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“Short and Distort” Litigation: Part 1

Introduction

Stock analysts and bloggers/influencers build followings online over time. Many do so under pseudonyms, although anonymity is not a requirement in ‘short and distort’ schemes.

Anyone can post online but someone with a substantial following can move a stock price, often by a significant amount, even if publishing information anonymously. If enough traders or investors buy or sell a stock after reading the published information, the stock price can move dramatically.

In a short and distort scheme, a stock analyst or other person with influence in stock market circles takes a short position in a publicly-traded company’s stock (or is working on behalf of others who take such a position). The analyst then intentionally publishes false negative information about that company and/or its directors and management with the intention of covering the short position at a significantly reduced price when the negative information drives the stock price down.

Traditionally, investors and traders abandon those who mislead and burn them. But the use of pseudonyms has stymied this basic economic response because a bad actor can simply change the pseudonym and build a new group of followers.¹

Short and Distort Litigation

Most states recognize tort actions such as defamation, interference with business opportunity, and interference with contract. Additional actions for market manipulation can include securities fraud or RICO violations, among others. But litigation is a creature of evidence. A plaintiff bears the burden of proving the essential elements of a case and, without such proof, the case will fail. Those who publish legitimate opinions about a publicly traded company or its representatives, however negative, enjoy the protection of anti-SLAPP² laws and the First Amendment of the

¹ The use of pseudonyms can undermine accountability in stock market information dissemination. Without accountability, those who spread rumors and misinformation—including the short and distort schemer—are able to manipulate markets and cause dramatic stock mispricing. *See* Joshua Mitts, *Short and Distort*, 49 J. Legal Studies 287 (2020).

² A SLAPP (Strategic Lawsuit Against Public Participation) is a lawsuit filed to harass or inflict litigation costs on another with the goal of restricting that person’s protected speech. These cases can drag on for years and deplete the resources of those who are sued. Many states have passed anti-SLAPP laws which discourage such suits. The focus of these laws varies from curtailing retaliatory actions against those who petition the government to protecting speech concerning public issues of the day. These laws seek to streamline the litigation and appellate processes, limit the litigation costs these defendants might incur, and

Constitution. Therefore, many publishers couch their statements in terms of opinions so as to avail themselves of this protection. They do so by prefacing a statement with “I think” or “I believe” or “In my opinion.”

Two cases, however, offer particularly helpful insights for attorneys. The results in *Farmland Partners, Inc. v. Rota Fortunae*³ demonstrates that companies can be successful in this type of litigation. *Bass v. United Development Funding, L.P.*⁴ demonstrates the extent and nature of evidence that a company will have to develop to survive a motion to dismiss.

Farmland Partners, Inc. v. Rota Fortunae

David Quinton Mathews owned an investment research firm. Mathews had also built a significant following online among traders and investors, writing under the pseudonym, Rota Fortunae.

In 2018, Mathews, writing under the Rota Fortunae pseudonym, published a false negative report about the publicly-traded company, Farmland Partners, Inc. (FPI), a Real Estate Investment Trust (REIT). As a result of his post, FPI’s stock price plummeted 39 percent in one day.

Mathews’ largest client, Sabrepoint Capital, had paid him as much as \$100,000 in a single year to research various publicly-traded companies. Mathews always knew, as he performed this research, whether Sabrepoint already held a position in the stock he was researching and whether that position was long or short. It was Sabrepoint, which already held a short position in FPI, that asked Mathews to research the company. Prior to this request, Mathews had never heard of the REIT.

Mathews researched FPI and began to prepare an article containing false negative information about the company. As he researched it, he bought short-dated put options⁵ in FPI which, he later admitted, would only pay off if FPI’s stock price dropped “significantly” shortly after he published the article. He also informed some of his other advisory clients about the stock and they, too, acquired short-dated put options for FPI.

Hoping to capitalize on the trust he had built among his followers, Mathews published his article in SeekingAlpha.com, an online service that offers stock market analysis and tools for investors. He

even provide for recovering costs from those who file the lawsuits. See Vining, Austin and Matthews, Sarah. “Overview of Anti-SLAPP Laws.” *Reporters Committee for Freedom of the Press* <<https://www.rcfp.org/introduction-anti-slapp-guide/>>(accessed Mar. 25, 2022).

³ See *Farmland Partners, Inc. v. Rota Fortunae*, C.A. No. 1:18-cv-02351-KLM (D. Colo. 2018). See also, Delevingne, Lawrence. “I regret any harm:’ Short seller compensates target in rare move.” *Reuters*(June 22, 2021) <<https://www.reuters.com/world/us/i-regret-any-harm-short-seller-compensates-target-rare-move-2021-06-21/>> (accessed Mar 25, 2022).

⁴ *Bass v. United Development Funding, L.P.*, No. 05-18-00752-CV (Tex. App. – Dallas [5th Dist.]) (August 21, 2019) <<https://law.justia.com/cases/texas/fifth-court-of-appeals/2019/05-18-00752-cv.html>> (accessed Mar. 25, 2022).

⁵ A put option is a contract that gives a trader the right to sell shares of a specific stock at a particular price within a specified timeframe. The trader secures this right by paying a premium for the contract. See “Investor Bulletin: An Introduction to Options.” *U.S. Securities & Exchange Commission* (March 18, 2015). <https://www.sec.gov/oiea/investor-alerts-bulletins/ib_introductionoptions.html> (accessed Mar 25, 2022).

was betting that his article would cause widespread selling among traders and investors, resulting in FPI's stock price plummeting rapidly, within the timeframe of the put options. This would allow him—and those he represented—to pocket a significant profit.

In the headline of the article, he asserted that FPI faced a risk of insolvency due to its loan program. Within the article, he claimed:

1. That FPI excluded preferred dividends from its calculation of Adjusted Funds from Operations (AFFO);
2. That Paul Pittman, FPI's CEO, had pledged his FPI shares in connection with a loan;
3. That FPI used its mortgage lending program to artificially increase revenues by making loans to 'related party' tenants—money these 'related parties' would 'round trip' right back to FPI as rent and interest;
4. That the 'related parties' to which he referred were members of FPI's management team;
5. That FPI failed to disclose that more than 70 percent of its mortgages were made to members of its management team;
6. That some borrowers in the FPI loan program also would 'round trip' their loan payments, paying these loans back to FPI as rent to inflate FPI's apparent earnings; and
7. As a result of improprieties with the loan program, several FPI directors resigned and the FPI auditor withdrew.

The fallout was extensive. Mathews' assertions thoroughly damaged FPI's reputation and FPI's stock price fell 39 percent in one day with its market capitalization slashed by as much as \$115 million.⁶ Mathews, Sabrepoint, and Mathews' other advisory clients made huge profits on their options.

FPI found itself facing a class action suit brought by shareholders who had suffered substantial losses. FPI, in turn, sued "Rota Fortunae" and other defendants for defamation, disparagement, intentional interference with prospective business relations, unjust enrichment, deceptive trade practice in violation of the Colorado Consumer Protection Act, and civil conspiracy.⁷

Mathews tried to hide behind his pseudonym and withhold the names of his co-conspirators but the court ordered that all parties be unmasked.⁸ Mathews also claimed, among other things, that

⁶ Delevingne, Lawrence. "I regret any harm: Short seller compensates target in rare move." *Reuters* (June 22, 2021) <<https://www.reuters.com/world/us/i-regret-any-harm-short-seller-compensates-target-rare-move-2021-06-21/>> (accessed Mar 25, 2022).

⁷ See *Farmland Partner's, Inc. v. Rota Fortunae* (Order on Defendant Sabrepoint's Motion to Dismiss) at 2, C.A. No. 1:18-cv-02351-RBJ, (D. Colo. Feb. 26, 2021) <<https://law.justia.com/cases/federal/district-courts/colorado/codce/1:2018cv02351/183088/206/>> (accessed Mar. 25, 2022).

⁸ See *Farmland Partners, Inc., Farmland Partners Inc. Announces Court Order to Unmask Defendants in "Short-and-Distort" Litigation*, *CISION PR Newswire* (May 20, 2020) (<https://www.prnewswire.com/news-releases/farmland-partners-inc-announces-court-order-to-unmask-defendants-in-short-and-distort-litigation-301062344.html>) (accessed Mar. 25, 2022).

he had prefaced statements with “I think” or “I believe” and “In my opinion,” and that these were opinions protected by the First Amendment. The court acknowledged that some of Mathews’ statements were opinions but that the First Amendment did not protect false statements of fact.⁹

Mathews decided to settle the case. He agreed to pay a ‘multiple’ of his gains from his actions. He also agreed to issue a press release admitting that he had made numerous misstatements of fact in his article—facts that he knew or should have known were false.¹⁰

Mathews admitted to making several key misrepresentations. FPI did not face a risk of insolvency. The loan program in question was an immaterial part of its business. FPI’s financial disclosures in that time frame made it clear that preferred dividends were included in the AFFO calculation. Mr. Pittman had not pledged his FPI shares in connection with a loan. The people in question were not ‘related parties’ as defined by the SEC. Further, one of the alleged ‘related parties’ had never been part of FPI’s management team and the other was not a member of the team at the time of the alleged loans. Moreover, the evidence showed the ‘round trip’ payment allegation to be false. Finally, FPI filings with the SEC—filings Mathews admits he reviewed when preparing the article—made it clear that the statements regarding resignations and withdrawal were false.

In a further repudiation of Mathews, SeekingAlpha.com purged its website of Mathews’ articles¹¹ and blocked Mathews’ account for his violations of the terms of use.¹²

The results of this case demonstrate that, with perseverance and strong evidence, a company can fight back and obtain court-ordered measures that can restore its reputation and compensate it for its losses.

Bass v. United Development Funding, L.P.

Bass v. United Development Funding, L.P.,¹³ a case that arose a few years before *Farmland Partners*, demonstrates the extraordinary effort and costs that a company may have to incur just to keep a short and distort lawsuit from being dismissed in the early stages of litigation. United Development Funding (UDF) prepared massive quantities of documentation in anticipation of litigation. The company’s preparations paid off when the defendants filed a motion to dismiss the

⁹ *Farmland Partners, Inc. v. Rota Fortuna et al.* (Order on Fortuna Defendants’ Motion for Summary Judgment) at 4–5, C.A. No. 1: 18-cv-02351-RBJ, (D. Colo. May 18, 2021) (reviewing trial court’s determinations) (<https://law.justia.com/cases/federal/district-courts/colorado/codce/1:2018cv02351/183088/223/>) (accessed Mar. 25, 2022).

¹⁰ Seeking Alpha, “Mathews Settlement Press Release.” (June 20, 2021), <<https://seekingalpha.com/instablog/47800059-rotafortunae/5605955-mathews-settlement-press-release>> (accessed Mar. 25, 2022).

¹¹ Delevingne, Lawrence. “‘I regret any harm:’ Short seller compensates target in rare move.” *Reuters* (June 22, 2021) <<https://www.reuters.com/world/us/i-regret-any-harm-short-seller-compensates-target-rare-move-2021-06-21/>> (accessed Mar 25, 2022).

¹² Seeking Alpha, Mathews Settlement Press Release (SA Editorial Note) (June 20, 2021) (editorial note in left margin), <<https://seekingalpha.com/instablog/47800059-rotafortunae/5605955-mathews-settlement-press-release>> (accessed Mar. 25, 2022).

¹³ *Bass v. United Development Funding, L.P.*, No. 05–18–00752–CV (Tex. App. – Dallas [5th Dist.]) (August 21, 2019) (appeals court list of claims) <<https://law.justia.com/cases/texas/fifth-court-of-appeals/2019/05-18-00752-cv.html>> (accessed Mar. 25, 2022).

action. The Court's opinion, with the exhaustive references to the evidence, offers a clear window into the breadth and detail of evidence that will come into play in these cases. It also demonstrates the extent and nature of the losses that must be calculated when bringing such a suit.

UDF was a real estate lender with entities listed on the NASDAQ stock exchange. Hayman was a hedge fund founded by J. Kyle Bass. Mr. Bass was also the fund's chief investment officer. After the defendants published disparaging information about the company, UDF and related entities sued Bass and Hayman Capital Management, L.P. (Hayman defendants) for business disparagement, tortious interference with contract, tortious interference with business relationships, and civil conspiracy to commit these torts.¹⁴

Mr. Bass and Hayman Capital took sizeable short positions in UDF stock then launched a campaign to convince the public that UDF was a fraudulent company on the verge of bankruptcy. Their goal was to drive the price of the stock down so they could profit from their short positions. They succeeded and, after extensive preparation, UDF sued the Hayman defendants.

Hayman moved to dismiss the lawsuit. The trial court denied the motion and Hayman appealed, arguing, among other things, that UDF had failed to establish a prima facie¹⁵ case: (1) that the statements were published with malice, (2) that the published statements were false, and (3) that the published statements caused UDF's damages.¹⁶

The appellate court found that UDF had presented not only a prima facie case against the defendants but had submitted 'prodigious' support for its claims—details and specific fact allegations that were more than sufficient to defeat a motion to dismiss.¹⁷ The discussion of UDF's documentation is a master class on how to prepare evidence in support of a claim before filing the complaint.

¹⁴ *Id.*

¹⁵ A prima facie case is the 'minimum quantum of evidence necessary to support a rational inference that the allegation of fact is true.' *Id.* at 26 (citations omitted). If the plaintiff establishes a prima facie case, the defendant bears the burden of establishing each element of a valid defense to the plaintiff's claims. If the plaintiff fails to establish a prima facie case, or if the defendant fails to establish the requisite elements of a valid defense, the trial court will dismiss the case. *Id.* at 27.

¹⁶ *Id.* at 2.

¹⁷ *Id.* at 3-4. UDF submitted over 2,000 pages of pleadings, affidavits, and evidence including Hayman's posts and statements, articles, correspondence, contracts and agreements, contract modification agreements, and SEC filings. UDF included extensive quotes from Hayman's online posts as well as dates, titles, headlines and where the information was posted. UDF also included pleadings and affidavits showing why the statements were false and evidence quantifying the losses and damages UDF suffered from those posts. UDF further included copies of the posts, other posts and news articles reporting on Hayman's statements, SEC filings, invoices, various contracts and agreements between UDF and business partners and associates, customers, and lenders, and other supporting information.

UDF alleged that Hayman took a huge short position¹⁸ in UDF stock then anonymously launched a systematic online attack against the company. The published statements asserted that UDF was not legitimate, that it was a house of cards—a Ponzi scheme, that the anonymous writer had researched UDF extensively and had found that UDF lacked the financial ability to conduct its business, and it was just a question of time before the company would be insolvent, leaving its creditors and investors holding the bag.¹⁹

UDF also alleged that these statements were made not only on the internet but were directly disseminated to business partners that were essential to the company's success. As a result, UDF claimed, the company (1) incurred hundreds of millions of dollars in damages, (2) suffered a sudden and severe loss of access to credit and capital markets, which were essential to operations, (3) was forced to pay off loans and liquidate assets, (4) lost customers and future investors, and (5) lost agreements and planned projects when the stock price fell. Hayman and Bass made \$60 million or more by covering their short positions at the lower stock price.²⁰

A. The Hayman Defendants' Attack Plan

Hayman created an anonymous blogger profile called "Investors for Truth" (IFT) on www.hvst.com, an investment website. Hayman used the pseudonym, "Ernest Poole." The Hayman defendants then took their large short positions and began posting their assertions that UDF was illegitimate, UDF was a Ponzi scheme using new investments to pay off old commitments, UDF had falsified its returns, UDF had collateralized 'development loans' by real estate with no development up to ten years later, UDF was underwater because there was no development for many of their loans, and UDF's investors were gullible victims of the Ponzi scheme.²¹ Hayman also published an anonymous letter sent to UDF's former auditor accusing him of being a co-conspirator who helped cover up UDF's activities.²² They published additional information with similar allegations and added attacks against a group of UDF's borrowers, claiming they were not creditworthy.²³

Hayman then published an article called "Reaching Across the Aisle of Your Private Jet Does Not Equal an Arm's Length Transaction United Development Funding (UDF)" in which it claimed that loans to Centurion²⁴ did not generate any principal or interest, were extended without extension fees being applied, and accrued increasing balances over time. The article challenged UDF management credibility, claiming UDF's SEC (Form 8-K) filings were questionable and that the company had misled investors over a period of years, a practice that continued. It also repeated many of the previously described allegations.

¹⁸ UDF claimed that the average short position taken in its UDF IV stock averaged 80,000 shares. Right before Hayman and Bass began their public campaign against the company, they took a short position of 4,000,000 shares.

¹⁹ *Id.* at 6.

²⁰ *Id.* at 6-7.

²¹ *Id.* at 8.

²² *Id.* at 9.

²³ *Id.*

²⁴ Centurion was Hayman's largest group of borrower entities. *Id.*

Haymant followed this publication with another, a few weeks later, entitled, “Anatomy of a Billion Dollar House of Cards-The Case Against UDF IV,” in which it reiterated the allegations.²⁵ These were all published under the anonymous pseudonym.

A few weeks later, Hayman went public, creating a website called UDFEXPOSED.com. Mr. Bass published on the website an open letter to the public, reiterating the same claims. But in the letter, Mr. Bass expanded the attacks, warning that UDF was preying on “Mom and Pop retail investors,” that UDF was on the verge of imploding, and that UDF faced significant bankruptcy risk that would leave its stock worthless.²⁶

B. Fighting Back: UDF’s Extensive Factual Evidence

In preparation for its lawsuit, UDF prepared and filed with the court extensive and specific documentation to refute the allegations Hayman had made. The CEO of UDF IV filed a 92-page affidavit that included extensive detail showing that the UDF loans had generated cash over the life of the loans. A forensic accounting expert provided a 24-page affidavit stating that Hayman’s claims that UDF was a Ponzi scheme were false, as were the claims that UDF’s published returns were fictitious.²⁷ And the former auditor, whom Hayman had claimed resigned due to UDF’s financial irregularities and misconduct, submitted a letter to the SEC stating that he had had no disagreements “on any matters of accounting principles or practice, financial statement disclosure or auditing scope or procedure.”²⁸ UDF also provided extensive documentation showing that Centurion was not insolvent, as Hayman had claimed.²⁹ In fact, UDF claimed, Mr. Bass knew Centurion was not insolvent because he had tried to do business with Centurion.³⁰

UDF similarly supported its claims of losses with prolific documentation. The bank with which UDF had done extensive business considered UDF a good credit risk. The lead banker for UDF prepared an affidavit that stated, among other things, that before Hayman published the allegations, the bank had issued to UDF a ten million dollar term loan and a five million dollar revolving line of credit. She stated that the Hayman allegations were not consistent with her experience and knowledge of UDF’s business and she was unaware of any information that would support Hayman’s assertions. She further stated that Hayman’s post caused a panic at the bank because it implied that the bank’s loan collateral was worthless. She stated that the post “caused the Bank’s entire relationship with UDF to come crashing down virtually overnight.”³¹

²⁵ *Bass v. United Development Funding, L.P.*, No. 05-18-00752-CV (Tex. App. – Dallas [5th Dist.]) at 10-11 (August 21, 2019)(appeals court list of claims) <<https://law.justia.com/cases/texas/fifth-court-of-appeals/2019/05-18-00752-cv.html>> (accessed Mar. 25, 2022).

²⁶ *Id.* at 11-12.

²⁷ *Id.* at 13-14.

²⁸ *Id.* at 14.

²⁹ *Id.* at 14-15.

³⁰ *Id.* at 15.

³¹ *Id.* at 17.

The bank stopped making loans to UDF and decided to wind down and terminate the company's outstanding loans and credit lines. UDF IV's CEO detailed, point by point, how the bank withdrew from doing business with UDF.³²

UDF also provided evidence of out-of-pocket losses incurred as a result of Hayman's misrepresentations. After Hayman began publishing the misinformation, UDF was inundated with an 'avalanche' of phone calls and emails demanding information regarding the allegations. The company hired a public relations firm, law firms, and accounting firms. It was also forced to pay the legal fees that banks incurred to research and confirm the efficacy of their collateral.³³ Further, UDF lost investors. Existing borrowers reduced their business with the company and potential future business partners did not follow through with planned business dealings with the company.³⁴

Some of the most significant evidence UDF brought to bear, however, were affidavits and evidence from market participants. Hayman tried to argue that they never accused UDF of perpetrating a Ponzi scheme but, rather, that UDF simply exhibited the characteristics of a Ponzi-like scheme. The Court found the argument disingenuous and pointed to the affidavits and evidence from various market participants and people involved with UDF, all of whom understood Hayman's statements to be an accusation that UDF's business was a Ponzi scheme, that the business was "worthless and illegitimate," and the company was about to collapse.³⁵

The Court noted that Seeking Alpha had posted an article entitled, "Ponzi Scheme Alleged at United Development Funding."³⁶ Value Walk posted an article, relying on the Hayman accusations, on "why the stock is a zero" and tweeted that Bass thinks UDF is "a total Ponzi scheme."³⁷ Citron Research covered Seeking Alpha's article under the title, "UDF Ponzi Can Go to \$0" and Street Insider re-published both the Seeking Alpha and Citron Research tweets.³⁸ UDF's lead banker understood the meaning of Hayman's allegations as well. Her affidavit included multiple statements that the bank representatives showed "widespread concern" over Hayman's allegations.³⁹

UDF had also carefully documented, in response to the original motion to dismiss, multiple instances of misrepresentations by Hayman and had attached affidavits and other evidence to its response demonstrating how these were perceived in the marketplace.⁴⁰ The appellate Court evaluated Hayman's posts as a whole and determined that a person of ordinary intelligence would reasonably perceive them as assertions "that UDF was running a Ponzi scheme predicated on fictitious returns, was an illegitimate business on the verge of collapse, was issuing loans to

³² *Id.* at 18-20.

³³ *Id.* at 20-21.

³⁴ *Id.* at 21-25.

³⁵ *Id.* at 31.

³⁶ *Id.* at 32.

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.* at 32-33.

developers who were not actually developing real estate projects, and was duping gullible investors into purchasing its worthless stock.”⁴¹

The Court further found, “UDF also adduced clear and specific evidence that Hayman’s disparaging statements about UDF’s business were false; UDF was a viable, legitimate business, with real earnings and gains; and UDF was engaged in growing real estate investments that were paying real dividends.”⁴² The Court accordingly found that UDF had “met and exceeded its burden to point to clear and specific evidence establishing a prima facie case that Hayman’s disparaging statements about UDF’s business were false.”⁴³

The Court also found Hayman had established a prima facie case of actual malice.⁴⁴ Although profit motive, alone, is not sufficient to establish malice, it one of several relevant factors a court takes into consideration.⁴⁵ UDF had alleged that the Hayman defendants, on information and belief, had profited in excess of \$60 million when they covered their short positions in UDF stock after driving down the stock price with their false statements.⁴⁶ Hayman had claimed it had spent a year researching UDF. But UDF argued that, from the outset, Hayman had sought to tank UDF’s stock price so it could profit substantially on its previously established massive short position. UDF alleged even more nefarious intent on Hayman’s part and that Hayman had deliberately avoided facts that contradicted its misrepresentations as evidenced by the fact that public information on the company, including SEC filings, directly contradicted Hayman’s allegations.⁴⁷

The Court found that the sensational headlines Hayman used supported the rational inference that Hayman deliberately wanted to draw attention to the posts. The use of photographs and accusations purported to show that UDF was a Ponzi scheme house of cards on the verge of imploding with the result that its stock price would go to zero. The use of a pseudonym provided further evidence regarding Hayman’s state of mind—the defendants wanted to hide the fact that they were the ones publishing all the negative information about UDF to ensure the likelihood that they would crash the company’s stock and profit handsomely.⁴⁸

The Court concluded that this was circumstantial evidence that Hayman deliberately avoided the truth and, in publishing the statements, acted with reckless disregard for the veracity of both the specific assertions and the overall gist of the accusations they levied against UDF through its body of published information.⁴⁹ Further, this supported the rational inference that Hayman sought to interfere with UDF’s business by intentionally “publishing and disseminating unconfirmed, false, and derogatory statements”⁵⁰ designed to harm UDF’s economic interests, prospective business, and stock value. The Court concluded that “Hayman deliberately distorted facts, omitted facts

⁴¹ *Id.* at 33.

⁴² *Id.*

⁴³ *Id.* at 35.

⁴⁴ *Id.*

⁴⁵ *Id.* at 36.

⁴⁶ *Id.* at 39.

⁴⁷ *Id.* at 37-38.

⁴⁸ *Id.* at 38-39.

⁴⁹ *Id.* at 39.

⁵⁰ *Id.*

contrary to its “story,” and purposefully avoided discovering facts that might show the falsity of its accusations.⁵¹ The Court concluded that UDF had met its burden of pointing to clear and specific evidence that established Hayman’s statements were made with actual malice.⁵²

In assessing whether UDF had made a prima facie case establishing that Hayman caused its damages, the Court noted that Mr. Bass had admitted that Hayman had targeted ‘the public marketplace’ with its published information about UDF. He also admitted it was his intention to see that the information reached investors, financial institutions, lenders, auditors, and investigators. UDF had filed substantial fact allegations showing how the false statements directly harmed UDF financially. To defeat the motion to dismiss, the company was only required to show enough evidence to support the rational inference regarding the existence of its damages but, as was the case with the other issues, it had exceeded that requirement.⁵³

The Court also found that UDF established a prima facie case of business disparagement in that Hayman made false statements with actual malice that proximately caused UDF’s alleged damages. Further, UDF established a prima facie case for tortious interference with contract. Hayman failed to argue, on appeal, that it did not interfere with ‘existing’ UDF contracts and thus was found to have waived that issue for the appeal. UDF provided clear and specific evidence establishing that Hayman acted with actual malice and proximately caused UDF’s alleged damages. The tortious interference with contract claim against Hayman thus survived appeal. Further, UDF was found to have established a prima facie case for tortious interference with business relationships and the conspiracy claims.⁵⁴ Thus, UDF’s claims against the Hayman defendants remained alive.⁵⁵

Given the court’s finding that UDF had done more than required to defeat a motion to dismiss, one could argue that the case is an example of overkill. However, one court’s excess is another court’s sufficiency. In any lawsuit, a party cannot know what a particular judge will find sufficient until the matter is adjudicated. Hence, UDF’s example stands as a strong template for what a company should do in anticipation of litigation.

C. UDF’s Evidence of Damages

Damages is an integral part of a lawsuit and UDF submitted evidence of attorney and accountant expenses as well as costs incurred for other professional services required because of Hayman’s actions. As a result of Hayman’s actions, UDF insurance and accounting expenses rose. Banks submitted their legal bills to the company for research necessary to confirm the efficacy of their collateral as well as the attorney fees they accrued for loan agreement modifications that lenders required after becoming aware of Hayman’s allegations. UDF lost credit or access to credit in

⁵¹ *Id.*

⁵² *Id.* at 40.

⁵³ *Id.*

⁵⁴ *Id.* at 42-44.

⁵⁵ These court findings were not judgments in favor of UDF. Rather, these were preliminary findings that allowed UDF to continue pursuing its lawsuit against the Hayman defendants.

several instances because of Hayman’s statements including a planned \$1 billion capital raise. Several projects fell through directly because of the Hayman statements. Further, many companies ceased conducting business with UDF because of Hayman’s statements.⁵⁶

Significant here was the fact that UDF submitted evidence and affidavits—specific and extensive information—in support of its claimed damages. It named the parties and contracts affected by Hayman’s statements and the financial impacts incurred when the parties withdrew in response to those statements. The evidence supported a rational inference that UDF suffered damages as a direct result of Hayman’s false and misleading statements about UDF’s business. Thus, the Court concluded, UDF had more than met its burden of providing clear and specific evidence establishing a prima facie case that Hayman’s actions proximately caused UDF to suffer these economic damages.⁵⁷

In another blow to the Hayman defendants, the SEC began criminal and civil investigations into their actions against UDF.⁵⁸

Conclusion

Short and distort schemes can target any company listed on any stock exchange. *Farmland Partners* demonstrates that targeting these market manipulators can bear fruit. *Bass*, however, is a sober warning of the hurdles required to pursue these cases.

Vega Economics Can Help with Short and Distort Litigation

Vega Economics is well positioned to help litigators with short and distort cases. Our experts are well versed in stock drop litigation. We are available to assist with all aspects of stock manipulation cases including:

- Address liability
- Assess class certification issues
- Analyze loss causation
- Rebut damages
- Assist in settlement negotiations

⁵⁶ *Id.* at 41-42.

⁵⁷ *Id.* at 42.

⁵⁸ Michaels, Dave and Viswanatha, Aruna. “Investor’s Attack on Texas Real-Estate Lender Boomerangs.” *The Wall Street Journal* (June 14, 2020) < <https://www.wsj.com/articles/investors-attack-on-texas-real-estate-lender-boomerangs-11592157950?mod=searchresults&page=1&pos=4> > (accessed March 26, 2022). *See also*, Kiesche, Liz. “United Development short-seller, Kyle Bass, comes under SEC scrutiny – WSJ.” *Seeking Alpha* (June 15, 2020) < https://seekingalpha.com/news/3582912-united-development-short-seller-kyle-bass-comes-under-sec-scrutiny-wsj?external=true&gclid=EAlalQobChMI34vTnlbl9qIVpTY4Ch0m1wPCEAAyAAEqJMFvD_BwE&utm_campaign=14049528666&utm_medium=cpc&utm_source=google&utm_term=137460309828%5Edsa-1455881688143%5E%5E555764444353%5E%5E%5E5Es > (accessed March 26, 2022).

- Conduct and critique event studies

In Part 2, we will review some important considerations for handling these short and distort cases.

For additional inquiries, please contact info@vegaeconomics.com.