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UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES AND EXCHANGE COMMISSION,	:
	:
Plaintiff	:
	:
v.	: 1:04-cv-2322 (GEL)
	:
	:
UNIVERSAL EXPRESS, INC., et al.,	:
	:
Defendants.	:

**PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER**

**I. Summary**

Plaintiff Securities and Exchange Commission ("SEC") moves the Court to appoint a Receiver to take control of the assets and operations of defendant Universal Express, Inc. ("Universal Express"). A receivership is necessary to enforce the Court's judgment entered on April 2, 2007 against Universal Express, which was entered on the SEC's motion for partial summary judgment.<sup>1</sup> Receivership is necessary to effectuate the Court's judgment barring

<sup>1</sup> The Court's judgment was signed on March 8, 2007 but was not entered by the Clerk into the docket of the case until April 2, 2007.

Altomare from acting as an officer and director of a public company, to allow the company to select new officers and directors, and to evaluate the company's continuing business operations in light of the judgment, which makes the company facially insolvent. Under the terms of that judgment, Universal Express is required to pay disgorgement, prejudgment interest and penalties in the total amount of \$21,906,483. These payments, which were due by April 16, 2007, are now in default. On April 2, 2007, the Court also entered judgments against defendant Richard A. Altomare ("Altomare") and defendant Chris Gunderson ("Gunderson"), who have also failed to take any steps to comply with the relief ordered by the Court. To the contrary, Altomare has continued to issue public statements and to sign the company's periodic reports with the SEC as ostensible CEO of Universal Express, despite the Court's judgment which bars him from acting in that position.

As has been found by Court, Universal Express has since 2001 existed primarily as a vehicle to flood unregistered stock into the public market at values fraudulently inflated by the dissemination of false and misleading statements by Universal Express, Altomare and Gunderson. Recent public statements by the company and Altomare demonstrate that this conduct is continuing unabated. Altomare's public statements demonstrate that, absent the imposition of a receivership, additional illegal conduct that is harmful to public investors will occur. Further, in light of the officer and director bar imposed by the Court against Altomare and the penny stock bars imposed against both Altomare and Gunderson, there is no current officer or director who is authorized to comply with the company's public reporting responsibilities with the SEC.<sup>2</sup>

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<sup>2</sup> Universal Express' most recent quarterly report filed with the SEC on May 21, 2007 continues to identify Altomare as the CEO of the company.

Universal Express' filings with the SEC indicate that the company's business operations are not sufficient to permit compliance with the Court's ordered relief. The SEC seeks the appointment of a receiver to take steps necessary to bring Universal Express into compliance with the Court's judgment, and to preserve the existing assets of the company for the benefit of its public investors, who are the intended beneficiaries of the Court's ordered relief. Absent the imposition of a receivership, the Court's judgment is likely to be eviscerated by the continuing conduct of Universal Express, Altomare and Gunderson, and the interests of the shareholders of Universal Express and of the public market further harmed.

## **II. Factual Background**

### **A. The Court's Judgment as to Universal Express, Altomare and Gunderson**

On February 21, 2007, the Court issued an Opinion and Order in this matter, granting the SEC's motion for partial summary judgment as to Defendants Universal Express, Altomare and Gunderson.<sup>3</sup> In its Opinion, the Court found that between April 2001 and March 2004, Universal Express illegally financed its operations through the offer and sale of 500 million shares of unregistered Universal Express stock. (Opinion, pp. 4-8; 18-22). The Court further found that Universal Express, Altomare and Gunderson were responsible for issuing a series of false and misleading statements about financing commitments and business operations which were "at best misleading and sometimes wholly fantastical." (Opinion, p. 22). These fraudulent statements were immediately followed by increases in the share price and trading volume of Universal Express stock and the liquidation of unregistered shares through defendants Mark Neuhaus, Tarun Mendiratta and Spiga, Ltd. (Opinion, pp. 23).

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<sup>3</sup> The SEC moved for and obtained summary judgment on the First through Fourth Claims of the Complaint which allege violations of the registration and antifraud provisions of the federal securities laws. By separate motion, the SEC has moved to voluntarily dismiss its remaining claims as to Universal Express, Altomare and Gunderson (the Fifth through Tenth Claims), as to which summary judgment was not previously sought.

As to Universal Express, Altomare and Gunderson, the Court found that injunctive relief was appropriate because, among others things, they committed violations “deliberately or at least recklessly and on repeated occasions; they not only deny culpability but do so with incredible and contorted arguments; and as the present CEO and general counsel to Universal Express remain in a position to commit possible violations in the future.” (Opinion, p. 26).

The Court found it appropriate to order disgorgement as to all three defendants, finding that the company received \$9,959,828 in unregistered stock sales proceeds, and that Altomare and Gunderson received a portion of those proceeds. (Opinion, pp. 26-27). The Court further found that prejudgment interest on disgorgement should be paid by all three, who were “repeated and remorseless violators.” (Opinion, p. 27). Finally, the Court ordered the payment of third-tier penalties because all three engaged in “numerous and inexcusable instances of securities law violations over the course of at least four years and gained substantial monies in relation to these violations -- which included fraud at the likely expense of Universal Express shareholders and the investing public.... ” (Opinion, p. 27). Under the terms of the Court’s judgment, payment of this financial relief was due on April 16, 2007. The Court further directed that such monies be held in an interest bearing account for the benefit of investors pending further order of the Court. (Judgment, para. IV.-VI.)

The Court further barred Altomare from serving as an officer and director of any public company, finding him “substantially unfit” to serve in such capacity because he abused his position of power in a public company by “repeatedly and brazenly committing fraud and flouting investor-protecting registration requirements.” (Opinion, p., 27). The Court noted that Altomare’s “apparent refusal to acknowledge the types of conduct that violate the securities laws raises serious concern that he will engage in misconduct in the future.” (Opinion, p. 28). The

Court further barred both Altomare and Gunderson from participating in any future activity involving the offer of any penny stock. (Opinion, p. 29).

**B. Actions by Universal Express, Altomare and Gunderson in Violation of the Court's Judgment**

Universal Express, Altomare and Gunderson have taken no steps to comply with the Court's judgment.<sup>4</sup> None has paid the required funds into the registry of the Court.

Further, since entry of the summary judgment order on February 21, 2007, barring him from acting as an officer and director of a public company, Altomare has signed, as Universal Express' chief executive officer and chairman of the board of directors, three reports filed with the SEC: an amended annual report on Form 10-K filed on March 26, 2007, a quarterly report filed on May 21, 2007, and an amended quarterly report filed with the SEC on June 14, 2007.<sup>5</sup>

Section 13(a) of the Securities Exchange Act of 1934 requires issuers to file periodic reports in accordance with "such rules and regulations as the Commission may prescribe...." The Commission's rules with respect to reports on Forms 10-K and 10-Q include the requirement that the filing be signed by the issuer's "principal executive officer or officers." The Court's imposition of an officer and director bar against Altomare means that Universal Express' filings signed by him since the Court's order on summary judgment do not meet the requirements of, and are therefore in violation of, the requirements of Section 13(a) [15 U.S.C. § 78m(a)].

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<sup>4</sup> On June 20, 2007, Universal Express, Altomare and Gunderson filed for the first time a motion to stay the Court's ordered relief pending their appeal. By separate pleading, the SEC will file its opposition to the motion to stay.

<sup>5</sup> See Attachment A, Form 10-KSB (Amendment No. 2), at page 29 where Altomare certifies the Amendment No. 2 to the Annual Report as the Chief Executive Officer and Chief Accounting Officer of Universal Express. Although the certification is dated December 21, 2006, the amendment was not filed until March 26, 2007. Under 17 C.F.R. § 240.13a-14, the chief executive officer must make the certification at the time of filing. See also Attachment B, Form 10-Q for the quarter ending March 31, 2007, at pages 19 and 20 where Altomare signs and certifies the report on May 21, 2007, as the president, chief executive officer and chairman of the board of directors of Universal Express.

Since entry of the Court's judgment, Altomare has also issued numerous statements to the media which continue to identify him as the current CEO of the company. Relevant portions of five such articles are attached as Attachment C.<sup>6</sup> The articles demonstrate that, in addition to publicly representing himself as the CEO of the company in violation of the Court's order, Altomare is continuing to issue false statements about the company. Altomare's most recent string of public announcements pertain to the purchase by Universal Express of memorabilia related to entertainer Michael Jackson, which press reports state was acquired by Universal Express earlier this year. After the company announced plans to auction the memorabilia in Las Vegas for proceeds projected by Altomare to equal \$30 million to \$200 million (Att. C, article dated May 22, 2007)), recent press reports estimate actual auction proceeds to date at around \$1 million. (Att. C, article dated June 4, 2007).

Universal Express has not disclosed the Court's judgment or its economic impact on the company's operations to its shareholders or to the investing public. The company has not filed a Form 8-K disclosing this material event (See index of recent filings at Att. A). Further, its most recent Form 10-Q, for the quarter ended March 31, 2007, fails to address the Court's judgment in

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<sup>6</sup> These articles are:

May 3, 2007 – OTCPicks.com at p. 3 quotes Altomare about Universal Express entering into a contract with JetOne Jets and identifies him as the Chairman and CEO.

May 22, 2007 – Market Wire article "Universal Express Announces Jackson Auction Dividend," states Universal Express insured the Jackson Family Memorabilia Collection that the company purchased earlier in the year and values at \$30,000,000 to \$200,000,000.

May 31, 2007 – Entertainment News article, "Jackson auction sells about \$500,000 on first day," identifies Altomare as the chief executive officer and quotes him as saying that Universal Express benefited greatly from the overall exposure of the auction.

June 4, 2007: Press News Limited article, "Prep-Entertainment -Report," discloses that auction generated proceeds of approximately \$1 million.

June 12, 2007 – Market Wire article, "Universal Express Updates Jackson Memorabilia Status."

the financial statements of the company. This failure renders the company's public filings and Altomare's many statements concerning the present and anticipated business operations of the company false and misleading.

The actions of Universal Express, Altomare and Gunderson to not only conceal but flout the Court's judgment are particularly troubling given that the company's public filings continue to repeat statements specifically found to be fraudulent in the Court's Opinion. In the company's March 31, 2007 Form 10-Q, which was filed with the SEC on May 21, 2007, the company discusses purported "revenue streams" from a "private postal network of 9,000 members called UniversalPost." (Att. B, Form 10-Q for 3/31/07 at p. 8). As the Court noted in its Opinion, Universal Express has no connection to this network and the projection of revenues from such a network is a fraud. (Opinion, pgs. 12-13).

### **C. A Receiver Necessary to Implement the Court's Judgment**

The company's financial statements suggest strongly that Universal Express will not be able to fully comply with the Court's order to pay disgorgement and civil penalties and continue operations. This necessarily follows from the fact that its primary source of historical revenues - illegal stock sales -- has now been foreclosed by the Court's judgment. Throughout the period of the violations found by the Court, Universal Express has been no more than a development-stage company in terms of any legitimate business operations. For example, according to its public filings, during fiscal 2002, Universal Express generated a net loss from operations of \$3,525,238. It had cash of \$31,342, and other assets consisting primarily of related party receivables, a "loan to officer" and goodwill totaling \$2,373,887, with liabilities of \$2,355,616. During fiscal 2002, Universal Express reported revenues of \$431,199 from business operations

and received \$1,991,500 in stock sales proceeds from defendants Tarun Mendiratta, Mark Neuhaus, and Spiga, Ltd.

According to public filings, during fiscal 2003, Universal Express generated a net loss from operations of \$6,523,624. It had cash of \$242,037, and other assets consisting primarily of related party receivables, a “loan to officer” and goodwill totaling \$2,565,519, with liabilities of \$2,434,090. During fiscal 2003, Universal Express reported revenues of \$2,435,540 from business operations and received \$2,771,328 in stock sales proceeds from Mendiratta, Neuhaus, and Spiga.

Universal Express’s current revenue-generating business operations are minimal. In its June 2006 Form 10-KSB, as last amended by a filing on March 26, 2007, the company reported in audited financial statements revenues for the 2006 fiscal year of \$1,073,486, gross profit of \$242,603, and an operating loss of <\$18,922,208>. The company reported assets including of cash and cash equivalents of \$2,102,459 and net property and equipment valued at \$206,832 (Att. A, Form 10-KSB, pp. 11-14.).

The company’s most recent filing is the March 31, 2007 Form 10-Q filed on May 21, 2007. In that unaudited filing, the company states that it has current assets of \$874,376 in cash and cash equivalents, \$350,159 in property and equipment and approximately \$4,707,383 in unspecified “other current assets.” (Att. B, 3/31/07 Form 10-Q, pg. 3). The company reports total current liabilities of \$3,297,511, which includes an obligation for “officers’ salary” of \$304,000 and unspecified “notes payable” of \$1,122,988. For the nine months ended March 31, 2007, the company reports revenues of \$2,687,262 and a net loss of <\$21,055,591> (Id., p. 5). The company’s reported operating expenses rose from \$4,657,809 for the nine months ended March 31, 2006 to \$21,634,168 for the nine months ended March 31, 2007.

The economic status of the company and the monetary relief ordered against it suggest that the appointment of a receiver to independently determine the most appropriate course of action is necessary at this time. The circumstances of the present case also suggest that the interests of public shareholders of Universal Express will be further compromised absent a receivership. The Court has made findings of pervasive fraud against the company's only two principals. Altomare is now barred from serving as an officer or director of the company. At present, the company appears to exist primarily as a vehicle for fraud. Whatever value exists in its core assets should be realized to satisfy the Court's judgment.<sup>7</sup>

#### **D. A Receiver is Necessary to Protect the Interests of Investors**

The SEC appears "not ... an ordinary litigant, but ... a statutory guardian charged with safeguarding the public interest in enforcing the securities laws". *SEC v. Management Dynamics, Inc.*, 515 F.2d 801, 807 (2d Cir. 1975). The relief ordered by the Court is designed to protect the interests of investors. The Court's judgment provides that the financial relief ordered against Universal Express is intended to be distributed to investors. The appointment of a receiver to bring Universal Express into compliance with the Court's judgment will therefore protect investors from further dissipation of their assets.

### **III. Legal Argument**

#### **A. The Court Has Authority to Impose a Receivership**

A district court in an SEC enforcement action has the authority, through the equitable jurisdiction conferred by Section 27 of the Securities Exchange Act of 1934, [15 U.S.C. § 78aa]

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<sup>7</sup> The company's financial statements facially indicate that Universal Express has enough assets to pay for a receivership at least initially. The company has equipment and other hard assets with a stated value of several hundred thousand dollars which can be liquidated to support a receivership. These assets should be used to pay for a receiver to conduct an initial independent evaluation of what course of action is appropriate in the interests of investors given the existing assets and operations of the company and the Court's judgments as to Universal Express, Altomare and Gunderson.

to appoint a receiver. The district court may appoint a receiver at the request of the SEC if necessary “to effectuate the purposes of the federal securities laws.” *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d 1082, 1105 (2d Cir. 1972); *SEC v. American Board of Trade*, 830 F.2d 431,436 (2d Cir. 1987), *cert. denied sub nom. Economou v. SEC*, 485 U.S. 938 (1988); *SEC v. Materia*, 745 F.2d 197, 200 (2d Cir. 1984), *cert. denied*, 471 U.S. 1053 (1985).

Federal courts often name receivers where there has been asset dissipation, a need to unwind complex transactions, or a prima facie showing of fraud and mismanagement, all of which are present with Universal Express. *SEC v. Current Financial Services, Inc.*, 783 F. Supp. 1441, 1443 (D.D.C. 1992). Courts will appoint a receiver where necessary (1) to preserve the status quo while various transactions are being unraveled in order to determine an accurate picture of the fraudulent conduct, *SEC v. Manor Nursing Centers, Inc.*, 458 F.2d at 1105; (2) to protect “those who have already been injured by a violator’s actions from further despoliation of their property or rights,” *Esbitt v. Dutch-American Mercantile Corp.*, 335 F.2d 141, 143 (2d Cir. 1964); (3) to prevent the dissipation of the defendant’s assets pending further action by the court, *SEC v. American Board of Trade, Inc.*, 830 F.2d at 436; (4) to install a responsible officer of the court who could bring the companies into compliance with the law, *id.* at 437; or (5) to place hopelessly insolvent entities in bankruptcy to effect their liquidation, *id.* at 436. Appointment of a receiver is appropriate to assign a responsible officer of the Court to ascertain the true state of a defendant's assets and affairs, to marshal and conserve assets and report on them to the Court. *See SEC v. Koenig*, 469 F.2d 198 (2d Cir. 1972); *SEC v. S&P Nat'l Corp.*, 360 F.2d 741, 750-51 (2d Cir. 1966).

The equitable remedy of receivership is addressed to the sound discretion of the district court. *SEC v. United Financial Group, Inc.*, 474 F.2d 354, 358-59 (9<sup>th</sup> Cir. 1973). In *SEC v.*

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*American Board of Trade, Inc., et al.*, 645 F. Supp. 1047 (SDNY 1986), a court set out the rationale for the appointment of a receiver: “[a] federal district court has the equity power to appoint a receiver when necessary ‘to prevent diversion or waste of assets to the detriment of those for whose benefit, in some measure, this injunction is brought.’” *Id.* at 1052.

Appointment of a receiver to take control of Universal Express is necessary to enforce the Court’s injunction against further securities law violations, to protect public investors in Universal Express, to preserve the assets of the company, to install a responsible officer to bring the company into compliance with the law, and to evaluate whether the company is insolvent. Appointing a receiver is in the public interest of enforcing compliance with the federal securities laws and will protect investors from Altomare’s further activities as the sole officer and director of the company where the Court has found him substantially unfit to serve in that capacity.

**B. Appeal of the Court’s Judgment Does Not Divest the Court of Jurisdiction to Impose a Receivership to Enforce the Existing Judgment**

On June 1, 2007, USXP, Altomare and Gunderson filed a Notice of Appeal of the Court’s judgment. However, the pendency of an appeal from the Court’s judgment granting summary judgment does not divest the district court of jurisdiction, during the pendency of that appeal, to appoint a receiver to take control of Universal Express. The Supreme Court has stated that the filing of a notice of appeal divests the district court of jurisdiction only over those aspects of the case “involved in the appeal,” *Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56, 58 (1982). Under Second Circuit case law, the appointment of a receiver is not “involved in” the appeal of the district court’s order finding the defendants liable for fraud and registration violations. See, e.g., *New York State Nat’l Organization for Women v. Terry*, 886 F.2d 1339, 1350 (2d Cir. 1989) (stating that “the filing of a notice of appeal only divests the district court of

jurisdiction respecting the questions raised and decided in the order that is on appeal”); *United States v. Rodgers*, 101 F.3d 247, 251 (2d Cir. 1996) (“The divestiture of jurisdiction rule is . . . a judicially crafted rule rooted in the interest of judicial economy, designed ‘to avoid confusion or waste of time resulting from having the same issues before two courts at the same time’. Hence, its application is guided by concerns of efficiency and is not automatic.”)(internal citations omitted)); *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 53 (2<sup>d</sup> Cir. 2004) (holding that an appeal from a denial of a motion to compel arbitration of issues in a case does not divest the district court of jurisdiction to proceed to trial on the same issues).

Further, absent a stay, a district court retains jurisdiction to enforce a judgment on appeal and always retains jurisdiction to take steps in service of the judgment on appeal. *See In re Fischer*, 53 Fed.Appx. 129, 133 (2d Cir. 2002) (unpub.) (“In entering the sale order, the bankruptcy court was only enforcing its judgment and was not expanding upon or altering it. Such action to enforce a judgment that had not been stayed on appeal was within its jurisdiction.”) *See American Town Center v. Hall 83 Ass’n*, 912 F.2d 104, 110-11 (6<sup>th</sup> Cir. 1990)) (noting “the crucial distinction between *expansion* and *enforcement* of judgments,” and holding that appeal does not deprive a court of the power to do the latter) (emphasis in original). The

appointment of a receiver is within the scope of such jurisdiction. Absent such appointment, the relief ordered by the Court will be eviscerated, and the shareholders of Universal Express, as well as the public market, will be further harmed.

#### **IV. Conclusion**

For the reasons set forth above, Plaintiff moves the Court for the appointment of a receiver.

Dated: June 21, 2007

Respectfully submitted,

s/ Julie K. Lutz            JL9404  
Julie K. Lutz  
Attorney for the Plaintiff  
Securities and Exchange Commission

## CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2007, I electronically filed the **PLAINTIFF'S MOTION FOR APPOINTMENT OF RECEIVER** with the Clerk of the Court for filing and uploading to the CM/ECF system which will send notification to the following as indicated to the parties listed below.

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Dated: June 21, 2007

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