

INITIAL DECISION RELEASE NO. 339
ADMINISTRATIVE PROCEEDING
FILE NO. 3-12653

UNITED STATES OF AMERICA
Before the
SECURITIES AND EXCHANGE COMMISSION
Washington, D.C. 20549

In the Matter of :
: CORRECTED
: INITIAL DECISION
CHRIS G. GUNDERSON, ESQ. : December 20, 2007
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APPEARANCES: Karen J. Shimp for the Office of General Counsel, Securities and Exchange Commission

Lawrence A. Garvey of Cushner & Garvey, L.L.P., for Respondent
Chris G. Gunderson, Esq.

BEFORE: Robert G. Mahony, Administrative Law Judge

On June 6, 2007, the Securities and Exchange Commission (Commission) instituted this proceeding against Chris G. Gunderson, Esq. (Gunderson), by issuing an Order Instituting Public Administrative Proceedings and Imposing Temporary Suspension Pursuant to Rule 102(e)(3) of the Commission's Rules of Practice (OIP). The Commission found that a permanent injunction had been entered against Gunderson by the United States District Court for the Southern District of New York in SEC v. Universal Express, Inc., et al., 475 F. Supp. 2d 412 (2007) (Civil Case). A final judgment was issued in the Civil Case permanently enjoining Gunderson from violating, directly or indirectly, Sections 5 and 17(a) of the Securities Act of 1933 (Securities Act) and Section 10(b) and Rule 10b-5 thereunder of the Securities Exchange Act of 1934 (Exchange Act), and was based upon the court's findings and conclusions that Gunderson had violated certain provisions of the federal securities laws. (OIP at 2.) The Commission believed it necessary and in the public interest to temporarily suspend Gunderson from appearing or practicing before the Commission. (Id.)¹

¹ The Commission moved for civil contempt proceedings against Gunderson alleging he participated in Universal Express, Inc.'s (USXP), issuance of an additional 21 billion unregistered shares in 2007 in violation of the permanent injunction entered against Gunderson in the Civil Case. (Plaintiff's Motion for Entry of Civil Contempt Against Defendants Universal

Gunderson filed a Petition to Lift Temporary Suspension and Demand for Evidentiary Hearing and All Discovery Provided for in Administrative Proceedings Before the Commission, and Otherwise Pursuant to Law on August 13, 2007, and the Office of General Counsel (OGC) filed its response in opposition to Gunderson's motion on August 20, 2007. On September 12, 2007, the Commission issued its Order Denying Motion to Lift Temporary Suspension and Directing Hearing. At an October 1, 2007, prehearing conference, OGC requested leave to file a motion for summary disposition. Leave was granted, pursuant to 17 C.F.R. § 201.250(a).

OGC filed its Motion for Summary Disposition and For an Order Permanently Disqualifying Gunderson From Appearing and Practicing Before the Commission, Including Statement of Points and Authorities (Motion), on October 31, 2007.² Gunderson filed his Brief in Further Support of Respondent's Petition to Lift Temporary Suspension and narrative with three exhibits on December 7, 2007 (Response).³ OGC filed its Reply in Support of Motion for Summary Disposition and For an Order Permanently Disqualifying Gunderson From Appearing and Practicing Before the Commission on December 13, 2007 (Reply).

Express, Inc., Richard A. Altomare, and Chris G. Gunderson, June 29, 2007, at 1-2.) A hearing on the motion is currently scheduled for January 11, 2008.

² The Motion has eleven exhibits: Exhibit 1 is the Complaint, dated March 24, 2004, the Commission filed in the Civil Case; Exhibit 2 is the Temporary Restraining Order issued in the Civil Case on March 24, 2004; Exhibit 3 is an Order Extending TRO issued in the Civil Case on April 19, 2004; Exhibit 4 is the Memorandum of Law of Defendants Universal Express, Inc., Richard A. Altomare and Chris G. Gunderson in Opposition to Plaintiff's Motion for Summary Judgment filed on November 13, 2006, in the Civil Case; Exhibit 5 is Gunderson's August 18, 2006, Declaration of Chris Gunderson filed in the Civil Case (excluding exhibits); Exhibit 6 is Gunderson's Supplemental Declaration of Chris Gunderson in Further Support of USXP, Richard A. Altomare and Chris G. Gunderson's Motion for Partial Summary Judgment and in Opposition to Security (sic) and Exchange Commission's Motion for Partial Summary Judgment, filed in the Civil Case on November 13, 2006; Exhibit 7 is the February 21, 2007, Opinion and Order in the Civil Case granting the Commission's Motion for Partial Summary Judgment (see also SEC v. Universal Express, Inc., et al., 475 F. Supp. 2d 412 (S.D.N.Y. 2007)); Exhibit 8 is the Final Judgment Against Universal Express, Inc., Richard A. Altomare and Chris G. Gunderson, issued on March 8, 2007, in the Civil Case; Exhibit 9 is Plaintiff's Motion for Entry of Civil Contempt Against Defendants Universal Express, Inc., Richard A. Altomare, and Chris G. Gunderson filed on June 29, 2007, in the Civil Case; Exhibit 10 is the August 30, 2007, Order and Opinion issued in the Civil Case granting the Commission's motion to appoint a receiver; and Exhibit 11 contains press releases issued by Universal Express, Inc., from June 25, 2007, to August 30, 2007. Motion Exhibits 1-11 are admitted into evidence.

³ Exhibit A is a collection of articles discussing naked short selling, and Exhibit B is a collection of sample press releases on naked short selling issued by USXP's President and Gunderson. Response Exhibits A and B are irrelevant to this proceeding and are not admitted into evidence. Gunderson's request for an evidentiary hearing in Exhibit C is moot based upon the instant proceeding, pursuant to Rule 250 of the Commission's Rules of Practice.

Pursuant to Rule 102(e)(3)(iv) of the Commission's Rules of Practice, Gunderson is precluded from contesting any findings made against him or facts admitted by him in the underlying Civil Case. Thus, the district court's findings of fact and conclusions of law, discussed throughout this Initial Decision, are binding upon Gunderson.

SUMMARY DISPOSITION

Rule 250(a) of the Commission's Rules of Practice provides that, after a respondent has filed an answer and documents have been made available to the respondent for inspection and copying, a party may make a motion for summary disposition as to any or all allegations of the OIP against a respondent. 17 C.F.R. § 201.250(a). The facts of the pleadings of the party against whom the motion is made shall be taken as true, except as modified by stipulations or admissions made by that party, by uncontested affidavits, or by facts officially noticed pursuant to Rule 323 of the Commission's Rules of Practice. 17 C.F.R. § 201.323. An administrative law judge may grant a motion for summary disposition if there is no genuine issue with regard to any material fact and the moving party is entitled to summary disposition as a matter of law. 17 C.F.R. § 201.250(a)-(b).

FINDINGS OF FACT

This Initial Decision is based on the parties' filings of October 31, December 7, and December 13, 2007. I applied preponderance of the evidence as the standard of proof. Steadman v. SEC, 450 U.S. 91, 102 (1981); see also William R. Carter, 47 S.E.C. 471, 472 n.3 (1981) (applying preponderance standard to a proceeding under Rule 2(e) predecessor to Rule 102(e)). All arguments and proposed findings and conclusions that are inconsistent with this decision were considered and rejected.

Gunderson is a licensed attorney practicing under the laws of New York and has served as in-house counsel for USXP, a publicly-traded Nevada corporation, since 1995. (Motion Exhibit 7 at 2-3.) Between April 2001 and January 2004, the court found USXP to have issued more than 500 million shares pursuant to questionable written agreements prepared by Gunderson, exchanging stock purportedly for consulting services. (Motion Exhibit 7 at 4.) During this time, the court found that USXP did not file any registration statements except for two Form S-8 documents, supposedly registering a combined total of 50 million shares. (Id.) When questioned about the legality of issuing certain shares by USXP's transfer agent, Gunderson wrote an opinion letter stating that the shares were properly registered in compliance with USXP's stock option plan, but they were not. (Motion Exhibit 7 at 5.)⁴ Furthermore, the stock option plan, to which Gunderson referred, only authorized up to 104,167 options due to a 1997 reverse stock split, far short of the 500 million shares Gunderson states were registered pursuant to the plan. (Id.) In fact, the court was unable to find any evidence that these shares

⁴ The district court found, "The 1994 Stock Option Plan ('Option Plan') has been attached to the bankruptcy reorganization plan, judicially approved in February 1994, of Universal Express's previous incarnation, Packaging Plus Services, Inc. The Option Plan authorized the company to issue shares upon the exercise of an option to purchase by 'Officers, directors, employees, consultants, franchisees and professional advisors of the Company.'" (Motion Exhibit 7 at 5.)

were issued pursuant to the subject S-8 filings, leading the court to conclude that, during this time period, no valid registration statement was ever filed by USXP. (Motion Exhibit 7 at 19.)

The court also found that Gunderson engaged in a fraudulent scheme to defraud investors when USXP issued several materially false or misleading press releases that Gunderson himself either drafted or edited and then reviewed and approved prior to release. (Motion Exhibit 7 at 8.) These press releases addressed misleading or false funding commitments, revenue sources, and/or potential purchases. (Motion Exhibit 7 at 22-25.) The court rejected Gunderson's claim that he acted in good faith, thereby lacking the requisite scienter to commit securities fraud, pursuant to Section 10(b) of the Exchange Act, because he failed to "identify any basis in truth that [he] discovered or relied on" during the process of verifying the subject press releases. (Motion Exhibit 7 at 23.) The court additionally rejected Gunderson's argument that he acted in good faith because he harbored his own understanding of certain words used in the press releases, pointing out that he did not offer any evidence demonstrating the "reasonable investor" would share his particular understanding. (Motion Exhibit 7 at 24.)

CONCLUSIONS OF LAW

Once a petition to lift a temporary suspension has been filed in accordance with Rule 102(e)(3)(ii) of the Commission's Rules of Practice, the Commission may, after opportunity for a hearing, censure or temporarily or permanently disqualify the petitioner from appearing or practicing before the Commission.⁵ The Commission has the burden to show that the district court, a court of competent jurisdiction, has permanently enjoined the petitioner from violating or aiding and abetting, or found the petitioner to have committed or aided and abetted, a violation of any provision of the federal securities laws or the rules and regulations thereunder. The violation must be found, or the injunction must be based on misconduct, in an action brought by the Commission. 17 C.F.R. § 201.102(e)(3)(i)-(iv).

OGC met its burden by submitting the final judgment of injunction showing that the district court, in an action brought by the Commission, found Gunderson in violation of Sections 5 and 17(a) of the Securities Act and Section 10(b) of the Exchange Act and Rule 10b-5 thereunder and permanently enjoined him from future violations of the same.

Since OGC has met its burden, the burden shifts to Gunderson to show cause as to why he should not be censured, or temporarily or permanently disqualified from appearing or practicing before the Commission. See 17 C.F.R. § 201.102(e)(3)(iv). Thus, the only remaining

⁵ According to Rule 102(f), "practicing before the Commission" includes, but is not limited to:

- (1) transacting any business with the Commission; and (2) the preparation of any statement, opinion, or other paper by any attorney, accountant, engineer or other professional or expert, filed with the Commission in any registration statement, notification, application, report or other document with the consent of such attorney, accountant, engineer or other profession or expert.

issues are whether Gunderson has shown cause, and if he has not, to determine the appropriate sanction.

Gunderson's Response seeks a deferred ruling on the grounds that due process prohibits the Commission from imposing the temporary suspension prior to a hearing and prior to the court of appeal's "de novo" review. (Response at 2-3.) Gunderson additionally includes a narrative setting forth his opinion of the Commission's position on naked short selling.

However, Gunderson's position, that the final judgment entered against him in the underlying Civil Case was in error and the Commission should take no action in this proceeding until the court of appeals rules on his appeal, is untenable. The Commission has held consistently that an appeal of an underlying permanent injunction is not grounds for delaying an administrative proceeding. Jose P. Zollino, 89 SEC Docket 2598, 2601 n.4 (Jan. 16, 2007) (quoting Joseph P. Galluzzi, 55 S.E.C. 1110, 1116 n.21 (2002)); Citadel Securities Corp., 82 SEC Docket 3249, 3253 (May 7, 2004) ("[A]n injunction is the act of a court of competent jurisdiction, and the fact that an appeal is taken does not affect the injunction's status as a statutory disqualification."); Charles Phillip Elliott, 50 S.E.C. 1273, 1277 n.17 (1992) (citing C.R. Richmond & Co., 46 S.E.C. 412, 414 n.11 (1976) (upholding statutory disqualification based on injunction under appeal)) (finding statutory disqualification based on conviction which had been appealed), aff'd 36 F.3d 86 (11th Cir. 1994) (per curiam); see also Robert J. Sayegh, 52 S.E.C. 1110, 1112 (1996) (upholding disqualification based on injunction during pendency of petition for rehearing stating that existence of petition "would not alter the 'factual' existence of the injunction 'and its public interest implications'").

In addition to his constitutional due process argument, which I do not credit, Gunderson's narrative sets forth his opinion of the Commission's position on naked short selling. However, it is not responsive to OGC's Motion, as it fails to address the issue currently before me, which is whether or not Gunderson may continue to practice or appear before the Commission.⁶ Accordingly, I find no genuine issue of material fact, and therefore, OGC is entitled to summary disposition as a matter of law. Thus, Gunderson has failed to show cause as to why he should not be sanctioned, and I am left only with determining the appropriate sanction.

SANCTIONS

OGC requests that Gunderson be permanently disqualified from appearing or practicing before the Commission. The instant findings and conclusions establish that Gunderson played an essential role in issuing 500 million unregistered USXP shares and issuing false or misleading press releases to the public.

⁶ Gunderson's due process argument alleges that the Commission has a conflict of interest in this administrative proceeding because of an alleged "pecuniary interest" in fees it received from the Depository Trust Clearing Corporation. (Response at 3.) OGC's Reply points out that the Commission has no pecuniary interest in whether Gunderson can practice and appear before it. (Reply at 2.) OGC further explains that the Section 31 transaction fees do not offset the amount of money available to the Commission and the Commission has no financial interest in attempting to increase securities trading volume. (Id. at 3-4.)

In enacting Rule 102(e), the Commission intended to “protect the integrity and quality of securities regulation and, by extension, the interests of the investing public.” Amendment to Rule 102(e) of the Commission’s Rules of Practice, 63 Fed. Reg. 57,164, 57,165 (Oct. 26, 1998); see also Herbert M. Campbell II, Esq., 83 SEC Docket 4000, 4009 (October 27, 2004).⁷

The Commission’s public interest factors are instructive in determining whether a sanction is appropriate under Rule 102(e). They include: (1) the egregiousness of the respondent’s actions; (2) the isolated or recurrent nature of the infraction; (3) the degree of scienter involved; (4) the sincerity of the respondent’s assurances against future violations; (5) the respondent’s recognition of the wrongful nature of his conduct; and (6) the likelihood of future violations. See Steadman v. SEC, 603 F.2d 1126, 1140 (5th Cir. 1979), aff’d on other grounds, 450 U.S. 91 (1981). No one factor is controlling. See SEC v. Fehn, 97 F.3d 1276, 1295-96 (9th Cir. 1996).

Here, Gunderson recklessly and repeatedly violated the antifraud and registration provisions of the federal securities laws by issuing hundreds of millions of unregistered shares over a period of nearly eighteen months as USXP’s chief lawyer. Gunderson’s conduct is especially egregious given that, in his position as General Counsel of USXP, he issued multiple false legal opinions ultimately enabling a scheme resulting in millions of unregistered shares being allowed into the hands of the investing public. Gunderson fails to provide any assurances at all against future violations because he fails to recognize the wrongfulness of his actions. Gunderson continues to represent that he has, “at all times, acted in good faith reliance on the orders of the Bankruptcy Court, the long-term provisions of the Reorganization Plan, confirmed by the Bankruptcy Court, and the immunities provided to the Company and its officers under the Bankruptcy Code.” (Response at 4.) Given the lack of appreciation for the wrongfulness of his conduct, Gunderson remains a threat to the investing public especially in light of the fact he remains a practicing attorney as General Counsel of USXP. In fact, the district court states, after hearing the relevant evidence and assessing Gunderson’s credibility, “[T]here is . . . much cause to expect future misconduct by Gunderson.” (Motion Exhibit 7 at 29.) Having considered the factors in their entirety, I find that it is in the public interest and necessary to preserve the integrity of the Commission’s procedures to permanently disqualify Gunderson from appearing or practicing before the Commission.

ORDER

It is ORDERED, pursuant to Rule 250(b) of the Commission’s Rules of Practice, that the Motion of the Office of General Counsel for Summary Disposition is GRANTED; and

It is further ORDERED that, in accordance with Rule 102(e)(3)(ii) of the Commission’s Rules of Practice, Chris G. Gunderson is hereby permanently disqualified from appearing or practicing before the Commission.

⁷ Rule 102(e) was codified in Exchange Act Section 4C(a)(1)-(3) in accordance with the Sarbanes Oxley Act of 2002.

This Initial Decision shall become effective in accordance with and subject to the provisions of Rule 360 of the Commission's Rules of Practice, 17 C.F.R. § 201.360. Pursuant to that Rule, a party may file a petition for review of this Initial Decision within twenty-one days after service of the Initial Decision. A party may also file a motion to correct a manifest error of fact within ten days of the Initial Decision, pursuant to Rule 111 of the Commission's Rules of Practice, 17 C.F.R. § 201.111. If a motion to correct a manifest error of fact is filed by a party, then that party shall have twenty-one days to file a petition for review from the date of the undersigned's order resolving such motion to correct manifest error of fact. The Initial Decision will not become final until the Commission enters an order of finality. The Commission will enter an order of finality unless a party files a petition for review or motion to correct manifest error of fact or the Commission determines on its own initiative to review the Initial Decision as to a party. If any of these events occur, the Initial Decision shall not become final as to that party.

Robert G. Mahony
Administrative Law Judge