

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DONALD ZARDA,

**MEMORANDUM IN
OPPOSITION**

Plaintiff,

10-cv-04334-JFB -ARL

-against-

**ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

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In some seventeen years of practice, I've never seen quite anything like this: An defense attorney so implacable, so impossible to talk to or negotiate with, so intent, on the one hand, in obstructing the flow of discovery from plaintiff's perspective; yet on the other hand, so intent on burdening the court with demands that are irrelevant, overbroad and patently abusive. Notably, Mr. Zabell has been sanctioned in discovery before - in state court, of all places, where discovery abuses are routinely tolerated. Cioffi v. Habberstad, 22 Misc. 3d 839, 845 (N.Y. Sup. Ct. 2008). In that decision, the judge sanctioned Mr. Zabell for conduct that was "unprofessional, condescending, rude, insulting and obstructive." Id.

While I can handle unprofessional, condescending and rude on my own, I cannot handle obstructive, and nor should the Court. And although this is defendant's motion to compel, the motion is obstructive and is being used to delay depositions and harass plaintiff with unnecessary demands that have no bearing on the central questions in this case: whether it was appropriate to deny plaintiff

minimum wage and to fire plaintiff for telling a customer that he is gay. In no federal case I have ever litigated has no deposition taken place *eight months* after the complaint was filed - notwithstanding plaintiff's eagerness to begin same, and notwithstanding the issuance of four subpoenas - three of which were ignored, and one of which defendant wants to quash. Never has an adversary failed to provide me with such simple, basic items in an employment discrimination and wage case as names and addresses of witnesses and work records. Yet, Mr. Zabell finds it necessary, to exceed your individual and the local rules to file a 176-page motion for such minutia, overbroad and irrelevant as stock certificates and bank records; so nonsensical as demanding admissions for infelicitously written demands that could easily be rephrased at a deposition; and for interrogatories that exceed the federal rules that, too, could easily be asked answered at a deposition of plaintiff that defendant refuses to take.

The Second Circuit has indeed held that resolution of these discovery demands are within the discretion of this Court, and there is nothing about this case that is so extraordinary that it requires some 186 demands and so much Court time. You have already made plain on the record that you do not understand why a relatively simple matter - at least as compared to other complex civil matters that appear before you - requires such hand holding. The answer is simple: Mr. Zabell has gone beyond the pale both in obstructing discovery that plaintiff is entitled to, and is abusing discovery against plaintiff in retaliation for plaintiff's filing this lawsuit. He is also defending his bad advice to his client that he could fire him for telling a customer that he is gay. Mr. Zabell has set the tone of this litigation by

refusing to cooperate in discovery, scorching the earth and refusing to choose battles. You should set the tone for the future of this case by denying the motion outright.

For simplicity's sake, I ask that this memorandum also be deemed a declaration under penalty of perjury insofar as any statement about the production of documents and responses served on my adversary is true within my own knowledge.

1. Plaintiff's Response to Defendants' First Set of Interrogatories:

Plaintiff amended his interrogatories on April 7, 2011, as attached hereto as Exhibit A that I emailed to defense counsel on April 8. (Exhibit B.) It is unclear to me, reading Mr. Zabell's papers, that they were received by him. These amended responses are adequate and if defense counsel wants more information, he can schedule a deposition.

- A. Interrogatory No. 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."

Compelling this demand should be rejected. First, as requested it is temporally overbroad. Plaintiff has no intention of bringing his 2001 tenure into the case as material or relevant evidence unless, over plaintiff's objection - an objection I am sure the Court will sustain - the defendant does. The statute of limitations for anything in 2001 has long passed and defense counsel refused to limit the interrogatory.

Second, the use of the word “with particularity” is vague makes the interrogatory abusive. How particular is “with particularity”? It is impossible to answer the question with this condition.

Third, the defendant has a small pool of employees, and upon information and belief, there are no “managers” or “human resources employees.” Other than the owner, defendant Raymond Maynard, what is the defendant talking about when he refers to managerial, supervisory or human resources employees? While this boilerplate interrogatory might be appropriate in a case involving large, publicly traded company, in this case, the defendant need only ask plain language questions at a deposition (with specific individuals) in order to get the information that might be relevant. Instead, he deems it necessary to delay the deposition and ask the question in a vague, stilted, temporally overbroad, legalistic manner and wastes the court’s time in seeking the demand be compelled.

Fourth, effectively, plaintiff has answered this question in response to the subparts of interrogatories 5 and 6, where plaintiff answers the questions as to what actions he took “in response” to specific instances of discrimination. Defendants’ attempt to compel an answer to this wooden question is an exercise in pointless formality. The question is flawed and if, after reading the answers to interrogatories 5 and 6 the defendants have any further questions, they can easily ask them in a deposition.

- B. Interrogatory No. 3: "Set forth with particularity and detail the basis of Plaintiff's belief that "[i]t was known at work that [P]laintiff is gay and he was open about it," as alleged in ¶ 21 of Plaintiff's Complaint."

Plaintiff truthfully answered this question and further response is unwarranted; plaintiff's answer is intelligible and straightforward. Defendant's demand for further detail is frivolous. Plaintiff's belief is his belief; the reasons for his belief are his reasons, whether they are simple or complex. If the defendant wants to ask follow up questions, then it should take a deposition

- C. Interrogatory number 5. **"Set forth with particularity and detail each and every act of alleged gender discrimination against Plaintiff in connection with Plaintiff's employment with Defendant from 2001 through the present, including but not limited to [subparts]."**

Plaintiff in his amended response has incorporated his answer as to interrogatory number 4 into number 6. The interrogatory is therefore answered.

- D. Interrogatory No. 6: Set forth with particularity and detail each and every act of alleged sexual orientation discrimination against Plaintiff in connection with Plaintiff's employment with Defendant from 2001 through the present, including but not limited to [subparts].

The motion to compel a further answer should be rejected. Even if my objections are overruled, the questions are answered with particularity. Defendants do not have the right to a statement "and nothing else" at the end of the answer in the absence of a question that asks that. Counsel can probe at a deposition.

- E. Interrogatory No. 10: **"Identify with particularity and detail any and all of Plaintiff's accounts, profiles, memberships or postings on all social networking websites or internet communities and forums, from 2004 through the present"**

Plaintiff answered this question in his supplementary responses that “Without waiving this objection, plaintiff has a membership with Facebook and dropzone.com for which his screen-name is jumper410.” This answers the question, even considering the gross overbreadth of the inquiry: 7 years.

While there is nothing more for plaintiff to answer here, plaintiff’s privacy objections are well placed and will be discussed below in connection with defendants’ attempt to get his Facebook contents.

- F. Interrogatory No. 11: "Identify with particularity and detail any and all email addresses and/or instant message screen names utilized by Plaintiff from 2004 through the present."

Plaintiff has answered the interrogatory in the amended interrogatories. “Without waiving the objection, don@donzarda.com and dgzarda@gmail.com. Plaintiff does not use IM’s.” This answers the question.

- G. Interrogatories Nos. 14, 15, 16, 17:

Plaintiff objects on the grounds that these interrogatories exceed what is allowed under Rule 33. In one part of their motion, the defendant argues that words should be afforded their common meaning, yet in another part, out of another side of their mouths defendants argue that the word “subpart” does not mean “subpart” and that a subpart is really a part of a whole so long as it is sufficiently related. This is nonsense and, in addition to common sense, the overwhelming authority holds that a subpart is a subpart and is counted toward the whole. See *Wildearth Guardians v. Public Serv. Co. of Colorado*, No. 09-cv-01862-ZLW-MEH, 2010 U.S. Dist. LEXIS 138972, 2010 WL 5464313, at *2-4 (D. Colo. Dec. 29, 2010)(discussing interrogatory subparts as discrete and separate questions); *Estate of Fahner v.*

Wayne Cnty., Michigan, No. 08-CV-14344, 2009 U.S. Dist. LEXIS 112167, 2009 WL 4644788, at *2 (E.D. Mich. Dec. 3, 2009)(striking extraneous subparts), aff'd, 2010 U.S. Dist. LEXIS 138069, 2010 WL 374174 (E.D. Mich. Jan 25, 2010); King Pharmaceuticals, Inc., v. Eon Labs, Inc., 2008 U.S. Dist. LEXIS 53884 (EDNY July 15, 2008); Safeco of America v. Rawstron, 181 F.R.D. 441, 442-46 (C.D. Cal. 1998).

In this case, not only are there subparts to each question, but they require plaintiff to answer subparts to each instance of discrimination that he alleges. This far exceeds the limit in Rule 33. Because subparts are subparts, and because the defendant has not moved to exceed the subpart limit, nor shown why this is an extraordinary case that would require responses to interrogatories in excess of what is presumptively reasonable, these objections should be sustained.

Additionally, each of 16 and 17 of these interrogatories is overbroad insofar as it seeks detailed irrelevant information since 2004, which is not calculated to lead to admissible evidence.

2. Plaintiff's Response to Defendants' First Request for Documents:

- A. Requests Nos. 12, 13, 14, 15, 16, 17: "Produce any and all documentation evidencing, referring, or supporting Defendant's purported discrimination against Plaintiff as alleged in 20, 21, 22, 23, 24, 25 of Plaintiff's Complaint, from 2004 through the present."

Plaintiff properly objects to these on the grounds that they are duplicative of demand number 9, which seeks documentation concerning "each and every allegation contained in Plaintiff's Complaint." Imagine I were to ask a witness on the stand what movies he saw during the week of May 25, and he were to give me a truthful and complete answer. If I then asked, "what movies did you see on May 25; what movies

did you see on May 26; what movies did you see on May 27," and so on, the Court would sustain an objection and consider the question asked and answered and cumulative.

What defendant has done here is to demand documents relating to the entire complaint, then make demands relative to each paragraph of the complaint. This is a ridiculous, tedious waste of time for any attorney and the Court. Plaintiff has gathered every imaginable document that may have any bearing whatsoever on any allegation in the complaint whatsoever and tendered it. The additional questions that seek documents responsive to each individual paragraph are therefore redundant, duplicative, and objectionable.

B: Request No. 32: "Produce any and all documentation evidencing Plaintiffs accounts, profiles, and/or memberships on all social networking websites or internet communities and forums, including but not limited to Facebook, Myspace, Twitter, and Friendster, from 2004 through the present."

and

Request No. 33: "Produce any and all documentation evidencing Plaintiffs utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, Friendster, and LinkedIn internet communities and internet forums, including but not limited to postings, messages, uploaded photographs, video and audio, from 2004 through the present."

These are essentially the same demand, and, as stated in plaintiff's amended interrogatories, plaintiff is a member of dropzone.com, and his postings on that forum are public and available to the defendant or anyone else in the world. Facebook, the only other social networking site that plaintiff uses is another thing altogether. Facebook is a private social networking site in which plaintiff has restricted his privacy settings. If an individual who is not admitted to plaintiff's

circle of Facebook friends tries to see any postings on his Facebook wall (see www.facebook.com/wingsuit.pilot), she will not be able to see a thing. Only upon asking permission and plaintiff's accepting the request will a person be able to see anything on plaintiff's Facebook wall. While some Facebook users can opt to allow any person in the world to view his entire Facebook universe, or only part of it, Don Zarda uses the most restrictive settings, and no one visiting his Facebook page who is not a Facebook 'friend' can see any of his postings or messages.

The idea that a plaintiff in a lawsuit must turn over private information in a Facebook page – which is essentially a modern day conversation among friends and family – has never been allowed by any court. The cases offered by the defendant do not allow them unfettered access to plaintiff's Facebook any more than they would allow a defendant access to love letters, or permission to eavesdrop on him in private settings. Bass v. Miss Porter's School, 2009 WL 3724968, *1 (D.Conn. 2009) allowed the defendant to tender Facebook messages *in camera* to determine if they were relevant. In this case, plaintiff has already tendered any Facebook messages that concern this lawsuit or its allegations without the *in camera* middle step. Therefore Miss Porter's ruling has been complied with. In Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y.Sup. 2010), the defendant made a special showing that is not present in this case. In Romano, the Court allowed the defendant access to the private areas of plaintiff's Facebook account only *after* the defendant showed that the publicly available areas demonstrated that the plaintiff was not injured in the manner she had alleged in the lawsuit. In this case, defendant makes no showing that plaintiff has ever made any statement in a public forum that contradicts the

allegations in this lawsuit, therefore there is no showing that would allow any further discovery into plaintiff's Facebook account. Finally, U.S. v. Lifshitz, 369 F.3d 173 (2d Cir.2004) involved an internet search of a person convicted of child pornography, and the Circuit held that a probationer had a diminished expectation of privacy as a result of said conviction, for which the defendant was then on probation. It's an embarrassing case for the defendant to cite in a civil case such as this, and is wholly inapplicable. See also Rozell v. Ross-Holst, 2006 U.S. Dist. LEXIS 2277 (S.D.N.Y. Jan. 20, 2006) (limiting discovery of electronic communications and discussed infra).

For these reasons, these demands are overbroad, and production of everything in plaintiff's Facebook universe should be denied.

- C: Request No. 34: "Produce any and all documentation evidencing Plaintiffs utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, LinkedIn, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding Plaintiffs expression of an emotional feeling, from 2004 through the present."

This demand is overbroad for the same reasons as set forth in point II B, and additionally is vague insofar as it would be impossible to define "emotional feeling," which presumably constitutes anything posted, since the whole purpose of a social network is to engage in communal exercise of online friendship, which is a quality rooted in emotion and feeling. As Chief Magistrate Francis found in Rozell v Ross-Holst, 2006 U.S. Dist. LEXIS 2277, 2006 WL 163143 (S.D.N.Y. Jan. 20, 2006). "To be sure, anything that a person says or does might in some theoretical sense be reflective of her emotional state. But that is hardly justification for requiring the production of every thought she may have reduced to writing or, indeed, the

deposition of everyone she may have talked to." Id. at 3-4. Since this demand is overbroad and is effectively the same as II B, it should be denied.¹

D: Requests Nos. 35: "Produce any and all documentation evidencing Plaintiffs utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding Plaintiffs employment with Defendant, from 2004 through the present."

and

Requests Nos. 36: "Produce any and all documentation evidencing Plaintiffs utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding any of the allegations contained in Plaintiffs Complaint, from 2004 through the present."

Notwithstanding plaintiff's objections, he produced all materials reasonably touching upon plaintiff's complaint or his employment with the defendant. Notably, in the Miss Porter's case cited by the defendants, the district judge allowed the plaintiff the opportunity to present the Facebook postings in camera so that she could determine which postings, if any, were potentially relevant to the case. Plaintiff has skipped this step and has tendered scores of pages of plaintiff's postings and messages on Facebook that are responsive these demands. Since there is nothing more to tender, the motion to compel the demand should be denied.

Request No. 51: "Produce any and all documentation referencing Plaintiffs employment status subsequent to his employment with Defendant, including but not limited to (a) personnel files, (b) job description, (c) applications, (d) resumes, (e) references, (f) recommendations, (g) diplomas, (h) salary and proof of wages and (i) and other documents provided during Plaintiff's initial application for a position, from July 2010 through the present."

¹ Plaintiff has tendered the few Facebook communications concerning this case, which contain references to plaintiff's anger and upset.

This demand is in part non-sensical and has otherwise been complied with. Plaintiff has elected to mitigate his damages by increasing his course load at university, though he has had one weekend job and continues to work at the business for which he is a partial owner, Plush Investments dba Advanced Skin Fitness. We have tendered earnings information, and plaintiff's 2010 taxes were just filed, so we will tender that shortly. We have also tendered a release of information from plaintiff's University, Embry Riddle. There's nothing more that exists and aside from the 2010 information, defendant has not shown otherwise. Therefore, the demand seeks nothing that plaintiff hasn't produced (or will shortly). The language about "personnel files (b) job description, (c) applications, (d) resumes, (e) references, (f) recommendations, (g) diplomas and other documents provided during Plaintiff's initial application for a position" does not exist, except for the resume, which I will tender shortly.

E: Request No. 53: "Provide a properly executed HIPAA Compliant Medical Authorization for any and all health care providers Plaintiff has treated or consulted with during his term of employment with Defendant, including but not limited to therapists, psychologist, psychiatrists and /or other mental health practitioners."

and

Request No. 83: "Produce any and all documentation supporting any alleged emotional damages suffered by plaintiff from 2004 through the present."

and

Request No. 84: "Produce all documents concerning, relating to and/or regarding consultation with and/or treatment by any medical and/or mental health professional concerning and/or regarding Plaintiffs allegations and/or claims for emotional distress and psychological injuries."

As it happens, plaintiff has not seen any such practitioner, though perhaps he would like to. However, he is terrorized by the prospect that whatever he says to his therapist will be examined by the defense. Notwithstanding this, he is not claiming anything aside from garden-variety emotional damages that could be attributed to an incident of employment discrimination, and the law of this Circuit will allow him to keep this information private. *In re Sims*, 534 F.3d 117 (2d Cir. 2008). Whether or not “it is a longstanding tenet of New York law that by claiming emotional damages . . . the plaintiff has placed his mental state in issue, [and] thus waiv[es] his right to confidentiality of probative medical documentation relevant to his mental state,” *New York law is no longer federal law in this Circuit after Sims in 2008*. Therefore, this request should be denied, and plaintiff should be permitted to visit a therapist if he can afford to without the threat that his private discussions with his therapist be exposed to the defense.

F: **Request No. 54: "Produce a properly executed authorization for the release of Plaintiffs employment records for each position held subsequent to the cessation of Plaintiff's employment with Defendant.**

As stated above, plaintiff has only had one weekend job since his termination and is part-time self-employed at Advanced Skin. There are no “employment records” per se to tender, other than earnings information, which we have agreed to turn over. That being said, in the future plaintiff may be employed and there should be no reason for defendants to obtain employment records other than earnings information. They have articulated not one reason why employment records – other than earnings information – would lead to the discovery of admissible evidence, and it could actually harm plaintiff’s ability to hold a job. *Plaintiff was denied one job*

because the potential employer got a whiff of this lawsuit from one of the defendant's employees, even before the lawsuit was filed. Given the potential harm that plaintiff could suffer, in contrast to there being no need for the information from the defendant's perspective, the request should be denied.

G: Request No. 63: "Produce any and all documentation concerning, relating to, and/or reflecting income earned by Plaintiff from 2004 through the present, including but not limited to a) 1099 and/or IRS Form W-2's, (b) payroll records, (c) pension documents, (d) 401(k) documents, (e) pay stubs, (f) deposit records and the like, and (i) any other compensation-related documents."

Plaintiff has tendered tax returns for 2007 through 2009 and will tender 2010 shortly. The request going back to 2004 is grossly overbroad, and deposit records and paystubs is cumulative, duplicative minutiae that is subsumed in the tax returns. Plaintiff's sworn tax documents are sufficient for the purposes of the defendant's mitigation defense and the remainder of the demand is overbroad.

There are no pension or 401k documents.

G: Request No 64: "Produce any and all of Plaintiffs banking records, including statements, notices, and other similarly responsive documentation, from 2004 through the present."

and

Request No. 65: "Produce any and all of Plaintiffs credit card statements from 2004 through the present."

These similar demands are grossly overbroad (in time and scope) and not calculated to lead to admissible evidence. First, as to bank records: Defendant has shown no basis to obtain bank records where plaintiff has turned over his tax records since 2007 and will tender 2010. That's enough for the purposes of proof of loss of income and mitigation for this case. Plaintiff was not terminated for misuse of

his bank account, nor has defendant made any showing whatsoever that he is hiding income of any kind. No single case stands for the proposition that, in an employment discrimination action, banking records – as opposed to tax records – are calculated to lead to admissible evidence. They are not, and therefore the demand should be denied.

Defendant has offered one unpublished case where the plaintiff was claiming extreme emotional distress and a court required her to tender her bank records. Chiguelin v. Efundz Corp., 2003 WL 21459581 (S.D.N.Y, 2003), The case is distinguishable here because plaintiff is only claiming garden-variety emotional distress. Additionally, the decision does not set forth how credit card records can possibly lead to insight into someone's mental state, and defendant has given not one example as to how it possibly could. It is an abusive, overbroad demand that is not calculated to lead to admissible evidence and it should not be compelled.

H: Request No. 66: "Produce all documents concerning Plaintiffs application and qualifications for employment with Defendant, including, but not limited to, (a) application forms, (b) notes, (c) memoranda, (d) e-mails, and (e) verification forms."

This demand is non-sensical because the defendant, not the plaintiff, should have these documents. I did agree and inadvertently did not tender the resume, which I will do as soon as possible.

I: Request No. 67: "Provide all documentation concerning the termination of Plaintiffs employment with any employer (whether by discharge, layoff, mutual agreement, resignation, voluntary quit, or any other matter) including, but not limited to, all documents concerning any charges, complaints, claims, or applications made or filed with any federal, state, or local government agency, court, or other tribunal concerning any such termination, from 2004 through the present."

Plaintiff has made no other charges or complaints. Aside from that, this demand is grossly overbroad and seeks documents about the termination of any employment in the past seven years for any reason whatsoever. Plaintiff in this case was terminated for telling a customer that he is gay. The case turns largely on whether that was a legitimate reason. Delving into plaintiff's previous employment will not lead to admissible evidence. Perhaps defendants would like to taint plaintiff with propensity evidence? It is unclear to me, but there is no showing that any employment plaintiff held in the last seven years is relevant to whether telling a customer that he is gay is a legitimate reason for his termination. See Hendricks v. Total Quality Logistics, LLC, 2011 U.S. Dist. LEXIS 53845 (S.D. Ohio May 6, 2011) (defendant's attempt in a FLSA case to get former employment records for plaintiff was based on a mere hope of obtaining discoverable information as opposed to a reasonable expectation and was therefore denied).

J: Request No. 72: "Produce all documents concerning any communications with any individual(s) whom Plaintiff believes possesses knowledge of the facts, allegations, and claims involved in this case, from 2004 through the present."

Defendant argues, "upon information and belief, and after reviewing the few documents Plaintiff produced from his Facebook page, it stands to reason additional responsive documentation exists." This is an ipse dixit assertion for which there is no evidence. The only persons with knowledge of plaintiff's case for which there are documents are his emails and chats with his co-employee Marko Markovich. Plaintiff also tendered one email with Rich Winstock, another person with information. There is nothing more to produce.

3. Plaintiff's Response to Defendants' Demand for Admissions:

Defendant wants to force plaintiff to make an admission to two imprecisely formulated requests that seek answers to variations on whether “before working for Defendant, Plaintiff expressed to Defendant’s employees that he is gay.” The request is worded poorly and vague; as such, defendant has no right to force an admission. Plaintiff has stated that he cannot answer the question in the manner in which it is asked, therefore that should be the end of the inquiry. If the defendant tried a deposition, I bet he could ask something more narrowly tailored or felicitously, more precisely phrased. But as demanded, there are problems with these questions: First, does the demand suggests all employees, or just at least two? The reference to “before working for defendant” is vague. Plaintiff worked for defendant in 2001 and was openly gay at that time. Does defendant mean to ask, before he arrived for his first day at work in 2009, he called people on the phone to remind them he was gay? Really, the suggestion is so bizarre as to be confusing and the reference to “employees” in the whole, furthermore, suggests *all* employees. If defendant wants an answer to that question, ask it more specifically. Plaintiff’s objection should be sustained and even if the question were not objectionable, plaintiff’s stated inability to answer the question as stated should be respected and defense counsel be forced to ask it a different way.

4. Defendants' Second Request for Documents:

A. The question of waiver of objections

First, defendant argues that objections have been waived. I disagree. The Second demand was emailed to me on February 9 along with three other documents, but I did not get a paper copy. Defense counsel affirms that he mailed

the documents on February 9. The paper demand was lost somewhere – either my office or defense counsel’s or the mail. The email copy was lost in the shuffle. Even assuming the demand was mailed on February 9, given five days for mailing, that would mean that a response was due on March 16. I served a response on March 18 – two days late and literally hours within the time that defense counsel notified me that a response was outstanding. No prejudice resulted by the delay. Whatever happened, it should be no surprise that with so many letters and demands that one should get lost in the shuffle somewhere. Had the demand been on my mind, I would have requested an extension from my adversary, or gone to the Court. I have not been late with any other of Mr. Zabell’s multiple demands. No waiver should be imposed; given the circumstances and my good faith in quickly responding to the demand when it was brought to my attention, the court should exercise its wide discretion in this matter and nunc pro tunc extend the time for me to answer the demands by two days, or just overlook them. Certainly defendant does not suggest that you don’t have that power. See FRCP 61 (“At every stage of the proceeding, the court must disregard all errors and defects that do not affect any party’s substantial rights.”)

- B. Request No.1: "Produce any and all documentation regarding communication between Plaintiff and Advanced Skin Fitness, its principals, managing partners, and/or employees, including but not limited to letters, emails, Facebook messages, Myspace messages, memoranda and other similarly responsive documentation, from 2005 through the present."

Defendant argues that this is relevant to Plaintiff’s mitigation efforts and measure of economic damages. How so? Plaintiff was fired in 2010. How could five years of communications about a small business prior to his termination possibly

relate to mitigation? The only relevant inquiry is earnings, and plaintiff has agreed to tender earnings since 2007. Please don't let Mr. Zabell take this case so grossly far afield as to further delay the successful completion of discovery.

- C: Request No. 2: "Produce any and all documentation regarding communication between Plaintiff and William Moore, including but not limited to letters, emails, Facebook messages, Myspace messages and other similarly responsive documentation, from 2005 through the present."

William Moore is my client's ex-partner and co-owner of Advanced Skin Fitness. Plaintiff earns in the low five figures annually as a result of this business and will turn over earnings information and tax returns. Nothing else is required for the defendant to examine the question of mitigation and emails with my client's former boyfriend will not lead to the discovery of admissible evidence.

- D: Request No. 3: "Produce any and all documentation regarding salary or monies earned by Plaintiff from Advanced Skin Fitness, including but not limited to checks, W-2 forms, financial reports, and other similarly responsive documentation, from 2005 through the present."

Plaintiff's tax returns, which we have produced, should suffice to respond to this demand. I will agree to confer with defense counsel to point out where and further direct my client to be sure that all information available has been turned over. The requests for checks and financial reports are abusive and overbroad and not calculated to lead to admissible evidence, nor has defendant shown how it is. All that matters is earnings; defendant has made no showing as to the need for anything else or why it could lead to admissible evidence on the question of mitigation.

- E: Request No. 4: "Produce any and all documentation regarding Plaintiff's ownership interest, employment with and/or work performed for Advanced Skin Fitness, including but not limited to invoices, employee time records, employee agreements/contracts,

employee manuals, memoranda, correspondence, and other similarly responsive documentation from 2005 through the present."

and

Request No. 5: "Produce any and all documentation regarding Plaintiffs ownership of and/or interest in Advanced Skin Fitness, including but not limited to corporate filings, certificates of incorporation, corporate taxation documents, shareholder agreements, partnership agreements, and other similarly responsive documentation, from 2005 through the present."

Defendant is actually making a motion for, inter alia, time records in plaintiff's employment five years prior to his termination. Defendant has not even produced to plaintiff his work records at the defendant corporation, not withstanding a claim for non-payment of hourly wages. This demand is confluence of the height of obstruction and the nadir of a ridiculous, overbroad demand. Similarly, ownership interest, corporate tax documents, shareholders agreements, etc., etc., is not remotely calculated to lead to admissible evidence. No matter what plaintiff's ownership arrangement is with regard to Advanced Skin Fitness, all that matters with respect to the question of mitigation is how much plaintiff made. This has been turned over and more is one the way.

F: Request No. 6: "Produce any and all correspondence between Plaintiff and Marko Markovich, including but not limited to letters, emails, Facebook messages, Myspace messages and other similarly responsive documentation from 2005 through the present."

Plaintiff has tendered these emails and communications from Facebook.

While there were portions of the papers we submitted to counsel that were redacted, they involved communications from *third parties* that were not responsive to the demand, and certainly not calculated to lead to admissible evidence. Indeed, the communications from Markovich, a former co-worker, are likely not calculated

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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DONALD ZARDA,

Plaintiff,

**ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

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**AMENDED
RESPONSE TO
DEMAND FOR
INTERROGATORIES**

10 Civ 4334 (JFB)(ARL)

GENERAL OBJECTIONS

A. Plaintiff objects to Defendants' First Set of Interrogatories to the extent that they seek to impose upon him obligations or burdens, which are greater than, or inconsistent with, the Federal Rules of Civil Procedure Rule 33.

B. Plaintiff objects generally to the First Set of Interrogatories on the grounds that they are overly broad and burdensome. Plaintiff has made a good faith effort to respond to the Interrogatories, but reserves the right to object to, and to move to have vacated, all of defendant's Interrogatories.

C. The following responses and objections are based upon information now known. Plaintiff has not yet completed discovery or preparation for trial in this action and therefore will supplement these responses and objections to the extent permitted.

D. The interrogatories exceed the 25 (including discreet subparts) allowed by Federal Rule of Civil Procedure 33.

E. Without waiving these objections and by way of response, Plaintiff provides the following responses.

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

INTERROGATORY #3: Set forth with particularity and detail the basis of Plaintiffs belief that “[i]t was known at work that [P]laintiff is gay and he was open about it,” as alleged in ¶ 21 of Plaintiffs Complaint.

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. Without waiving the objection, plaintiff states as follows:

Because frequent comments, jokes, and at some times discussion regarding my sexuality by not only employees, but also patron jumpers, non-jumpers, friends of jumpers, and around customers without any denial by me about my sexual orientation. The discussion about plaintiff’s sexuality was constant and too numerous to recount in an interrogatory.

See, however, for example, the constant reference to plaintiff’s sexual orientation in the emails from Marko Markovich, in plaintiff’s document production Bates Stamped 100-174 and in other interrogatories herein.

INTERROGATORY #4: Set forth with particularity and detail any and all instances that Ray Maynard demonstrated hostility to expression of “sexual orientation that did not conform to sex stereotypes,” as alleged in ¶ 22 of Plaintiffs Complaint, 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. Without waiving the objection, plaintiff states as follows:

Ray Maynard was hostile to the fact that I chose to wear a pink cast on my foot and that I also had pink colored toenails that were visible outside of the cast. He also openly tolerated banter of a sexual nature on behalf of all male students, who

commonly objectified women and made fun of homosexuals and made constant reference to my homosexuality. Yet when he learned that I as much as mentioned my being gay to an employee who objected to that knowledge, I was fired.

Additionally, he did not so much as ask me to respond to allegations of an alleged inappropriate touching a female passenger, notwithstanding a complete lack of objective evidence of such touching on the tape of her dive, and notwithstanding the fact that I am homosexual and would have no motive to touch a female passenger in any manner other than to protect her safety in accordance with proper procedures and the release signed by the passenger wherein she knew she would be touched. It is my position in this lawsuit that Maynard's reaction to a baseless complaint of touching by a woman is an instance of sex stereotyping, insofar as it validates a woman's complaint against a man whereas a man's complaint against a woman – gay or straight – would never have been accorded any credence in similar circumstances.

Additionally, upon information and belief, Maynard acted upon the complaint not so much of Rosanna but her boyfriend, who apparently lamented that Rosanna's birthday was "taken from her" because plaintiff told Rosanna that he was gay. Maynard, in terminating plaintiff, made the statement that the boyfriend "could never give his fiancé back her birthday," a maudlin, bigoted sentiment that conveys an attitude that Rosanna, a woman, was helpless and needed to be "protected against" a gay person and that her birthday was ruined because she was exposed to a homosexual who publicly identified as such.

Additionally, Maynard's belief that my identification as a gay person was an offense justifying termination is an instance of his hostility toward a gender stereotype and a hostility toward plaintiff as a gay man.

Additionally, on or about July 2, 2009, when I broke my ankle coming down from a jump, Ray asked me, "are you going to be a wussie or what?" The word "wussie" I understand to mean a male person who is less than "manly." The comment in the context of breaking my ankle I understood to mean, as it only could have, that I should "man up," and endure the pain. I believe he did not want me to cause his business any expense, and he intended to guilt me into ignoring the pain by suggesting that to attend to it would be less than manly.

INTERROGATORY #5: Set forth with particularity and detail each and every act of alleged gender discrimination against Plaintiff in connection with Plaintiffs employment with Defendant from 2001 through the present, including but not limited to:

- a) the date and time any alleged instance of discrimination occurred;
- b) the type of discrimination experienced by Plaintiff;
- c) the manner in which Plaintiff was discriminated against;
- d) the individual(s) that discriminated against Plaintiff;
- e) any action taken in response thereto by Plaintiff; and
- f) any action taken in response thereto by Defendant's employees.

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. Plaintiff further objects on the grounds that "discrimination" is a term of art in this lawsuit that may have a legal connotation and cannot be answered by a lay witness. Without waiving the objection, plaintiff states as follows:

See response to #4. A) The events involving the cast and toenails took place at various times in July and August 2009 at SDLI. The events concerning plaintiff's termination took place in June 2010. B) The type of discrimination is outlined in the interrogatory – gender discrimination, therefore this subpart has already been limited by the question. C) This request is vague and impossible to answer. It is impossible to determine what is meant by “manner.” Without waiving the objection, these statements reflect animosity toward any expression of behavior that did not conform to Maynard's belief as to stereotypical gender roles. The suspension, termination was the outward manifestations of discrimination, as well as Maynard's hostile manner and his withholding (conversion), for a period of a week, of plaintiff's pay because of the complaint. D) Maynard and Altitude Express. E) Filing this suit. F) Unknown at this time.

INTERROGATORY #6: Set forth with particularity and detail each and every act of alleged sexual orientation discrimination against Plaintiff in connection with Plaintiff's employment with Defendant from 2001 through the present, including but not limited to:

- a) the date and time any alleged instance of discrimination occurred;
- b) the type of discrimination experienced by Plaintiff;
- c) the manner in which Plaintiff was discriminated against;
- d) the individual(s) that discriminated against Plaintiff;
- e) any action taken in response thereto by Plaintiff; and
- f) any action taken in response thereto by Defendant's employees.

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. Plaintiff further objects on the grounds that “discrimination” is a term of art in this lawsuit that may have a legal connotation

and cannot be answered by a lay witness. Without waiving the objection, plaintiff states as follows:

1. Ray Maynard specifically and very clearly stated during my initial suspension from work meeting with him that I was being suspended because I am gay and the two customers that complained were offended by my stating as much.
 - a. On or about June 21, 2010 immediately following sunset which was at 8:30 PM
 - b. sexual orientation
 - c. verbal scolding and suspension, failure to pay for dive (conversion of funds due to plaintiff)
 - d. Ray Maynard
 - e. inquiry into the adverse action. Immediately consulted the chief instructor and safety and training advisor (Rich Winstock) following the adverse action as I was leaving the premise. Privately discussed the matter that just took place minutes ago in detail and specificity with Rich Winstock in the drop zone classroom.
 - f. Discussed situation with Rich Winstock. Ray barged in opening door and yelled, "ugh, you're in here talking about this" and slammed door as he went away.
2. Ray Maynard terminated plaintiff.
 - a. On or about June 28, 2010
 - b. sexual orientation and gender discrimination
 - c. termination
 - d. Ray Maynard
 - e. EEOC charge and complaint
 - f. unknown
3. Ray Maynard acted on the complaint of a person intolerant of homosexuality.

a-f: as set forth above in ¶¶ 1, 2
4. References to plaintiff's sexual orientation in a derogatory manner by various staff and Ray Maynard.
 - a. Continuously as described above: Too numerous to remember in particular. Constantly. For example, without limiting my response in any manner: the word "gay" was used often, usually as a pejorative often, in my presence. I was often the butt of jokes when men were talking about their girlfriends or other women. My sexual orientation was constantly referred to. I was constantly told that I would be interested in certain straight men, when I had no interest in them because they were straight. I was also stereotypically grouped together with all LGBT people insofar as, if a person were gay, it was pointed out to me, and it was assumed that I would be romantically interested in that person. On one occasion, at Neptune's, a bar on Long

Island where the staff had an after hours party, a transvestite was there and I was goaded into approaching him and asked to take pictures with her. The staff who suggested it thought it was comedic. I thought it was insulting.

- b. sexual orientation
- c. hostile work environment
- d. Ray Maynard and other employees, and at least one customer
- e. Asking employees to stop on occasion; on others, ignoring the comments
- f. None that plaintiff is aware of

INTERROGATORY #7: Set forth with particularity and detail any and all days Plaintiff worked and did not receive minimum Wage as an employee of Defendant, from 2004 through the present.

Plaintiff did not earn minimum wage during any hour in which he was at the drop zone and not participating in a dive. Plaintiff is not in possession of defendant's records, notwithstanding a release for same and thus cannot answer this question at this juncture, but will do so when records are provided by the employer and he has an opportunity to review them.

INTERROGATORY #8: Set forth with particularity and detail any and all days Plaintiff worked and did not receive overtime compensations as an employee of Defendant, from 2004 through the present.

Plaintiff is not in possession of defendant's records, notwithstanding a release for same and thus cannot answer this question at this juncture, but will do so when records are provided by the employer and he has an opportunity to review them.

INTERROGATORY #9: Set forth with particularity and detail any and all weeks Plaintiff worked and did not receive overtime compensations as an employee of Defendant.

See response to ¶ 7, 8.

INTERROGATORY #10: Identify with particularity and detail any and all of Plaintiffs accounts, profiles, memberships or postings on all social networking websites or internet communities and forums, from 2004 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 an unwarranted invasion into his privacy. Without waiving the objection, plaintiff has an account on Facebook and on dropzone.com.

INTERROGATORY #11: Identify with particularity and detail any and all email addresses and/or instant message screen names utilized by Plaintiff from 2004 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 an unwarranted invasion into his privacy. Without waiving the objection, don@donzarda.com and dgzarda@gmail.com. Plaintiff does not use IM's.

INTERROGATORY #12: Identify all of Plaintiff's employers, including contact information, from 2004 through the present, including but not limited to all sky diving employers.

Plaintiff objects on the grounds that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence and calls for an unwarranted invasion into his privacy. Without waiving the objection, Defendant has resumes on file for both professional skydiving and non-skydiving containing such information that was emailed to defendant over the winters of 2008 and 2009. Said resumes will be re-produced in this litigation and incorporated herein.

INTERROGATORY #13: Identify with particularity and detail Plaintiff's claims for damages for lost wages, failure to pay overtime compensation, failure to pay minimum wage, lost benefits, or other economic damages, specifically:

- a) the total amount claimed for each claim;
- b) information used to calculate the amount of each claim; and
- c) the method of calculation for those damages.

Plaintiff is not in possession of defendant's records, notwithstanding a release for same and thus cannot answer this question at this juncture, but will do so when records are provided by the employer and he has an opportunity to review them.

INTERROGATORY #14: Identify with particularity and detail any other damages that Plaintiff claims were caused by Defendant and have not already been described in response to these interrogatories, specifically:

- a) the type of damage;
- b) the total amount claimed, and;
- c) the method of calculation of these damages.

Plaintiff objects on the grounds that this interrogatory brings the defendant into a number (including subparts) exceeding the allowable maximum under Rule 33 of the Federal Rules of Civil Procedure. If the defendant obtains permission to seek interrogatories in excess of the amount permissible by the rule, plaintiff reserves the right to assert additional objections, including but not limited to the fact that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence.

Without waiving the objection: See initial disclosures.

INTERROGATORY #15: Identify any and all individual(s) with knowledge and/or information concerning the allegations in Plaintiffs Complaint. For each individual identified, provide:

- a) contact information for the individual(s);
- b) the knowledge and/or information possessed by each individual(s).

Plaintiff objects on the grounds that this interrogatory brings the defendant into a number (including subparts) exceeding the allowable maximum under Rule 33 of the Federal Rules of Civil Procedure. If the defendant obtains permission to seek interrogatories in excess of the amount permissible by the rule, plaintiff reserves the right to assert additional objections, including but not limited to the

fact that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence. Without waiving the objection: See initial disclosures, and response to interrogatory # 2, both of which plaintiff will amend if required.

INTERROGATORY #16: Identify any employment positions that Plaintiff has held since 2004, including (a) the identity of each such employer; (b) the length of time Plaintiff has been employed at each such place of employment; (c) the date the employment commenced; (d) the dates of and reasons for any period of separation from that employment; (e) Plaintiffs job title, duties and responsibilities, and immediate supervisor at each place of employment; (f) Plaintiffs rate of pay at the time each employment commenced and the date and amount of all increases in that rate of pay; and (g) a detailed description of, and the monetary value of, all other forms of compensation and fringe benefits received by Plaintiff from each employer including, but not limited to, bonuses, commissions, expense reimbursements, and medical and pension benefits

Plaintiff objects on the grounds that this interrogatory brings the defendant into a number (including subparts) exceeding the allowable maximum under Rule 33 of the Federal Rules of Civil Procedure. If the defendant obtains permission to seek interrogatories in excess of the amount permissible by the rule, plaintiff reserves the right to assert additional objections, including but not limited to the fact that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence.

INTERROGATORY #17: Identify any of Plaintiffs additional sources of income (Whether or not reported as taxable income and including, but not limited to, income earned while performing services as an independent contractor, self-employed or as a sole proprietor of a business or as a partner in a partnership, unemployment compensation, workers' compensation, severance pay, deferred wages, medical payments or benefits, vacation pay, pension benefits, social security benefits, and disability benefits) which Plaintiff has received from 2004 to the present, including, for each source of income: (a) the nature, source and amount of the income (including the initial rate of payment and the amount of all subsequent increases); (b) the dates of commencement and termination of each source of income; and (c) the reason, if any, for termination of the income.

Plaintiff objects on the grounds that this interrogatory brings the defendant into a number (including subparts) exceeding the allowable maximum under Rule 33 of the Federal Rules of Civil Procedure. If the defendant obtains permission to seek interrogatories in excess of the amount permissible by the rule, plaintiff reserves the right to assert additional objections, including but not limited to the fact that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence.

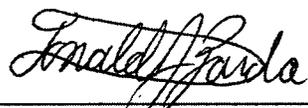
Dated: New York, New York
April 7, 2011

A handwritten signature in black ink, appearing to read 'G. Antollino', written over a horizontal line.

GREGORY ANTOLLINO
Attorney for Plaintiff
18-20 West 21st Street Suite 802
New York, NY 10010
(212) 334-7397

DONALD ZARDA, does hereby declare under penalty of perjury that I have reviewed the answers to interrogatories attached hereto and state that they are true to the best of my knowledge.

Dated: April 7, 2011
Richmond, Missouri

A handwritten signature in cursive script, appearing to read "Donald Zarda", written over a horizontal line.

DONALD ZARDA

Subject: Interrogatories

Date: Friday, April 8, 2011 5:07 PM

From: Gregory Antollino <gregory10010@verizon.net>

To: "'Saul D. Zabell'" <szabell@laborlawsny.com>

I deem my supplementary disclosures complete.

Gregory Antollino, Esq.
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New York, NY 10010
(212) 334-7397
www.antollino.com

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X

DONALD ZARDA,

Plaintiff,

**ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,**

Defendants.

-----X

**AMENDED
RESPONSE TO
DEMAND FOR
INTERROGATORIES**

10 Civ 4334 (JFB)(ARL)

GENERAL OBJECTIONS

- A. Plaintiff objects to Defendants' First Set of Interrogatories to the extent that they seek to impose upon him obligations or burdens, which are greater than, or inconsistent with, the Federal Rules of Civil Procedure Rule 33.
- B. Plaintiff objects generally to the First Set of Interrogatories on the grounds that they are overly broad and burdensome. Plaintiff has made a good faith effort to respond to the Interrogatories, but reserves the right to object to, and to move to have vacated, all of defendant's Interrogatories.
- C. The following responses and objections are based upon information now known. Plaintiff has not yet completed discovery or preparation for trial in this action and therefore will supplement these responses and objections to the extent permitted.
- D. The interrogatories exceed the 25 (including discreet subparts) allowed by Federal Rule of Civil Procedure 33.
- E. Without waiving these objections and by way of response, Plaintiff provides the following responses.