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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff	: ECF CASE
	: 1:04-cv-02322 (GEL)
v.	:
	:
UNIVERSAL EXPRESS, INC., et al.,	:
	:
Defendants.	:

PLAINTIFF’S REPLY ON SECOND SUBMISSION ON ALTOMARE’S CONTEMPT

Plaintiff Securities and Exchange Commission submits this reply in support of its argument that Richard Altomare has failed to purge his contempt by either paying the full amount of disgorgement and prejudgment interest, or meeting his burden of proving it is impossible for him to make any payment to comply with the Court’s Order. Altomare has paid only \$60,000 of the \$1,419,025 in disgorgement and \$283,073 in prejudgment interest that was ordered. Although Altomare has produced numerous documents in response to various requests

by the SEC, he has failed to provide any coherent analysis that demonstrates it is financially impossible for him to make any further payment toward satisfaction of the Court's order. To the contrary, his failure to produce documents that identify his assets and their disposition, the source of funds he received in the past two years, copies of all his credit card statements, and his activities in founding a new corporation to raise money from investors make it reasonable to infer that he has not disclosed all his assets or demonstrated his inability to pay an additional amount. On the basis of this record, the Court should deny Altomare's request to be released from incarceration because he not met his burden of proof of inability to pay.

I. Altomare Has Failed To Demonstrate He Has No Assets From Which To Pay The Order.

There remain unanswered questions about the source of various funds Altomare used to acquire, refurbish and furnish the condominium. The settlement sheet for Altomare's purchase of the Toscano condominium lists a deposit of \$100,000 in earnest money. [Exhibit 2 (previously marked as Exhibit 61 at 2/4/08 hearing), see Docket # 338-4] At the February 4, 2008 hearing, Altomare testified that he did not recall the source of these funds, "but it must have come out of ... my checking account." See February 4, 2008 hearing transcript at p. 47 [Docket 298]. Subsequent to his June 26, 2008 deposition, Altomare provided a copy of a letter dated September 1, 2006 from Coldwell Banker confirming receipt of a \$100,000 personal check for deposit into the firm's trust account related to the purchase of the Toscano condominium. See Defendant's Exhibit 45, hand delivered to the court. However, Altomare has not produced a copy of the check or identified the account that was the source of these funds.

The bank statement for Altomare's personal checking account at Wachovia Bank (ending in the account number 5480) lists no checks drawn on the account in the amount of \$100,000. See Defendant's Exhibit 46, Consolidated Statement 8/8/06 thru 9/6/06 at Bate numbered pages

2504-2508. Moreover, the balance in this account never exceeded \$25,000 during three weeks that precede the letter. *Id.* at p. 2508. Nor do the checks drawn on this account contain a copy of a check in the amount of \$100,000 drawn on this account. Similarly, the Altomares' credit line with Wachovia Bank (ending in the account number 4286) does not show any check in the amount of \$100,000 drawn on the account in the month prior to September 1, 2006. See Exhibit D and E to March 21, 2008 SEC Submission on Contempt [Docket # 338-4, -11, -12]. Altomare has failed to produce evidence about the source of these funds. In these circumstances it is reasonable to infer that he has other sources of funds that he has not disclosed to the Court, from which he could make some payment on the judgment.

The invoice from the Weinstein Design Group for the remodel and furnishing of the Toscano condominium lists total project costs of \$611,306.35 as of February 7, 2008, of which approximately \$153,275 are for remodeling costs. See attached Exhibit 68. The balance of approximately \$458,000 was used to acquire furnishings for the Toscano condominium. See Weinstein invoice 2/7/08 RAA-1239-1250. This invoice also indicates that of the \$690,492.14 cost of the project, Altomares have made payments or received credits of \$685,554.69. However, Altomares produced checks totaling only \$641,979.52 that were paid to the Weinstein Design Group. Altomare has not produced documents showing the source of the additional \$43,575.17 in payments.

Altomare has failed to provide a list of the assets he currently possesses or disclosed the disposition of his income and assets over the past two years. On August 9, 2007, the SEC submitted a request for production of documents requesting that Altomare identify all expenditures of \$500 or more, and the purpose of the payment, the amount, and the name of the payee. He has failed to provide that information. On May 13, 2008, the SEC submitted its

second request for production of documents requesting that Altomare identify all pieces of art and jewelry that he owned in March 2007. He has produced an insurance policy¹ which insured \$807,800 in jewelry and \$215,700 in fine art, but the documents do not identify the items insured. Altomare has failed to provide any inventory of jewelry, fine art, or other assets that he has possessed in the past two years. He was not able to identify jewelry purchased from Mayor's for \$4,313.25. See attached Exhibit 36; Attachment A, Altomare deposition at pp. 103-104 [Docket 338-1]. Moreover, when the SEC identified a watch purchased for \$12,923.08 that Altomare testified on June 26, 2008 was located at his home, he then directed delivery of the watch to his attorney as payment on legal fees rather than to the SEC as a payment toward satisfaction of the judgment. At every step Altomare continues to demonstrate his contempt of the Court's order.

Altomare produced on July 2, 2008, copies of the 2008 bank statements for his Wachovia checking account 5480.² These bank statements show deposits of \$51,406.13 during the month ending February 6, 2008, \$5,971.50 during the month ending March 6, 2008, \$20,650.68 during the month ended April 8, 2008, \$11,998.94 during the month ended May 6, 2008, and \$1,490.21 during the month ended June 5, 2008. However, Altomare has provided no explanation of the sources of the \$91,517.46 in funds, other than the recurring monthly payment of \$305.53 from a retirement fund that are noted on the account statements. Altomare has not produced copies on his wife's account at Commerce Bank for the period from January 9, through June 12, 2008.

Altomare has failed to provide evidence on the disposition of the \$571,000 in cash that he received from his transfer of jewelry, watches and silver bars to The Estate Department in

¹ Altomare did not provide a copy of the insurance policy with Chubb, so the SEC has no information on what assets that policy covers.

² These documents were requested in Plaintiff's Third Request for Production of Documents issued on June 12, 2008.

September 2007. The Second Hand Dealer forms completed by The Estate Department and filed with the Palm Beach County Sheriff's Department indicate the sales occurred on September 24, and 25, 2007. The SEC has requested that Altomare identify every cash deposit made from the \$571,000 in proceeds received from the sale of the jewelry and other items. He has not provided that information to date. Assuming that all the cash deposits into the Wachovia account 5480 after September 24, 2007 through June 5, 2008 came from the proceeds from the jewelry transactions, these deposits total \$243,750 during 2007, and an additional \$90,000 during 2008, which is less than the \$371,000 represented in Altomare's Response at p. 20. Altomare testified that they deposited \$200,000 from the jewelry proceeds into his wife's account at Commerce Bank. Together these amounts total \$533,750, which is \$37,250 less than the total proceeds from the jewelry transactions. Altomare has provided no information on where the \$37,250 in funds is currently located or proof of his disposition of those funds.

Altomare claims that \$1.7 million in compensation that he received from Universal Express in 2007 has been spent. Response at 40. His bank records for the Wachovia checking account 5480 document the receipt and disbursement of \$825,669.72 of those funds, and the payroll records show tax deductions of \$607,628.97. Exhibit 11, [Docket # 338-10]. Yet he has not been able to explain into what account or accounts he received the benefit of the balance of \$311,204.95. He claims this information is available through the controller of the Universal Express, but he has failed to meet his burden of providing an affidavit from her explaining these transactions.

Altomare has failed to produce complete records of the credit card statements for the more than fifteen credit card accounts that he and his wife have. These accounts have been the source, on occasion, of cash advances paid into the Wachovia checking account 5480, but

Altomare could not identify the third parties to whom other cash advances had been paid. See Altomare deposition transcript at pp. 75- 79, 104-106, which is Attachment A to SEC Second Submission on Contempt [Docket # 338-1], and attached deposition Exhibit 22, at p. 50113, Exhibit 37 at p. 50125, Exhibit 38 at p. 50196. He did not identify the source of \$8,000 in cash deposited by Mrs. Altomare on September 5, 2006. Response at 39.

Altomare asserts his only assets are his ownership of Universal Express securities, a percentage ownership in the Jackson Family Memorabilia Collection, and partial ownership of two judgments obtained by Universal Express. He has not yet produced documents showing his ownership of part of the Jackson Family Memorabilia although requested during his June 26, 2008 deposition. Altomare has also failed to produce any documents related to his personal transfer of 8,500,000 shares to Segoes Trust located in the Grand Cayman Islands or his receipt of compensation related to that transaction.³ See Exhibit 69 attached. From this transaction, it appears Altomare has an interest in an offshore entity. He has not tendered any of these assets to the SEC toward satisfaction of the judgment.

While pleading poverty to the Court, Altomare directed his attorney, defendant Chris Gunderson, to incorporate Encore Holdings, Inc., entered into a lease of a virtual office, conducted negotiations to acquire a company operating in Florida, and offered an investment in the enterprise to at least one of the former investors in Universal Express. See attached deposition Exhibit 44. Altomare failed to disclose any of these activities in either the January 18, or February 4, 2008 hearings. While it is not illegal for Altomare to form a corporation, Response at 42-43, he is prohibited from offering securities when no registration statement is in effect or filed for the transaction, or serving as an officer or director of a public company.

³ Altomare's passport indicates that he traveled to the Cayman Islands.

Altomare has filed supplemental information that he has been served with a suit to foreclose on the Toscano condominium for failure to pay the mortgage. While this development indicates that he may lose this asset unless he cures his default, it does not meet his burden of proving impossibility to pay the judgment. As discussed above, he continues to have assets for which he has not disclosed the location or disposition. He continues to own, with his wife, the Bocaire home which was taken off the market and only re-listed for sale on July 12, 2008.

II. Altomare Has Not Met His Burden And Should Remain Incarcerated.

Altomare has failed to demonstrate categorically and in detail that it is financially impossible for him to pay further amounts toward the disgorgement judgment. The SEC has identified numerous assets that Altomare retains, which could be turned over to the SEC toward satisfaction of the judgment, including, but not limited to, his ownership in the Bocaire house, his fine art and jewelry, the furnishings in the Toscana condominium, his ownership interest if any in the Jackson memorabilia and Universal Express judgments. Nor has Altomare provided records to show the source of the down payment on the Toscano condo or the additional \$43,000 in payments to the Weinstein Design Group from which it can be inferred that he has other bank accounts. Furthermore, he has not provided records showing the disposition of various cash advances from his more than fifteen credit card accounts. Regardless of whether Altomare is in default on the Toscano loan, he has not demonstrated his inability to pay some amount toward the judgment. Since the entry of the order to show cause in August, 2007, Altomare has spent over \$400,000 through his Wachovia account 5480.

Altomare argues that the SEC's search for his assets has been a shifting line in the sand moving back in time rather than focusing on his current ability to pay. Response at 21. The SEC's inquiries into Altomare's finances prior to entry of the March 8, 2007 judgment are

designed to locate assets and accounts which Altomare has not disclosed. He has known about the SEC's lawsuit since March 2004. He has had substantial time to structure his finances in a manner to hide his sources of income and assets.

Altomare argues that he should not remain incarcerated while the SEC analyzes his financial records. Response at 31-32. The SEC has attempted to work with Altomare's counsel to jointly retain a financial analyst. When those efforts to work jointly failed because of Altomare's purported inability to share in the cost, the SEC has retained an expert to review the records provided by Altomare, but he has not completed his analysis. Altomare has not provided any form of analysis, independent or otherwise, of the records that he has produced to the SEC or the Court. Response at 24. The summaries of various bank transactions submitted by the SEC do not meet Altomare's burden of demonstrating the sources and disposition of his income and assets. They are limited to the information that has been available to the SEC, which does not have knowledge or possession of all of Altomare's bank and credit card accounts. The 2006 bank account statements were necessary as they included information on wire transfers and other deposits that were not included in the checks and other records previously produced. Altomare has failed to provide any documentation on the property inspections for which he paid in July and September 2006. Response at 38-39. While Altomare's credit report does not show ownership of additional properties in his name, he may have acquired properties in the name of an entity which he has not disclosed.

III. Conclusion

Altomare has failed to submit documents or information to the SEC or to the Court which demonstrate categorically and in detail that it is financially impossible for him to pay any amount toward satisfaction of the judgment, which is his burden. Altomare continues to have access to

liquid assets which may be a source of funds to satisfy the judgment. Plaintiff is continuing to analyze documents recently produced by Altomare, and has retained a forensic accountant to analyze the records.

For the reasons discussed above, the Commission respectfully requests that the Court order that Altomare remain incarcerated until he pays the disgorgement and prejudgment interest in full, or proves categorically and in detail that any payment is impossible. The SEC also requests that the Court freeze Altomare's assets to prevent further dissipation. This freeze should be limited to exclude the Toscana condominium, which is currently in foreclosure, but extend to its contents which Altomare could sell.

Dated: July 18, 2008

s/ Leslie J. Hughes
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Securities and Exchange Commission

CERTIFICATE OF SERVICE

I hereby certify that on July 18, 2008, I electronically filed the **PLAINTIFF'S REPLY ON SECOND SUBMISSION ON ALTOMARE'S CONTEMPT** with the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification to the following as indicated to the parties listed below.

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Dated: July 18, 2008

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