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April 12, 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 I write in response to defense counsel's response to plaintiff's motion to compel discovery, and related matters.

Initially, this motion is procedurally proper. Mr. Zabell refers to an alleged statement made by the Court at the last tele-conference in which discovery should be resolved by "formal motion practice." I do not recall what words you used at the last conference about discovery motions, but I doubt that you were inviting voluminous submissions on discovery issues in this case that you already expressed was taking up more time than expected. This correspondence *is* "formal motion practice." Your individual rules require that discovery motions follow local civil rules 37.3 and 6.4, which limit discovery motions to three pages in letter form. Defense counsel should be aware of these rules in making his anticipated motion to compel.

1. Names and addresses of co-workers at the defendant company for the summers of 2009 and 2010.

Plaintiff has demanded this information to inquire into statements and behavior that was regularly tolerated in the workplace. Defendant's sole argument objecting to the relevance of this demand is that plaintiff has not identified the persons who participated the behavior, and that plaintiff should therefore not be entitled to the information. Unfortunately for the Court, Mr. Zabell's premise – that plaintiff did not identify the employees who engaged in the behavior – is a misrepresentation. Attached as "Exhibit 1" is the list of many employees that plaintiff indicated, in a response to an interrogatory, engaged in the behavior described in the complaint. What is more important, even if plaintiff had not made such identification, the objection is irrelevant: an employee need not *engage* in behavior in order to *observe* someone else's behavior. Therefore, the information could lead to admissible evidence. Fed. R. Civ. P. 26(b)(1).

Now, as to this question of defense counsel's readiness to represent employees at the company: The Court should admonish defense counsel not to do this as it would be in defendants' interest alone, would violate the disciplinary rules, and would impede plaintiff's attempt to interview non-party witnesses. Defense counsel stated categorically in a letter to me on April 7 that, "Moreover, inasmuch as these individuals *are represented by counsel*, you would be precluded from contacting them directly." See Exhibit 2, Letter of Saul Zabell, April 7, 2011 p.2 (reference to initial disclosure 27) (emphasis added). "Inasmuch as" means "because of the fact that," and the sentence would seem to indicate that these employees are currently, in fact represented by counsel. If Mr. Zabell really meant "inasmuch as" to mean "if," then it evidences an intention to obfuscate and confuse me as to his representation of these employees, or to represent these employees in the future, and to impede my contact with them. This shows an appearance of impropriety that should not be countenanced.

Defense counsel very coyly states, "the undersigned has not *actively* solicited any employee of Defendants. However, should an employee request representation in the course of this proceeding, we intend to undertake such representation." (Italics supplied.) What does "actively solicit" mean? I suggest that either one solicits or one does not. In my opinion, defense counsel has either previously or will in the future "indirectly solicit" representation of these employees. If the defendant himself conveys to the employees that defense counsel is willing to represent them, or if defendant pays for the representation, that would be solicitation, no matter how indirect, a violation of the rules, and defense counsel should be admonished not to engage in such an appearance of impropriety.

2. Names and addresses of customers with whom plaintiff took skydives with in the summers of 2009 and 2010.

Defendant does not deny that the customer names and addresses are not confidential (per the decision of Judge Mukasey, noted in my letter), nor burdensome to produce. Defendant ignores my contention that what the customers observed the behavior in the workplace is not irrelevant, and could lead to admissible evidence. That is all we much show. Fed. R. Civ. P. 26(b)(1). The information must therefore be produced.

Plaintiff has also asked for one complaining customer and her complaining boyfriend's (referred to as "Steve") contact information. The defendant has had this information since the beginning of discovery, as the customer waivers are kept on file. The defendant produced the waiver executed by Rosanna and Steve and intentionally omitted the page containing their contact information. Perhaps defense counsel is indirectly soliciting their retention of them. Whatever the reason, the delay is unexplained and inexcusable.

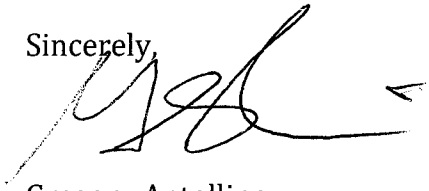
3. Plaintiff's Jump Logs.

Defendants have identified this information on their initial disclosures but refuse to tender it. They have offered no reason why the information would be confidential, and do not address, let alone refute, Judge Mukasey's opinion that customer information is not confidential. Additionally, they do not deny that these logs have bearing on plaintiff's minimum wage claim. While the federal claim might be withdrawn, the state minimum wage claim is not governed by federal law. See 12 NYCRR § 142-2.1; Matter of Cuomo v. Dreamland Amusements, Inc., 880 N.Y.S.2d 223 (Sup.Ct. NY County 2009). The jump logs therefore must be produced.

4. Defendant should be required to schedule depositions forthwith.

Defendants cannot hold discovery hostage because of a motion to compel that they will bring "shortly." Plaintiff plans to be in New York in late May, and the defendant should be required to choose a date in which to depose him now. If not, they should waive priority. I concede priority in the abstract, but the defendant cannot cling to it while simultaneously refusing to schedule plaintiff's deposition.

Sincerely,



Gregory Antollino

Cc: Saul Zabell by ecf

INTERROGATORY #1: Set forth with particularity and detail any and all efforts on the part of Plaintiff to lodge complaints of alleged gender and/or sexual orientation discrimination with any managerial, supervisory or Human Resources employees of Defendant, from 2001 through the present.

Plaintiff objects on the grounds that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence and calls for a narrative covering a period of nearly ten years.

INTERROGATORY #2: Identify all individuals employed by Defendant who partook in purported banter or conversation with Defendant's customers and/or clients as described in ¶ 18 of Plaintiffs Complaint.

Ray Maynard
Carmen M. Villamil Burgos
Duncan Shaw
Edward Reiter
Joe Fortune
Jordan Miles
Marko Markovich
Lauren Callanan
Meghan Ayers
Curt Kellinger
Jerry Hannon
John Sherman
Rich Winstock
Ben Lowe
Brett Nock
Michael Gocke Sr.
Pat Newman
Shaun Tierney
Wayne Burell
Alley Rogers
Brian Petretti
Janeen Tierney
Kevin Gilbert
Jason Lucas
Pilot Jim
John Ciatti? (Campbell)
Telly Dorizas
"Willie"
"Alex"
Others whose names are not known

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April 7, 2011

***VIA* FIRST CLASS MAIL**
& ELECTRONIC MAIL

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your April 5, 2011 email. We respond to each open issue as follows:

Initial Disclosure #15:

This information was previously provided to you in connection with our March 24, 2011 letter.

Initial Disclosure #24:

While Defendant Altitude is in possession of its own jump log, this information is not relevant in the case at bar. Despite your assertions to the contrary, Defendants are not under any duty to produce these documents. According to the 1993 Committee Note of FRCP 26, the listing of documents does not waive objections to their production, even on grounds of relevance. ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.") Committee Note, 146 F.R.D. at 631. Inasmuch as you have failed to articulate how Defendant Altitude's entire jump log for 2010 is relevant to Plaintiff's claims of discrimination, Defendants' objections are well founded. Based upon the foregoing, Defendants will not produce this information absent court Order.

Initial Disclosure #26:

This information was previously provided to you in connection with our March 24, 2011 letter.

Initial Disclosure #27:

While Defendant Altitude is in possession of the contact information for its employees, this information is not relevant in the case at bar. Despite your assertions to the contrary, Defendants are not under any duty to produce this information. According to the 1993 Committee Note of FRCP 26, the listing of documents does not waive objections to their production, even on grounds of relevance. ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.") Committee Note, 146 F.R.D. at 631. Inasmuch as you have failed to articulate how a list of every single employee, along with their contact information, is relevant to Plaintiff's claims, Defendants' objections are well founded. Moreover, inasmuch as these individuals are represented by counsel, you would be precluded from contacting them directly. Based upon the foregoing, Defendants will not produce this information.

Customer Contact Information:

Similar to the above discussion concerning Defendants' employees, the identity of every single passenger that Plaintiff jumped with is irrelevant to Plaintiff's claims of discrimination. By Plaintiff's own admission, as discussed in Plaintiff's Complaint, the only relevant passenger in the case at bar is "Rosanna" as Plaintiff alleges it was her complaint that was the impetus behind Plaintiff's termination. As stated in your April 5, 2011 email, you have no proof that any of these individuals possess relevant information. Rather, you state they "may have discoverable information." Such speculation and conjecture does not meet the burden necessitating the production of every single passenger who jumped with Plaintiff. Absent a court Order or convincing case law, Defendants will not produce this information.

Depositions:

Regarding Plaintiff's deposition, in order to avoid having to recall Plaintiff for additional deposition dates, and to avoid the added expense imposed upon him for having to fly to New York multiple times, Defendants will not depose Plaintiff until paper discovery is substantially complete. Inasmuch as you have already conceded deposition priority, Defendant Maynard will only be deposed after Plaintiff.

Concerning Mrs. Maynard, your email references a subpoena you have sent out for service. We have not been provided a copy of this subpoena previous to your attempts to serve Mrs. Maynard. Moreover, while you state in your email a copy of the subpoena is attached, no such attachment is found in the email. Kindly remedy this situation so that we may file a motion to quash.

Zabell & Associates, P.C.
EMPLOYMENT COUNSELING, LITIGATION, LABOR & BENEFITS LAW

Regarding the marital privilege, it is unlikely we would agree to Mrs. Maynard's deposition in the event this action was discontinued against Mr. Maynard. However, we will broach that topic with our client.

Please do not hesitate to contact me should you have any further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: client