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February 23, 2011

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)(ARL)

Dear Judge Bianco:

I represent plaintiff in this action and respond to defendants' letter opposing amendment of the complaint. Defendant has given the Court no basis in law or logic to deny the amendment. First, Mr. Zabell faults me for misrepresenting his failure to consent, which he promptly refuses to give in a letter opposing the motion. He also faults me for not sticking to an earlier proposed amended complaint that he did not consent to. These are not reasons to deny the motion and are moot in light of Mr. Zabell's written refusal to give consent, which I asked for on February 7.

Second, Mr. Zabell complains that the original omission of the new causes of action was strategic. This is untrue, and even if it were true, amendment is precisely what is available to a plaintiff who decides to change strategy. In point of fact, however, the original omission of the state human rights law causes was an oversight on my part based on my having forgotten about the caps. The omission of the minimum wage claim was a pleading error since the minimum wage issue is mentioned in the original complaint.

Third, there is no prejudice to the defendants in my bringing the claims now. The facts of the sex-stereotyping claim and the minimum wage claims were mentioned in the original complaint, but not fleshed out as separate causes of action. Therefore, defendants were on notice as to each of these new delineated causes of action and cannot claim prejudice. The prejudice the defendant complains about – allegedly not getting adequate discovery – is something that will be addressed by the Court separately. Of course, if Mr. Zabell would call to confer on each of his objections to my production, as the rules require and as I have asked him to now four times, he might get discovery faster than waiting for the conference scheduled for March 1, at which point my position will be that he must make an effort to meet and confer rather than send me letters.

Fourth, defendant disputes various allegations of fact made in the proposed amended complaint. However disagreeing with an averment of fact is not a basis to deny the amendment of the complaint. Rather, defendant can deny the allegation in an answer. This includes the allegation about the video described in the proposed amended complaint. For the record, after requesting that video several times and asking why it was not identified in the initial disclosures, I finally got it in the mail today. However, the allegation that the defendant lost custody of the tape is still made in good faith - it is a centrally important piece of evidence and the defendants did not have a copy of it until now. On February 9, 2011, Mr. Zabell wrote to me stating that the "Defendants are seeking to obtain a copy of the video tape . . . as it is not within our possession." Defendant is lucky they found the tape, because spoliation sanctions would likely have been imposed if they had not. Nevertheless the allegation that the defendant lost custody of the tape is still true, and if defendants believe otherwise, they can deny the allegation in an answer.

Finally, Mr. Zabell faults me for allegedly "reneging" on a plan to withdraw certain causes of action seeking overtime pay. This is false. Mr. Zabell provided me - and the Court - with documents purporting to show that the defendant was entitled to a certain defense as a matter of law. After a pre-motion conference at which the Court stated that this defense could not likely be decided on a pre-answer motion, the defendants decided not to make the motion. In a conversation I had with Mr. Zabell, I told him that after seeing tax and banking records - which still have not been produced, despite that they were identified in defendants' initial disclosures - if I was persuaded that the defendant would prevail on its overtime defense, I would withdraw the overtime claims, but not the claim for unpaid minimum wage. I stand by that promise, but still have not seen the records Mr. Zabell promised to produce.

For these reasons, defendants' objections should be overruled and the complaint be permitted to be amended.

Sincerely,

A handwritten signature in black ink, appearing to read 'G. Antollino', with a long horizontal flourish extending to the right.

Gregory Antollino

Cc: Saul Zabell by elf