

REBUTTAL OF THE UNIVERSITY AT BUFFALO FOUNDATION, INC. TO AAUP'S FEBRUARY 23, 2016 "THE OTHER BUFFALO BILLION; TIME FOR TRANSPARENCY AT THE UB FOUNDATION" PUBLICATION

PREFACE TO UBF REBUTTAL

The following, prepared by the University at Buffalo Foundation, Inc., is a response to the February 23, 2016 "Other Buffalo Billion" Document promulgated by the three professors who purport to represent the UB Chapter of the American Association of University Professors (AAUP). The purported "AAUP publication" is a continuation of the three authors' propaganda campaign against the University at Buffalo Foundation, Inc. and its affiliates (the University at Buffalo Foundation, Inc. and its affiliates are together referred to herein as "UBF").

The "Other Buffalo Billion" Document was not prepared by the United University Professions (UUP), which is the *only* legally-recognized representative of the more than 4,000 faculty and professional staff who work at UB, nor was it prepared, authorized or endorsed by the national AAUP organization, an important national institution known for protecting academic freedom. As these three faculty members are the only identified members of the UB Chapter of the AAUP, it appears that this latest document is yet another attempt by a small, disgruntled faculty group to air grievances against UB and UBF by leveraging a connection to AAUP. In fact, it is not clear if this latest document was prepared, or even agreed to, by more than these three individuals.¹ It appears that the UB Chapter of the AAUP, while listed on the AAUP national website, was created in 2015 for the purpose of promulgating this campaign of misinformation against UBF, as there is no evidence of the "chapter" undertaking any other activities or even having a meeting. Little else about this "chapter" or its relationship with the faculty at UB is known. What is abundantly clear, though, is that the UB Chapter of the AAUP is not permitted to act in a representative capacity for the national AAUP organization – as the website for the purported "UB Chapter of AAUP" expressly acknowledges that "[p]ostings on this website reflect the views of individual members in their private capacity as citizens, and do not represent the official position of any part of the University at Buffalo or the national AAUP."

A brief synopsis of recent pronouncements from the "University at Buffalo Chapter" of the AAUP is critical to fully contextualize the three professors' "Other Buffalo Billion" Document. Both on June 8, 2015 and August 27, 2015, these same three professors promulgated similar papers entitled "Time for Transparency at the UB Foundation" (the "Time for Transparency Document") and "Time for an Independent Audit of the UB Foundation" (the "Time for Audit Document") (the Time for Transparency Document and the Time for Audit Document are together hereinafter referred to as the "Prior UBF Critiques"). In response to each of the Prior UBF Critiques, UBF prepared lengthy substantive responses to the three professors' allegations,

¹ Chapters of AAUP formed at institutions for which it is not the collective bargaining agent (as is the case for UB) may be formed with simply seven (7) dues-paying members applying to the national office. The publication does not indicate who the other four (4) members of the "UB Chapter of AAUP" are and/or if those other members approved, ratified, or even knew of this publication.

including full and proper context to each of their points as well as detailed, reasoned, and factually-supported rebuttals. It is important to note that, despite the disclaimer language which the UB chapter has on its website, neither of the Prior UBF Critiques included any similar disclaimers regarding the views espoused in the documents and the views of the national AAUP organization, thus misleading the reader into believing that the pieces were actually the work product of, or at a minimum endorsed by, an organization with the national stature and gravitas of the AAUP. It is now evident that no such relationship or endorsement existed, and the authors intentionally misrepresented these pieces as having the imprimatur of the national AAUP in an attempt to confer legitimacy on their propaganda campaign.

In spite of this misrepresentation, the three professors provided the Prior UBF Critiques to the Chairman of the SUNY Board of Trustees, who charged SUNY Counsel's Office with investigating the substance of the claims. UBF fully cooperated with SUNY counsel's inquiry into these claims and promptly provided the two UBF rebuttals to the Chairman of the SUNY Board of Trustees, the SUNY Chancellor and SUNY General Counsel. The UBF rebuttals were both reviewed and analyzed by SUNY Counsel's office and the Audit Committee of the SUNY Board of Trustees, which concluded that UBF had adequately addressed the claims raised in the Prior UBF Critiques, and, as such, did not recommend any further or follow-up actions with respect to the allegations. To date, neither the national AAUP, nor the three individuals claiming to be the representatives of the University at Buffalo Chapter of the AAUP, have addressed the substance of UBF's two rebuttal documents, or the fact that SUNY Counsel and the Audit Committee of the SUNY Board of Trustees have concluded UBF adequately addressed the various allegations and claims in the Prior UBF Critiques.

Undeterred by this history and apparently unencumbered by the factual information provided to them months ago in the UBF rebuttal documents, the same three professors are attempting, yet again, through their "Other Buffalo Billion" Document, to mischaracterize, misinterpret, and misrepresent facts in a calculated way to mislead the public into believing that UBF is the alter ego of the State University of New York, thus justifying full public oversight and control. Even more troubling is the fact that while two of the three authors of the "Other Buffalo Billion" document have doctoral degrees in law and one of the two is admitted to practice law in New York State, the authors have chosen to simply recapitulate the claims set forth in the Prior UBF Critiques, with full knowledge that the claims have been factually rebutted by UBF to the satisfaction of SUNY Counsel and the Audit Committee of the SUNY Board of Trustees. By ignoring information contained within UBF's comprehensive substantive rebuttals and failing to accept or even identify the determinations of SUNY Counsel and the Audit Committee of the SUNY Board of Trustees, this latest document ironically violates the very principle which it purports to advance – transparency. As such, it is impossible to regard the "Other Buffalo Billion" Document as legitimate. This latest piece is little more than a well-written retweet of innuendo, conspiracy theories and half-truths from the Prior UBF Critiques which were fully vetted with and answered to the satisfaction of SUNY Counsel and the Audit Committee of the SUNY Board of Trustees.

The fact that the "Other Buffalo Billion" Document completely ignores this history should be enough in and of itself to dismiss the document out of hand. Nonetheless, despite its obvious flaws, UBF is willing to provide yet another response to the baseless claims and innuendos promulgated by this group of three dissident professors. What follows are numerous excerpts

from the “Other Buffalo Billion” Document with UBF’s corresponding response to the specific allegation or assertion made by these three professors. As noted in UBF’s prior rebuttals, UBF has an over fifty year history of operating as an independent not-for-profit corporation, while at the same time supporting and enhancing the UB community. Unlike all other Campus Related Foundations (“CRFs”) at SUNY institutions, the University at Buffalo Foundation, Inc. was chartered by the New York State Board of Regents, and therefore exists for not-for-profit objectives, but also for certain educational purposes, something which other CRFs do not. As with the Prior UBF Critiques, the “Other Buffalo Billion” Document is well written and stylized in a manner that ostensibly supports its conclusions. However, as the following rebuttal will show, the three professors have largely reorganized the specious and inflammatory rhetoric of the Prior UBF Critiques, and completely ignored the substance of UBF’s detailed point by point rejections of the baseless allegations contained in the Prior UBF Critiques.

UBF REBUTTAL

No.	Authors’ Assertion	UBF Response
1.	<p>“In the difficult financial times in which UB finds itself, these questions deserve answers.” <i>(See page 1, second full paragraph, second column)</i></p>	<p>This claim was rebutted on page 4 of UBF’s response to the Time for Transparency Document. “[The authors] offer no support for this statement. Declines in state funding do not dictate that activities or the resources of UBF must be subjected to greater public control or oversight. The fact that UB may be calling upon the resources of UBF more frequently does not stand for anything other than a testament to the current state budgetary constraints, and the good work being done for the betterment of UB through UBF.”</p>
2.	<p>“The UBF manages UB’s endowment and the donations made each year to benefit the University.” <i>(See page 1, third paragraph, second column)</i></p>	<p>For clarification, UBF manages UBF’s endowment and donations made to UBF. Expenditures of funds out of UBF’s endowment and out of donations made to UBF are determined by UBF’s board following consultation with University at Buffalo administration. All UBF expenditures are made for the benefit of UB, taking into account any applicable donor restrictions or conditions.</p>

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3.	<p>“Given the remarkable resource these dedicated and diverse donors have built, and <i>the enormous contributions the State itself has made to UB and the UBF</i>, these stakeholders have an interest in ensuring the transparency of the UBF and its accountability to the public at large.” (See top of page 2, first full paragraph)(emphasis added)</p>	<p>It is a gross exaggeration to say that the State of New York makes “enormous contributions to UBF.” The state does not make any contributions to UBF; rather, it is fair only to say that the state makes contributions to UB.</p> <p>UBF does not operate with or handle public funds. No taxpayer dollars or student tuition payments are contributed or paid to UBF by either SUNY or the State.</p> <p>This claim was rebutted on page 3 of UBF’s response to the Time for Transparency Document:</p> <p><i>Other than the general reference to “the public at large”, the [] piece does not identify where UBF has violated its mission, its contract with SUNY or otherwise abused donor funds, public funds, or taxpayer dollars. Moreover, as more fully described in [point #19 below], UBF does not handle “public resources or revenue.”</i></p> <p>Further, see UBF response #20 of this rebuttal below.</p>
4.	<p>“Nationwide, many state universities have recognized the need to increase public oversight of their foundations. Their experience shows that transparent foundation spending and management are fully compatible with preserving appropriate donor confidentiality.” (See page 2, second paragraph)</p>	<p>In attempting to assess the current state of affairs regarding the applicability of public disclosure (i.e. freedom of information and open meeting laws) to independent foundations associated with public colleges and universities, the authors attempt to create the impression of a national trend towards subjecting these types of entities to full public disclosure. By stating that “many state universities” have moved towards requiring public oversight and control of foundations, the authors imply that</p>

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		<p>SUNY is somehow out of step with current best practices. This suggestion is misleading and inconsistent with the authors' own facts presented towards the end of the "Other Buffalo Billion" document. At the top of page 7 of the "Other Buffalo Billion" document in the first column, the authors state: "By 2015, <i>eleven</i> states had ruled that state university foundations are 'subject to ... public disclosure laws.'" (emphasis added) Eleven out of fifty states, which number itself is grossly inaccurate as explained below, is hardly a universal or overwhelming endorsement of the public policy position being advanced by the three authors throughout their three papers. There is simply no groundswell of support for the proposition of subjecting university foundations to public disclosure; in fact, just the opposite is true – the overwhelmingly majority of states recognize that there are legitimate policy concerns against public disclosure and thus the <i>majority of state legislatures have not mandated the very requirements which these authors characterize as a universal truth.</i></p> <p>Even more concerning is that a close examination of the source cited by the authors for their "eleven states proposition" followed by a full review of state statutes, court cases, and attorney general opinions that have addressed this issue, reveals that <i>only five state legislatures have definitively ruled that state university foundations are subject to varying degrees of public disclosure (California, Kentucky, Nevada, Colorado, and Tennessee).</i> In another state, North Dakota, the attorney general issued an opinion that the state university system must disclose its records upon request, but such an opinion is certainly</p>

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		<p>not binding precedent. The legislatures of two other states, Minnesota and Georgia (but Georgia only if certain criteria are met), have decided only that donors' names are public information. And the attorney general of one state, Texas, has also decided only that donors' names are public information – again not binding precedent. Approximately seven other state courts have either directly or tangentially analyzed this issue, but in all instances the decisions of such courts were made with respect to a specific university foundation and/or in no way stood for the proposition that the state's university foundations are subject to public disclosure laws.</p> <p><i>As a result, it is most accurate to state that only a handful (five) state legislatures have definitively ruled that state university foundations are subject to public disclosure laws.</i> The fact that over 40 states recognize, directly or indirectly, the importance of independently governed, autonomous not-for-profit foundations affiliated with public colleges and universities makes a far more significant statement about current best practices for public college and university foundations, than does a mischaracterization of a position followed in a small minority of jurisdictions. This is yet another example of the authors' inflammatory and misleading hyperbole calculated to deceive the reader into thinking that their extreme views represent current best practices.</p> <p>This claim was also previously rebutted on pages 3 and 20 of UBF's response to the Time for Transparency Document:</p>

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		<p><i>“The generalized statement by [the authors] is a red-herring. [The authors] attempt to impugn the integrity of UBF and other SUNY CRFs by reference to a handful of high profile problems at unrelated institutions outside of New York State. The problems at institutions not connected to SUNY, UB or UBF have no place in the “Other Buffalo Billion” document other than to advance the authors’ “guilty because also a university foundation” argument which is repeated throughout the “Other Buffalo Billion” document. Overall, the national record for CRFs is very positive and admirable. The problems at all levels are rare, and to conclude as the authors do, that CRFs require extensive public oversights and control as if the CRFs were an extension of state government is unwarranted. Simply put, the authors offer no evidence to support its allegation of an endemic crisis regarding lack of public oversight and control at CRFs.”</i></p>
5.	<p>“But crucial details about the UBF’s deliberations, policies, and expenditures have long been shrouded in darkness.” (See page 2, third paragraph)</p>	<p>This claim was rebutted on page 11 of UBF’s response to the Time for Transparency Document:</p> <p><i>“The existing SUNY guidelines for CRFs identify transparency as an important policy consideration with respect to the activities of CRFs. These guidelines and the related affiliation agreement between SUNY and the UBF provide SUNY with multiple means to audit and access to financial and operational information regarding UBF. At no time has UBF ever denied SUNY with access to any information about its finances or operations which have prevented SUNY from determining whether the UBF is in compliance with the guidelines or the affiliation agreement. This is an attempt</i></p>

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		<i>by the authors to create the appearance of a problem where none exists."</i>
6.	"UBF Operates in UB's Name" (See page 2, heading)	<p>This claim was rebutted on page 4 of UBF's response to the Time for Transparency Document:</p> <p><i>"[The authors'] assertion is factually incorrect. UBF exists as an independent foundation (as per CASE and AGB standards) to provide support and resources for the betterment of UB, and as such does not depend on UB or SUNY resources, and does not receive any operating subsidies from the State of New York, SUNY or UB."</i></p>
7.	"UB gives the UBF the right to use its name in its fundraising and other activities. And the UBF's success in fundraising depends on the regard and respect that UB enjoys from alumni and community members." (See page 2, fourth paragraph, first column)	<p>Pursuant to the contract between UBF and SUNY, UBF does have the right to utilize UB's name and logo. It is clear, moreover, that the University at Buffalo, like every other SUNY institution and practically all other public colleges and universities, prefers that philanthropy be directed to an independent foundation associated with the school, as opposed to the school itself. It is equally clear that UBF's status as an independent private not-for-profit corporation encourages greater philanthropy from the University community than would be the case if donations were made directly to SUNY since SUNY is a part of state government. There is but no doubt that the level of contributions which are made to UBF are connected in a meaningful way to the prestige of UB and the level of respect that UB enjoys with its alumni and friends. What should also be made clear, though, is that UBF does not engage in fundraising activities. All formal fundraising activities related to UB are conducted under the auspices and</p>

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		<p>supervision of the UB's Division of Philanthropy and Alumni Engagement. UBF is not the fundraising arm of the University at Buffalo. UBF stewards donations made to and other revenue generated by UB and UBF.</p>
8.	<p>"The University at Buffalo Foundation was chartered by the State in 1962, absorbing the old University of Buffalo endowment. Since then, it has become a nest of seven affiliated non-profits, unlike the single foundations serving the other SUNY centers in Albany, Binghamton, and Stony Brook. It is run by twenty-nine employees, a Board of Trustees, a Board of Directors, and seven committees. UB's President is a voting trustee, and other UB administrators are non-voting trustees." (See page 2, fifth paragraph)</p>	<p>This claim was rebutted on page 16 of UBF's response to the Time for Transparency Document:</p> <p><i>"Each UBF affiliated entity is a not-for-profit corporation with an independent board and operates as such. Under applicable SUNY guidelines, the President of UB serves as an ex officio voting member of the UB Foundation board only (but not any of its affiliates). No other state or SUNY employee or officer serves as a voting trustee of the UB Foundation or as a voting director of any of the UBF's affiliates. SUNY and the UB Foundation do enter into an affiliation agreement outlining the terms and conditions of the relationship by and among SUNY and the UBF entities. This agreement sets forth all of the legal obligations by and among SUNY and the UBF entities. There is no other legal authority subjecting UBF to SUNY oversight and control."</i></p>
9.	<p>"From 1962 to 2011, the SUNY Board of Trustees appointed UBF board members. Then, after a local journalist brought suit to subject the UBF to the State's Freedom of Information Law, and while that case was being litigated, the State Board of Regents ended the power of the SUNY Trustees to appoint UBF Board members. This eliminated a significant element of public oversight. Since then, the UBF itself exercises complete control</p>	<p>This claim was rebutted on page 19 of UBF's response to the Time for Transparency Document:</p> <p><i>"This account of what occurred in 2011 is a gross mischaracterization and completely ignores the context for this action by the New York State Board of Regents and SUNY. In practice, since the formation of the UBF in 1962, SUNY's "oversight" under the provision</i></p>

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	<p>over membership on its Boards of Trustees and Directors.” (See page 2, last paragraph in first column)</p>	<p><i>in question consisted of simply ratifying names of prospective trustees provided to it by the UBF. In no instance during the almost 50 year period this provision was in place, did SUNY ever reject or even question any name provided to it by the UBF. In consenting to the amendment of the UBF charter, the New York State Board of Regents and the SUNY Board of Trustees recognized the pro forma nature of this approval, which was unique to the UB Foundation among all SUNY CRFs, as an unnecessary administrative anachronism. It is important to note moreover, that this issue was discussed extensively by the New York State Supreme Court in its ruling that the UB Foundation was not subject to FOIL.”</i></p>
<p>10.</p>	<p>“The listed qualifications and responsibilities for the UBF boards are reasonable, leading us to expect diverse community representation from faculty and staff, non-UB educators, and the business, not-for-profit, labor, government, and faith communities. In reality, however, almost all UBF board and committee members are builders, real estate developers, lawyers, investment managers, and corporate executives.” (See page 2, first paragraph, second column)</p>	<p>This claim was rebutted on page 17 of UBF’s response to the Time for Transparency Document:</p> <p><i>“Nothing in the organizational documents of any of the UBF entities dictates that individual faculty members or a representative of the Faculty Senate of UB be afforded oversight over the affairs of UBF or representation on its boards. Among its purposes, the UBF exists to provide “fellowships and professorships and other financial aid to... Faculty; and/or faculty activities... .” The fact that the UBF actually spends its funds for these purposes, lessening SUNY and UB’s financial burdens, does not convert UBF funds into public money, does not make the UBF entities public bodies subject to public control and oversight and does not mandate that UB faculty members be given representation, oversight or control over</i></p>

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		<p><i>UBF affairs. This premise, which underlies the entire [“Other Buffalo Billion” Document], is a flawed assumption and ignores valid and well-established rationale, recognized by SUNY, the NYS Education Department, the NYS Comptroller (“OSC”) and the NYS Attorney General (“NYSAG”), for the existence of separate and independent UBF entities, which benefit both SUNY and UB.”</i></p>
11.	<p>“Sheldon M. Berlow serves on the UBF Board of Directors, its Audit and Properties Committees, and the boards of four UBF affiliates. He is an associate broker at Cushman and Wakefield, whose website says he has been responsible for “site selection for the University at Buffalo and various dispositions for the University at Buffalo Foundation.” (See page 2, second column, first bullet)</p>	<p>UBF certainly acknowledges that it relies on many of its board members, as do almost all not-for-profit entities, to provide substantive expertise in their professional fields, which is precisely what Mr. Berlow was doing in the instances cited in the “Other Buffalo Billion” document. Importantly, except in two instances outlined more fully below, Mr. Berlow provided this expertise on a volunteer that is unpaid basis. It is certainly not a conflict of interest for a board member to provide substantive, professional advice to the entity he or she serves – that is one of the exact reasons not-for-profits seek board members in the first place. Had UBF not utilized Mr. Berlow’s professional skills on a complimentary basis, there is an even greater likelihood that it would have been criticized for wasting resources when it could have accomplished the same task by simply utilizing certain expertise of its board members. In two instances, one over six years ago and the other over thirteen years ago, Mr. Berlow did provide brokerage services to UBF on a paid basis in regard to the sale of two UBF properties. In both of these instances the properties were intensely marketed over several years, including encouraging many local real estate</p>

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		<p>brokers to cooperate in the sale. In accordance with UBF conflict of interest policy, Mr. Berlow disclosed the conflict of interest to the UBF board and recused himself from all deliberation and voting related to that transaction. Since that time, UBF has engaged in a number of other significant real estate transactions where real estate brokerage services have been provided by firms which Mr. Berlow is not associated with.</p>
12.	<p>“From 2002 to 2008, Buffalo developer Michael Joseph was a UBF Trustee. In 2005, his company paid \$410,000 for a quarter-acre vacant lot in downtown Buffalo, then assessed at \$55,700. In 2012, the company sold the lot to the UBF as part of the Buffalo-Niagara Medical Campus for \$1,260,000. This company insists it only broke even on that transaction because, before selling the lot, it had to demolish a building on the site.” (See page 2, second column, first bullet)</p>	<p>This claim was rebutted on page 8 of UBF’s response to the Time for Transparency Document:</p> <p><i>“[The authors’] argument is simply not supported by the facts. [The authors] attempt to draw a negative inference from the 2012 purchase by a UBF affiliate of one of the four parcels of land for the new downtown medical school from an entity controlled by a former trustee, Michael Joseph, a prominent local real estate developer. The cited source for this alleged conflict of interest comes from a Buffalo News account of the transaction. Mr. Joseph served as a trustee of the UBF between 2002 and 2008. Mr. Joseph did not, however, ever serve as a director or officer of the independent UBF affiliate which purchased this property. Moreover, the arms-length transaction occurred in 2012, some four years after Mr. Joseph’s service on the UBF board ended. The sale came about as a result of an extensive property search by an independent national real estate brokerage firm, CBRE, following extensive consultation with and investigation by the State University Construction Fund as to suitable properties for the medical school. The</i></p>

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		<p><i>purchase price was supported by an appraisal prepared by an independent licensed appraiser, which documented that the price paid was fair market value based upon sales of similar properties on the Buffalo Niagara Medical Campus. Here again, this transaction was handled in complete accordance with the UBF's contract with SUNY, UBF's conflict of interest policy, and applicable law."</i></p>
13.	<p>"From 2006 to 2011, the late Frank Ciminelli and his son Paul were both Directors of four UBF affiliates. In 2010, the Town of Amherst issued a bond to one UBF affiliate, naming as "Construction Manager" LPCiminelli Inc., a construction company founded by Frank and wholly owned by his son Louis, Paul's brother. The 2011 IRS 990 for that UBF affiliate acknowledges the relationship and describes LPCiminelli Inc. as an "interested person" that received a construction contract valued at \$48,013,153." (See page 2, second column, second bullet)</p>	<p>This claim was rebutted on page 7 of UBF's response to the Time for Transparency Document:</p> <p><i>"[The "Other Buffalo Billion" Document and the Time for Transparency Document] both fail to identify the most significant facts with respect to this transaction – Frank Ciminelli (now deceased) and Paul Ciminelli, neither of whom have or had any ownership, employment or other financial interest or relationship in LPCiminelli, Inc., completely recused themselves from all discussions, deliberations and decisions with respect to the cited student housing project because LPCiminelli, Inc. submitted a bid on the project. This was done in complete accordance with UBF's conflict of interest policy and applicable law. Information that was available to [the authors] would have shown, moreover, that LPCiminelli, Inc. was selected for the UBF Faculty-Student Housing Corp. project by virtue of being the low bidder on a publicly advertised and publicly opened bid.</i></p>

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		<p><i>In drawing its conclusions with respect to this transaction, [the “Other Buffalo Billion” Document and the Time for Transparency Document] both rely in large part for factual support on a 2011 article about UB authored by Buck Quigley, the unsuccessful petitioner in the FOIL lawsuit referenced in the [the “Other Buffalo Billion” Document and the Time for Transparency Document] which appeared in Artvoice, a weekly free community newspaper in Buffalo. It is worth noting that numerous factual statements made in the Quigley article with respect to UBF and UB were materially inaccurate and appear not to have been properly fact checked. At least 20 material factual misstatements were included in that article. A point by point rebuttal of the various inaccuracies in that article was attached for reference as <u>Exhibit B</u> to UBF’s rebuttal of the [Time for Transparency Document]. Given these inaccuracies, that article cannot be accepted as credible authority on UBF or UB.”</i></p>
14.	<p>“Since 2009, Paul Harder, Finance Chair for the 2010 re-election campaign of then Erie County Executive Chris Collins, has sat on one or another UBF board. In 2010, the UBF made two improper campaign contributions to the Collins campaign, possibly endangering its non-profit status. According to UB’s student newspaper, which broke the story, UB officials called the donation an “honest mistake,” and the Collins campaign returned the money the day after the newspaper story broke.” (See pages 2, last bullet, onto page 3)</p>	<p>This claim was rebutted on pages 14 and 15 of UBF’s response to the Time for Transparency Document:</p> <p><i>“UBF acknowledged this inadvertent error, immediately recovered the funds, and immediately adopted a policy to tighten controls to better prevent such payments in the future. Mr. Harder had no involvement whatsoever in either the original expenditure or in the return of the funds to the UBF. His affiliation with both organizations was purely coincidental.”</i></p>

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15.	<p>“In 2003, after Stephen Walsh contributed \$240,000 to the UBF, it nominated him to one of its boards. He also served on the UBF Investment Committee until 2009. During this time, his investment firm defrauded, among others, university foundations and pension funds. In 2012, the U.S. District Court for the Southern District of New York ordered the UBF to repay Walsh’s contribution, which he had improperly diverted. In 2014, Walsh pled guilty to financial fraud involving over \$554,000,000 and began serving a twenty-year prison term.” (See page 3, first full bullet)</p>	<p>This claim was rebutted on page 8 of UBF’s response to the Time for Transparency Document:</p> <p><i>“[The authors] infer that UBF acted inappropriately with respect to events involving Mr. Walsh occurring years after his board service ended, for activity having nothing to do with his service on the UBF board. UBF voluntarily returned a portion (i.e., less than half) of the aggregate donations made by Mr. Walsh to UBF over a period of years. These payments were returned to a court appointed trustee charged with tracing the funds Mr. Walsh obtained from his investors, which is standard operating procedure for cases of this nature. A number of other charities were in the same situation as UBF by virtue of donations made by Mr. Walsh with his investors’ monies. UBF completely cooperated with this process. It is important to note that at no point did the court appointed trustee allege or even insinuate that UBF or its trustees acted inappropriately in accepting donations from Mr. Walsh.”</i></p>
16.	<p>“In 2011, SUNY Chancellor Nancy Zimpher proposed that the SUNY Board of Trustees adopt new “Guidelines for Conflict of Interest Policies of Campus-related Foundations.” Though we have not been able to determine whether these proposed guidelines are currently in effect, Chancellor Zimpher’s proposal directs each campus-related foundation like the UBF to “keep a written record of disclosures of actual or potential conflicts and to make such records available annually to the Audit Committee of the</p>	<p>The conflict of interest guidelines promulgated in 2011 by Chancellor Zimpher relied in part, in fact, on the existing conflict of interest guidelines previously developed by the UBF board. UBF takes pride in the fact that SUNY acknowledged its existing conflict of interest guidelines as being “best practices” and relied on them in part for the system-wide policy. Given the connection between the SUNY policy and UBF’s prior conflict of interest policy, UBF is confident that it has been</p>

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	State University Board for public disclosure.” (See page 3, second bullet)	and continues to be in full compliance with these requirements.
17.	<p>“Without more public disclosure, <i>given that the UBF claims it is not subject to the State’s FOIL Law</i>, it is impossible for the public to know how the UBF assesses and manages its conflicts of interest.” (See page 3, third bullet) (emphasis added)</p>	<p>This statement by the authors is grossly mischaracterized. UBF does not “claim” that it is not subject to FOIL; rather, that was the ruling of the New York State Supreme Court in Quigley v. University at Buffalo Foundation.</p> <p>This claim was also rebutted on page 5 of UBF’s response to the Time for Transparency Document:</p> <p><i>“The court’s decision in the Quigley FOIL case ran over twenty pages and, of all the cases throughout New York State that have considered the applicability of FOIL to SUNY CRFs, it is by far the most detailed and complete analysis. It is significant that the petitioner, Buck Quigley, did not elect to appeal the court’s ruling, and, as such, the decision stands as binding precedent on the applicability of FOIL to the UBF.”</i></p>
18.	<p>“In the 2011 court case seeking to subject the UBF to the State’s FOIL Law, UBF’s Executive Director stated that it was “funded entirely by private donations and handles strictly private funds” and “does not handle public funds in any capacity.”” (See top of page 3, second column)</p>	<p>UBF’s Executive Director’s statement with respect to public funds is accurate; that is, UBF does not handle public monies (i.e. state or federal taxpayer dollars), nor does UBF receive any funding from SUNY or the State of New York. The authors’ insinuation that UBF handles “public funds” is inaccurate.</p>
19.	<p>“But the UBF’s own webpage reveals that only 16% of its yearly income derives from “private donations” (i.e., “Gifts, Bequests, and Private Grants”). Over the years, UBF has received substantial revenues from public sources ...” (See top of page 3, second column)</p>	<p>This claim was rebutted on page 2 of UBF’s response to the Time for Transparency Document:</p> <p><i>“[The authors] mischaracterize the fundamental nature of UBF annual revenue. The referenced revenue numbers are from the FY ‘14 financials.</i></p>

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		<p><i>No portion of UBF revenue comes from student tuition, taxpayer dollars or public sources. A complete breakdown of the FY '14 UBF revenue is as follows:</i></p> <ul style="list-style-type: none"> <i>i. 16% of total revenue is direct gift revenue (private sources);</i> <i>ii. 53% is from investment earnings on UBF held funds, which funds can be traced to private gifts, resources generated by or through private activity related to UB and reserve funds related to UBF owned real estate;</i> <i>iii. 11% represents rental revenue from UBF owned (not SUNY or SUNY owned) real estate;</i> <i>iv. 4% is from the separate clinical practice corporations supporting their department's educational activities (see discussion at page 12 of this Rebuttal);</i> <i>v. 4% is from the UDSmr program, which derives solely via the work and efforts of UBF to commercialize intellectual property developed at the Medical School which was initially rejected by the SUNY Research Foundation ("RF") and SUNY for commercialization (see discussion at page 10 of this Rebuttal for a more complete discussion on this program);</i> <i>vi. 4% is from UBF administered revenue generated through non-credit bearing continuing education programs offered to</i>

No.	Authors' Assertion	UBF Response
		<p><i>licensed professionals who are not matriculating students; and</i></p> <p>vii. <i>8% is from UBF administered revenues generated from miscellaneous revenue generating programs and activities related to UB."</i></p>
20.	<p>"In 2008, SUNY transferred UB's portion of what was then called the "State University Endowment Fund" to the UBF, adding over \$200,000,000 in State funds. In recommending that transfer, SUNY Interim Chancellor Clark noted that the monies in the State University Endowment had been "given and bequeathed to the State University," and that SUNY was transferring the funds to the UBF with the understanding that it would manage them "as agent of the State University." Notwithstanding the Chancellor's proviso, those transferred monies now appear to be under the sole possession and control of the UBF." <i>(See page 3, second column, first bullet)</i></p>	<p>Here, the authors' attempt to characterize UBF's role "as agent" as applying to the entire State University Endowment Fund. However, as a full and careful read of the SUNY memorandum cited for the clause at issue shows, title to the UB endowment was moved to UBF, and UBF acts "as agent of the State University" only for selected situations where a campus lacks a CRF or the campus CRF lacks the experience, resources, and expertise to handle endowment funds. Endowment funds related to SUNY Maritime, and Old Westbury are examples of this situation.</p> <p>This claim was also rebutted on page 5 of UBF's response to the Time for Transparency Document:</p> <p><i>"[The authors'] statement is not supported by the underlying facts of what happened here. Much attention is devoted in the ["Other Buffalo Billion" Document and the Time for Transparency Document] to the State's return to UBF in 2009 of the original private UB endowment. The vast majority of these funds represents the accumulated donations which were held by UB when it converted from a private institution and joined SUNY in 1962. In late 2008, with the full approval of and oversight by the OSC and the NYSAG, the SUNY Board of Trustees made a</i></p>

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		<p><i>determination that these funds should be transferred to UBF and administered as part of its endowment for the benefit of UB. This decision was based in significant part on honoring the intentions of the original donors to private UB. With very limited exceptions, the vast majority of these assets were not bequeathed to the State of New York as the authors assert. UBF does not manage 'State University Endowment Fund assets.'</i>"</p>
21.	<p>“SUNY policy states that foundations are “prohibited from engaging in . . . activities that generate revenue from the use of state property.” This is true even though the UBF gains revenue from a fee called the General University Service Fee. UB itself imposes the GUSF on “all funds generated through the use of university faculty or staff time and/or use of university facilities.” Students must pay this fee for certain courses involving laboratory or art equipment. Between 2009 and 2013, the monies the UBF collected from the GUSF increased by 225%, with a 2013 total over \$4,000,000.” (See page 3, second column, second bullet)</p>	<p>This claim was rebutted on page 9 of UBF’s response to the Time for Transparency Document:</p> <p><i>“GUSF is a broad based fee collected by UBF at the request of UB on all revenue-generating activity that is related to UB. This fee is collected on, among other things, revenues administered through UBF, revenues administered through Campus Dining and Shops, and revenues administered through the RF. UBF is simply one of several entities that collects the GUSF, and to the extent UBF does so, it collects this fee as an accommodation to UB. UBF is not legally mandated to collect this fee. Under UBF board policy, GUSF funds collected by UBF are made available to UB leadership for expenditure like any other privately generated revenue administered by UBF. This fee is not imposed on any one class of persons, and the authors’ description of the GUSF grossly mischaracterizes the fee as being akin to a student services fee, which is the type of fee that is applicable to “students and members of the public.” The authors also attach great significance to the recent increase in the GUSF, but fail to identify that the</i></p>

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		<i>increase in the GUSF was imposed at the request of senior leadership of UB, not UBF.</i> "
22.	<p>"In 2013, the UBF collected revenue of over \$73,000,000 from various activities that appear linked to UB property or staff. This includes nearly \$3,000,000 in "unrestricted revenue" from performances at UB's Center for the Arts (a university facility), over \$10,000,000 from a nebulous category called "other activities and services," and \$8,000,000 from a corporation marketing medical software developed by UB faculty working on UB time." (See page 4, first bullet)</p>	<p>This claim was rebutted on pages 10 and 12 of UBF's response to the Time for Transparency Document:</p> <p><i>"Ticket revenue from concert and other public events at the Center for the Arts are administered through UBF at the request of UB. However, the funds are used by UBF, at the direction of UB, to pay for services at the Center for the Arts. Contrary to the claim advanced here by [the authors], UBF does not receive rents/revenue from the "use of state property." The Center maintains an account with UBF and utilizes UBF to provide payroll and support services for events at the Center for the Arts because it affords the Center with greater flexibility to pay performers, hourly part-time personnel and local vendors.</i></p> <p><i>The intellectual property rights at issue were conveyed to UBF, after RF and UB initially determined that the intellectual property had no value to them. Representatives from UBF and from the Medical School then proceeded, through the expenditure of UBF-generated (as opposed to public) resources, to use this intellectual property to produce goods and services worthy of securing subscriptions for access to a database of rehab information from rehab facilities around the world. All costs to develop and operate UDSmr program are paid from these revenues, and these revenues are NOT "generated by UB employees from State facilities and properties...." This program operates completely off-campus, using its own revenues to cover</i></p>

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		<p><i>all personnel and facility costs. No state resources go into this program, and nothing is “produced by UB faculty apparently working on State time” as the [authors] erroneously postulate.”</i></p>
23.	<p>“In 2013, a UBF affiliate collected over \$23,000,000 from UB students living in housing sited on leased UB property. Some of these monies paid maintenance costs, some paid off the UBF construction bonds, and some—over \$1,700,000—appear to be general “profit” for the UBF.” (See page 4, second bullet)</p>	<p>Starting in the late 1990s, in recognition of dwindling public resources for development and construction of new housing, UBF Faculty-Student Housing Corp. was formed for the purpose of addressing this problem. Since its formation, UBF Faculty-Student Housing Corp. has successfully developed and constructed one off-campus and five on-campus student housing facilities, containing over 2,700 beds, all of which were paid and financed entirely with private funding. Unlike conventional dormitories, no taxpayer dollars were used to construct these facilities. Each of these student housing projects required approval from the SUNY Board of Trustees, the NYSAG’s office and the OSC which were obtained prior to construction and financing of each project. Any surplus funds, after payment of operating expenses and debt service for these student housing projects, are expended by UBF, in consultation with the University, for the overall betterment of the UB community. This student housing model has received national and state recognition, and has been successfully replicated at five other SUNY colleges and universities.</p>
24.	<p>“SUNY policies state that foundations “are prohibited from engaging in . . . instructional and credit-bearing programs.” But in 2013, the UBF reported revenues of \$19,500,000 from dental student training, “other</p>	<p>This claim was rebutted on page 11 of UBF’s response to the Time for Transparency Document:</p> <p><i>“[The authors’] characterization of UBF’s income is inaccurate. The</i></p>

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	<p>educational service,” and Continuing Education in such fields as Law, Dentistry, Medicine, Pharmacy, and Social Work. These instructional programs, which award “credits” toward various professional certifications, rely on UB resources, including UB’s campus and facilities, its status in conferring professional accreditation, and its staff, faculty, and websites. In these programs, the UBF appears to derive “revenue from the use of state property” through “instructional” activities that award “credit” toward professional certifications. This practice seems inconsistent with prohibitions imposed by SUNY.” (See page 4, third bullet)</p>	<p><i>authors mistakenly describe UBF revenue identified on its IRS form 990 as “Other Educational Service” as deriving from instructional credit bearing activity of the University. This category of UBF revenue, which is described in IRS guidelines as Educational Support Services, is a general catchall for a wide variety of private revenue generating activities administered by UBF, none of which involve instructional credit bearing programs of the University. Examples of income in this category include student and parent fees for orientation programs and fees for athletic camps. The income which UBF does receive from continuing education derives from continuing education courses for licensed professionals who are not matriculated students. These programs are conducted in affiliation with various UB professional schools. All of the revenue streams identified by [the authors] are authorized under and consistent with the terms and conditions of the affiliation agreement between SUNY and the UBF.”</i></p>
25.	<p>“Despite its student-focused webpage, “Giving to UB,” scholarships are not a priority. Between 2007 and 2013, as the table below indicates, only 3.4% to 6.9% of UBF yearly spending went to student scholarships. In an era of burgeoning, devastating student debt, this low allocation contrasts with those of many other university foundations around the country, which have prioritized scholarships.” (See bottom of page 4, first column onto second column)</p>	<p>The first sentence of this quote characterizes the linked webpage “Giving to UB” as a UBF webpage. However, the “Giving to UB” webpage is not maintained by UBF, but rather is a UB website under the Division of Philanthropy and Alumni Engagement, to which the UBF website provides a link for purposes of billing and processing donations. As stated above, all UB fundraising initiatives and activities are controlled by the University, not UBF. UBF stewards and processes donations.</p> <p>The authors’ argument in this section – that UBF does not make scholarships a</p>

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		<p>priority – is both misguided and, once again, presented without a full explanation of the facts. Like fundraising activity, the overall amount of UB resources committed to scholarships is determined by the University, not UBF. The UB Provost decides, out of all resources available to UB (i.e., University revenue, state support and UBF funding), how much money <i>and which money</i> will be spent on scholarships. To the extent that the Provost requests UBF to expend its resources to fund any portion of the University's scholarship commitment, the UBF board has followed the practice of honoring the Provost's request. In addition, it must be noted that every dollar given to UBF for scholarship purposes is expended by UBF on scholarships for UB students.</p>
26.	<p>“Given the priorities at other university foundations, some of the UBF's 2013 operating expenses are disconcerting. There were, for example, expenditures over \$3,000,000 for “investment management fees,” ...” (See page 4, second column, first full paragraph)</p>	<p>Prudence and best practices dictate using investment advisors to manage an \$800 million investment portfolio. Not using investment advisors to manage an investment portfolio of this size and nature would certainly be both irresponsible and likely a violation of the fiduciary duties of the UB Foundation's board members. The total of all investment management fees incurred by UBF equate to just over 1% of the total portfolio, which is regularly monitored by the UBF Board and the Investment Committee and benchmarked for reasonableness against peer foundations.</p>
27.	<p>“... and nearly \$10,000,000 for a catch-all category denominated simply as “Other.” The IRS requires that an entry</p>	<p>UBF is thankful that the authors have brought this error to its attention. UBF certainly never claims perfection, and</p>

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	<p>as large as this last one be broken down and itemized in its Form 990, Schedule O. Based on our review, it appears that the UBF has not done that.” (See page 4, second column, first full paragraph)</p>	<p>acknowledges that the required breakdown on Schedule O was overlooked. UBF has instructed its outside accounting firm, KPMG, to file a corrected Schedule O with the IRS. Once filed, UBF will add the schedule to its tax return information which is posted on its website.</p>
28.	<p>“Details about the UBF’s expenditures are especially noteworthy because, in recent years, its total assets have grown at a brisk clip: from \$201,446,000 in 1997 to \$1,057,068,000 in 2013, the latest year for which we have data. In that year alone, UBF’s total assets increased by a respectable 9.5%, or \$91,000,000. This rapid asset growth is hard to reconcile with current admonitions on campus that UB faculty and students must adjust to a new austerity regime.” (See page 4, second column, second full paragraph)</p>	<p>The University is, without doubt, in an era of diminishing public support. However, decisions about the level of UBF spending are governed not by state or SUNY officials but rather by a UBF Board approved spending policy. This spending policy is developed by benchmarking to best practices within the university foundation industry. Furthermore, UBF’s spending policy has been, and will continue to be, available on UBF’s website. If expenditure of UBF resources fell to SUNY and state officials, the whole reason for an independent foundation would be compromised. Philanthropy would undoubtedly be negatively impacted if donor gifts could be subjected to unilateral actions of government officials.</p>
29.	<p>“The UB Administration does not consult with the Faculty Senate when deciding the current UBF annual budget of \$105,000,000. That is true even though that expenditure is more than one-sixth of UB’s annual operating budget, and a far larger percentage of its discretionary spending.” (See page 5, first full paragraph)</p>	<p>These two sentences by the authors illustrate a complete lack of understanding of both UBF expenditures and the process UB uses to determine its annual budget. The UBF resources referenced do not represent “UBF’s annual budget” nor do they represent a line item on “UB’s annual operating budget.” Rather, the \$105,000,000 represents the total amount of annual UBF expenditures. As noted many times throughout this rebuttal and prior rebuttals, UBF is an independent,</p>

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		<p>autonomous organization whose board of directors is responsible for determining its annual expenditures in accordance with, among other things, donors' intent, and, in all instances, in conformity with the board of directors' fiduciary responsibilities under the New York not-for-profit law.</p> <p>The overwhelming majority of these expenditures are not unrestricted funds considered fungible or available for general use, allocation, or reallocation by the university. Rather, these funds represent UBF expenditures of every kind and nature, including all operating expenses for its various facilities; earmarked dollars generated by endowments; funds restricted to a specific activity, program, decanal unit, college, or professional school, as the case may be. The vast majority of these funds come with specific donor restrictions, and it is the fiduciary duty of both the UBF and UB to ensure that the funds are spent according to such intent. This is no different than UB's obligation to spend funds provided via research grant or contractual agreement for sponsored programs according to the requirements of those contractual obligations – these restricted funds are also not subject to university budget processes for obvious reasons.</p> <p>What is left over after the restricted fund expenditures noted above is an unrestricted pool of funds generated by UBF activities averaging \$10 million per year, which funds are made available to UB and which are part of the UB's budget process. UB takes an "all funds" approach to budgeting. Thus, the \$10 million unrestricted pool of funds is communicated as part of the UB's annual</p>

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		<p>budget discussions with the Faculty Senate and other campus stakeholders. This means that UBF support for the University is in fact included in the overall budget numbers. Thus, when UB administration officials consult with the Faculty Senate about the overall UB budget, they are, in fact, consulting with the Faculty Senate about the expenditure of the unrestricted UBF funds.</p> <p>See also UBF response #10 of this rebuttal above.</p> <p>This claim was also rebutted on page 13 of UBF's response to the Time for Transparency Document:</p> <p><i>"UBF overseas and administers the expenditure of resources generated through donations and other private revenue sources to ensure compliance with UBF's tax-exempt purposes. The expenditure of these resources are in full compliance with applicable law and its affiliation agreement with SUNY (which is approved by the NYSAG and the OSC). These expenditures are in no way "public funds," and thus UBF does not administer taxpayer dollars."</i></p>
30.	<p>"In 2012, amid nationwide controversy, the UB Administration dissolved its short-lived Shale Resources and Society Institute. SRSI received funding to study hydraulic fracturing for natural gas, or "hydrofracking." To this day, we do not know if that funding came from private sources with an economic interest in the subject to be studied, thereby potentially compromising the independence and academic integrity of research done under its aegis. We do know that SRSI began with unscholarly, straight-up</p>	<p>This claim was rebutted on page 15 of UBF's response to the Time for Transparency Document:</p> <p><i>"[The authors] misstate UBF's level of involvement with this program. The authors seek to impugn UBF by reference to UB's Shale Resources and Society Institute. At no time did UBF have any control over or involvement in the policies, research or academic activities of the Shale Resources and Society Institute. The UB Department of</i></p>

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	<p>advocacy for hydrofracking and a funding appeal that offered corporate contributors to its UBF account the opportunity to shape its research agenda.” (See page 5, second column, first full paragraph)</p>	<p><i>Geology controlled the output from the SRSI, and UBF had no ability to influence what UB accomplished.”</i></p>
31.	<p>“The State and the public also lack basic information regarding outsized UBF salary supplements to certain administrators and faculty. Some UBF payments to faculty—for instance, those that support endowed chairs, research, conferences, or other academic activities—are completely proper. But even for those expenditures, there is no reason why the recipients, amounts, and UBF processing fees should continue to be hidden.” (See page 5, second column, second full paragraph)</p>	<p>UB maintains a clear and consistent Approval Authority Policy that governs all salary changes and additional compensation, whether originating from UBF or otherwise. This policy is, and has been, publicly available on UB’s website (see http://www.buffalo.edu/administrative-services/policy1/ub-policy-lib/approval-authority.html). All salary supplements to UB administrators and faculty above their 10% base salary require the approval of the Provost or Vice President of UB and the President of UB.</p>
32.	<p>“Some salary supplements paid by the UBF appear to be especially questionable. For example, in 2009, in a one-time disclosure to a local journalist, the UBF revealed salary payments it made to UB administrators or faculty supplementing their State salaries. Some of these salary “top-ups” amounted to tens of thousands of dollars a year, and several reached into the hundreds of thousands. According to the State Comptroller, such payments improperly evade Civil Service salary caps.” (See page 5, second column, third full paragraph)</p>	<p>First, and foremost, the source cited for the assertions set forth by the authors in this paragraph is so grossly mischaracterized by the authors that any close reader would conclude that the authors have engaged in blatant misrepresentation. The authors artfully take salary “top-ups” which occurred at the RF and try to impugn UBF and its practice of salary augmentation with absolutely no evidence of any wrongdoing by UBF. A close examination of the audit report (see pages 26-27 of the report), reveals that the evasions of state salary limitations mentioned in this report relate to two individuals who are not associated with UBF. The authors application of the problem to “UB administrators or</p>

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		<p>faculty” is just plain wrong and is a blatant mischaracterization.</p> <p>Had the authors bothered to investigate UBF’s practices with respect to salary augmentation, they would have discovered that all proposed UBF salary augmentations are checked and reviewed by UB’s Civil Service Officer to confirm and ensure that the proposed augmentations are not in violation of the law, including the top off restrictions identified by the authors.</p> <p>This claim was also rebutted on page 13 of UBF’s response to the Time for Transparency Document:</p> <p><i>“The expenditure of UBF funds for these purposes are administered by UBF staff to ensure conformity with UBF’s tax exempt purposes. No portion of UBF funds used to pay any salary or wages to UB faculty or staff employees come from taxpayer dollars.</i></p> <p><i>From its inception, SUNY and the NYS Education Department have recognized and approved the use by UBF of its funds to compensate faculty and staff members at the direction of UB. This augmentation has allowed UB to offer competitive compensation packages to its faculty and staff. In fact, such activity is recognized in UBF’s organizational documents as one of its authorized tax exempt functions. The payments made today are no different than payments made to faculty and staff throughout the fifty year history of the UBF. These payments are authorized by UB leadership who have direction and control over the individuals as well as the responsibility to defend and share</i></p>

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		<i>their criteria for such salary augmentation.</i> "
33.	<p>"In 2009, the UBF added \$538,968 to UB President John B. Simpson's State salary of \$328,041. In 2010, it added \$350,000 to the \$400,000 State salary of Vice President for Health Sciences David L. Dunn. In 2012, it added \$302,000 to the \$361,000 State salary of Medical School Dean Michael Cain, and \$265,000 to the \$449,000 State salary of UB President Satish K. Tripathi." (See page 5, second column, fourth full paragraph)</p>	<p>Augmentation of faculty, staff and administration salaries by the UB Foundation was recognized by the Board of Regents and the NYSAG in the foundation's organizational documents. UBF has an over 50 year history of providing salary augmentation for the benefit of the University at Buffalo. UBF exercises this right only after consulting with University and SUNY leadership. The fact that UBF exercises this right should come as no surprise to anyone.</p>
34.	<p>"But even this limited transparency disappeared in 2013, when the UBF stopped counting anyone but its own 29 staff members as "employees." Consequently, it stopped listing UB administrators receiving six-figure top-ups among its "highest compensated employees." Yet UBF salary payments continue to flow, largely in the dark." (See page 5, second column, last paragraph onto page 6)</p>	<p>UBF stopped characterizing UB administrators as "UBF employees" at the advice of its outside accounting firm, KPMG, which noted that such practice was both inaccurate and inconsistent because those UB administrators failed to meet the necessary criteria of "employee" merely because of the salary augmentation being provided by UBF.</p> <p>This claim was also rebutted on page 13 of UBF's response to the Time for Transparency Document:</p> <p><i>"The information presented by [the authors] in support of [their] argument is incorrect. The authors' characterization of that UBF "stopped counting" others as employees of UBF is misleading because only approximately 30 people are UBF employees, and are responsible for overseeing the operations of UBF. The remainder of the identified persons are not UBF employees, but rather are UB faculty and staff whose salary is paid</i></p>

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		<i>either completely or partially with UBF funds at UB's direction."</i>
35.	<p>"In its 1983 agreement with the State Comptroller, SUNY promised to audit university foundations at "periodic" intervals. But the SUNY Audit Office acknowledges that, in the 33 years since then, it has audited the UB Foundation—SUNY's largest—only once. That was in 2000. Another audit, initiated by the SUNY Audit Office in 2007, was cancelled in 2008." (See page 5, second column, last paragraph onto page 6)</p>	<p>First, and foremost, the source cited by the authors for the assertion that the 2007 audit was "cancelled" is an October 19, 2015 email from Ms. Amy Montalbano, Assistant University Auditor. The email does not say the 2007 audit was cancelled, rather her email states: "The audit was <i>suspended</i> in 2008 and at that me there was <i>no indication of inappropriate conduct or substantive fiscal concerns</i>. However, the audit identified certain activities being conducted by the Foundation under an existing waiver. At the time of our audit, SUNY leadership determined that additional work was needed to research the waivers and activities, and engaged in on-going discussions. Due to those on-going discussions, the audit report was never finalized." This represents just another example of the authors of the "Other Buffalo Billion" Document intentionally withholding information and substituting an inaccurate word where one does not exist, all to fit their argument.</p> <p>This claim was also rebutted in UBF's preface and response #1 in its reply to the "Time for Audit" Document:</p> <p><i>"[The authors] incorrectly refer to this 1983 Memorandum as an "Agreement" among SUNY and the OSC. To the extent there is an agreement among SUNY and the OSC, the terms of such agreement are borne out of the Guidelines for Campus-Related Foundations, which guidelines are approved and authorized by the</i></p>

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		<p><i>SUNY Board of Trustees. This 1983 Memorandum is nothing more than its title: a memo from SUNY Central to its Universities' Presidents.</i></p> <p><i>[The authors'] allegations that SUNY has neglected to audit the operations of UBF are simply incorrect. From 2007-2008 the OUA conducted audits of several CRFs, including UBF. While it does not appear that OUA ever issued a formal "official audit report", in the case of UBF, the OUA did recommend improvements in certain business practices of UBF. Furthermore, Mr. Michael Abbott, University Auditor, has confirmed to UBF that in 1998 OUA conducted a review of UBF to determine if it was in compliance with SUNY CRF Guidelines. Following that review, OUA recommended to SUNY that the scope of its CRF guidelines be updated to address the expanding role of CRFs, but did not otherwise issue any findings suggesting that UBF was out of compliance with SUNY regulations for campus related foundations.</i></p> <p><i>The clear implication of [the authors] statement here is that UB and SUNY have ignored their responsibility to oversee the financial affairs of UBF. This is a complete misrepresentation of the degree of oversight which both SUNY and UB exercise over UBF. The Internal Audit Department of the University at Buffalo, the Controller of the University at Buffalo and the Vice President for Finance and Administration of the University at Buffalo all have complete and unfettered access to all University-related revenue and expense transactions handled by UBF. In accordance with SUNY procedures, the Internal Audit Department is required to report any</i></p>

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		<p><i>instances of suspected fraud to the University Auditor. To suggest, as the [Time for Audit Document] does, that UBF operates in a financial vacuum, without oversight from the University or SUNY, is simply not accurate.</i></p> <p><i>It is important to bear in mind, moreover, that in addition to these oversight activities, UBF's financial statements are audited annually by an independent certified public accountant, and the full results of each audit, including any applicable management letters issued by the auditor to the UBF Board of Trustees, are then annually reviewed by the University Controller.</i></p> <p><i>As the above illustrations show, in fact there are numerous examples of SUNY and UB oversight of UBF "over the past thirty-two years," both from direct access to all of UBF's University-related revenue and expense transactions as well as several audits and reviews by both SUNY and UB. To claim as the authors of the [Time for Audit Document] do – that neither UB nor SUNY has conducted an audit of the operations of the UBF – is just plain wrong."</i></p>
36.	<p>"Each year, an independent audit firm does examine and approve the UBF's own accounting of its financial activities. But that firm acknowledges that it expresses "no opinion" as to "the effectiveness" of the UBF's "internal control" procedures. That is, the firm does not independently evaluate the accuracy of the financial information provided to it by the UBF, or the adequacy of UBF systems to monitor its</p>	<p>This claim was rebutted in UBF's response #2 in its reply to the "Time for Audit" Document:</p> <p><i>"[The authors] unilaterally introduce the term "independent" into the dialogue about the audit of CRFs. There is no requirement in the SUNY guidelines, the 1983 Memorandum or anywhere else in NYS law, for SUNY or OSC to conduct an independent (meaning third party)</i></p>

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	spending and investing.” (See page 6, third paragraph)	<i>audit of the internal operations of UBF or any other CRF.”</i>
37.	“The Wider Controversy” (See page 6, first column, heading)	<p>This claim was rebutted on page 20 of UBF’s response to the Time for Transparency Document:</p> <p><i>“In what is perhaps [the authors’] biggest red herring argument, [the authors] devote a whole section of the [“Other Buffalo Billion” Document] to highlighting controversies and problems that have occurred at foundations related to other higher education institutions. A careful reading of this section, however, shows that all of the cited problems and abuses involve institutions either located outside of New York State or not related to UBF whatsoever.”</i></p>
38.	<p>“In February 2016, the Committee on Open Government in the New York Department of State issued an advisory opinion that the UB Foundation is subject to FOIL. Pursuant to its authority under New York Public Officers Law, the Committee advised Mr. John Kaehny, Executive Director of Reinvent Albany and Co-Chair, NYC Transparency Working Group, of that decision. This advisory opinion concluded that a 2011 lower court ruling that the UBF was not subject to FOIL was “inconsistent with prior judicial determinations regarding ‘foundations’ chartered by the Regents of the State of New York created to support and promote” SUNY and CUNY.” (See page 7, first paragraph)</p>	<p>The source cited for this paragraph brings the reader to a <i>user-created and reformatted .pdf version of an email</i> from the NY Department of State, which intentionally omits the Reinvent Albany Executive Director’s initial question/request. Thus, there is no way to tell exactly how the question to the Committee on Open Government was asked, how it was phrased, or what exactly was requested. Rather, the authors intentionally stripped some sections of the email and created their own .pdf document to present the reader only those words which the authors want the reader to see. Curiously enough, at the top of this user-generated .pdf is the following statement: “The staff of the Committee on Open Government is authorized to issue advisory opinions. The ensuing staff advisory opinion is based solely upon the information presented in your correspondence, except</p>

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		<p>as otherwise indicated.” It is the “your correspondence” piece which the authors of the “Other Buffalo Billion” document intentionally omit.</p> <p>See also UBF response #15 above.</p> <p>Perhaps the most important fact to bear in mind here, though, is that this issue has already been decided by the New York courts. UBF is exempt from FOIL. That determination was made by New York State Supreme Court in the decision that was not appealed. The Committee on Open Government issues solely <i>advisory</i> opinions, and does not have any authority to overturn binding court decisions. The New York State Supreme Court has already fully considered this issue and ruled that FOIL is <u>not</u> applicable to UBF (which is <i>binding precedent</i>). The authors of the “Other Buffalo Billion” Document who have law degrees and teach law should fully understand the doctrine of <i>res judicata</i> and its relevance to this argument.</p>
39.	<p>“Moving from case law to common sense, it is difficult to understand why the UBF argues that, because 16% of its yearly revenues derive from donations, and because some of these donors wish to remain anonymous, all donations, expenditures, and investments must remain secret. This is particularly puzzling, given that legislation on university foundation transparency currently being considered in Albany explicitly protects donor privacy. So does that already instituted in the University of California and Cal State systems.” (See page 7, last paragraph, first column)</p>	<p>To state that only 16% of UBF’s yearly revenue derives from donations is misleading. Rather, 16% comes from <i>direct gifts from donors</i> and another approximately 15% comes from investment returns generated by investment earnings from UBF’s endowment.</p> <p>This claim was rebutted on page 3 of UBF’s response to the Time for Transparency Document:</p> <p>“[The authors] misrepresents the nature of the proposed legislation. Because the pending legislation is proposed, and its terms remain in flux, there is no</p>

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		<p><i>certainty, as the authors [] assert, that donor confidentiality and other important matters like reach-back period and confidential strategies will be maintained. In fact, several iterations of the proposed legislation have not included provisions protecting donor confidentiality.</i>"</p>
40.	<p>"Neither is there good reason for the UBF to oppose a second piece of legislation in Albany that would make public the payrolls for the UBF and other university foundations. New York State posts the salaries of all its civil servants." (See page 7, top of second column)</p>	<p>This claim was rebutted on page 6 of UBF's response to the Time for Transparency Document:</p> <p><i>"[The authors] misrepresent the impact of the proposed legislation. This proposed legislation is significantly flawed in numerous key respects. SUNY central, the UBF, and a number of the other SUNY CRFs have submitted memoranda in opposition. A copy of the opposition memorandum submitted by UBF was attached for reference as Exhibit A to UBF's rebuttal to the Time for Transparency Document."</i></p>
41.	<p>"Recent scholarship indicates that transparency actually increases private donations to university foundations." (See page 7, last paragraph, second column)</p>	<p>This claim was rebutted on page 6 of UBF's response to the Time for Transparency Document:</p> <p><i>"Under present UBF policy, like with most public charities, any benefactor who desires public acknowledgement is afforded an opportunity to choose to do so. There is no basis whatsoever to believe the statement put forth by [the authors] suggesting that potential benefactors of UBF would give more generously based on increased public control and oversight of UBF. In fact, many donors give to UBF expressly because it is not a public governmental</i></p>

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		<i>entity, thus, outside of the control of state officials and public budgeting.</i> "
42.	<p>“For 2000 to 2013, what stands out is the 174% increase in absolute spending on salaries, along with the increasing share (from 30% to nearly 40%) of overall spending devoted to salaries.” <i>(See page 8, second column, last paragraph)</i></p>	<p>Ironically, this statement, which is the second to last sentence in the “Other Buffalo Billion” Document, stands in stark contrast to the very first sentence put forth by the authors, which reads: “Many UB students, staff, and faculty are adjusting to what appears to be a new era of austerity, born of dwindling State support.” One of the main themes of the “Other Buffalo Billion” Document is that UBF does not spend enough to help UB across the board. However, it is hard to reconcile that theme as legitimate given that UBF has increased its absolute spending 174% from 2000-2013 – a fact even the authors felt noteworthy enough to include at the end of their piece.</p>