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

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 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, :
 -----X

DEFENDANT, RICHARD A. ALTOMARE'S
ALTERNATIVE MOTION FOR EXTENSION OF TIME OR
STAY OF PROCEEDINGS PENDING FURTHER EVIDENTIARY
HEARING ON SEC'S MOTION FOR CONTEMPT

Mr. Altomare, by and through his undersigned attorney,
 alternatively moves this Court for an extension of time or
 stay of proceedings on any finding of contempt pending
 further evidentiary hearing on that issue and for the

granting of further evidentiary hearing so as to allow him to produce "...documentation to show categorically and in detail that any further payment is impossible..." as expressly provided for by this Honorable Court in its April 18, 2008 Order. In support of this motion Mr. Altomare states and avers:

1. Mr. Altomare understands the concerns expressed by the Court in its subject, 17 page Opinion and Order, and humbly, contritely and enthusiastically appreciates the Court's apparently providing for an additional opportunity to produce documentation to show "categorically and in detail" that any further payment is impossible beyond the minimum monthly commitment he authorized counsel to represent to the Court during the October 12, 2007 hearing. He verily believes that the additional opportunity which the Court apparently provided for will satisfy the Court that he has acted in good faith and has been as compliant as he could be based upon certain advices he received (not from the undersigned counsel) and from a judgment call that completing the build-out of the Toscano condominium and furnishing it would provide the best opportunity to generate the highest sale reasonably to be expected given the South Florida real estate market "turn down"

fortuitously coinciding with the Court's disgorgement order in March, 2007.

2. Time constraints between the Court's announcing at the January 18, 2008 hearing its decision to conduct an evidentiary hearing on February 4, 2008, some 17 calendar days hence, did not allow adequate time to obtain full documentation for and to prepare a forensic accounting of the various bank accounts. Had there been time to do so, many of the Court's concerns and criticisms of Mr. Altomare, as expressed in the Opinion and Order filed April 18, 2008 would have been answered to the Court's satisfaction. In addition, had there been time permitting, substantial additional documentation could have been obtained and would have supported the forensic accounting and Mr. Altomare's testimony, portions of which also drew the Court's criticism.

3. The brief period of time between the ordering and conducting of the February 4, 2008 evidentiary hearing also prevented the gathering of additional documentation which seemed to trouble the Court based upon the concerns expressed in the Opinion and Order. For an example, counsel for Mr. Altomare would have obtained documentary confirmation of the encumbrances recorded against the title of the residence and Toscano condominium by obtaining

certified copies of the public recording of the security interest documents.

DISCUSSION

I. Legal Standards.

Mr. Altomare agrees with the Court's citing to *EEOC v. Local 638*, 753 F.2d 1172, 1178 (2d Cir. 1985) for the standard that so long as "...the order being enforced is clear and unambiguous, the proof of noncompliance is clear and convincing, and the defendant[] ha[s] not been reasonably diligent and energetic in attempting to accomplish what was ordered, a contempt finding is supportable. Said otherwise, "(i)t is not necessary to show that the defendant[] disobeyed the district court's orders willfully." *Id.* (citations omitted). Mr. Altomare also agrees that an alleged contemnor who claims that he is unable to pay a (disgorgement) judgment, "bears the burden of proving evidence of his inability to comply." *Huber v. Marine Midland Bank*, 51 F.3d 5, 10, (2^d Cir. 1995) citing *United States v. Rylander*, 460 U.S. 752, 757 (1983); *McPhaul v. United States*, 364 U.S. 372, 379 (1960); *Maggio v. Zeitz*, 333 U.S. 56, 75-76 (1948). Furthermore, Mr. Altomare must satisfy his burden which "...is to establish his inability clearly, plainly and unmistakably." *Huber*, 51 F.3d at 10. That is to say, Mr. Altomare must clearly

establish "that compliance is impossible." *Rylander*, 460 U.S. at 757. The burden includes demonstrating an "...inability to comply categorically and in detail." *SEC v. Bankers Alliance Corp.*, No. 95 Civ. 0428, 1995 WL 590665, at *2 [D.D.C. May 5, 1995] (citation and internal quotation marks omitted). In addition, in the Southern District of New York, Mr. Altomare's standard includes the rule that "the party must pay what he or she can pay." *SEC v. Musella*, 818 F.Supp. 600, 602 (S.D.N.Y. 1993) (citations omitted). In the Southern District of New York there is also a rebuttal presumption of a present ability to pay where in the reasonable past there was an ability to comply. *SEC v. Princeton Econ. Int'l Ltd.*, 152 F.Supp.2d. 456, 459 (S.D.N.Y. 2001).

Mr. Altomare suggests that he did far more than "offer no evidence of his inability to comply...or stand mute." *Huber*, 51 F.3d at 10, quoting *Maggio*, 333 U.S. at 75. Instead, in the brief period of time allowed by the Court between the announcement of and conducting of the evidentiary hearing, Mr. Altomare marshaled and presented into evidence substantial documentation of (i) dire financial circumstances, (ii) current inability to pay his debts, (iii) current absence of revenue from employment since August, 2007, (iv) current (as of September, 2007)

action to liquidate assets to meet immediate household, debt repayment, contract and other financial obligations which overwhelmingly continue to remain unsatisfied in full and, in fact, only partially settled, and (v) overall insolvency as defined by federal bankruptcy standards. Mr. Altomare verily believes at a supplemental or re-opened evidentiary proceeding apparently allowed by the Court in its order, he will be able to document categorically and in detail inability to comply further until certain circumstances beyond his control vary to the point of lifting the South Florida real estate market, and otherwise provide for a careful, orderly and deliberate partial liquidation process so as to generate additional cash to pay against the outstanding disgorgement and prejudgment interest order.

As is evidenced by Mr. Altomare's affidavit filed in support of this alternative motion, there exists additional documents that will incontrovertibly, plainly and clearly document his inability and account for the source and disbursement of funds.

II. Extension or Stay of Proceedings Pending Further Evidentiary Hearing.

This motion for further evidentiary proceedings and for extension of time to comply or for stay of enforcement

of the contempt finding is in the nature of a motion for amendment to the findings or for additional findings, prompted by this Court's very language in the introductory paragraph of its order.¹ As such, this motion is in the nature of a request for the Court to amend its findings or make additional findings and to amend the contempt order accordingly akin to a motion for such relief made pursuant to Rule 52(b), *Federal Rules of Civil Procedure*.

Generally, motions made pursuant to Rule 52, may be the subject of a stay by the Court either *sua sponte* or on application. Rule 62(b), *Federal Rules Civil Procedure*.

For the reasons set forth in this motion and the affidavit filed contemporaneously herewith whose contents are incorporated herein by reference, we ask either for extension of time to provide the additional evidence apparently invited by the Court or to stay proceedings on the Court's contempt findings, all in the Court's discretion. It is suggested that not to allow an extension of time or grant a stay, Mr. Altomare's ordered

¹ The Court expressly said in its charging paragraph, "(f)or the following reasons, that motion (by the SEC for an order finding contempt) will be granted, and Altomare will be incarcerated until he pays the disgorgement and prejudgment interest in full, **or produces documentation to show categorically and in detail that any further payment is impossible.**"

incarceration, will, in effect, and under these limited circumstances, constitute imprisonment for debt.

Respectfully submitted,

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BY /s/
ARTHUR W. TIFFORD
(NY ID-011481)

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the above and foregoing was electronically filed this 1st day of May 2008 to:

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