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UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK
CASE NO. 04cv 02322 GEL

U.S. SECURITIES AND EXCHANGE COMMISSION Plaintiff, v. UNIVERSAL EXPRESS, INC., RICHARD A. ALTOMARE, CHRIS G. GUNDERSON, MARK S. HEUHAUS, GEORGE J. SANDHU, SPIGA, LTD., AND TARUN MENDIRATTA, Defendants,	:

CORRECTED
DEFENDANT, RICHARD A. ALTOMARE'S
MEMORANDUM OF FACT AND LAW ON THE PLAINTIFF,
SECURITIES AND EXCHANGE COMMISSION'S
MOTION FOR CONTEMPT

For the reasons and facts outlined below, the single remaining point of the SEC's Motion for Contempt[1] should be

[1] The Court's judgment against Mr. Altomare was entered on April 2, 2007 [Docket 202]. The judgment ordered Mr.

denied with a finding that Mr. Altomare has not willfully failed to pay this Court's judgment ordering the payment of disgorgement and specified prejudgment interest.

Procedural History

On April 2, 2007, this Court entered judgment against Mr. Altomare ordering, among other things, the payment of disgorgement in the amount of $1,419.25 and prejudgment interest in the sum of $283,073.00. [Docket 179; 202]. In July, 2007, the SEC filed a motion requesting this Court to issue its rule to show cause why Mr. Altomare should not be held in contempt of court for failing to comply with the multi-faceted directives in the judgment. The Court set an initial hearing on the SEC's motion for October 12, 2007. On August 31, 2007 the Court granted the SEC's separate motion for the appointment of a receiver, effectively removing Mr. Altomare from any position of directorship or executive control over the conduct of Universal Express, Inc. ("USXP").

At the October 12, 2007 hearing the Court determined that the appointment of the Receiver neutered the SEC's bases for contempt proceedings except for the issue of Mr. Altomare's non-payment of the disgorgement and prejudgment

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Altomare to pay disgorgement in the amount of $1,419,025.00 and prejudgment interest in the sum of $283,073.00 [Docket 179].

interest. [Tr. October 12, 2008 at 41-45].[2] After expressing certain discomfort with the concept of incarcerating an individual to enforce payment of a financial judgment if there is some prospect that the financial judgment may be complied with (*id*., at 47), the Court ordered an additional hearing on January 4, 2008 so as to allow the parties an opportunity to better determine and evaluate the good faith basis and adequacy of Mr. Altomare's efforts to make payments toward the disgorgement and prejudgment interest. (*id*., at 51).

Following a brief continuance, the pending motion for contempt proceedings came on for evidentiary hearing on February 4, 2008.

The Standard of Review

The parties agree that the Second Circuit standard of review on a motion for civil contempt for allegedly failing to comply with the Court's order. That standard is: "…a party may be held in civil contempt for failure to comply with an order of the court if the order being enforced is

[2] Counsel for Mr. Altomare suggested that perhaps the word, "moot" would not be perfectly artful or technically precise in describing the effect of the appointment of the Receiver on the non-financial components of the pending motion for contempt proceedings; but the Court expressed its understanding that the emplacement of a receivership eliminated the need for court action or sanction with respect to those components (*Id*.).

clear and unambiguous, the proof of non-compliance is clear and convincing, and the defendants have not been reasonably diligent and energetic in attempting to accomplish what was ordered." *SEC v. Margolin,* 196 U.S. Dist. LEXUS 11299*6 (S.D.N.Y. 1996), citing *EEOC v. Local 638,* 753 F.2d 1172, 1178 (2nd Cir. 1985); *King v. Allied Vision, Ltd.,* 65 F.3rd 1051, 1058 (2nd Cir. 1995). Upon proper showing, that standard of review shifts the burden of the proof to the defendant who must go forward proving why he has been unable to comply with the court's judgment. *United States v. Rylander*, 460 U.S. 775; *SEC v. Princeton Economic International, Ltd.,* 2001 U.S. Dist. LEXUS 9948*4 (S.D.N.Y. July 18, 2001); *SEC v. Credit Bancorp., Ltd.,* 2000 U.S. Dist. LEXUS 9755,**19-20 (S.D.N.Y. July 12, 2000) (respondent in contempt proceedings bears the burden of producing evidence of inability to comply). Said otherwise, the respondent must demonstrate the inability to pay the money payment ordered. *Huber v. Marine Midland Bank*, 51 F.3rd 5, 8 (2nd Cir. 1995).

The Evidence Presented

Mr. Altomare has satisfied the high burden required by the Second Circuit in demonstrating his inability to pay more than the amounts deposited thus far and committed for the months of February and March, 2008. He has done so

supported by substantial documents inclusive of tax returns, leases, real estate purchase agreements, the two mortgages on his residence, the two mortgages on the Toscano condominium, the contracts and payment histories on the build-out and completion of the condominium, the monthly bank statements for the joint account at Wachovia Bank retrospective to January, 2007, and the individual account owned by his wife, at Commerce Bank (DX-19), among numerous additional documents.

Unrebutted and uncontradicted, Mr. Altomare's evidence can be summarized thusly: that he has demonstrated an inability to date to pay a larger portion of the disgorgement and prejudgment interest than that paid and committed to be paid. In an almost 17-year affiliation with the corporation, approximately 3 of which transpired during a Chapter 11 bankruptcy proceeding in the Eastern District of New York and 13 of which transpired after the corporation emerged from bankruptcy, he was entitled by contract to a salary on an accrued basis and was not paid salary until approximately 2004.[3] (Tr. February 2, 2008 at 11-16). Starting in 2004, Mr. Altomare's paid compensation

[3] The bankruptcy court also authorized the corporation to make loans to Mr. Altomare as its sole director and chief executive officer ("CEO"). Both the accrued salary and various loans were regularly recorded on all SEC filings and tax returns with the Internal Revenue Service.

was approximately $600,000.00 for that year and 2005, was increased to $650,000.00 in 2006 and increased again in 2007 to approximately $1.6 to $1.7 million.[4] Mr. Altomare's accrued salary, offset by the various loans from the corporation and his later paid salary and bonuses comprised his sole source of revenue during the past 17 years. (*id.*, at 17-18). He had no other income, including passive income, other than the salary and the loans received from USXP, and bonuses. (*Id)*.

In addition, the Court ordered bar from being an officer or director of a publicly traded company has adversely impacted on Mr. Altomare's ability to find new employment since the appointment of the Receiver on August 31, 2007. (*Id*.). The publicity surrounding USXP and the court proceedings also has caused a negative impact on his ability to successfully obtain new employment. (*id*., at 18-19). Circumstances ultimately resulted in Mrs. Altomare initiating action to liquidate jewelry to generate operating cash for current needs.[5]

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[4] At last report, Mr. Altomare was preparing to challenge the $1.7 million compensation figure which the Receiver caused to be inscribed in the corporation's W-2 form for him. (*id.*, 16-17).

[5] The term, "current" predates the appointment of the Receiver since several of Mr. Altomare's paychecks during 2007 were not negotiated due the company's inadequate bank balances.

Moreover, a study of Mr. Altomare's financial circumstances dating back to January 1, 2007 and referencing the Receiver's issued W-2 form (even though disputed) demonstrating approximately $1.7 million in total compensation to Mr. Altomare from the corporation, confirms his net worth to be negative; he qualifies for bankruptcy due to his financial obligations exceeding the equity in his fixed assets and zero income since his last negotiated paycheck from the corporation predating August 31, 2007. A more detailed examination clearly supports the foregoing conclusion.

Mr. Altomare's current residence is owned in a special form of ownership recognized by Florida law known as a tenancy-by-the-entirety. This ownership means each spouse in the martial relationship owns an undivided interest in the whole property. The undivided interest means that without waiver or abandonment by the other spouse, one spouse cannot alienate the property or encumber it with debt. That residence, located in Bocaire, Boca Raton, Florida, also is his homestead and has a present value of approximately $1.1. million in the current real estate market. It is subject to a first and second mortgage. The unpaid principal balance of the first mortgage is approximately $1.03 million and the second mortgage

approximately $178,000.00.[6] Mr. Altomare's second principal asset, as such, is a condominium development known as Toscano in Highland Beach, Florida which was originally titled on its deed as a tenancy-by-the-entirety with his wife who has presented to this Court on a memorialized record, her waiver, abandonment and relinquishment of tenancy-by-entirety rights and entitlements otherwise provided by Florida law.[7] At the time of purchase the condominium had an appraised value (market value) of $3.3 million (DX-2, RAA-0080). Currently it has an estimated market value of between $2.5 and $2.8 million (Tr. at 27).[8] Irrespective of the exact current market value, encumbering that value are two mortgages. The first, owned by Countrywide, carries an unpaid principal balance of $2.1 million. A second mortgage, owned by Washington Mutual Bank, F.A., has a current unpaid principal balance of $750,000.00. (Tr. at 27-28; DX RAA-3; DX RAA-4; DX RAA-5, RAA-0328-0250). Currently, the Countrywide mortgage

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[6] American Home Mortgage holds the first mortgage and Wachovia Bank holds the second. (Tr. at 25-26; DX RAA-7).
[7] See Tr. October 12, 2007 at 37-39.
[8] The current national real estate market remains at least as depressed as it was on February 4, 2008, especially in South Florida. High end properties, however, do not appear to have suffered as much as lesser valued real estate. Irrespective, circumstances commonly known confirm Mr. Altomare's estimated market value as he testified: $2.5 to $2.8 million.

payments exceed $13,500.00 per month (RAA-0248-0250) and require an additional payment to bring current the escrow for real estate taxes and insurance. The Washington Mutual Bank second mortgage required as of February 3, 2008 a $14,992.91 payment in order to maintain an unpaid principal balance during the month of February, 2008 of $747,801.16. (DX RAA-6; RAA-0252). In essence, the condominium enjoys minimal equity with exhausted credit, disabling further encumbrances in order to generate liquidity.

Mr. Altomare's additional assets include his ownership of Class B stock in USXP which, pursuant to the bankruptcy court order he cannot sell, and an asserted percentage ownership interest in the Jackson Family Memorabilia Collection and two judgments obtained in favor of USXP in a civil action for fraud and punitive damages resulting in the same lawsuit, one dated July 26, 2001 and the other dated April 22, 2003. Mr. Altomare's assertions of ownership interest in a portion of the judgments and the Jackson Family Memorabilia collection is or may be subject to controversy. In either event, none of these assets provide any current liquidity and currently possess no quality to gain liquidity by any fixed deadline. In the case of the judgments liquidity first requires successful, complex judgment enforcement action. In the case of the

Jackson Family Memorabilia collection first requires judicial resolution of competing and conflicting ownership assertions.

Against the foregoing assets, as such, are very substantial liabilities, many of which demand extremely high monthly payments in order to maintain and to prevent action or foreclosure. The first mortgage on the Bocaire, Boca Raton residence requires approximately $4,600.00 per month. The second mortgage requires approximately $1,500.00 per month. The first mortgage on the Toscano condominium monthly payment was recently increased to approximately $12,700.00 per month and required extraordinary negotiations with the mortgagee in order to defer foreclosure (Tr. at 31-32). The second mortgage on the Toscano condominium requires an approximate monthly payment of $4,500.00. Non-mortgage payments on the Bocaire residence approximate $2,000.00 per month and on the Toscano condominium $3,500.00 per month. The average monthly electric bill at the residence is $500.00 per month and at the Toscano condominium $300.00 per month. The average monthly water charge at the residence is $100.00 per month and combined miscellaneous expenses approximate $400.00 to $500.00 per month. In addition, cable and telephone service are maintained at the condominium at an

approximate expenses of $200.00 per month to help facilitate its sale. (Tr. at 33-34).

Mr. Altomare also maintains a $5 million life insurance policy in which there is an accumulated value of $174,823.22. (Tr. at 36; DX-12; RAA-0446, 0447 and 0048). However, the accumulated value is not reachable by Mr. Altomare for liquidation at the current time. (Tr. at 36-37).[9] Mr. Altomare also is subject to personally covering tens of thousands of dollars of credit card and debt subject to high interest rates on charge cards used for USXP purposes but personally guaranteed by him. (Tr. at 37-38).

Additional Fixed Monthly Overhead and Other Expenses

Contributing to Mr. Altomare's non-liquidity and inability to generate liquidity beyond that currently demonstrated to date in the form of the initial $30,000.00 payment and the monthly payments thereafter commencing on or about November 15, 2007[10] are two additional principal

[9] The accumulated value in the life insurance (DX-12) will be subject to some form of maturity date subject to the life insurance contract between American General Life Insurance Company and Mr. Altomare, at which point some currently unknown portion of it can be liquidated.

[10] To date Mr. Altomare has paid in $60,000.00 and acknowledges his tardiness with respect to the February and March 2008 monthly installments.

circumstances. The first consists of three automobile leases all of which were entered into substantially prior to the appointment of the Receiver. One lease requires a monthly payment of $3,220.88 (DX-13; RAA-0451) and present financial circumstances required renegotiating certain monthly installments by moving them to the end of the lease and extending the total period of payments. (RAA-0449). The second lease requires monthly payment of $910.66 (DX-14; RAA-0452). The third lease requires an $1,876.98 monthly payment. (DX-RAA-15; RAA-0453). The second circumstance preventing liquidity is the build-out and finishing of the Toscano condominium in order to facilitate its sale. Contract commitments began almost 19 months prior to the appointment of the Receiver (DX-RAA-9; RAA-0308-0311). Combined, the build-out expenses totaled $647,984.33, including sales tax leaving an unpaid balance due of $12,129.34. (DX-9; RAA-0394-0395). Additional expenses to complete build-out, finish the premises and render the condominium presentable for potential maximum market value involved Harmony Home Systems whose total contracts came to $98,970.80 (DX-10; RAA-0424), and Benchmark Building, etc. whose contracts required $129,847.82, including a current balance due as of January 8, 2008. (DX-11; RAA-0440-0445).

As of the hearing Mr. Altomare testified and introduced corroborating evidence that he was being pursued for collection personally by FIA Card Services for over $47,000.00 based upon his guarantee of corporate charge card expenses (DX-17; RAA-0488), and North Fork Bank for approximately $8,500.00 as of November 20, 2007 (DX-18; RAA-0489-0494).

The Liquidation of Personal Jewelry

Time and energy have been devoted to the circumstances leading to Mrs. Altomare's decision and action to sell her jewelry in order to raise liquidity in September, 2007, shortly after the appointment of the Receiver, and Mr. Altomare's contributing some of his jewelry to that effort. (Tr. at 38-42). In retrospect, the issue appears to have arisen as a result of the SEC's misunderstanding of several substantial payments by wire transfer to a local jewelry store since January 1, 2007, first discovered by the Receiver, and insufficient time to confirm whether or not funds used to pay the jewelry store were properly accounted for.[11] Evidence later proved that the funds transferred by wire or check from USXP accounts to the jewelers and to the Altomare personal bank account were thoroughly accounted

[11] Specifically, the SEC employed the word, "stole" or "stolen" monies from USXP.

for and properly posted for bookkeeping and accounting purposes.[12] Mr. Altomare nevertheless testified in the form of an accounting of the proceeds of that sale. The rendition of that accounting under oath is found at (Tr. 38-42) and the supporting exhibits, foremost of which are DX-1 and DX-19 In principal measure, $200,000.00 of the $500,000.00 received for the sale of the jewelry, the overwhelming portion of which was Mrs. Altomare's, was deposited by Mrs. Altomare in Commerce Bank. (Tr. 39-40; DX-19; RAA-0495-0504). As is evidenced by RAA-0495-0504, all large disbursements were devoted to the payment of one or more of the contractees related to the Toscano condominium build-out prior to the sale of the jewelry. Starting with the sale of the jewelry (RAA-0501-0502) $150,000.00 of the $200,000.00 was paid for attorney's fees for two different civil actions, one of which consisted of these proceedings and the other the pending appeal to the United States Court of Appeals for the Second Circuit. The remaining disbursements, all relatively minor, are itemized at (RAA-0503-0504) and do not merit any further advocacy or judicial resources of this Court.

[12] Mr. Altomare has no dog in the fight between The Estate Department, as intervenor, and the SEC over whether or not the intervenor is a *bona fide* purchaser for value or other innocent purchaser of the jewelry, and will not endeavor to enter that controversy.

The remaining $300,000.00 from the sale of the jewelry was deposited into the Altomare joint checking account. (DX-1; RAA-0052-0076).[13] The disbursements as evidenced by the monthly bank statements confirm Mr. Altomare's testimony concerning the payment of additional attorney's fees in the sum of $50,000.00 in September, 2007. (DX-1; RAA-0053, check number 4261).

In sum and substance, exactly as Mr. Altomare testified, he does not have the financial means to have paid more toward the disgorgement or prejudgment interest ordered by this Court. (Tr. at 42).[14]

Conclusion

Based on the foregoing facts, the extensive testimony provided by Mr. Altomare, the corroborating 23 exhibits comprising 527 pages and the fact that the principal

[13] DX-1; RAA-0001-0051 predate the jewelry transaction.

[14] The Court and counsel for Mr. Altomare addressed the subject of Mrs. Altomare's rewritten (more legibly) check disbursements ledger relating to the Wachovia Bank joint account [DX-1], and counsel's statement that he would provide in writing to the Court after an opportunity to speak with Mrs. Altomare, a response to the Court's inquiry as to whether or not the $300,000.00 portion of the jewelry sale proceeds was deposited into the Wachovia account in a single deposit. Counsel also offered to have typed up the rewritten (more legibly) checkbook journal maintained by Mrs. Altomare. Counsel has not been able to accomplish those two tasks as of this submission due to substantial, domestic travel commitments and certain health issues that arose during the past six weeks. Counsel will provide that information to the Court shortly, and respectfully requests leave to do so.

motivating drive for the SEC's motion and supplemental submission on contempt filed and served January 10, 2008 [Docket 273] was the mistaken belief that the jewelry liquidated in September, 2007 had been purchased with misappropriated funds, which mistake has been thoroughly belied, the motion for contempt should be denied.

Respectfully submitted,

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BY /s/
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was electronically filed this 24th day of March 2008 to:

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