EXHIBIT A

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

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.,
TARUN MENDIRATTA,

Defendants.

THE ESTATE DEPARTMENT, INC.,

Intervenor.

No. 04 Civ. 2322 (GEL)

Electronically Filed

ANSWER OF THE ESTATE DEPARTMENT, INC. TO PLAINTIFF'S "MOTION IN THE NATURE OF INTERPLEADER FOR AN ORDER DIRECTING MARSHAL TO SELL PROPERTY BEING HELD BY THE RECEIVER"

Date: December 4, 2007

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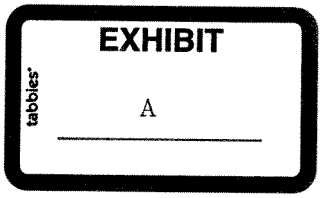

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The Estate Department, Inc. ("TED"), by and through its undersigned counsel, hereby submits its Answer to Plaintiff's "Motion in the Nature of Interpleader for an Order Directing Marshall to Sell Property Being Held by the Receiver" (the "Motion to Sell") and states as follows:

I. INTRODUCTION

The Motion to Sell arises from the SEC's wrongful *ex parte* seizure of property purchased by TED in good faith, for fair consideration, and without knowledge of the SEC's outstanding and unpaid Judgment against the seller, Richard A. Altomare ("Mr. Altomare"). Under applicable principles of law, TED has good title to the seized property and, as a good faith purchaser for fair value without knowledge of the unpaid Judgment, its rights to the property are protected by law. Further, Mr. Altomare's assets were not diminished by his sale of the seized property to TED. Rather, those assets were merely changed in form so that, instead of the property sold, he now has cash. Had the SEC levied directly on the property while it was still owned by Mr. Altomare, the SEC would have had to conduct its own sale of the property. Consequently, the SEC lost nothing by Mr. Altomare's sale of the property to TED. Furthermore, the SEC failed to follow the applicable legal procedure for executing on its Judgment and its *ex parte* seizure and retention of the property is entirely wrongful under the law.

II. SUMMARY OF FACTS AND ARGUMENT

TED is one of the nation's largest estate buyers, located in Boca Raton, Florida, and advertises to the general public that it pays the highest prices in cash for diamonds, jewelry, gold, silver, watches, antiques, artwork and other collectibles. In response to such an advertisement, Mr. and Mrs. Altomare approached TED and, ultimately, sold twenty-four items (referred to herein as

the "Property" or the "Wrongfully Seized Property") to TED, including jewelry, watches, a loose 11.02 ct. diamond, and two silver bars, for a total price of $571,000 paid by TED to the Altomares in cash. The sales by the Altomares occurred on two different dates, September 5, 2007, when they made an initial sale of several items to TED for $90,000, and September 24, 2007, when they made a second sale of the remaining items to TED for $481,000.[1] TED paid extremely fair consideration for the items purchased from the Altomares — a total of $571,000 — and employed a significant percentage of its available working capital to do so. At the time of the purchases, TED had no knowledge that the SEC had an outstanding and unpaid judgment against Mr. Altomare in this action for $3,121,123.[2]

On October 10, 2007, on behalf of the SEC and with the assistance of the Receiver, the U.S. Marshal served a Writ of Execution on TED at its principal office in Boca Raton, Florida, and seized the twenty-four items of Property purchased by TED from the Altomares.[3] The Property was seized

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[1] Because TED required a GIA certificate for the major piece sold by the Altomares — an 11.02 ct loose diamond — TED withheld $70,000 of the purchase price until an original GIA certificate could be obtained. Thus, there were three cash payments by TED to the Altomares, a payment of $90,000 on September 5, 2007; a payment of $411,000 on September 24, 2007; and a third payment of $70,000 on October 5, 2007.

[2] This Court entered a Final Judgment against Mr. Altomare on March 8, 2007, Docket Entry No. 179. On information and belief, the SEC has not registered that Final Judgment with any court in the State of Florida, where Mr. Altomare resides and could be presumed to own property, nor has the Receiver filed a copy with the Clerk in the Southern District of Florida although she did file a copy of her Order of Appointment and the Complaint on September 6, 2007. *U.S. Securities and Exchange Commission v. Universal Express, Inc.*, Case No. 9:07-mc-80815-DMM (S.D. Fla.), Docket Entry No. 1, (Receiver's Notice of Filing Complaint and Order of Appointment).

[3] The Wrongfully Seized Property, presently in the custody of the Receiver, is described in the exhibits attached to the Affidavit of Carl F. Schoeppl, Esq. (the "Schoeppl Affidavit"), attached hereto and incorporated herein by reference as **Exhibit 1,** with accompanying **Exhibits A** (Writ of Execution), **B** (U.S. Marshal's Seized Property and Evidence Control Forms with photographs of Wrongfully Seized Property) and **C** (TED's Second Hand Dealer's Property

without prior notice and without providing TED any pre-seizure opportunity to have its rights determined by a court in a supplementary procedure. Despite repeated requests by TED's undersigned counsel, the SEC and the Receiver have refused to return the Wrongfully Seized Property to TED.

The SEC makes no argument whatsoever that TED had any knowledge of the outstanding and unpaid Final Judgment against Mr. Altomare and offers no evidence that would support any finding but that the relationship between the Altomares and TED was a good faith arm's length business dealing. While the SEC does argue that TED paid less than "fair consideration" for the Property, it has failed to offer any evidence that would support such a finding and indeed, all of the evidence is strongly to the contrary. In line with its claim that it pays "the highest prices in cash" for diamonds and jewelry, TED paid extremely fair consideration for the Property.

To protect its interest in the Wrongfully Seized Property in the most expedient manner, TED has been forced to move to intervene in this Court, far from its home office in Florida and where the challenged transactions took place[4], and to incur significant cost and expense. As a purchaser for fair consideration without knowledge of the judgment outstanding and unpaid by Mr. Altomare, TED is entitled to have its interest in the Wrongfully Seized Property protected and the SEC's seizure of the Property pursuant to the Writ of Execution was wrongful. Accordingly, TED requests that the Court find: (a) that TED has good title to the Property; (b) that the Property must be immediately

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Forms reflecting purchases of Property).

[4] By moving to intervene in this proceeding, TED is consenting to have this Court determine the issues in this proceeding but does so only because it is the most expedient means of resolving the rights of the parties to the Wrongfully Seized Property.

returned to TED; (c) that the SEC is liable to TED for its costs and expenses incurred to recover the Wrongfully Seized Property; and (d) that TED is entitled to such other and further relief as the Court deems appropriate and proper.

III. DETAILED STATEMENT OF RELEVANT FACTS WITH CITATIONS TO EVIDENTIARY SUPPORT

TED is a five generation family owned and operated business, located in Boca Raton, Florida, paying the highest market prices, in cash, for diamonds, jewelry, gold, silver, watches, antiques, artwork and collectibles. A copy of the relevant excerpts from the web page for TED is attached hereto and incorporated herein by reference as **Exhibit 2**. A copy of an advertisement by TED that ran in the Sun Sentinel newspaper in or about August and September 2007 which clearly advertises to the general public that it makes its purchases for "cash" and that TED was running a free evaluation of diamonds and jewelry between September 3, 2007 and September 7, 2007 (the "Sun-Sentinel Advertisement") is attached hereto and incorporated herein by reference as **Exhibit 3.**

TED is recognized as one of the nation's largest estate buyers and has an extensive staff of experts in gemology, numismatics, and appraisers who travel the world to make purchases from clients. *See* Affidavit of Andrew Kravit (the "Andrew Kravit Affidavit") at ¶ 3, a copy of which is attached hereto and incorporated herein by reference as **Exhibit 4**. The President of TED is Mr. Andrew Kravit, who has extensive diamond training and is a graduate gemologist. *See* the Andrew Kravit Affidavit at ¶ 2, **Exhibit 4**. Mr. Andrew Kravit's father, Mr. Marc Kravit, is an expert consultant to TED, and has worked in the family business during the course of his entire life.

A. The September 5, 2007 Purchase of Jewelry by TED from Mr. and Mrs. Altomare for $90,000.00.

On Wednesday, September 5, 2007, Mrs. Barbara Altomare came to the offices of TED in Boca Raton, Florida in response to the Sun-Sentinel Advertisement. *See* the Andrew Kravit Affidavit at ¶ 8, **Exhibit 4**. TED publishes advertisements on a weekly basis in the Sun-Sentinel and other local newspapers advertising that TED pays the highest market prices, in cash, for diamonds, jewelry, and other items. *See* the Andrew Kravit Affidavit at ¶¶ 2 and 6. Mrs. Altomare met with Mr. Andrew Kravit and informed him that she had a 7.00ct fancy yellow diamond ring and a straight line emerald cut diamond bracelet that she wanted TED to evaluate for possible liquidation. *Id.* at ¶ 10. She explained to Mr. Andrew Kravit that her visit to TED was prompted by two principal factors: first, that she had exceeded the jewelry budget allotted to her by her husband to purchase jewelry for herself; and second, that she needed to decorate a new 4,000 ± square foot double penthouse that she and her husband had just purchased in a luxury oceanfront condominium development called "Toscana" (the "Toscana Penthouse") in the Boca Raton, Florida area. *Id.* at ¶ 11; and *see* a copy of a real estate listing for the Toscana Condominium development attached hereto and incorporated herein by reference as **Exhibit 5**. After evaluating the jewelry items presented by Mrs. Altomare, Mr. Andrew Kravit made verbal offers to purchase the jewelry for cash. *Id.* at ¶ 12.

During the initial meeting on September 5, 2007 at the offices of TED, Mrs. Altomare also informed Mr. Andrew Kravit that the decor of the new Toscana Penthouse was going to be more contemporary than her current home in the Bocaire Country Club (the "Bocaire Home") and that she was also looking to sell most of her and her husband's art collection. *Id.* at ¶ 13. To assist TED

with the review of the artwork, Mr. Andrew Kravit introduced Mrs. Altomare to Mr. Marc Kravit. *Id.* at ¶ 14. Mr. Marc Kravit scheduled a house call with Mrs. Altomare for later that afternoon to give Mrs. Altomare time to consider the offers TED made to purchase the jewelry and for Mr. Marc Kravit and a local art expert named Bruce Kodner of the Bruce Kodner Galleries in Lake Worth, Florida to preview the art collection at the Bocaire Home. *See* Affidavit of Marc Kravit (the "Marc Kravit Affidavit") at ¶ 15, a copy of which is attached hereto and incorporated herein by reference as **Exhibit 6**.

Later during the afternoon on Wednesday, September 5, 2007, Messrs. Marc Kravit and Kodner went to the Bocaire Home and met with Mr. and Mrs. Richard Altomare to evaluate the art collection and learned how the pieces were obtained. *See* the Marc Kravit Affidavit at ¶ 18. During this process, Mr. Marc Kravit saw a Jaeger LeCoultre Atmos Clock (the "Jaeger Clock") that piqued his interest and caused him to call Mr. Richard Revesz, a Senior Horological, Jewelry, and Colored Gemstone Consultant/Buyer for TED who previously served as the expert in charge and managing director of Antiquorum Auctioneers, S.A., the world's leading auction house in watches and clocks, and requested Mr. Revesz' attendance at the Bocaire Home to inspect the Jaeger Clock. *Id.* at ¶ 19; and *see* the *Curriculum Vitae* for Mr. Revesz, a copy of which is attached hereto and incorporated herein by reference as **Exhibit 7**. After Mr. Revesz arrived[5], he inspected the Jaeger Clock and discussed the fact that he was also an expert in watches. *See* the Marc Kravit Affidavit at ¶ 19; and Affidavit of Mr. Revesz (the "Revesz Affidavit) at ¶ 7, a copy of which is attached hereto and incorporated herein by reference as **Exhibit 8**. At that time, Mr. Altomare explained that he had a

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[5] The local art expert, Mr. Kodner, departed the Bocaire Home before Mr. Revesz arrived. *See* the Marc Kravit Affidavit at ¶ 20.

a collection of high-end wristwatches that he would like Mr. Revesz to evaluate since he was there.[6] *See* the Marc Kravit Affidavit at ¶ 21; and the Revesz Affidavit at ¶ 8. After inspecting the Jaeger Clock and the wristwatch collection, Mr. Revesz made a conditional offer to Mr. and Mrs. Altomare to purchase the Jaeger Clock subject to conducting further research on the Jaeger Clock and gave Mr. Altomare an estimate on the value of the wristwatch collection. *See* the Revesz Affidavit at ¶ 8.

With respect to Mrs. Altomare's jewelry, Mr. Marc Kravit made an offer to purchase the same for cash[7] at the Bocaire Home. *See* the Marc Kravit Affidavit at ¶ 23. In connection therewith, Mr. Altomare specifically represented that he and/or his wife owned the jewelry that was being offered for sale, that he and his wife had the receipts confirming the purchase of the jewelry, and that there were no liens on such jewelry. *See* the Marc Kravit Affidavit at ¶ 24; and the Revesz Affidavit at ¶ 11. Thereafter, Mr. and Mrs. Altomare accepted the offer to purchase the jewelry and Messrs. Marc Kravit and Revesz purchased a 7.00ct fancy yellow diamond ring, a straight line emerald cut diamond bracelet, two 100 ounce silver bars, and an aquamarine and diamond brooch/pendant for a total of $90,000.00 in cash which was contained in nine $10,000.00 packs.[8]

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[6] During the visit at the Bocaire Home, Mrs. Altomare brought out several other pieces of jewelry for TED to evaluate in addition to the 7.00ct fancy yellow diamond ring and the straight line emerald cut diamond bracelet that she had shown Mr. Andrew Kravit earlier that day. *See* the Marc Kravit Affidavit at ¶ 21.

[7] Mr. Marc Kravit had brought approximately $100,000.00 in cash with him on his visit to the Bocaire Home which was normal and customary in his business because transactions are typically consummated in face-to-face meetings where the jewelry is exchanged for the bargained-for consideration. *See* the Marc Kravit Affidavit at ¶ 16. Mr. Marc Kravit obtained the funds to consummate the foregoing transaction from TED's bank account at Mercantile Bank, Account No. 063113772. *See* the Marc Kravit Affidavit at ¶ 16.

[8] After making the initial purchase, TED and Mr. and Mrs. Altomare agreed to schedule a follow-up appointment at the Bocaire Home on September 24, 2007 which followed the Jewish high holidays and preceded an out-of-town purchasing event that TED had previously scheduled.

See the Marc Kravit Affidavit at ¶ 25; and the Revesz Affidavit at ¶ 12. The $90,000.00 was counted by Mr. Marc Kravit in the presence of Mr. and Mrs. Altomare and Mr. Revesz. *See* the Marc Kravit Affidavit at ¶ 26; and the Revesz Affidavit at ¶ 13. TED documented the purchase in a statutorily mandated form called a "Second Hand Dealer's Form" (the "09/05/07 Second Hand Dealer's Form") that contained a verification stating, in relevant part, that:

> I verify that I am eighteen years or older, and **I am the rightful owner of the above-described property** which is being sold or pledged, or that **I am entitled to sell** or pledge **such goods**, and that **THE PROPERTY IS CLEAR OF ALL LIENS AND ENCUMBRANCES**, including liens for past due child support. If proven otherwise, I promise full restitution, and understand that **I will be criminally prosecuted to the fullest extent of the law**.

See 09/05/07 Second Hand Dealer's Form, Bates No. TED 29, a copy of which is attached as part of **Composite Exhibit 1-C,** (emphasis added). The 09/05/07 Second Hand Dealer's Form also contains an acknowledgment for receipt of $90,000.00 that was initialed, signed, and thumb printed by Mr. Altomare confirming the payment of $90,000.00 by TED to him for the above-described property. *Id.* TED's purchase of the property described above was complete on September 5, 2007 and title to that property passed to TED on that date.[9] Thus, the attached evidence demonstrates conclusively that TED was a purchaser of such property for fair consideration without knowledge of any claim by the SEC at the time of the purchase and is entitled to the return of the same.

See the Marc Kravit Affidavit at ¶ 25.

[9] The jewelry was also taken into the possession on TED at its corporate offices in Boca Raton, Florida on that date. *See* the Andrew Kravit Affidavit at ¶ 20; *See also* the Marc Kravit Affidavit at ¶ 29.

B. The September 24, 2007 Purchase of Jewelry by TED from Mr. and Mrs. Altomare for $411,000.00.

On September 24, 2007, Messrs. Marc Kravit, Revesz, Eric Monath, a Sergeant for the Palm Beach County Sheriff's Office who accompanied Messrs. Marc Kravit and Revesz as security detail, and Marvin Rosenbaum, an art expert and owner of Rosenbaum Fine Arts, a nationally recognized firm specializing in high end works of art, arrived at the Bocaire Home for the previously scheduled follow-up appointment with Mr. and Mrs. Altomare to further examine Mr. and Mrs. Altomare's art collection, Mrs. Altomare's jewelry, and Mr. Altomare's wristwatch collection. *See, e.g.,* the Marc Kravit Affidavit at ¶ 30. *See also* the Revesz Affidavit at ¶ 17; and the Affidavit of Sergeant Monath dated October 18, 2007 (the "Sergeant Monath Affidavit") at ¶ 1, a copy of which is attached hereto and incorporated herein by reference as **Exhibit 9**. A copy of Sergeant Monath's Resume is attached hereto and incorporated herein by reference as **Exhibit 10.**

After examining the art collection for approximately thirty minutes, Mr. Rosenbaum did not identify any pieces that he wanted to purchase but offered to broker a handful of paintings at one of his many galleries. *See, e.g.,* the Marc Kravit Affidavit at ¶ 31. *See also* the Revesz Affidavit at ¶ 18. Mr. Altomare did not indicate an interest in brokering the paintings and Mr. Rosenbaum departed the Bocaire Home shortly thereafter. *See, e.g.,* the Marc Kravit Affidavit at ¶ 32. *See also* the Revesz Affidavit at ¶ 19. The focus of the dealings between TED and Mr. and Mrs. Altomare then turned to Mrs. Altomare's jewelry and Mr. Altomare's wristwatch collection. *See, e.g.,* the Marc Kravit Affidavit at ¶ 33. *See also* the Revesz Affidavit at ¶ 20. Mr. Marc Kravit conducted a further examination of Mrs. Altomare's jewelry and Mr. Revesz conducted a further examination

of Mr. Altomare's wristwatch collection.[10] *See, e.g.*, the Marc Kravit Affidavit at ¶ 34. *See also* the Revesz Affidavit at ¶ 21. Mr. Altomare specifically represented that he and/or his wife owned the jewelry collection, that he owned the wristwatch collection, and that he and his wife had the receipts confirming the purchase of the jewelry. *See, e.g.*, the Marc Kravit Affidavit at ¶ 35. *See also* the Revesz Affidavit at ¶ 22. Mr. Altomare further represented that there were no liens on the pieces in Mrs. Altomare's jewelry collection or Mr. Altomare's wristwatch collection that were being considered for sale. *See, e.g.*, the Marc Kravit Affidavit at ¶ 36. *See also* the Revesz Affidavit at ¶ 23; the Sergeant Monath Affidavit at ¶ 3. Satisfactory prices were then negotiated between the

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[10] Before making any offers to purchase additional pieces of Mrs. Altomare's jewelry and Mr. Altomare's wristwatch collection, TED, by and through Messrs. Marc Kravit and Revesz, conferred with the original sellers of Mrs. Altomare's jewelry collection and Mr. Altomare's wristwatch collection and confirmed that Mr. and Mrs. Altomare had purchased the respective collections and that no monies were owed on the same. *See, e.g.*, the Marc Kravit Affidavit at ¶ 34. *See also* the Revesz Affidavit at ¶ 21. Mr. Marc Kravit also contacted Les Bijoux, a prominent Boca Raton jewelry retailer, to determine whether it retained the original copy of a Gemological Institute of America ("GIA") diamond report for an 11.02ct Emerald Cut Diamond that was the most expensive part of the transaction (*i.e.*, as described below, TED ultimately paid $375,000.00 in cash for the 11.02ct Diamond). *See* the Marc Kravit Affidavit at ¶ 34. A representative of Les Bijoux confirmed that it did not retain the original GIA certificate for the 11.02ct Diamond. *See* the Marc Kravit Affidavit at ¶ 34. Mrs. Altomare presented Mr. Marc Kravit with a photocopy of the GIA certificate for 11.02ct Diamond and a sales receipt from Les Bijoux for $400,000. *Id.* The SEC states that Mr. Altomare purchased the 11.02ct Diamond for $500,000, Memorandum in Support of Motion to Sell at ¶ 9, but has offered no evidence to support that figure. The SEC references a "diamond straight line bracelet purchased for approximately $100,000," Memorandum in Support of Motion to Sell at ¶ 13, and may have erroneously included the price of the bracelet with the price of the 11.02ct Diamond. Indeed, the SEC's Exhibit I, purporting to be a "spreadsheet explaining the purchases made by Mr. Altomare with Les Bijoux . . ." does not refer to either the 11.02ct Diamond or the 9.00 ct. Diamond "straight line" Bracelet at all and refers only to a 7.00 Fancy Yellow Diamond ring, the Jaegar Clock, and an FP Journe watch. While the Jaegar Clock was, as noted on the SEC's Exhibit I, returned to Les Bijoux, the 7.00 Fancy Yellow Diamond, the FP Journe watch, the 9.0 ct. Diamond Bracelet and the 11.02 ct Diamond sold by Les Bijoux to Mr. and Mrs. Altomare are among the twenty-four items purchased by TED and wrongfully seized by the SEC. For purposes of the discussion herein, those four pieces are referred to as the "Les Bijoux Pieces."

parties for the purchase of Mrs. Altomare's jewelry and Mr. Altomare's wristwatch collection. *See, e.g.,* the Marc Kravit Affidavit at ¶ 37. *See also* the Revesz Affidavit at ¶ 24. In total, the parties agreed that TED would pay $481,000.00 in cash for Mrs. Altomare's Jewelry and Mr. Altomare's wristwatch collection.[11] *See, e.g.,* the Marc Kravit Affidavit at ¶ 38. *See also* the Revesz Affidavit at ¶ 25. Mr. Marc Kravit counted the cash in the presence of Mr. and Mrs. Altomare and Mr. Revesz and Mr. Altomare completed a "Second Hand Dealer's Form" (the "09/24/07 Second Hand Dealer's Form") that contained a verification stating, in relevant part, that:

> I verify that I am eighteen years or older, and **I am the rightful owner of the above-described property** which is being sold or pledged, or that **I am entitled to sell** or pledge **such goods**, and that **THE PROPERTY IS CLEAR OF ALL LIENS AND ENCUMBRANCES**, including liens for past due child support. If proven otherwise, I promise full restitution, and understand that **I will be criminally prosecuted to the fullest extent of the law**.

See 09/24/07 Second Hand Dealer's Form at TED 34, a copy of which is attached as part of **Composite Exhibit 1-C** (emphasis added). *See, e.g.,* the Marc Kravit Affidavit at ¶ 39. *See also* the Revesz Affidavit at ¶ 26; and the Sergeant Monath Affidavit at ¶ 4 ("There was a substantial cash exchange between Mr. Kravit and the Altomare's for the purchase of the inspected items. . . .").

Given the fact that the purchase of the 11.02ct Diamond represented the largest component of the purchase on September 24, 2007, Mr. Marc Kravit called Mr. Andrew Kravit, who is an expert in diamonds and diamond jewelry, for his assistance confirming that the photocopied GIA

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[11] A copy of the front and back of cancelled TED's Mercantile Bank Check No. 5775 dated September 17, 2007 in the amount of $225,000.00 which is payable to "Cash" and TED's Mercantile Bank Check No. 5796 dated September 20, 2007 in the amount of $920,000.00 which is payable to "Cash" from which TED derived the funds used to Mrs. Altomare's jewelry and Mr. Altomare's wristwatch collection from Mr. and Mrs. Altomare on September 24, 2007 are attached hereto and incorporated herein by reference at **Composite Exhibit 11**.

certificate for the 11.02 ct Diamond that was presented with the sales receipt from Les Bijoux did, in fact, match the 11.02 ct Diamond that Mrs. Altomare was presenting to Mr. Marc Kravit for evaluation. *See* the Marc Kravit Affidavit at ¶ 40. Mr. Andrew Kravit arrived at the Bocaire Home and attempted to confirm the match between the 11.02ct Diamond and photocopy GIA certificate and sales receipt. *See* the Andrew Kravit Affidavit at ¶ 24; and the Marc Kravit Affidavit at ¶ 41. Mr. Andrew Kravit could not draw a definitive conclusion as to matching the grade of the diamond without inspecting the original GIA certificate and he suggested that a new GIA report for the 11.02ct Diamond could be ordered that would take approximately one to two weeks to generate from the laboratory in Carlsbad, California. *See* the Andrew Kravit Affidavit at ¶ 25; *See also* the Marc Kravit Affidavit at ¶ 42; and the Revesz Affidavit at ¶ 29. Without the original GIA certificate, Mr. Andrew Kravit informed Mrs. Altomare that TED would reduce the purchase price for the 11.02ct Diamond by $70,000.00 and that TED would pay her an additional $70,000.00 upon the receipt of a new GIA report for the 11.02ct Diamond that confirmed that the diamond was graded F Color and VVS2 Clarity by the GIA.[12] *See* the Andrew Kravit Affidavit at ¶ 26; *See also* the Marc Kravit Affidavit at ¶ 43; and the Revesz Affidavit at ¶ 30. Mr. and Mrs. Altomare agreed to this reduction in the purchase price and initialed the change of the purchase price from $481,000.00 to $411,000.00 in two places on the 09/24/07 Second Hand Dealer's Form at TED 38, a copy of which is attached

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[12] Out of the total purchase of $481,000.00, the original offering price for the 11.02ct Diamond was $375,000.00 or approximately 78% of the aggregate amount offered. *See* the Andrew Kravit Affidavit at ¶ 27; *See also* the Marc Kravit Affidavit at ¶ 43; and the Revesz Affidavit at ¶ 30. The reduction made by Mr. Andrew Kravit reduced the original offering price for the 11.02ct Diamond from $375,000.00 to $305,000.00 and reduced the aggregate purchase price from $481,000.00 to $411,000.00. *See* the Andrew Kravit Affidavit at ¶ 27; *See also* the Marc Kravit Affidavit at ¶ 43; and the Revesz Affidavit at ¶ 30.

as part of **Composite Exhibit 1**. *See* the Andrew Kravit Affidavit at ¶ 28; *See also* the Marc Kravit Affidavit at ¶ 49; and the Revesz Affidavit at ¶ 31. TED's purchase of the property described above was complete on September 24, 2007 and title to such property passed to TED on that date.[13] *See* the Marc Kravit Affidavit at ¶ 45. Thus, TED was a purchaser of such property for fair consideration without knowledge of any claim by the SEC at the time of the purchase and is entitled to the return of the same.

On pages 3-4 of its Memorandum in Support of Motion to Sell, the SEC identifies six wire transfers in the amounts of $325,000, $30,000, $40,000, $33,900, $30,000, and $50,000 from the bank account of Universal that it contends were the means by which Mr. Altomare paid Les Bijoux for the 11.02ct Diamond. In total, the six wire transfers total $508,900. The SEC has offered no evidence from Les Bijoux that such transfers were for payment solely of the 11.02ct Diamond nor does it explain why six transfers were made on differing dates.[14]

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[13] The jewelry was also taken into the possession of TED at its corporate offices in Boca Raton, Florida on that date. *See* the Andrew Kravit Affidavit at ¶ 30 *See also* the Marc Kravit Affidavit at ¶ 43.

[14] The SEC attempts to bolster its argument that Mr. Altomare "stole" the funds from Universal by pointing out that the the annual report for Universal mentions only Mr. Altomare's annual compensation of $650,000 and does not reference the wire transfers to Les Bijoux. But the absence of such a reference in Universal's filings is of little significance since the SEC offers no evidence that there was not an internal bookkeeping mechanism at Universal whereby such amounts were simply deducted from the cash compensation due to Mr. Altomare as reported in Universal's annual reports.

C. The October 5, 2007 Payment of Additional $70,000 in Cash by TED to Mrs. Altomare after Receiving GIA Certificate for 11.02ct Diamond

On October 5, 2007, TED received the GIA report for the 11.02ct Diamond which confirmed that it was 11.02cts, F Color, and VVS2 clarity. *See* the Andrew Kravit Affidavit at ¶ 32. Mrs. Altomare came to the corporate offices of TED in Boca Raton, Florida on that same date and she was paid an additional $70,000.00 in cash by Mr. William Bryan, a buyer who is employed by TED, in the presence of Mr. Chris Nagel, an office coordinator employed by TED.[15] *See* the Affidavit of Mr. Bryan (the "Bryan Affidavit") at ¶ 5, a copy of which is attached hereto and incorporated herein by reference as **Exhibit 12.**

D. The Wrongful Seizure of the Property and the SEC's Refusal to Return It to TED

On October 10, 2007, the United States Marshal, at the behest of the SEC and the assistance of the Receiver, served the Writ of Execution on TED and seized the twenty-four items of Property purchased by TED from Mr. and Mrs. Altomare. *See* Writ of Execution, attached hereto and incorporated herein by reference as **Composite Exhibit 1-A; Seized Property and Evidence Control Sheet,** attached hereto and incorporated herein by reference as **Composite Exhibit 1-B.**

After the seizure, on October 31, 2007, the Receiver made written demand on Mr. Altomare for, among other things, the payment of "$558,900 to reimburse Universal Express for the purchase

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[15] This additional payment to Mrs. Altomare was also captured on TED's security surveillance system and, if there is any need to do so, TED has available and will produce a copy of the DVD containing the surveillance video. TED furnished a copy of the DVD to the SEC with its demand letter.

of jewelry from Les Bijoux." *See* Memorandum in Support of Motion to Sell, Exhibit G (Demand Letter from Receiver). [16]

Despite at least two formal requests from TED's counsel, the SEC and the Receiver have refused to return the Wrongfully Seized Property. *See* Affidavit of Carl F. Schoeppl, Esq., attached hereto and incorporated herein by reference as **Exhibit 1.** Consequently, in order to protect its very significant investment in the Wrongfully Seized Property and to recover that Property in the most expeditious manner possible, TED is being forced to intervene in this action, in a venue far from Florida where both its principal place of business is located and where the transactions at issue occurred, and to incur substantial and unwarranted expense. The SEC had no good faith basis for its wrongful seizure of the Property and must be compelled to both return the Wrongfully Seized Property to TED immediately and to make TED whole for the losses it has been forced to incur as a result of the wrongful seizure.

IV. LEGAL ARGUMENT

A. As a Good Faith Purchaser for Value, TED Received Good Title to the Wrongfully Seized Property from the Altomares

1. Good Title to the Wrongfully Seized Property Passed to TED When It Purchased the Items in Good Faith for Value and Took Physical Delivery from the Altomares

The SEC contends that the Wrongfully Seized Property "belongs to the Company" because

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[16] In its Memorandum, at ¶ 9, the SEC contends that Mr. Altomare paid for the 11.02 ct Diamond with six wire transfers from the bank account of Universal Express to Les Bijoux totaling $508,900 and also states that Mr. Altomare made a partial payment for two of the Les Bijoux Pieces — the 7.00 fancy yellow ring and the FP Journe watch — with three wire transfers totaling $80,000. It is unclear why the Receiver is demanding the payment of $558,900 from Mr. Altomare rather than $588,900.

"Altomare used the Company's funds to buy at least part of the Seized Property . . ." Memorandum in Support of Motion to Sell, at 3. Consequently, the SEC argues: "Altomare's attempt to sell the Property and take the proceeds for himself was theft. Under these circumstances, The Estate Department acquired no title to the Property because the Property was owned by the Company and wrongfully converted by Altomare. No one can confer a better title than he has and a thief cannot pass good title." *Id.* (citations omitted).

This argument is flatly contrary to all controlling principles of law and in direct contradiction to Section 2-403 of the Uniform Commercial Code (the "UCC").[17] Section 2-403(1) of the UCC, adopted in both Florida and New York, states unequivocally:

> (1) A purchaser of goods acquires all title which his transferor had or had power to transfer . . . ***A person with voidable title has power to transfer a good title to a good faith purchaser for value.*** When goods have been delivered under a transaction of purchase the purchaser has such power even though
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> (a) the transferor was deceived as to the identity of the purchaser, or
>
> (b) the delivery was in exchange for a check which is later dishonored, or
>
> (c) it was agreed that the transaction was to be a "cash sale", or
>
> (d) the delivery was procured through fraud punishable as larcenous under the criminal law.
>
> . . .

Fla. Stat. § 672.403(1); N.Y.U.C.C. § 2-403(1). Assuming *arguendo* that the SEC's recital of the facts surrounding Mr. Altomare's acquisition of the Les Bijoux Pieces is accepted as true, at worst, Mr. Altomare had *voidable* title to those items and retained the power to transfer good title to TED, "a good faith purchaser for value."

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[17] New York's choice of law rules provide that questions relating to the validity of a transfer of personal property are governed by the law of the state where the property is located at the time of the transfer. *Kunstsammlungen Zu Weimar v. Elicofon*, 536 F. Supp. 829, 845-46 (E.D.N.Y. 1981), *aff'd*, 678 F.2d 1150 (2d Cir. 1982). Thus, Florida law will govern the issue of the validity of the transfer between Mr. Altomare and TED.

The SEC's contention that Mr. Altomare originally purchased some of the Wrongfully Seized Property with funds "stolen" from Universal and is, therefore, a "thief" with no ability to transfer good title to the Property is wrong. Even if the SEC is correct in its characterization of the transfers to Les Bijoux as a "theft" of funds by Mr. Altomare from Universal, it is a well-established precept that title to currency passes with delivery to a person who receives it in good faith for value.[18] *See, e.g., Rankin v. Chase National Bank*, 188 U.S. 557, 565 (1903) (bank who in good faith received funds from embezzler for payment of debt could not be compelled to repay the funds). *See also United States v. McCorkle*, 143 F.Supp.2d 1311, 1324 (M.D. Fla. 2001) (rejecting government's claim that transfer of property obtained by fraud and subject to forfeiture was void *ab initio*, noting that § 2-403's "good faith purchaser exception promotes finality in commercial transactions . . .").

Title to goods passes as the parties agree, and "[u]nless otherwise explicitly agreed title passes to the buyer at the time and place at which the seller completes her or his performance with reference to the physical delivery of the goods . . ." Fla. Stat. § 672.401(2); N.Y.U.C.C. § 2-401(2). Mr. Altomare and TED expressly agreed that "[i]n consideration of the sum listed below, paid in hand and receipt acknowledged by the seller, said seller does herein sell, transfer and assign all of his rights, title and interest in the above described property to the dealer." *See* Second Hand Dealers Forms, attached hereto and incorporated herein by reference as **Exhibit 1-C**. Thus, good title to the Wrongfully Seized Property passed to TED, as a good faith purchaser for value, when Mr. Altomare completed his performance of the sale by physically delivering that Property to TED.

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[18] While TED offers no opinion on the good faith with which Les Bijoux accepted the wire transfers from Universal, the SEC does not suggest a lack of good faith. As a transferee further removed from any alleged "theft" by Mr. Altomare, TED's good faith is far less open to question than that of Les Bijoux who received the transfers directly from Universal.

In light of the foregoing analysis, TED has good title to the Wrongfully Seized Property, that Property does *not* belong to Universal, and the Receiver should be ordered to return it to TED immediately.

2. Florida's Secondhand Dealer Statute Has No Effect on the Passage of Good Title to TED as a Good Faith Purchaser for Value

The SEC next argues that, because the Florida Secondhand Dealer Statute[19] precludes TED from selling or using the Wrongfully Seized Property for a period of 15 calendar days after the date of acquisition of the goods, "title did not pass to The Estate Department during that 15 day holding period." Memorandum in Support of Motion to Sell, at 4-5. The SEC then argues that it had a "lien" on the Wrongfully Seized Property before title passed to TED because "[d]uring the 15 day holding period, this court issued a writ of execution ("Writ") and it was served on Mr. Altomare on October 4, 2007" and that TED "took title subject to the lien." *Id.* This argument entirely misses the mark, misinterprets and misapplies the Secondhand Dealer Statute, and has no merit.

The Secondhand Dealer Statute, as well as the parallel statute governing pawnbrokers,[20] was enacted primarily to help combat the problem of property theft and to assist law enforcement. *See, e.g.*, Jarrett C. Oeltjen, *Florida Pawnbroking: An Industry in Transition*, 23 Fla. St. U. L. Rev. 995, 1014 (Spring, 1996) ("The main impetus behind the law was to confront the problem of property theft and drug-related crimes by facilitating recovery of stolen goods and apprehending those

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[19] Referred to herein as the "Secondhand Dealer Statute," the formal name of the statute is the Secondhand Dealer and Secondary Metals Recyclers Act and it is embodied in Chapter 538 of the Florida Statutes, §§ 538.03, et seq.

[20] The Florida Pawnbroking Act (the "Pawnbroking Act") is embodied in Chapter 539 of the Florida Statutes, §§ 539.001, *et seq.*

criminals who may turn to secondhand dealers for cash."). In contrast to other states, other than its effort to help law enforcement, Florida imposes few regulations on secondhand dealers and pawnbrokers. *Florida Pawnbroking, supra*, at 1010-11 ("Current statutory provisions still regulate pawnbrokers little beyond the extent necessary to assist law enforcement in recovering stolen property and in solving other theft-related crimes."). Thus, it is in the context of its avowed purpose — assisting law enforcement — that the provisions of the Secondhand Dealer Statute must be considered.[21]

While the SEC quotes one sentence from one section of the holding period provision of the Secondhand Dealers Statute, Fla. Stat. § 538.06, a review of the entire provision in the context of the entire statute makes clear that the 15 day holding period has no effect on passage of title but is rather intended to provide a period during which law enforcement can ascertain whether the property purchased by the secondhand dealer is stolen; if so, law enforcement is permitted to place a 90-day written hold on the property and may obtain the property for use as evidence.[22]

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[21] Further evidencing its purpose as primarily a law enforcement tool, if a secondhand dealer violates any of the provisions of the Secondhand Dealer Statute — which largely require the maintenance of certain records and procedures to assist law enforcement — the Statute provides for a criminal misdemeanor penalty. Fla. Stat. § 538.07(1).

[22] To protect the rights of the theft victim, the Statute contains a procedure whereby any person "alleging ownership" of the property in question may bring an action for replevin and, in such an action, also provides that "[t]he court shall award the prevailing party attorney's fees and costs." Fla. Stat. § 538.08(1) & (2). There is no provision in the Statute for the seizure of property from the secondhand dealer without a pre-seizure notice and hearing and indeed, statutes permitting such seizures have repeatedly been found to violate Constitutional Due Process requirements. *See, e.g., Florida Pawnbrokers and Secondhand Dealers Association, Inc. v. City of Fort Lauderdale*, 699 F.Supp. 888 (S.D. Fla. 1988) (granting summary judgment to plaintiffs on claim under 42 U.S.C. § 1983 and holding that prior Florida statute authorizing seizure of property upon *ex parte* application of putative lawful owner of property violated due process); Nickles, H., Adams, E., *Pawnbrokers, Police, and Property Rights – A Proposed Constitutional Balance*, 47 Ark. L. Rev. 793, 807 (1994) (general discussion of due process rights of pawnbrokers). The Secondhand Dealer Statute does not

In stark contrast, the Pawnbroking Act explicitly provides that if *pawned* — as opposed to *purchased* — goods are not redeemed within 30 days of the maturity date of the pawn, then "absolute right, title, and interest in and to the goods shall vest in and shall be deemed conveyed to the pawnbroker by operation of law . . ." Fla. Stat. § 539.001(10). By negative implication, such language indicates that "absolute title" to *pawned* goods does *not* pass to the pawnbroker prior to that point in time. *See, e.g., Ross v. M/Y Andrea Aras*, No. 05-61238-CIV-COHN/SNOW, 2007 WL 842675 at *1 (S.D. Fla. Mar. 16, 2007) (holding that vehicle had not been purchased by pawnbroker, but had been pawned, and that consequently, title did not pass to pawnbroker until end of 30-day period after maturity date for redeeming pawn). The absence of similar language expressly dealing with *purchases* — in either the Secondhand Dealers Statute or the Pawnbroking Act — is clear evidence that neither of those statutes was intended to affect the passage of title for a *purchased* item. Such a reading is sensible since a seller no longer retains any ownership rights in the item sold, in contrast to a pledgor who has pawned an item and retains the right to redeem it.

For the reasons set forth above, the 15 day holding period mandated by the Secondhand Dealers Statute to assist law enforcement did not affect the passage of title to TED.

The SEC argues that during the 15 day holding period mandated by the Secondhand Dealer's Statute title, a "judgment lien" was created when the Writ of Execution was *delivered* to the Marshall in Florida on October 4, 2007 and that such "judgment lien" limited the title interest which

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apply to a "receiver who has presented proof of such status to the secondhand dealer . . .," Fla. Stat. § 538.03(2)(c), and thus, the Receiver would not appear to be limited to the statutory replevin procedure provided for the assertion of Universal's putative ownership rights to the Wrongfully Seized Property. Notwithstanding the inapplicability of the Secondhand Dealer Statute to "a receiver," however, nothing in the Secondhand Dealer Statute excuses the flagrant disregard of both the SEC and the Receiver for TED's constitutional due process rights and their wrongful seizure of the Property with no prior notice.

passed to TED. As set forth above, the Secondhand Dealer's Statute does not affect the passage of title to TED and, as a good faith purchaser for value, good title to the Wrongfully Seized Property passed from Mr. Altomare to TED when TED took possession of the property. The Writ of Execution could have no effect on that title since title passed to TED before the Writ of Execution was obtained.

Furthermore, the SEC's position is directly contrary to New York statutory law relating to the effect of delivery of a writ of execution to the sheriff.[23] Section 5202 of the Civil Practice Law and Rules of New York (the "CPLR"), governing the substantive rights of judgment creditors as against transferees of the judgment debtor's property expressly provides that:

> Where a judgment creditor has delivered an execution to a sheriff, the judgment creditor's rights . . . are superior . . . to the rights of any transferee of the debt or property, ***except***:
>
> 1. ***a transferee who acquired the debt or property for fair consideration before it was levied upon***; or
>
> 2. a transferee who acquired a debt or personal property not capable of delivery for fair consideration after it was levied upon without knowledge of the levy.

CPLR § 5202(a)(1) (emphasis added).[24] As a purchaser for fair consideration who acquired the

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[23] Rule 69(a) of the Federal Rules of Civil Procedure provides: "Process to enforce a judgment for the payment of money shall be a writ of execution . . . The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held . . ." Consequently, New York law applies to issues relating to the enforcement of the SEC's judgment against Mr. Altomare.

[24] Florida law is similar. *See* Fla. Stat. § 55.205(1) (providing that a "judgment creditor proceeding by writ of execution acquires a lien ***as of the time of levy*** and only on the property levied upon. . . .") (emphasis added). The SEC did not follow the alternate procedure embodied in Fla. Stat. § 55.202(2)(a) to obtain a judgment lien by filing a judgment lien certificate with the Florida Department of State. The Receiver similarly has not filed a copy of either the Judgment or the Writ of Execution with the Clerk for the Southern District of Florida, despite the mandate of 28 U.S.C. § 1692 providing that: "In proceedings in a district court where a receiver is appointed for property,

Property *prior to the Marshal's levy*, TED's ownership rights are fully protected by statute, and, as will be discussed in greater detail below, this protection extends throughout New York state law and protects TED's ownership rights from the SEC's claim that the purchase from Mr. Altomare was a fraudulent conveyance that should be set aside.[25]

B. Under New York's Fraudulent Conveyances Law, TED's Ownership Rights in the Wrongfully Seized Property Are Protected Because TED Is a Purchaser for Fair Consideration Without Knowledge

The SEC argues that pursuant to either Section 273-a or 276 of New York's Fraudulent Conveyances law,[26] Mr. Altomare's sale of the Wrongfully Seized Property to TED was a fraudulent conveyance. But the true test of a "fraudulent" conveyance is whether the debtor's estate is diminished as a result of the conveyance and, in the present context, Mr. Altomare's estate was not

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real, personal, or mixed, situated in different districts, process may issue and be executed in any such district as if the property lay wholly within one district, but ***orders affecting the property shall be entered of record in each of such districts***." (emphasis added). *See Federal Savings and Loan Insurance Corp. v. McKinzie*, 661 F.Supp. 1415 (D. Nev. 1987) (holding that writs of attachment issued by California federal court could be executed in Nevada and that "[a]ll that is necessary is that plaintiff file such writs with this Court and that the clerk of this Court enter such writs of record.").

[25] NY CPLR § 5232(a) & (b) provide that a "levy" can occur either when the sheriff serves a copy of "the execution upon the garnishee . . ." or "by seizure." Thus, the Property was not "levied" upon until October 10, 2007, when the Marshal actually seized the property from TED, not when the SEC served a copy of the writ of execution on Mr. Altomare or delivered the Writ to the Marshal in Florida.

[26] Pursuant to the Fed. R. Civ. P. 69(a) mandate that "[p]rocess to enforce a judgment for the payment of money shall be a writ of execution . . . The procedure on execution, in proceedings supplementary to and in aid of a judgment, and in proceedings on and in aid of execution shall be in accordance with the practice and procedure of the state in which the district court is held . . .", New York law will apply to issues relating to the enforcement of the SEC's judgment against Mr. Altomare, including New York's law relating to fraudulent conveyances.

so diminished because he and his wife received fair value — $571,000 to be precise — for his sale of the Wrongfully Seized Property to TED. *See, e.g., Lippe v. Bairnco Corp.*, 249 F.Supp.2d 357, 375 (S.D.N.Y. 2003) ("it is hornbook law that '[a] conveyance cannot be fraudulent as to creditors if the debtor's solvency is not affected thereby, that is, if the conveyance does not deplete or otherwise diminish the value of the assets of the debtor's estate remaining available to creditors.'") (citations omitted).

Furthermore, the remedy available to a creditor — including the SEC in the present circumstances — when a conveyance is deemed to be "fraudulent" as to that creditor, specifically ***excludes*** any rights against a "purchaser for fair consideration":

> § 278. Rights of creditors whose claims have matured
>
> 1. Where a conveyance or obligation is fraudulent as to a creditor, such creditor, when his claim has matured, may, ***as against any person except a purchaser for fair consideration without knowledge of the fraud at the time of the purchase***, or one who has derived title immediately or mediately from such a purchaser,
>   a. Have the conveyance set aside or obligation annulled to the extent necessary to satisfy his claim, or
>   b. Disregard the conveyance and attach or levy execution upon the property conveyed.
> 2. ***A purchaser who without actual fraudulent intent has given less than a fair consideration for the conveyance or the obligation, may retain the property*** or obligation as security for repayment.

New York Debtor and Creditor Law § 278 (emphasis added). The SEC has fallen far short of carrying its burden of proving that TED is not a "purchaser for fair consideration."[27] Consequently,

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[27] As will be discussed at greater length below, the SEC has failed entirely to follow "the practice and procedure" of the state of New York for supplementary proceedings "to and in aid of a judgment." *See Knox v. Orascom Holding S.A.E.*, 477 F.Supp.2d 642, 645 & n.2 (S.D.N.Y. 2007) (Pursuant to Rule 69(a), to enforce judgment obtained in federal court in New York, the relevant practice and procedure is N.Y.C.P.L.R. § 5225(b) which permits judgment creditor to bring proceeding against third party in possession of property to which the creditor has rights). While the SEC contends that TED did not give fair consideration for the purchase from Mr. Altomare, it does

TED's good title to the Wrongfully Seized Property must be honored, its status as a "purchaser for fair consideration without knowledge of the fraud at the time of the purchase" protected, and the Wrongfully Seized Property immediately returned.

1. The SEC Has Failed to Carry Its Burden of Proving that TED Is Not a "Purchaser for Fair Consideration"

Section 272 of the Debtor and Creditor Law defines "fair consideration" to require both a "fair equivalent" exchange and "good faith." Thus, in New York, "the concept of fair consideration has two components — the exchange of fair value and good faith — and both are required." *Lippe v. Bairnco Corp.*, 249 F.Supp.2d 357, 376-77 (S.D.N.Y. 2003) (granting summary judgment to defendants on, among other things, plaintiffs' fraudulent conveyance claims). There is no precise formula for what constitutes "fair consideration" and the determination of whether "fair consideration" has been paid must be analyzed on a case-by-case basis. *United States v. McCombs*, 30 F.3d 310, 326 (2d Cir. 1994); *Lippe, supra*, 249 F. Supp. at 377.

When, as in the matter *sub judice*, all of the evidence of the specific value and nature of the consideration is available to the creditor and the "only issue to be decided is whether the value of that consideration approaches the fair market value of the property in issue," it is the *creditor* who bears the burden of proving a lack of fair consideration. *McCombs, supra*, 30 F.3d at 325-27 ("we believe it is only fair that the burden of proving that the consideration was disproportionately less than the fair market value of the Property remains with the government, the party asserting the fraudulent conveyance claim.") (footnote omitted); *Lippe, supra*, 249 F. Supp. at 377-78 (granting

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not argue — nor could it — that TED had any "actual fraudulent intent" and, thus, by its *ex parte* seizure of the Property, the SEC has entirely disregarded subsection 2 of Section 278.

summary judgment on fraudulent conveyance claims when "plaintiffs have not presented any admissible evidence to show that less than fair value was paid . . ."). The SEC has failed to make any showing that could carry its evidentiary burden of proving that TED did not pay "fair value" in "good faith" for the Wrongfully Seized Property.

a. TED Paid Fair Value for the Property

The SEC has failed to show that the consideration paid by TED for its purchase of the Property from Mr. Altomare was not "fair value." To the contrary, TED holds itself out to the public as paying the "highest in the industry" cash prices and paid the Altomares accordingly. Indeed, the expert retained by TED in connection with this matter has provided an appraisal of the fair market value of the Property that indicates that TED paid extremely fair prices and significantly *over* fair market value. *See* Ben Adams Appraisal, attached hereto and incorporated herein by reference as **Exhibit 13.**

To be considered "fair," there is no requirement that the consideration paid be the maximum obtainable for the item or in excess of its fair market value. New York law codifies the definition of "fair consideration" for purposes of determining whether a conveyance is fraudulent to include an amount that is not "disproportionately small as compared to the value of the property . . ." N.Y. Debtor & Creditor Law § 272(b). The courts, however, have concluded that "the concept can be an elusive one that defies any one precise formula" and have found that what constitutes fair consideration must be determined upon the facts and circumstances of each case. *McCombs, supra*, 30 F.3d at 326.

While no precise mathematical formula is determinative, in *McCombs*, the Second Circuit Court of Appeals remanded for further evaluation by the trial court whether consideration of

$57,797.94 was "fair consideration" for property with a fair market value of $85,657, thus leaving open the possibility that consideration equaling 67% of the fair market value could be deemed "fair" in the circumstances of that case. *McCombs, supra*, 30 F.3d at 327 ("In our view, therefore, the government's fraudulent conveyance claim under section 273 rises or falls on whether it can prove that consideration of $57,797.94 is disproportionately unequal to the value of the Property as considered in the context of a forced foreclosure proceeding.").

In the circumstances of the present case, the SEC has failed to offer any evidence that it could have obtained more that TED paid the Altomares for the Wrongfully Seized Property had the SEC seized the Property directly from the Altomares and sold it. Indeed, TED very likely paid the Altomares substantially *more* than the SEC could obtain at a marshal's sale since it had the expertise and time to properly evaluate the Property, speak to the original sellers, and obtain the appropriate GIA certificates. Thus, the SEC has failed *entirely* to prove that TED did not give fair value for the Wrongfully Seized Property.

b. TED Purchased the Property in Good Faith

Nor has the SEC demonstrated a lack of good faith by TED in making the purchase. The SEC has not offered *any* evidence whatsoever that TED had any knowledge of the outstanding unpaid judgment against Mr. Altomare let alone any evidence that would indicate that TED was complicit in any intent to defraud, hinder or delay by Mr. Altomare.[28] Nor has the SEC offered significant evidence of any of the typical "badges of fraud" that might be used to circumstantially

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[28] TED, on the other hand, has submitted numerous affidavits asserting that none of its personnel was aware of any liens against the Property at the time it was purchased from the Altomares. *See, e.g.*, Andrew Kravit Affidavit, Exhibit 4 hereto, at ¶ 36; Marc Kravit Affidavit, Exhibit 6 hereto, at ¶ 50; Revesz Affidavit, Exhibit 8 hereto, at ¶ 36.

demonstrate an intent to defraud. Such "badges of fraud" have typically included an examination of:

> (1) the adequacy of consideration (as discussed above and set forth in **Exhibit 13**, TED paid fair value for the Property);
>
> (2) the relationship between the transferee and transferor (there is no evidence that the relationship between TED and the Altomares was anything other than an arm's length business transaction);
>
> (3) the transferor's solvency (the SEC has offered no evidence that Mr. Altomare was not solvent at the time of the sale of the Property to TED and the circumstances as they appeared to TED personnel at the time of sale would indicate not only solvency but a relatively lavish lifestyle, *see, e.g.*, **Exhibit 5** hereto (real estate listing extolling amenities of Toscana luxury condominium where the Altomares had purchased oceanfront penthouse; **Exhibit 4** (Andrew Kravit Affidavit at ¶ 11 (referencing the Altomares' purchase of the Toscana Penthouse)));
>
> (4) the circumstances of the transfers (the SEC has provided no evidence to contradict the ample evidence that the purchases from the Altomares were part of TED's customary business operations);
>
> (5) whether the transfers were conducted in secrecy (in view of TED's recording of the purchases on the legally required Second Hand Dealer's Property Form, attached as **Exhibit 1-C** hereto, the evidence is conclusive that the purchases were not conducted in any "secrecy" indicative of an intent to defraud); and
>
> (6) whether the transferor retained control over the "transferred" assets (the evidence proves that the Altomares did not retain any control over the Property after its sale to TED).

In New York, the *absence* of "badges of fraud" constitutes evidence that there was no intent to defraud. *See, e.g.*, *Lippe, supra*, 249 F. Supp. at 377-78 ("Of course, the flip side of these badges of fraud is that their absence . . . would constitute evidence that there was no intent to defraud."). *See also* NY UCC § 1-201(19) (defining "good faith" as "honesty in fact in the conduct or transaction concerned").

Under the UCC, a person has "notice" of a fact when:

(a) he has actual knowledge of it; or
(b) he has received a notice or notification of it; or
(c) from all the facts and circumstances known to him at the time in question he has reason to know that it exists.

NY UCC § 1-201(25). The SEC has provided no evidence whatsoever that TED knew or had reason to know about its unpaid Judgment against Mr. Altomare. While the SEC suggests that Les Bijoux retained an interest in the Property by virtue of an unpaid balance due from Mr. Altomare, Les Bijoux has no lien on the Property and, indeed, waived any claims it might have had by cooperating in TED's purchase. TED had no obligation to investigate the Altomares or to question their *bona fides*.

The SEC has offered no evidence whatsoever that the transaction whereby TED purchased the Property from the Altomares was anything other than what it purported to be, an arm's length commercial transaction negotiated in good faith for fair value. More significantly, because the consideration was paid directly to the Altomares — not to a third party where it would have been beyond the reach of the SEC — there was no diminution in the assets available to the SEC to satisfy its Judgment and, as a matter of law, it has no viable claim for fraudulent transfer. *See, e.g., Lippe, supra*, 249 F.Supp.2d at 378 (granting summary judgment to third party transferee on fraudulent transfer claims when, among other things, plaintiffs presented no evidence from which jury could find that the challenged transactions resulted in diminution of debtor's assets and because the transferee paid fair value directly to the debtor, "plaintiffs cannot show that the consideration was put beyond the reach of [the debtor's] creditors"). Consequently, TED's ownership rights must be protected and the Wrongfully Seized Property must be returned immediately to TED.

C. TED Is Entitled to Summary Judgment in Its Favor and to an Order Determining Its Ownership Rights to the Wrongfully Seized Property

The SEC is permitted, pursuant to Rule 69(a) of the Federal Rules of Civil Procedure, to use state law procedures to secure satisfaction of a judgment. *See, e.g., SEC v. Antar*, 120 F.Supp.2d 431, 438-39 (D.N.J. 2000) (court employed Rule 69 procedure to exert ancillary jurisdiction over third parties when SEC sought to set aside fraudulent conveyances by judgment debtor). The relevant state law procedure is provided in NY CPLR § 5225(b) authorizing a special proceeding by a judgment creditor against a third party to recover money or personal property and "where it is shown that the judgment debtor is entitled to the possession of such property or that the judgment creditor's rights to the property are superior to those of the transferee, the court shall require such person to pay the money . . . and to deliver any other personal property . . ." *HBE Leasing Corp. v. Frank*, 48 F.3d 623, 633 (2d Cir. 1995). *See also Knox v. Orascom Holding S.A.E.*, 477 F.Supp.2d 642, 645 & n.2 (S.D.N.Y. 2007) (Pursuant to Rule 69(a), to enforce judgment obtained in federal court in New York, the relevant practice and procedure is N.Y.C.P.L.R. § 5225(b)).

Under New York state law, the proper procedure to pursue the remedies afforded by NY CPLR § 5225(b) is a special proceeding whereby the judgment creditor submits a petition seeking to obtain a writ of execution and a turnover order. *See, e.g., Alliance Bond Fund, Inc. v. Grupo Mexicano De Desarrollo, S.A.*, 190 F.3d 16, 20-21 (2d Cir. 1999) (the process to enforce a judgment is a writ of execution and procedure to obtain is governed by state law where federal court issuing judgment sits; in New York, procedure for enforcement of judgments is set out in Article 52 of the CPLR); *HBE Leasing Corp., supra,* 48 F.3d at 633 n.7 (§ 5225(b) authorizes special proceeding by judgment creditor against third party to recover property for satisfaction of judgment). Article 4 of

the CPLR contains the procedures for special proceedings, requires a petition supported by appropriate evidence, and mandates a summary judgment procedure whereby the court must determine if there are any disputed material facts at issue and, if not, enter a judgment determining the rights of the parties. NY CPLR §§ 402, 409(b), 411. *See also HBE Leasing Corp., supra,* 48 F.3d at 633 ("In a special proceeding under New York C.P.L.R. § 5225(b), applicable in the District Court via Fed. R. Civ. P. 69(a), a court may grant summary relief where there are no questions of fact, but 'it must conduct a trial on disputed issues of fact on adverse claims in a turnover matter.'") (Citation omitted).

There are no disputed issues of material fact in this proceeding and, as amply demonstrated by the attached affidavits and exhibits submitted herewith, TED is a good faith purchaser for fair value of the Property and is entitled to have its ownership rights respected. Consequently, on the basis of the Motion to Sell and the exhibits in support thereof, the SEC has failed entirely to meet its burden of proving any "fraudulent conveyance" and TED is entitled to summary judgment in its favor, a determination that it is the owner of the Property, and an order compelling the immediate return of the Property. In addition, the SEC should be ordered to recompense TED for the substantial expense incurred by its wrongful *ex parte* seizure of the Property.

D. The SEC Has Wrongfully Seized the Property from TED, Has Failed to Adhere to the Proper Procedure for the Execution of Its Judgment Against Mr. Altomare, and Has Refused to Return the Wrongfully Seized Property to TED

As discussed above, the SEC has entirely disregarded the applicable and proper procedure for the enforcement of its Judgment against Mr. Altomare and has engaged in an entirely improper *ex parte* seizure of the Property from TED with no pre-seizure notice or hearing and with no

compensation.[29] *See Fuentes v. Shevin*, 407 U.S. 67, 81-82 (1971) (generally, due process requires notice and opportunity to be heard prior to seizure of property). The SEC's wrongful and unconstitutional taking of TED's Property has caused TED to suffer very significant harm and prejudice. Not only does the SEC lack a legal or factual foundation on the merits for its seizure and retention of the Wrongfully Seized Property — because TED paid fair value in good faith and has done nothing wrong — but it has entirely ignored all applicable legal procedures, including those mandated by the Constitution of the United States.

With no judicial oversight, with no pre-seizure notice to TED or opportunity for TED to be heard in a meaningful manner before the seizure, with no posting of a bond or security, the SEC has seized Property that was lawfully in TED's possession.[30] Further, the SEC and the Receiver have

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[29] The SEC's blithe assertion that TED "is not without its remedies" and that those remedies are against Mr. Altomare is not only cavalier but disingenuous. TED is the rightful owner of the Wrongfully Seized Property and it is the SEC and Receiver that have wrongfully deprived it of its ownership rights. Mr. Altomare's estate has not been diminished by TED's purchase of the Property and the SEC retains the same rights to proceed against Mr. Altomare to collect its Judgment as it had prior to his sale of the Property to TED. In addition to deliberately flouting the applicable legal procedure, the SEC, therefore, had no good faith basis in law or fact for its *ex parte* seizure of the Property. *See* Fed. R. Civ. P. 11(c).

[30] While the SEC has designated its Motion to Sell as "in the nature of an interpleader," such a characterization is obviously incorrect. An interpleader action is generally brought when a neutral stakeholder, such as a bank, is concerned over competing claims to a common fund and requests that a court determine the rightful owner. *See, e.g., Hartford Life Insurance Co. v. Einhorn*, 452, F.Supp.2d 126, 130-31 (E.D.N.Y. 2006) (discussing requirements for statutory interpleader). The SEC is a judgment creditor, not a "neutral stakeholder," and an interpleader action is not a substitute for the proper procedures to be followed by a judgment creditor pursuant to Fed. R. Civ. P. 69(a). (Generally, the SEC contends that, pursuant to the procedure of Fed. R. Civ. P. 69(a), the Court has ancillary subject matter jurisdiction over its fraudulent transfer claims against third party transferees. *See, e.g., SEC v. Antar*, 120 F.Supp.2d 431, 439-40 (D.N.J. 2000)). In the matter *sub judice*, the SEC's characterization of its Motion to Sell as "in the nature of an interpleader" is not controlling. In *SEC v. Smyth*, 420 F.3d 12255, 1230-31 (11th Cir. 2005), the Eleventh Circuit vacated a disgorgement judgment when the SEC improperly designated its motion as "motion for judgment" instead of "motion for summary judgment" and then persuaded the district court to enter a

refused to return the Property to TED despite the repeated requests of TED's counsel. Because TED employed a significant amount of its available working capital in making the purchase of the Property and, as a result of the wrongful seizure, has now been unable to sell the Property in the normal operation of its business, TED is suffering egregious harm. Further, TED is being forced to incur very substantial expense to recover the Property in these proceedings. While the SEC has a useful function to perform, it should not be permitted to ride roughshod over the constitutional rights of non-parties who have committed no wrongdoing. *See, e.g., SEC v. Ross*, No. 05-35541, 2007 WL 2983707 (9th Cir. Oct. 15, 2007) (admonishing SEC and Receiver "to avoid improper shortcuts" and vacating disgorgement order entered against non-party over whom court did not have jurisdiction).

TED is an innocent third party to these proceedings. It has no interest in or involvement in the underlying action brought by the SEC against, among others, Mr. Altomare. The SEC has no authority to effectively freeze the assets of a non-party — against whom no wrongdoing is alleged — in an *ex parte* fashion. *Compare SEC v. Cherif*, 933 F.2d 403, 413-14 (7th Cir. 1991) ("Nothing in the statute or case law . . . authorizes a court to freeze the assets of a non-party, one against whom no wrongdoing is alleged."). The SEC's seizure of the Property, without according TED any due process protection prior to the seizure, has caused severe and substantial harm to TED since not only has TED been deprived of its Property wrongfully, but it has been forced to incur very significant and substantial expense in the course of this proceeding.

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disgorgement judgment when the amount involved was in dispute. The Court found that by accepting the motion as if it were authorized, "in effect, the court minted a new rule . . . notwithstanding precedent that holds that district courts may not 'promulgate an *ad hoc* procedural code whenever compliance with the Rules proves inconvenient.'" Similarly, the SEC is not free to ignore the applicable procedures and to create *ad hoc* procedures at will.

The SEC and the Receiver have no legal right to seize and retain the Wrongfully Seized Property and must be compelled to return the Property to TED immediately and to make TED whole for its attorney's fees, expert costs, and other costs incurred in this proceeding. This Court has the inherent authority to award such fees and costs when it finds that a party has acted in bad faith and abused the judicial process. *Chambers v. NASCO, Inc.*, 501 U.S. 32, 45-46 (1991). Furthermore, the inherent power of the court to award sanctions for bad faith and abuse can be invoked even if procedural rules exist which sanction the same conduct. *Id.*

There are also a number of statutory provisions which authorize obliging the SEC to reimburse TED for its reasonable attorney's fees and expenses incurred in this proceeding. *See* Equal Access to Justice Act ("EAJA"), 28 U.S.C. § 2412 (providing for mandatory award of fees and costs incurred by prevailing party when action is not substantially justified); 28 U.S.C. § 1927 (providing for award of expenses when attorney "unreasonably and vexatiously" multiplies proceedings in bad faith); Fed. R. Civ. P. 11(c) (permitting sanctions when necessary to deter violations of Rule 11 requirement that any paper submitted to court have good faith basis in law and fact).

The SEC is not immune from liability for the costs incurred by its conduct when that conduct is not "substantially justified." *See, e.g., SEC v. Zahareas*, 374 F.3d 624 (8th Cir. 2004) (finding that when SEC had advanced "novel" legal theories "accompanied by unsupportive facts," it was not substantially justified and attorney's fees could be awarded to prevailing defendant despite absence of outright bad faith). *See also SEC v. Cedric Promotions, Inc.*, No. 04 CV 2324(TPG), 2006 WL 1423041 (S.D.N.Y. May 23, 2006) (awarding, pursuant to EAJA, $53,834.84 in attorney's fees to prevailing defendant when SEC failed to demonstrate that its position had a reasonable basis in law

and fact). In the matter *sub judice*, TED has been forced to expend substantial amounts in attorney's fees and costs, including expert's fees, in this proceeding and requests an award from the Court to reimburse it. *See* Affidavit of Carl F. Schoeppl, Esq., attached hereto and incorporated herein by reference as **Exhibit 1**.

V. CONCLUSION

For the reasons set forth above, the SEC's seizure of the Property was wrongful and its position in this matter is not substantially justified. Further, given the repeated requests of TED's counsel for the return of the Property to TED and the SEC's obdurate refusal to do so, the SEC's conduct is evidence of bad faith.

WHEREFORE, TED, by and through its undersigned counsel, requests that the Court enter Judgment in favor of TED and against the SEC:[31]

A. Finds that TED is the owner of the Property;

B. Finds that TED gave fair consideration for the Property when purchasing it from the Altomares;

C. Finds that neither the SEC nor the Receiver has any rights in or to the Property;

D. Finds that the SEC's seizure of the Property was improper and its position in this matter was not substantially justified;

E. Finds that the SEC's Motion to Sell lacked a good faith basis in law and fact;

F. Finds that the SEC has acted in bad faith as evidenced by its repeated refusal to return the Wrongfully Seized Property to TED;

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[31] In the event that the Court determines that there are disputed issues of fact, then TED requests a trial/evidentiary hearing on the merits.

G. Directing the SEC and the Receiver to return the Property to TED;

H. Directing the SEC to reimburse TED for reasonable attorney's fees, expert fees, and costs it incurred in securing the return of the Property; and

I. Grants such other and further relief as this Court deems just and proper.

Dated: December 4, 2007
Boca Raton, Florida

Respectfully submitted,

s/ Carl F. Schoeppl, Esq. (CS7917)
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on December 4, 2007, I electronically filed the foregoing with the Clerk of the Court by using the CM/ECF system which will send a notice of electronic filing to all counsel of record as indicated below.

s/ Carl F. Schoeppl, Esq.
Carl F. Schoeppl. Esq.
Counsel for Intervenor,
The Estate Department, Inc.

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