

07-2407-cv.  
SEC v. Universal Express, Inc

UNITED STATES COURT OF APPEALS  
FOR THE SECOND CIRCUIT

**SUMMARY ORDER**

**RULINGS BY SUMMARY ORDER DO NOT HAVE PRECEDENTIAL EFFECT. CITATION TO SUMMARY ORDERS FILED AFTER JANUARY 1, 2007, IS PERMITTED AND IS GOVERNED BY THIS COURT'S LOCAL RULE 32.1 AND FEDERAL RULE OF APPELLATE PROCEDURE 32.1. IN A BRIEF OR OTHER PAPER IN WHICH A LITIGANT CITES A SUMMARY ORDER, IN EACH PARAGRAPH IN WHICH A CITATION APPEARS, AT LEAST ONE CITATION MUST EITHER BE TO THE FEDERAL APPENDIX OR BE ACCOMPANIED BY THE NOTATION: "(SUMMARY ORDER)." A PARTY CITING A SUMMARY ORDER MUST SERVE A COPY OF THAT SUMMARY ORDER TOGETHER WITH THE PAPER IN WHICH THE SUMMARY ORDER IS CITED ON ANY PARTY NOT REPRESENTED BY COUNSEL UNLESS THE SUMMARY ORDER IS AVAILABLE IN AN ELECTRONIC DATABASE WHICH IS PUBLICLY ACCESSIBLE WITHOUT PAYMENT OF FEE (SUCH AS THE DATABASE AVAILABLE AT [HTTP://WWW.CA2.USCOURTS.GOV/](http://www.ca2.uscourts.gov)). IF NO COPY IS SERVED BY REASON OF THE AVAILABILITY OF THE ORDER ON SUCH A DATABASE, THE CITATION MUST INCLUDE REFERENCE TO THAT DATABASE AND THE DOCKET NUMBER OF THE CASE IN WHICH THE ORDER WAS ENTERED.**

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan Courthouse, 500 Pearl Street, in the City of New York, on the 13<sup>th</sup> day of November, two thousand eight.

Present:

HON. PIERRE N. LEVAL,  
HON. ROBERT A. KATZMANN,  
HON. DEBRA ANN LIVINGSTON,  
*Circuit Judges.*

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U.S. SECURITIES AND EXCHANGE COMMISSION,

*Plaintiff-Appellee,*

v.

No. 07-2407-cv

RICHARD A. ALTOMARE, CHRIS G. GUNDERSON

*Defendants-Appellants.*

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For Plaintiff-Appellee: CATHERINE A. BRODERICK (Brian G. Cartwright, Andrew N. Vollmer, Jacob H. Stillman, and Michael A. Conley, *of counsel*), U.S. Securities and Exchange Commission, Washington, D.C.

For Defendants-Appellants: ARTHUR W. TIFFORD, Tifford & Tifford, P.A., Miami, FL (Lawrence A. Garvey, The Law Offices of Cushner & Garvey LLP, Tarrytown, N.Y., *of counsel*)

Appeal from the United States District Court for the Southern District of New York (Lynch, J.).

**ON CONSIDERATION WHEREOF**, it is hereby **ORDERED, ADJUDGED**, and **DECREED** that the judgment of the district court entered April 2, 2007, be and hereby is **AFFIRMED**.

The United States Securities and Exchange Commission (“SEC”) sued, *inter alia*, defendants Richard A. Altomare and Chris G. Gunderson, alleging violations of various federal securities laws. The SEC then moved, in relevant part, for summary judgment against Altomare and Gunderson with respect to its claims that they violated sections 5 and 17(a) of the Securities Act of 1933, section 10(b) of the Securities Exchange Act of 1934, and Rule 10b-5 promulgated thereunder. Altomare and Gunderson cross-moved for summary judgment with respect to the section 5 claims. The district court denied Altomare’s and Gunderson’s motion and granted the SEC’s motion. Altomare and Gunderson appeal both aspects of that decision.

We review the district court’s grant of summary judgment *de novo*, “examining the evidence in the light most favorable to, and drawing all inferences in favor of, the non-movant.” *Sheppard v. Beerman*, 317 F.3d 351, 354 (2d Cir. 2003). Summary judgment is appropriate when “there is no genuine issue as to any material fact and . . . the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(c).

Altomare and Gunderson argue two points on appeal. They contend first that they did not violate section 5 of the Securities Act because the shares they issued to various consultants were exempt from registration pursuant to sections 1125(e) and 1145 of the Bankruptcy Code. They assert next that there were genuine issues of fact as to their state of mind so as to make summary judgment with respect to the fraud claims inappropriate. Having carefully considered the record, we find these arguments to be without merit. Substantially for the reasons stated in the district court's thorough and thoughtful opinion and order, *SEC v. Universal Express, Inc.*, 475 F. Supp. 2d 412 (S.D.N.Y. 2007), the judgment of the district court is **AFFIRMED**.

FOR THE COURT:  
CATHERINE O'HAGAN WOLFE, CLERK

By: \_\_\_\_\_