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April 3, 2014

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)

Dear Judge Bianco:

I represent plaintiff and respond to defendants' letter in anticipation to move to strike and dismiss.

First, I'm confused. We had a pre-motion conference on Mr. Zabell's anticipated motion to dismiss on the grounds of diversity, even though it had escaped me that I had previously pled the amounts in controversy were in excess of the jurisdictional limits. SO if he wants to waste his clients' money as to that you've given him permission.

Second, as to amending specific allegations to conform to the evidence, what is wrong with that? When I pled initially, it was based on what I knew at the time before discovery and before witnesses had been deposed. Having been exposed to more evidence, the pleadings confirm to the proof. How are defendants' prejudiced by that? They are not. The pleadings are not evidence and my spin on them doesn't prove my case. The standard for striking an allegation is essentially that the pleading is so inflammatory as to be defamatory. Pleadings are not proof, and I just shuffled around a few allegations *as they conformed to the proof adduced in discovery*. Mr. Zabell's fiery argument is nothing but hot air and should be denied outright.

Third, I withdrew the FLSA claims because I've abandoned them. At the time of summary judgment, I was not 100% sure that the claim was not worthy; Mr. Zabell never gave me the earnings information that would make Altitude Express a seasonal company, but I felt that the chance of winning was close to nil and thus didn't respond to their motion, which resulted in the abandonment of the claim.

I feel quite differently about the Title VII claim and respectfully disagree with Your Honor's ruling on that. The fact that it is in the complaint doesn't change your ruling, but, in the event that I choose to reargue or appeal on the issue. Respectfully, I believe that you gave me two bases to do so, by precluding Professor Yoshino's report, even if modified, and by not crediting my client's central theory that it was his right as a

male to remove himself from the insinuation that he was heterosexual, which required him to announce he was gay, and that ultimately got him fired. Thus, I choose not to send the message that I am abandoning the claim, in the event that I argue at a later date that your decision was incorrect. That doesn't resurrect the claim or prejudice the defendant.

For these reasons, I ask that the Court deny the motion to strike outright and that Mr. Zabell make his motion that you gave him permission to make at the last tele-conference.

Sincerely,

/s/   
Gregory Antollino

Cc: Saul Zabell by ecf