming from the Government's conduct.") (emphasis added; citation and internal quotation marks omitted).

As set forth in detail in the Defendants Motion to Dismiss the Indictment (ECF 129) the United States Attorney's Office and the FBI intentionally disregarded DOJ procedures designed to ensure the privacy of attorney-client privileged communications by: (1) failing to consider lesser intrusive approaches than a search warrant to obtain relevant documents; (2) failing to alert the United States Magistrate of the likely encounter with significant amounts of attorney-client privileged information; (3) failing to provide protocols for ensuring that the privileged information, once seized, would be segregated from review by the prosecution team; (4) taking steps to covertly inventory review materials containing privileged communications prior to the materials being cleared by a proper filter team; (5) providing access to privileged materials to other regulatory bodies prior to the materials being cleared by a proper filter team; and (6) authorizing the covert access and imaging by the prosecution team of materials that had been segregated as potentially privileged.

At least when the government has engaged in such a corrupt intrusion of the attorney-client relationship, the burden should shift to the government to prove that none of the testimony or

evidence – or theory of its prosecution – was influenced by the privileged information obtained. *See United States v. Schwimmer*, 924 F.2d 443, 446 (2d Cir. 1991) ("The government must demonstrate that the evidence it uses to prosecute an individual was derived from legitimate, independent sources.") (citing *Kastigar v. United States*, 406 U.S. 441, 461-62 (1972)).[10]

F. This Court erred in broadly defining "Affiliate" in the Jury Instructions.

Over the defendants' objection, this Court adopted the government's proposed broad definition of "affiliate" in the jury instructions rather than the narrower one proposed by the defendants. Jury Instructions, at 20. That broad definition comes from the Securities Act of 1933. This Court refused to adopt the defendants' proposed narrower definition of "affiliate," which appears in other areas of securities law (and commercial law generally).[11]

The defendants were not charged with violating the criminal provisions of the 1933 act. *See* 15 U.S.C. §§ 78(b) & 77ff. Rather, they were charged with fraud offenses in Title 18. A "scheme to defraud," within the latter context, should not be based on a definition from the 1933 act, with which the defendants were not charged. Rather, it should be based on the narrower definition that the defendants themselves included in UDF V's public disclosures, which appears in other areas of the securities law and commercial law generally. In view of the ambiguity in the meaning of "affiliate,"[12] the defendants were entitled to have the jury to be instructed on the

[10] We acknowledge *United States v. Davis*, 226 F.3d 346, 353 (5th Cir. 2000) ("Even assuming that the government intruded on Davis's attorney-client privilege by initially seizing the documents, we would not dismiss the case against Davis without some showing of prejudice. *See United States v. Morrison*, 449 U.S. 361, 365-66 (1981)."), and *United States v. Melvin*, 650 F.2d 641, 643 (5th Cir. 1981) ("[T]here is no per rule requiring dismissal of the indictment as the sanction for the intrusion into the attorney-client relationship by government agents."). However, *Davis* and *Melvin* are not controlling because they did not address a "corrupt" violation of the attorney-client privilege that had a pervasive effect on the defense.

[11] The defendants' proposed definition appears at page 41 at ECF 198.

[12] *Psilos Group Partners, L.P. v. Towerbrook Investors L.P.*, No. Civ.A. 1479-N, 2007 WL 14876832, at *11 (Del. Chanc. Jan. 17, 2007) ("The word 'affiliate' has many gradations in American commercial law. In close cases, determining whether one entity is an affiliate of another might be a difficult task.").

narrower definition. *Cf. Dixson v. United States*, 465 U.S. 482, 491, 496 (1984) ("If the legislative history fails to clarify the statutory language, our rule of lenity would compel us to construe the statute in favor of petitioners, as criminal defendants in these cases.").

This error clearly prejudiced Mr. Greenlaw and the other defendants during trial. The government extensively focused on this Court's broad definition of "affiliate" in its closing arguments in arguing for a guilty verdict on all counts. *See* Transcript, Vol. 8, at 1489, 1497-1500, 1503-04, 1508, 1573, 1576, 1583.

G. Mr. Greenlaw adopts the common grounds for a new trial set forth in his three Co-defendants' Motions for a New Trial.

Mr. Greenlaw adopts the following 10 grounds set forth in his codefendants' motions for a new trial (which are equally applicable to his case):

1. This Court's denial of the defendants' pretrial motion to suppress under the Fourth Amendment (including the agents' violation of *Franks v. Delaware*, 438 U.S. 154 (1978));[13]

2. The jury instruction's erroneous definition of "intent to defraud," which permitted the jury to find such a *mens rea* based on an "intent to deceive ***or*** cheat someone";[14]

3. The jury instructions' flawed definition of "scheme to defraud" as meaning "any plan, pattern, or course of action" intended ***either*** to "deprive another of money or property" ***or*** to "bring about some financial ***gain*** to the person";[15]

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[13] Codefendant Wissick's Motion for a New Trial, at 10-12.

[14] Codefendant Obert's Motion for a New Trial, at 7-9. Mr. Greenlaw adds that that, although the Supreme Court's decision in *Shaw v. United States*, 137 S. Ct. 462, 469-70 (2016), interpreted the bank fraud statute, Congress intended "intent to defraud" in the mail fraud, bank fraud, wire fraud, securities fraud statutes, and health care fraud statute all to be given the same meaning. *See* S. Rep. No. 107-146 (May 6, 2002), at 20 ("The intent requirements [of the securities fraud statute] are to be applied consistently with those found in 18 U.S.C. §§ 1341, 1343, 1344, 1347.").

[15] Codefendant Obert's Motion for a New Trial, at 2-6. In addition, Mr. Greenlaw adopts Obert's renewal of the defendants' pretrial motion to dismiss, which raised the same issue in the context of a pretrial challenge to the indictment. *Id.* at 7. Mr. Greenlaw adds that this Court's reliance on District Judges Association's pattern jury instructions – which have not received the imprimatur of the Fifth Circuit itself – do not insulate a case from reversible error. *Cf. United States v. Fooladi*, 746 F.2d 1027, 1031 (5th Cir. 1984) ("As a matter of superintendence we add a word of caution. That the pattern instruction given here will not necessarily be adequate in the face of specific requests in other cases is inherent in our reasoning. . . . We do not demean the role of pattern instructions, by reminding that, as with all such aids, pattern instruction cannot substitute for case-specific thought and adjustment."); *see also United*

4. The jury instructions' failure to include the defendants' proposed unanimity instruction concerning the government's multiple theories of liability;[16]

5. This Court's refusal to submit the defense instruction that "a reasonable opinion cannot be a false statement," which was not substantially covered elsewhere in the jury charge;[17]

6. This Court's rulings prohibiting the defendants from introducing evidence about Kyle Bass's role in the investigation and prosecution of the codefendants – for purposes of challenging the integrity of the investigation and prosecution in this case, for explaining why UDF was delisted from the Nasdaq, and to impeach FBI Forensic Accountant Martinez;[18]

States v. Stefanik, 674 F.3d 71, 77 (1st Cir. 2012) (noting that "reliance on pattern jury instructions does not insulate a trial court from claims of instructional error").

The District Judges Association's pattern jury instruction's now-outlier definition of "scheme to defraud" appears to have originated in *Beaudine v. United States*, 368 F.2d 417, 420 & n.4 (5th Cir. 1966) ("[T]he charge given by the trial Court, adapted from Judge Mathes' *Manual of Jury Instructions*, seems quite in order. . . . To act with 'intent to defraud' means to act knowingly and with the specific intent to deceive or cheat, for the purpose of either causing some financial loss to another, or bringing about some financial gain to one's self.' *Mathes, Jury Instructions and Forms for Federal Criminal Cases*, 27 F.R.D. 90, § 7.05."). That definition eventually found its way into mail and wire fraud cases by the 1980s. In 1989, the Fifth Circuit rejected a challenge to this "financial gain" prong of the "scheme to defraud" definition. *See United States v. Judd*, 889 F.2d 1410, 1414 (5th Cir. 1989) ("The Court [in *McNally v. United States*, 483 U.S. 350 (1987)] was not specifying that such findings must be a part of every mail and wire fraud case. *McNally* is read much too broadly when it is claimed to require that mail and wire fraud convictions can be sustained only if motivated by intent to cause financial loss to another."). Significantly, the Fifth Circuit's 1989 decision in *Judd* has been undermined by subsequent decisions, including the Supreme Court's 2021 decision in *Kelly*. Indeed, Westlaw includes a "flag" warning that *Judd* appears to have been overruled by *Kelly*.

[16] Codefendant Wissick's Motion for a New Trial, at 1-3.

[17] Codefendant Obert's Motion for a New Trial, at 9-12.

[18] Codefendant Obert's Motion for a New Trial, at 12-17. Mr. Greenlaw adds that the Supreme Court's decision in *Kyles v. Whitley*, 514 U.S. 419, 445, 448-49 (1995), further demonstrates this Court's error in excluding the evidence about Bass. Although discussed in the context of a *Brady* claim, the Supreme Court's reasoning in *Kyles* concerning the "materiality" of the suppressed evidence of a confidential informant named "Beanie" provides strong support for the defendant's arguments about why the evidence about Bass was admissible. *See Kyles*, 514 U.S. at 445 ("Even if Kyles's lawyer had followed the more conservative course of leaving Beanie off the stand . . . Beanie's various statements would have raised opportunities to attack . . . the thoroughness and even the good faith of the investigation, as well. . . . Beanie's statements to the police were replete with inconsistencies and would have allowed the jury to infer that Beanie was anxious to see Kyles arrested for Dye's murder. Their disclosure would have revealed a remarkably uncritical attitude on the part of the police."); *see also id.* at 448 ("The potential for damage from using Beanie's statement to undermine the ostensible integrity of the investigation is only confirmed by the prosecutor's admission at one of Kyles's postconviction hearings, that he did not recall a single instance before this case when police had searched and seized garbage on the street in front of a residence . . . and by Detective John Miller's admission at the same hearing that he thought at the time that it 'was a possibility' that Beanie had planted the incriminating evidence in the garbage . . . . If a police officer thought so, a juror would have, too."); *id.* at 449 ("Beanie's same statement, indeed, could have been used to cap an attack on the integrity of the investigation and on the reliability of Detective Dillman, who testified on cross-examination that he did not know if Beanie had been at

7. The government's improper opening statement and closing argument;[19]

8. This Court's erroneous exclusion of defense exhibits;[20]

9. The government's constructive amendment to the indictment by prosecuting the defendants based on theory of fraud not set forth in the indictment;[21]

10. The government's presentation of misleading testimony at trial.[22]

Concerning this Court's error in excluding the evidence about Bass, Mr. Greenlaw adds to Obert's argument the additional point that a criminal defendant has a constitutional right to offer evidence that calls into question the "integrity" of the investigation.

H. Cumulative error

At the very least, even assuming that none of the identified errors above independently would warrant a reversal on appeal, the cumulative effect of the multiple errors would warrant a reversal on appeal. *See United States v. Delgado*, 672 F.3d 320, 343-44 (5th Cir. 2012) (en banc) ("[T]he cumulative error doctrine ... provides that an aggregation of non-reversible errors (i.e., plain errors failing to necessitate reversal and harmless errors) can yield a denial of the constitutional right to a fair trial, which calls for reversal. . . . 'Cumulative error' justifies reversal only when errors so fatally infect the trial that they violated the trial's fundamental fairness."); *see*

Kyles's apartment on Sunday."). The Supreme Court recognized that "[a] common trial tactic of defense lawyers is to discredit the caliber of the investigation or the decision to charge the defendant" which necessarily approved of in finding that the suppression of the evidence about Beanie was "material." *Kyles*, 514 U.S. at 446; *see also United States v. Waters*, 627 F.3d 345, 353 (9th Cir. 2010) (recognizing that "'attack[ing] the reliability of [an] investigation' is an important defense tactic") (quoting *Kyles*).

[19] Codefendant Obert's Motion for a New Trial, at 17-25.

[20] Codefendant Wissick's Motion for a New Trial, at 12-15.

[21] Codefendant Wissick's Motion for a New Trial, at 8-9.

[22] Codefendant Jester's Motion for a New Trial, at 5-8.

also United States v. Lighty, 616 F.3d 321, 371 (4th Cir. 2016) ("Pursuant to the cumulative error doctrine, the cumulative effect of two or more individually harmless errors has the potential to prejudice a defendant to the same extent as a single reversible error.") (citation and internal quotation marks omitted).

II. Even assuming *Arguendo* no reversible legal error occurred, this court still should grant a new trial in the interests of justice.

The Fifth Circuit has held that, "even when there has been no specific legal error," in certain circumstances a district court has discretion under Rule 33 to grant a new trial to prevent what the court deems in its discretion a miscarriage of justice. *United States v. Scroggins*, 485 F.3d 824, 831 (5th Cir. 2007) (quoting *United States v. Scroggins*, 379 F.3d 233, 255 (5th Cir.2004), *vacated and remanded on other grounds*, 543 U.S. 1112 (2005)).[23]

For the reasons discussed in Part I. above, this case raises several significant errors that, individually and cumulatively, require a retrial. Even if this Court were to conclude that those errors, considered individually or cumulatively, do not amount to reversible error, the Court still has discretion to grant a new trial if the Court believes that, considering all that transpired, a new

[23] In a prior stage of the appeal in *Scroggins*, the Fifth Circuit cited *United States v. Vicaria*, 12 F.3d 195 (11th Cir.1994), as an example of a case in which a district court properly granted a new trial even without a "legal error." In that case, the Eleventh Circuit stated:

> The basis for granting a new trial under Rule 33 is whether it is required "in the interest of justice." That is a broad standard. It is not limited to cases where the district court concludes that its prior ruling, upon which it bases the new trial, was legally erroneous. Accordingly, the government's argument that the district court's initial refusal to give the theory of defense instruction was correct is unpersuasive in determining whether the district court abused its discretion in granting a new trial because of its failure to give the instruction. In granting a new trial, the district court did not hold that it had committed legal error in refusing the defense instruction. Instead, it stated that "on reflection and reading over the instructions, I think that the Court should have instructed the Jury on that theory of his defense." In other words, upon reconsidering the matter, the Court concluded only that it "should have instructed the jury" on the defense theory, not that its failure to do so was legal error. A district court has broad discretion to determine what instructions to give and in what form. . . . The district court acted within its discretion in deciding to grant a new trial.

Id. at 198-99.

trial would be proper in the interests of justice. In addition to the errors identified above, this Court should consider the fact that the jury in this case originally was unable to reach a verdict as militating in favor of granting a new trial in the interests of justice.[24]

III. This Court should grant a new trial because the jury's verdict is against the weight of the evidence.

Unlike the type of judicial review of a jury's verdict under Federal Rule of Criminal Procedure 29, which views the evidence in a light most favorable to the verdict, judicial review of the sufficiency of the evidence under Rule 33 asks whether "the weight of the evidence preponderates against the verdict." *United States v. Wright*, 634 F.3d 770, 775 (5th Cir. 2011).[25] This Court has discretion to order a retrial based on this Court's own independent assessment of the weight of the evidence and the credibility of witnesses. In other words, this Court "sits as a thirteenth juror." *United States v. Herrera*, 559 F.3d 296, 303 (5th Cir. 2009) (citation and internal quotation marks omitted). Because the two legal standards differ, this Court may grant a new trial under 33 after having denied a motion for judgment of acquittal under Rule 29. *Tibbs v. Florida*, 457 U.S. 31, 42-43 (1982) ("A reversal based on the weight of the evidence . . . can occur only

[24] *See, e.g.*, *United States v. Woodard*, 699 F.3d 1188, 1199 (10th Cir. 2012) (noting the fact that "jury deliberated for eight hours and reached a verdict only after receiving an *Allen* charge . . . further convinc[es] us that the error was not harmless beyond a doubt"); *United States v. Jean-Baptiste*, 166 F.3d 102, 109 (2d Cir. 1999) ("The fact that a jury initially was deadlocked and reached a verdict only after receiving an *Allen* charge may support an inference that the case was close."); *cf. Vicaria*, 12 F.3d at 198-99 ("The district court acted within its discretion in deciding to grant a new trial. The case was a close one, as shown by the first jury's inability to reach a verdict.") (cited with approval by the Fifth Circuit in *Scroggins*, *supra*).

[25] *See also United States v. Okwilagwe*, No. 3:16-CR-0240-B, 2019 WL 493790, at *2 (N.D. Tex. Feb. 7, 2019) ("Whereas a Rule 29 motion turns on the sufficiency of the evidence, a motion under Rule 33 turns on whether the weight of the evidence supports the verdict."); *see also United States v. Mallory*, 902 F.3d 584, 586-87 (6th Cir. 2018) ("[W]hile Rule 29 requires the court to view the evidence in a light most favorable to the prosecution, . . . Rule 33 does not. . . . The judge that saw the witnesses and sat with the evidence at trial must make th[e] call . . . [whether] the manifest weight of the evidence . . . support[s] the verdict."); *United States v. Arrington*, 757 F.2d 1484, 1485 (4th Cir. 1985) ("When the motion attacks the weight of the evidence, the court's authority is much broader than when it is deciding a motion to acquit on the ground of insufficient evidence.").

after the State both has presented sufficient evidence to support conviction and persuaded the jury to convict.").

Although the Rule 33 standard fashioned by courts speaks of whether the evidence "preponderates" against the verdict – language obviously borrowed from the civil context – because the ultimate quantum of proof required for a criminal conviction is proof beyond a reasonable doubt, a district court in assessing a Rule 33 motion ultimately must ask whether the prosecution's evidence, when viewed through the court's own independent lens and without Rule 29-type deference to the verdict, proved each element beyond a reasonable doubt. *See United States v. Robertson*, 110 F.3d 1113, 1118 (5th Cir. 1997) ("We are convinced that the court weighed the evidence and assessed the credibility of the witnesses in reaching its conclusion that the jury verdict was contrary to the weight of the evidence. The court simply considered Robertson's guilty verdict in light of all of the evidence adduced at trial *and concluded that the government did not satisfy the standard of proof beyond a reasonable doubt.* Thus, after carefully reviewing the record, we are convinced that the district court did what it said it would do – rule on a motion for new trial.") (emphasis added).

After an independent assessment of the credibility of the witnesses and weighing of all the evidence at trial, this Court should order a new trial because the jury's verdict is against the weight of the evidence and raises at least a reasonable doubt. In support of this argument, Mr. Greenlaw incorporates the arguments set forth in his Rule 29 motion, albeit under the more generous Rule 33 standard.

The most compelling grounds for granting a new trial based on insufficient evidence are: (1) the fact that, at the time of the relevant transactions in 2011-2015, the law, at the very least, was not clear about whether the defendants did anything illegal; and (2) even assuming *arguendo*

that Mr. Greenlaw intended to engage in deception (he did not), there was no evidence that he intended to cheat anyone (i.e., deprive them of their money or property). *See* Defendant Greenlaw's Motion for Judgment of Acquittal, at 12-26.

Therefore, the government did not prove beyond a reasonable doubt – or even by a preponderance of the evidence – that Mr. Greenlaw had specific intent to defraud or willfulness, which require, respectively, (1) ***an intent to cheat or deprive*** another person of money or property (as opposed to merely intending to financially gain);[26] and (2) knowledge at the time of the transactions that he understood what he was doing ***was against the law*** and ***an intent to violate that law***.[27] Every count in the indictment requires that *mens rea.* The lack of evidence of Mr. Greenlaw's *mens rea* requires a new trial.

The evidence in this case shows that the defendants, including Mr. Greenlaw, engaged in financial transactions that were legal (then and now). The evidence also shows that Mr. Greenlaw did not fail to disclose any required information in the various SEC filings at issue at trial. *See* Defendant Greenlaw's Motion for Judgment of Acquittal, at 7. Furthermore, the government's contention that the defendants knowingly and intentionally engaged in illegal transactions with "affiliates" lacks any factual or legal support, particularly in view of the murky definition of "affiliate." *Id* at 27-30.

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[26] *See Shaw v. United States*, 137 S. Ct. 462, 469-70 (2016); *United States v. Miller*, 953 F.3d 1095, 1102-03 (9th Cir. 2020).

[27] *United States v. Arditti*, 955 F.2d 331, 341 (5th Cir. 1992) ("[T]he [district] court instructed, 'If the defendant knows about a plan, knows that it is an unlawful plan, and knowingly and willfully joins in the unlawful plan . . . that is sufficient to convict him for conspiracy.' These instructions cover the necessary elements of the conspiracy offense, including the requisite mental state. . . . [S]uch willfulness [is] . . . a 'critical element' of the [conspiracy] offense."); *United States v. Tencer*, 107 F.3d 1120, 1127 (5th Cir. 1997) ("[T]he intent element is satisfied as long as the government showed that Tencer willfully participated in a scheme to defraud 'with the intent that the scheme's illicit objectives be achieved.'") (substantive fraud count); (quoting *United States v. Rochester*, 898 F.2d 971, 977 (5th Cir. 1990)); *United States v. Britton,* 289 F.3d 976, 981 (7th Cir. 2002) ("intent to defraud" requires a "willful act"); *see also Bryan v. United States*, 524 U.S. 184, 193 (1998) ("More is required . . . with respect to the conduct . . . done 'willfully.' The jury must find that the defendant acted with an evil-meaning mind, that is to say, that he acted with knowledge that his conduct was unlawful.").

see Psilos Group Partners, L.P. v. Towerbrook Investors L.P., No. Civ.A. 1479-N, 2007 WL 14876832, at *11 (Del. Chanc. Jan. 17, 2007) ("The word 'affiliate' has many gradations in American commercial law. In close cases, determining whether one entity is an affiliate of another might be a difficult task.").

If the government's evidence did not clearly prove that Mr. Greenlaw engaged in any acts or omissions that clearly were against the law in 2011-2015, then the government's evidence necessarily cannot prove intent to defraud and willfulness, certainly not beyond a reasonable doubt. At the very least, the laws he alleged violated were vague as applied to the government's allegations in this case and should not be applied to criminally punish a person for engaging in conduct not clearly proscribed as criminal. *Cf. Skilling v. United States*, 561 U.S. 358, 405-09 (2010).

In addition, even assuming *arguendo* that there was intentional deception, through act or omission, the government's evidence failed to prove a specific intent to cheat or deprive anyone of money or property. Proof of an intent to receive financial gain does not prove intent to defraud. *Shaw*, 137 S. Ct. at 469-70. Therefore, the government's evidence failed to prove the essential element, in all counts charged, of the specific intent to defraud.

In our free-market economy, we should not deter income-generating activity that is not unlawful when done by making it unlawful only after the fact. By criminalizing such activity with 20-20 hindsight, as occurred in this case, the government not only unjustly punishes upstanding citizens who have built wealth inuring to the benefit of our society but also stifles the very type of entrepreneurial activity that a free-market system seeks to encourage.[28]

[28] *See* Richard A. Booth, *What Is a Business Crime*?, 3 J. BUS. & TECH. L. 127, 142-43 (2008); *cf.* Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 IND. L. REV. 645, 647 (2003) ("[T]he American civil justice system weighs heavily on innovators . . . . Any decision to diverge from a well-worn path risks severing the rope holding the anvil and delivering a crushing blow to the business and its innovation.")

CONCLUSION

If this Court does not enter a judgment of acquittal on all counts, then, at the very least, this Court should grant a new trial in the interests of justice.

Dated: February 7, 2022.

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CERTIFICATE OF CONFERENCE

I hereby certify that on February 7, 2022, I attempted to confer with Assistant U.S. Attorney Tiffany Eggers, counsel for the government in this case, regarding the relief sought through this motion. As of the time of filing I have been unable to confer with AUSA Eggers. Accordingly, it is submitted to the Court for determination.

/s/ Rose L. Romero
Rose L. Romero

CERTIFICATE OF SERVICE

I certify that on February 7, 2022, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system. I further certify that a true copy of the foregoing was furnished by CM/ECF to all counsel of record.

/s/ Rose L. Romero
Rose L. Romero

Witness Proffers

UDF Employees

1. Stacey Dwyer - Would testify that:
   - Fund IV financials show that during the relevant period the Fund was solvent and had sufficient funds to pay distribution and pay its debt.
   - Fund IV disclosures were reasonable and appropriate
   - Knowledge of UDF IV Audit Committee meetings with UDF IV auditors.

2. Todd Etter - Would testify regarding:
   - UDF's business practices.
   - UDF's reliance on inside and outside counsel.
   - Full disclosure practices; all known material matters disclosed and above board.
   - Business events surrounding the various UDF funds.
   - The honesty and integrity of UDF executives and employees.
   - The government's mistaken assumptions about UDF business practices.
   - Discussion with Legacy Bank regarding loan repayment.

3. Ty Henderson - Would testify as to:
   - The interaction with the sales representatives regarding the sale of UDF investments.
   - His interaction with the Government regarding common borrower transactions.

4. Kenda Josey - Would testify that:
   - The auditors were aware of UDF's transactions, including that UDF IV refinanced UDF III loans for common borrowers and that UDF V originated loans to common borrowers.
   - UDF was fully transparent with its auditors.
   - UDF fully complied with its disclosures.

5. Jennifer Molaison - Would testify:
   - The auditors were aware of UDF's transactions, including that UDF IV refinanced UDF III loans for common borrowers and that UDF V originated loans to common borrowers.
   - UDF was fully transparent with its auditors.
   - UDF fully complied with its disclosures.
   - As to the details of Government Exhibit 301, which the government showed for the first time in closing arguments.

6. Doug Ballast - Would testify that:
   - The auditors were aware of UDF's transactions, including that UDF IV refinanced UDF III loans for common borrowers and that UDF V originated loans to common borrowers.
   - UDF was fully transparent with its auditors.

- UDF fully complied with its disclosures.

7. Reggie Lei - Would testify that:
   - The auditors were aware that UDF IV refinanced UDF III loans for common borrowers.
   - UDF was fully transparent with its auditors.
   - UDF fully complied with its disclosures.

8. Jeff Gilpatrick - Would have testified further as to:
   - The details of each of the 11 future projects included on the Buffington loan portfolio modeling, including the due diligence surrounding each of the projects.
   - The history of using similar current and future project modeling during his time working at Buffington and thereafter.

9. Scott Burrer – Would testify as to:
   - The bona fides of portfolio level and project level draws.
   - UDF's arms-length relationships with its borrowers.
   - The details as to the "Chicken Little" email that was used by the government during cross examination of a defense witness.

10. Renee Mueller – Would testify as to:
    - The relationship and the transparency of communications between UDF and Centurion.

11. Joe Goggans – Would testify as to:
    - As to his asset manager position at UDF, asset manager meetings, and working with Brandon Jester as his supervisor.
    - The customary relationship between UDF and its borrowers.

12. James Kenney – Would testify as to:
    - UDF V, UDF IV and UDF III communication with EisnerAmper
    - Neither EisnerAmper nor Brian Downey notified UDF V, UDF IV or UDF III that EisnerAmper had an issue with or concluded that UDF V engaged in affiliate transactions proscribed by UDF V disclosure.

Bankers

13. Michael David Jones - Would testify that:
    - He worked for Legacy Texas Bank from January or February 2008 through August 2020
    - He held the position of credit manager for large commercial workout loans.
    - The bank learned of the FBI search warrant of UDF through news reports.
    - After the FBI search warrant, the bank set up a meeting with UDF senior management at the UDF offices.

- Tom Swiley, the Chef Financial Officer for Legacy Texas Bank, and Michael David Jones attended the meeting.
- Two UDF loans were fully paid off while Mr. Jones was still at the bank.
- There was no decision at that time for Legacy Texas Bank to sever its relationship with UDF.
- The bank suffered no loss, and he does not believe the bank was at a risk of loss.

14. Hector Retta - Would testify that:
    - On January 20-21, 2016, Mr. Retta and Peter Spier conducted a due diligence visit with the UDF management team.
    - The visit included a collateral inspection of The Villages of Hidden Lake in Pflugerville, Texas and a collateral inspection of Woodcreek in Fate, Texas.
    - The due diligence investigation included discussions with Hollis Greenlaw, UDF Chairman, and Ben Wissink, UDF President, at the UDF headquarters in Grapevine, Texas.
    - The collateral inspection of the Villages of Hidden Creek was led by Jeff Gilpatrick, UDF Asset Manager. The collateral inspection included a tour of neighboring and competing communities. Mr. Retta found land development and homebuilding activities were underway.
    - Mr. Retta found that Capital Bank collateral within the community was well positioned and considered the most valuable as many of the lots were adjacent to the lake.
    - The collateral inspection of the Woodcreek development was led by Aaron Richards, UDF Asset Manager. The collateral inspection included a tour of neighboring and competing communities. Aaron Richards demonstrated an in-depth knowledge of the market and the collateral. Mr. Retta found land development and homebuilding activities were underway. The Community provides homebuyers with the most affordable housing options in the trade area.
    - Mr. Greenlaw and Mr. Wissink addressed each of the "Red Flags" outlined in the December 10, 2015, ValueWalk blog.
    - Mr. Retta found that in the absence of any disagreements between the UDF Companies and Whitley Penn or any "reportable" events, especially in light of the observations.
    - UDF paid the Capital Bank loan in full.
    - The UDF loans presented no loss or risk of loss to the bank.

UDF Trustees

15. Philip Marshall - Would testify that:
    - Fund IV disclosures were reasonable and appropriate
    - Knowledge of UDF IV Board of Trustees Audit Committee meeting with UDF IV auditors.
    - William Kahane, as a UDF V Trustee, approved a UDF V transaction in which loan proceeds of the UDF V loan were used to retire a UDF IV loan and thus he did not believe that this was an improper affiliated transaction.

- Philip Marshall and other Trustees were recipients on an email sent to Kahane with attachments regarding the retirement of the UDF IV loan where Kahane approved the transaction.
- The Trustees, including Kahane, did not believe the transaction was an improper transaction.

16. Heath Malone - Would testify that:
    - He is a CPA, formerly with Arthur Andersen, who was a UDF V Trustee.
    - UDF V transactions were not improper "related party" or "affiliated" transactions as claimed by Kahane.

Financial Advisers

17. Dorann Hurley - Would testify as to:
    - Her interaction with UDF management and her sale of UDF investments.

18. Robert Wamoff - Would testify as to:
    - His interaction with UDF management and his sale of UDF investments.

19. James Warren - Would testify that:
    - He began a due diligence review of UDF in 2012.
    - He did not see any transactions or evidence that UDF IV and UDF V funds were used to pay cash distributions to UDF III.
    - UDF properly used the UDF IV and V Funds to refinance existing UDF loans, finance continued development, monetize improved land and finished lot value, reduce the borrower's costs of capital and generate a high level of profitability for investors as an on-going successful operating business.

20. Jesse Griffin - Would testify as to:
    - His interaction with UDF management and his sale of UDF investments.

Borrowers

21. Mehrdad Moayedi - Would testify as to:
    - The relationship between UDF and Centurion, including levels of communication, draw requests, and operations in comparison to those with other Centurion lenders.
    - The level of detail and documentation between UDF and Centurion as they pertained to the movement of funds or loans.

22. Jack Dawson - Would testify as to:
    - The Centurion/UDF relationship.

23. Marc Tindall – Would testify as to:
    - Projects, potential projects, and relationship with UDF.

24. Ken Williams - Would testify as to:
- Projects, potential projects, and relationship with UDF.

25. Marc Tindall - Would testify as to:
- Projects, potential projects, and relationship with UDF.

26. Joe Straub – would testify as to:
- The Buffington loan loss reserve.
- His experience as a developer and work as a Partner of H&S.
- Since 1992, H&S and its predecessor firms have developed large master planned communities, custom estate subdivisions and infill homesites as well as commercial and multifamily developments. The neighborhoods total over 3,600 homesites valued at more than $250 million.
- His over four decades of experience in all aspects of real estate development including sales, marketing, and management in the Greater Austin area.
- H&S's work with various UDF entities on projects. For example, their work with UDF on the Commons at Rowe Lane, a luxury single-family home community 25 miles from downtown Austin in Pflugerville, Texas. In 2014, UDP acquired 71.388 acres from an affiliate of H&S that owned the Rowe Lane project, and UDP hired H&S for the fee development work on that land. UDF later purchased another phase of the Rowe Lane project from H&S's affiliate. H&S also worked with UDF on the Shadow Canyon residential community in Georgetown, Texas, and the Bar W Ranch project.
- H&S's agreement on November 12, 2015 with UDF III, UDF IV and United Residential Home Finance (part of United Mortgage Trust) ("UDP") on principal terms for an additional development transaction. A true and correct copy of that agreement is attached hereto as Annex 1 ("Term Sheet").
- As of December 10, 2015, the Straub Entities were ready and able to complete the takeover of the Buffington Land.

Auditors

27. Stephen Hamilton – Would testify as to:
- UDF's transparency with auditors and compliance with disclosures.

28. Chelsea McCleskey – Would testify as to:
- UDF IV's disclosures.
- UDF IV refinancing of loans to common borrowers.
- Whitley Penn's awareness of those transactions.
- UDF's compliance with its disclosures.
- The emails she was on that were used as exhibits at trial.

29. Michael Bodwell – Would have further cross-examined him regarding:
- UDF III, IV, and V's disclosures.
- UDF IV refinancing of loans to common borrowers.

- UDF V's loan originations to common borrowers.
- Whitley Penn's awareness of those transactions.
- UDF's compliance with its disclosures.

30. Jeff Lawlis – Would have further cross-examined him regarding:
    - UDF IV's disclosures.
    - UDF IV refinancing of loans to common borrowers.
    - Whitley Penn's awareness of those transactions.
    - UDF's compliance with its disclosures.

31. Susan Powell – Would have further cross-examined her regarding:
    - UDF III's disclosures.
    - UDF III transactions.
    - Whitley Penn's awareness of those transactions.
    - The Buffington issue.
    - UDF's compliance with its disclosures.

32. Brian Downey – Would have further cross-examined him regarding:
    - UDF III, IV, and V's disclosures.
    - UDF IV refinancing of loans to common borrowers.
    - UDF Vs loan originations to common borrowers.
    - His interactions with UDF.
    - UDF's compliance with its disclosures.

Experts

33. Dale Kitchens – Would have testified further regarding:
    - The propriety of the transactions at issue in UDF III, IV, and V.
    - The flaws in Mr. Martinez's analysis.
    - The sufficiency of UDF's disclosures.

34. Jeff Ferguson – Would have testified further regarding:
    - The propriety of the transactions at issue in UDF III, IV, and V.
    - The flaws in Mr. Martinez's analysis.
    - The sufficiency of UDF's disclosures.
    - The indicia of a Ponzi scheme.
    - The Buffington loan collectability issue.

35. Scott Martinez – Would have further cross-examined him regarding:
    - His methodology.
    - His conclusions on the transactions at issue.
    - UDF's business.
    - UDF's disclosures.

Clients

36. Cara Obert – Would have testified further regarding:
- UDF III, IV, and V's disclosures.
- The audit process.
- UDF's open and transparent relationship with its auditors.
- Whitley Penn's knowledge of UDF's transactions.

37. Hollis Greenlaw – Would have testified further regarding:
- Kyle Bass short-and-distort scheme and the government's involvement in the scheme.
- Mr. Greenlaw's good-faith belief of actions.
- The agreement with the government and prosecutors in exchange for UDF III, UDF IV, and UDF V releasing *Bivens* action and claim under Federal Tort Claims Act.
- Mr. Greenlaw's honesty, integrity, and prudent fiduciary conduct acting in the best interest of UDF shareholders.
- The alleged conspiracy to commit fraud affecting a financial institution.

Character Witnesses

38. Cathy Groos – Would have testified regarding:
- Cara Obert's character.