

Holdings, L.P. (“UMT Holdings”). Defendants Hollis Greenlaw, Theodore (Todd) Etter, Ben Wissink, and Cara Obert are executives of UDF and own and control the defendant entities.

The issue. In January 2022, defendants Hollis Greenlaw, Cara Obert, and Ben Wissink were convicted on ten counts of securities, wire, and bank fraud for operating UDF IV (and other UDF funds) as a *Ponzi* scheme. Despite their criminal convictions, the entity defendants continue to use UDF IV funds to pay the convicted defendants’ legal fees, including for the appeal of their criminal convictions. The payment of these fees is not allowed under the law or the Advisory Agreement between UMTH General and UDF IV.

The relief sought. This Motion seeks to put a stop to that practice by enjoining all defendants from using UDF IV’s assets to pay any legal fees incurred in connection with the appeal of the criminal convictions or any other matter to which they are a party (including defending this lawsuit).

Basis for relief. In general, the Advisory Agreement between UDF IV and UMTH General allows for advancement and/or indemnification of legal fees but only in instances where “such liability or loss was ***not the result of negligence or misconduct by the Advisor*** or its Affiliates, including their respective officers, directors, trustees, partners and employees” See Advisory Agreement §5.01(a)(iii) (emphasis added). Here, the “loss” results directly from the criminal actions of the individual defendants. Accordingly, indemnification of the individual defendants for their legal fees is prohibited. Further, as shown below, all of the elements for the requested temporary injunction are satisfied.

II. Facts Supporting the Motion

A. The Relevant Players.

The individual defendants, led by Hollis Greenlaw and Todd Etter, used a complex web of companies to operate a series of real estate limited partnerships and REIT funds. They intentionally created a structure that would maximize control in the hands of a few individuals (themselves), generate outrageous fees for those individuals, and hide the illegal, *Ponzi*-like nature of their business. Each subsequent fund (*e.g.*, UDF I, II, III, IV and V) raised money from individual investors by promising large dividends from its purported real estate development loans. In reality, however, the funds could not make the promised dividend payments to investors from the loan proceeds themselves, and therefore constantly siphoned off newly raised money to pay dividends to investors in earlier funds in a *Ponzi*-like manner.

To carry out their scheme, the individual defendants set up the following structure to own and manage the various UDF funds:

- UMT Services, Inc. (“UMT Services”) is the parent entity and owns (serves as general partner) of Defendant UMT Holdings.
- UMT Holdings in turn owns and controls defendant UMTH General.
- UMTH General (or “Advisor”) serves as the advisor entity to UDF IV.
- Defendant UMTH Land serves as an affiliated advisor and asset manager. UMT Holdings owns and controls UMTH Land as well.
- The individual defendants own UMT Services (and other affiliated entities) and have served in officer positions.

The ultimate effect, by design, was that the individual defendants directed and controlled the UDF entities.

B. The Individual Defendants' Criminal Behavior and Convictions.

In 2015, the FBI commenced a criminal investigation of UDF based on a whistleblower complaint from an employee at one of UDF's borrowers. There was also an ongoing investigation by the SEC during that time as well. The criminal investigation focused on whether UDF was operating as a *Ponzi* scheme and other related matters such as bank and wire fraud.

In October 2021, a grand jury indicted four UDF officers on ten counts of securities, wire and bank fraud, including three of the individual defendants in this case: Hollis Greenlaw, Cara Obert, and Ben Wissink. Each defendant had their own team of criminal lawyers. The enormous legal fees incurred in connection with the criminal investigation and trial were largely paid from UDF IV assets.

On January 21, 2022, a federal jury convicted all three defendants on ten counts of securities fraud, wire fraud, and conspiracy. The evidence at trial established that UDF was operated as a Ponzi scheme for at least five years. As the Department of Justice (or "Government") explained in their press release announcing the convictions:

“When developers failed to repay money they borrowed from one fund, triggering multi-million dollar shortfalls, the defendants transferred money out of another fund in order to pay distributions to the original fund's investors, all without disclosing the transfers to the SEC and the investing public.”

Dep't of Justice Press Release, "United Development Funding Executives Convicted of Fraud."

The criminal case charged UDF's executives with conspiracy as well as securities and wire fraud based on transfers identified by the FBI. During the criminal trial, the Government introduced a plethora of evidence, including files the Government obtained from an FBI raid on the UDF headquarters. The evidence included UDF's internal financials, which showed coordinated and repeated transfers of money from fund to fund in order to cover millions in losses and to perpetuate the fraud. The Government's evidence also included the FBI's analysis of UDF's

financials over a five-year period. The FBI's review was exhaustive and it prepared summary worksheets for each month of UDF's business, compiling relevant emails, bank statements, and documents from a variety of independent sources showing the movement of money between the UDF funds.

The FBI's worksheets showed that, over a five-year period (60 months), UDF moved money raised from new investors (in UDF IV and/or UDF V) in order to pay "dividends" to older investors in UDF III a total of 53 of the 60 months examined (2011 through 2015). This represented \$111 million in money moved from new investors to older investors in order to pay dividends and expenses for UDF III.

As the Government summarized in its closing argument:

"Ladies and gentlemen, *this is a Ponzi-like scheme*. They were taking money from later investors so they could pay distributions to earlier investors. They can sugarcoat it all they want, but that's what it is.

And I'm going to ask you to find them guilty of all 10 counts."

See Criminal Trial Transcript at 1509:3-8 (Assistant US Attorney Tiffany H. Eggers) (emphasis added).

The jury agreed, convicting four of UDF's most senior executives on all ten counts. The three defendants in this case were sentenced to seven years (Greenlaw) and five years (Obert and Wissink), respectively. All three have appealed their convictions and have retained new appellate counsel for that appeal. It is believed that they continue to pay for their lawyers with funds from UDF IV, paid at the direction of UDF IV's controlling "advisor."

C. The Role of the Advisor and the Advisory Agreement.

UDF IV had no employees, so its activities were controlled, managed, and conducted by UMTH General, as its advisor, and by the Advisor's officers and employees, including the

individual defendants. The relationship between UDF IV and UMTH General is governed by a contract known as the Advisory Agreement to which UDF IV and UMTH General were parties.

UDF IV delegated virtually all day-to-day management and operational responsibilities of UDF IV to the Advisor under the Advisory Agreement. Such duties included, among others, selecting and closing investments; managing and collecting principal and interest on UDF's portfolio of loan investments; ensuring compliance with covenants on such loans and pursuing remedies upon default of such loans, managing UDF IV's cash; ensuring that UDF IV was properly capitalized, including by raising money through the issuance of UDF IV shares to the public, managing the day-to-day business affairs of UDF IV; preparing financial statements for UDF IV and working with UDF IV's independent auditor in its annual audit of UDF IV's financial statements; ensuring that all reports are filed with the SEC and handling all investor relations; including issuing news releases; taking investor calls and ensuring that investors are provided all information typically provided to investors in public companies. *See* Advisory Agreement § 2.02. In other words, if something improper took place with respect to UDF IV's operations, it was UMTH General and its principals, including the individual defendants, who engaged in or directed such improper conduct.

Importantly, the Advisory Agreement clearly provides that UMTH General is in a fiduciary relationship with the shareholders of UDF IV, including Plaintiffs. Section 2.01 of the Advisory Agreement provides as follows:

“The Advisor shall be deemed to be in a fiduciary relationship to the Trust ***and its Shareholders.***”

See Advisory Agreement at § 2.01 (emphasis added). Thus, in evaluating this Motion, the Court must consider that UMTH General is a fiduciary to Plaintiffs.

D. The Advisory Agreement Only Allows Indemnification in Limited Circumstances.

While the Advisory Agreement provides for advancement and indemnification of the Advisor, including the payment of legal fees, it carefully limits any indemnification by UDF IV in several ways.

First, the Advisory Agreement allows indemnification of the Advisor (and of the convicted individual defendants) only in instances where “such liability or loss was ***not the result of negligence or misconduct by the Advisor*** or its Affiliates, including their respective officers, directors, trustees, partners and employees.” *See* Advisory Agreement §5.01(a)(iii) (emphasis added). This provision would certainly prohibit indemnification of conduct involving intentional fraud on financial institutions, shareholders, and the public.

Second, significantly, Section 5.01(a) of the Advisory Agreement further states that under no circumstances can the Advisor be indemnified for “any losses, liability or expenses arising from or out of an alleged violation of federal or state securities laws” unless at least one of the following conditions is satisfied:

- (i) there has been a successful adjudication on the merits of each count involving alleged securities law violations ***as to the particular indemnitee***;
- (ii) such claims have been dismissed with prejudice on the merits by a court of competent jurisdiction as to the particular indemnitee; and
- (iii) a court of competent jurisdiction approves a settlement of the claims against a particular indemnitee and finds that indemnification of the settlement and the related costs should be made, and the court considering the request for indemnification has been advised of the position of the Securities and Exchange Commission and of the published position of any state securities regulatory authority in which securities of the Trust were offered or sold as to indemnification for violations of securities laws.

See Advisory Agreement at § 5.01(a) (emphasis added). Because the individual defendants were convicted of violating federal securities laws, this provision is triggered, and none of the aforementioned conditions are satisfied because (i) the alleged securities law violations were not

adjudicated in favor of the defendants, (ii) the claims were not dismissed, and (iii) no such settlement was approved.

Third, the Advisory Agreement allows indemnification of the Advisor only in instances where “the Advisor or its Affiliates, including their respective officers, directors, trustees, partners and employees, have determined, in good faith, that the course of conduct which caused the loss or liability was in *the best interests of the Trust*.” (emphasis added). See Advisory Agreement §5.01(a)(i). This clearly cannot be the case here, because it is not in the best interests of the UDF IV (the Trust), to have been operated in a *Ponzi*-like manner or to have the executives and officers of its advisor indicted and convicted of fraud in connection with how they managed UDF IV.

These limitations listed herein and in the Advisory Agreement are important and were totally disregarded by Defendants.¹ Defendants wrongfully ignored these provisions and, in the process, improperly forced shareholders in UDF IV to pay, on information and belief, more than \$65 million in legal fees and indemnification expenses—and they continue to do so today, prompting this lawsuit and motion.

III. Argument

A. Legal Standard.

After notice to the Defendants and an opportunity for hearing, the Court may issue a temporary injunction to preserve the status quo pending a trial on the merits of the action. See TEX. R. CIV. P. 681; *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2002). The Court may issue a temporary injunction if Plaintiffs plead and prove:

¹ Because virtually all activities of UDF IV were delegated to the Advisor and its affiliates under the Advisory Agreement, the indemnification and advancement provisions set forth in the Advisory Agreement, which were more restrictive than those in the corporate documents of UDF IV, were intended to supersede and limit the indemnification, advancement and liability limitation provisions set forth in UDF IV’s organizational documents as relates to the services and activities of the Advisor and its affiliates on behalf of UDF IV.

- a. A cause of action against the defendant
- b. A probable right to the relief sought
- c. A probable, imminent, and irreparable injury before trial on the merits can be held and judgment entered

Id. at 204. As shown below, each of these elements is satisfied here.

B. Cause of Action Against Defendants.

In their Original Petition, Plaintiffs assert numerous valid causes of action against all Defendants. Those claims include breach of fiduciary duty (given that the Advisor and its affiliates are fiduciaries of Plaintiffs); knowing participation in a breach of fiduciary duty (the individual defendants); breach of third-party beneficiary contract (given Plaintiffs' status as a third-party beneficiary to the Advisory Agreement). Part of these claims is specifically aimed at the wrongful payment of indemnification, in the past and on an ongoing basis. Having pleaded several causes of action, the first required element for a temporary injunction is easily satisfied. *See Sun Oil v. Whitaker*, 424 S.W.2d 216, 218 (Tex.1968) (stating that the temporary injunction applicant is not required to establish that it will prevail on final trial and need only plead a cause of action and show a probable right to the relief sought).

C. Probable Right to Relief Sought.

Under Texas law, the term “probable right to recover” is “a term of art” and does not require the Court to make a determination of the facts based upon “probabilities.” *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d 901, 904 (Tex. App.—Austin 1999, writ dismissed, w.o.j.). Rather, for injunctive relief to issue, the applicant is “only required to show that a bona fide issue exists as to his right to ultimate relief.” *Id.* In other words, the applicant must simply “**adduce evidence that tends to support his right to recover on the merits.**” *Id.* (citing *Camp v. Shannon*, 348 S.W.2 517, 519 (Tex. 1961) (emphasis in original)).

As the facts here establish, and as Plaintiffs will further demonstrate at the hearing, Plaintiffs are likely to succeed on the merits of their claims for wrongful payment of indemnification and for legal fees because there simply is no legal basis for defendants to allow UDF IV funds to be used to pay ongoing legal fees for the now-convicted individual defendants to appeal their convictions.

As previously discussed, the Advisory Agreement provides for indemnification of the Advisor, those indemnification rights are severely limited. *See supra* at § II. D. Specifically, Section 5.01 of the Advisory Agreement allows UDF IV to indemnify the Advisor (and its affiliates) for certain losses or liability ***only if*** “such liability or loss was ***not*** the result of negligence or misconduct by the Advisor or its Affiliates.” *See* Advisory Agreement §5.01(a)(iii) (emphasis added).

Moreover, under no circumstances can the individual defendants be indemnified for “any losses, liability or expenses arising from or out of an alleged violation of federal or state securities laws” unless there was “successful adjudication on the merits.” *See* Advisory Agreement at § 5.01(a). Here, three of the individual defendants were indicted and convicted of violations of federal securities laws (and wire and banking fraud), so that exception does not apply.

These same provisions also bar indemnification of the three convicted defendants for any legal fees they incur in this action. This action results from their own criminal misconduct and wrongful acts in perpetuating the *Ponzi* scheme that was the UDF operation, the same acts and misconduct they were convicted for. Thus, indemnification by UDF IV is not permitted.²

² Defendant Todd Etter was not indicted although Plaintiffs understand that the criminal investigation remains ongoing. Nonetheless, Etter was the center of the Advisor’s actions (he sat on the UDF IV investment committee, for example). Accordingly, he is not entitled to advancement or indemnification for any legal fees he is incurring with respect to this lawsuit, either.

D. Probable, Imminent, and Irreparable Injury to Plaintiff.

For injunctive relief to issue, the applicant must also show that it will be subjected to probable, imminent, and irreparable injury. *Butnaru v. Ford Motor Co.*, 84 S.W.3d 198, 204 (Tex. 2004). “An injury is irreparable if the injured party cannot be adequately compensated in damages or if the damages cannot be measured by any pecuniary standard.” *Id.*

The Defendants in this case have a demonstrated track record of placing their own interests ahead of the interests of the very shareholders who allowed them to conduct business in the first place and an unfathomable disregard for the interests and financial well-being of such shareholders. The harm from any payment or indemnification is probable and imminent because the Defendants—whether individually or in conspiracy with other Defendants—have continued to engage their criminal defense counsel and have engaged appellate counsel and have paid them with UDF IV funds. Even at their sentencing hearing, Defendants clearly expressed an intent to appeal and later filed notices of appeal.

The harm to Plaintiffs resulting from the wrongful and continued indemnification of Defendants legal fees is also irreparable. Plaintiffs lack an adequate remedy at law because the monetary damages and/or any shareholder funds further dissipated by Defendants will be impossible to calculate and/or recover. In short, UDF IV is in financial distress with limited assets. It is no longer operating as a going concern business, so any money it pays out in indemnification is money that is lost forever that should be going to shareholders to recoup their investment.

Furthermore, the Court may not need a finding that Plaintiffs lack an adequate remedy at law to grant injunctive relief here. In a breach of fiduciary duty case, the beneficiary may not be required to show that he has no adequate remedy at law because a breach of fiduciary claim is by nature an “equitable” action, even in cases where damages may be sought, if the fiduciary relationship is still continuing. *183/620 Group Joint Venture v. SPF Joint Venture*, 765 S.W.2d

901, 903–904 (Tex. App.—Austin 1989, writ denied w.o.j.). Texas courts have held that the beneficiaries, here Plaintiffs as shareholders of UDF IV, should have an equitable right to be protected from further harm without having to prove they have no adequate remedy at law. *Id.*

The wrongful and self-dealing conduct of Defendants (whether individually or in conspiracy with other defendants), which has persisted for many years and involves tens, if not hundreds, of millions of dollars, has caused and will continue to cause imminent and irreparable harm to Plaintiffs before trial on the merits and entry of judgment in this action. For the reasons set forth herein, anything less than maintaining the status quo before this suit is fully litigated will cause irreparable harm to Plaintiffs that cannot be adequately measured, and for which Plaintiffs cannot be adequately compensated. Injunctive relief is imperative to prevent Defendants from continuing to inflict such irreparable injury on the Plaintiffs.

E. Terms of Requested Temporary Injunction.

To prevent the imminent and irreparable harm to Plaintiffs described above, Plaintiffs request that the Court set a hearing on temporary injunction. Following proper notice to Defendants and such a hearing, the Court should issue a temporary injunction enjoining **all Defendants**, their officers, directors, agents, employees, successors, assigns, representatives, affiliated entities, and any other person or entity acting in concert or participation with them, who receives notice of such orders and injunctive relief by personal service or otherwise (*see* TEX. R. CIV. P. 683), from the following actions:

- a. Directly or indirectly requesting, distributing, transferring, or wiring any sums of money traceable to UDF IV, any UDF IV affiliate, or any UDF Entity Defendant, including any legal indemnification fees, legal fees, management fees, consulting fees, or fees under the Advisory Agreement, to any individual defendant, or for the benefit of any or all individual defendants;

- b. Directly or indirectly requesting, distributing, transferring, or wiring any sums of money traceable to UDF IV, any UDF IV affiliate, or any UDF Entity Defendant, for payment of litigation fees, or for payment of any settlement, in connection to any case involving any Defendant as a party; and
- c. Using any money from UDF IV to pay or reimburse attorneys' fees or expenses incurred by or for the benefit of any of the individual defendants without this Court's prior approval.

Furthermore, the Court should issue a temporary injunction further enjoining the individual defendants and any other person or entity acting in concert or participation with them who receives notice of such orders and injunctive relief by personal service or otherwise (*see* TEX. R. CIV. P. 683), from accepting or receiving any payment of funds from UDF IV.

IV. Bond

Plaintiffs are willing to post a reasonable bond to secure the injunctive relief sought.

V. Prayer

Plaintiffs request that the Court grant this motion, enter a temporary injunction enjoining the Defendants from taking any of the actions requested to be enjoined herein, and for any other relief in law or equity to which Plaintiffs may be entitled.

Dated: September 15, 2022

Respectfully submitted,

/s/ Jeffrey M. Tillotson

Jeffrey M. Tillotson

Texas Bar No. 20039200

jtillotson@tillotsonlaw.com

Jonathan R. Patton

State Bar No. 24088198

jpatton@tillotsonlaw.com

Joseph A. Irrobali

State Bar No. 24092564

airrobali@tillotsonlaw.com

Enrique Ramirez

Texas Bar No. 24122158

eramirez@tillotsonlaw.com

TILLOTSON JOHNSON & PATTON

1807 Ross Avenue, Suite 325

Dallas, Texas 75201

Telephone: (214) 382-3041

Facsimile: (214) 292-6564

COUNSEL FOR PLAINTIFFS

CERTIFICATE OF CONFERENCE

No defendant has appeared in this action as of the date of filing. Plaintiffs will reach out to their counsel as they appear and confer accordingly.

/s/ Jeffrey M. Tillotson

Jeffrey M. Tillotson

CERTIFICATE OF SERVICE

The undersigned hereby certifies that a true and accurate copy of the above and foregoing document, Plaintiffs' Motion for Temporary Injunction, has been served electronically upon all parties or their counsel of record in accordance with the Texas Rules of Civil Procedure on September 15, 2022.

/s/ Jeffrey M. Tillotson

Jeffrey M. Tillotson