

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

U.S. SECURITIES & EXCHANGE COMMISSION,

Plaintiff

v.

UNIVERSAL EXPRESS, INC.,
RICHARD A. ALTOMARE,
CHRIS G. GUNDERSON,
MARK S. NEUHAUS,
GEORGE J. SANDHU,
SPIGA, LTD.,
TARUN MENDIRATTA

Defendants.

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: Case No: 04 CV 02322(GEL)
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: **TARUN MENDIRATTA'S**
: **RESPONSE TO PLAINTIFF'S**
: **MOTION IN LIMINE TO**
: **PRECLUDE DEFENDANT'S**
: **REQUESTED TESTIMONY**
: **FROM PLAINTIFF'S**
: **COUNSEL, LESLIE J.**
: **HUGHES, AND TO**
: **EXCLUDE PROPOSED**
: **SETTLEMENT DOCUMENTS**
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Defendant, Tarun Mendiratta ("Mendiratta"), has designated as exhibits to be offered at trial of this matter the Consent of Defendant Tarun Mendiratta (Exhibit TM-1) and Judgment as to Defendant Tarun Mendiratta (Exhibit TM-2). Mendiratta also identified as a witness in his case-in-chief SEC counsel in this case, Leslie J. Hughes.

The Consent of Defendant Tarun Mendiratta and Judgment as to Defendant Tarun Mendiratta (collectively hereinafter referred to as the "Consent and Judgment") were submitted to the SEC's counsel on or about October 2, 2007, after negotiations between the SEC and Mendiratta. The Consent and Judgment were only submitted after counsel for the Plaintiff advised counsel for Mendiratta that they thought the Consent and Judgment represented a fair

and reasonable resolution of Plaintiff's claims against Mendiratta and would recommend the Consent and Judgment to the SEC's Commissioners in Washington, D.C.

On October 12, 2007, the parties were present in Court for a status conference. At the status conference, this Court was advised by counsel for the SEC that Mendiratta had submitted a Consent and Judgment which, although the SEC counsel in this case had not yet recommended to the Commissioners, was going to recommend to the SEC Commissioners. The undersigned understands that the SEC counsel in this case did, in fact, recommend the SEC Commissioners in Washington approve and accept the Consent and Judgment, however, the undersigned does not know when that recommendation occurred. In any event, as of the date and time of the filing of this Response, the SEC Commissioners in Washington have not acted upon the Consent and Judgment.

At the October 12, 2007 hearing, this Court made reference to Mendiratta "switching sides" and, although acknowledging awareness of the SEC's settlement approval process, clearly indicated to SEC counsel that they should move expeditiously to get a determination of whether or not Mendiratta's Consent and Judgment, as recommended by SEC counsel in this case, would be accepted by the SEC Commissioners. In particular, this Court wanted to know in advance of trial who the parties at trial would be and the nature and extent of the matters requiring resolution.

In order for the SEC's counsel in this case to recommend the Consent and Judgment to the Commissioners, they required Mendiratta relinquish his previously asserted rights under the Fifth Amendment of the United States Constitution and provide truthful deposition testimony. This Mendiratta did, at some jeopardy to himself, as there remains an ongoing criminal

investigation by the United States Attorney's Office for the Southern District of New York ("USAO"). The inaction of the SEC's Commissioners in the case have been prejudicial as to Defendant Mendiratta. Clearly, the SEC is capable of moving quickly when it wants to, yet, appears to have dragged its feet to the significant detriment of Mendiratta. Not only as mentioned above has Mendiratta upheld his end of the bargain, providing truthful testimony at the SEC's request, but he had now been forced to incur significant fees and expenses in preparing for trial. Further, we are now into the Thanksgiving week and still no response from the SEC's Commissioners, and it appears Mendiratta may be forced to go to trial on this matter commencing November 26, 2007, solely as a result of the inaction of the SEC's Commissioners. Mendiratta is subject to the foregoing while having a negotiated Consent and Judgment, believed to be fair and reasonable by the SEC's counsel. As a result, Mendiratta has been prejudiced. Such prejudice may be rectified by this Court through exercise of its equity jurisdiction.

Mendiratta offers Exhibits TM-1 and TM-2, the Consent and Judgment, as well as the testimony of Plaintiff's counsel, Leslie J. Hughes, for purposes of demonstrating the following:

1. The SEC has unduly delayed finalizing the settlement with Mendiratta, thus unduly prejudicing Mendiratta. Mendiratta has performed essential elements so as to allow a settlement of the Plaintiff's claims against him and has done so to his detriment on the reliance that at least his Consent and Judgment would be acted upon, if not accepted.

2. The SEC has announced it intends to seek sanctions and relief much more severe than those which it represented to the SEC Commissioners as being fair and reasonable under the circumstances. Mendiratta seeks to offer Exhibits TM-1 and TM-2 and the testimony of Leslie

Hughes to refute any evidence and arguments for move severe sanctions than as represented in the Consent and Judgment.

Contrary to the vast majority of the Plaintiff's Motion in Limine, Mendiratta does not seek to intrude upon any work product privilege of Plaintiff's counsel. Noteworthy, almost every case cited by the Plaintiff in its Motion in Limine pertains to discovery of attorney work product. Such cases are, therefore, not relevant to resolution of the admissibility of Exhibits TM-1 and TM-2 and Ms. Hughes' testimony. Furthermore, this is a trial to the Court and not a jury, and, thus, the danger of tainting trial counsel by subjecting trial counsel to testimony does not exist. Most certainly, this Court would not draw adverse inferences upon Ms. Hughes' trial abilities by virtue of her testimony on a very limited issue.

Fed. R. Evid. 408 provides the following:

(a) Prohibited Uses. Evidence of the following is not admissible on behalf of any party, when offered to prove liability for, invalidity of, or amount of a claim that was disputed as to the validity or amount, or to impeach through prior inconsistent statement or contradiction:

(1) furnishing or offering or promising to furnish – or accepting or offering or promising to accept – a valuable consideration in compromising or attempting to compromise the claims; and

(2) conduct or statements made in compromise negotiations regarding the claim, except when offered in a criminal case and the negotiations relate to a claim by a public agency or agency in the exercise of regulatory, investigative or enforcement authority.

(b) Permitted Uses. This rule does not require exclusion if the evidence is offered for purposes not prohibited by subdivision (a). Examples of permissible purposes include proving your witness' bias or prejudice; negating a contention of undue delay; and proving an effort to obstruct a criminal investigation or prosecution. (Emphasis added.)

Rule 408 does not impose an absolute ban on admission of statements made during settlement negotiations. Evidence of settlement offers may be admissible to challenge a claim of undue delay, to prove knowledge or intent, and for purposes of impeachment or rebuttal. *Southwest Nursery's, LLC v. Florist Mutual Ins., Inc.*, 266 F. Supp.2d 1253, 1258 (D. Colo. 2003). *See also Coakley & Williams Construction, Inc. v. Structural Concrete Equipment, Inc.*, 973 F.2d 349, 353 (4th Cir. 1992) (evidence of settlement negotiation only inadmissible if offered to prove liability and damages) and *Massey v. Farmers Ins. Group*, 986 F.2d 1428 (Table) (10th Cir. 1993) (admission of evidence that insurer's representative had delayed seeking settlement authority for almost a year in an effort to pressure plaintiffs to accept a lesser amount admissible). Also important in this case, in view of Mendiratta's substantial assistance provided to the SEC and that SEC's counsel in this case believes the terms of the Consent and Judgment to be fair and reasonable based on all the facts and circumstances, the Consent and Judgment as well as the testimony on this subject of Ms. Hughes has probative value outweighing any potential unfair prejudice to the SEC. *See Fed. R. Evid.* 403.

The Consent and Judgment and the testimony of Ms. Hughes are not offered to prove liability. It is the SEC which seeks to establish liability against Mendiratta. The Consent and Judgment and testimony of Ms. Hughes are not offered to prove the invalidity of or amount of a claim. In fact, the disgorgement amount contained in the Consent and Judgment is virtually the exact same disgorgement amount which in the Plaintiff's Motion for Summary Judgment, was the amount they contended was actually received by Mendiratta. In addition to this amount, the Consent and Judgment adds \$30,800 worth of prejudgment interest. Unless the SEC is now

changing its position for trial and, thus, contradicting prior under oath statements, there is, or should be, no contested claim amount.

Mendiratta does not seek to use the Consent and Judgment and testimony of Ms. Hughes as to matters prohibited by Rule 408. Instead, Mendiratta seeks the admission of the Consent and Judgment and to elicit the testimony of Ms. Hughes with regard to Mendiratta's substantial performance of matters essential to the Consent and Judgment settlement and to show any disingenuousness of any request for relief beyond that set forth in the Consent and Judgment.

Mendiratta respectfully requests that the SEC's Motion in Limine to preclude the use and admission of designated Exhibits TM-1 and TM-2, the Consent of Defendant Tarun Mendiratta and Judgment as to Defendant Tarun Mendiratta, respectively, and to preclude the testimony of Ms. Hughes related thereto be denied.

Respectfully submitted November 19, 2007.

HARRY H. WISE, III, ESQ.

s/Harry H. Wise, III (HW6841)

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CERTIFICATE OF MAILING

I hereby certify that on November 16, 2007 I electronically filed the foregoing **TARUN MENDIRATTA'S RESPONSE TO PLAINTIFF'S MOTION IN LIMINE TO PRECLUDE DEFENDANT'S REQUESTED TESTIMONY FROM PLAINTIFF'S COUNSEL, LESLIE J. HUGHES AND TO EXCLUDE PROPOSED SETTLEMENT DOCUMENTS** with the Clerk of Court using CM/ECF System, which will send notification of such filing to the following e-mail addresses:

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s/Harry H. Wise, III (JW 6841)