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April 21, 2015

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 re-read my second letter of March 28 and noticed two minor errors. For convenience sake I will simply repeat the letter here, and note the changes in red, and one clarification. Sorry about this. What follows is the letter with two important corrections in ¶¶ 5, 14, 16:

I represent the plaintiff in this action and write regarding the defendant's cross designations in relation to plaintiff's deposition. While most of them are unobjectionable background information, I won't be reading it because it is so lengthy that it will put the jury to sleep. Mr. Zabell acted as a cross examiner in his deposition, and the "asked and answered" objection doesn't work in the deposition context. He asked and asked and asked several areas, some of which are not in contention anymore. These issues need not be delved into. Further, get ready for this, because the defense is out to accuse plaintiff of being a sleaze. The Court might have ruled that there was a complaint that he touched a woman improperly, but there was no ounce of evidence that plaintiff was sexually perverted, or interested in women. Summary judgment is one thing, but I beg you not to let them turn this trial into a cloak for defamation, without a good faith basis.

To be clear: Plaintiff's minimum wage claim is not worth the effort, so I am dropping it, as I said in an earlier letter. You have dismissed plaintiff's hostile work environment claim, which was never pled, but only implied. You also dismissed the overtime aspect of the complaint, which I never prosecuted. To be sufficiently clear, this is what plaintiff seeks relief on: Discrimination on the grounds of sexual orientation, by Ray Maynard that caused the adverse job actions of discipline, further loss of a job, and loss of the use of one weeks pay which was withheld from him. Part of our damages is the shame he felt in being accused of touching a woman, but the community didn't believe it, therefore it was not defamation and truth is not a defense - it was how *he* felt being accused of such a horrible thing. It's fair game for the defense to argue that the improper touching did happen, but it is not fair game to suggest how plaintiff felt was true – that he was a homo-pervert so sexually confused that he would hit on anyone. There is no evidence to that effect.

I will try to be as specific as possible regarding these designations, but there are some that come up again and again that I will mention them by subject matter and refer to the page number as best I can. The designations I object to are as follows:

1. 19-20: Questions about what medications plaintiff was taking. You ruled that inadmissible.
2. 22-23: The rules of depositions, e.g., answer verbally, etc. Why does the jury need to hear that?
3. 30-33, 264-65, 269-294: These refer to my client's belief in the truthworthiness of various members at the dropzone. There is no relevance to whether my client believes various members of the dropzone.
4. 99-reference to my client's drinking habits (which were mild). He was not a drinker, nor was fired for drinking. To ask the question would be prejudicial to suggest as much.
5. 55: Whether there was any physical contact between my client and girls he dated in high school. This goes to suggest that he had deep, deep down a feeling for women and he used it to grope Rosanna, the complainant. Propensity is inadmissible, even if you are trying to prove the absurd position that a gay man holds a residual propensity for women and that, on top of that, he acted out on it on Rosanna. That is not only absurd and inadmissible, but would discriminate against bi-sexuals – it suggests that **mostly gay people who identify as bisexual** who **nevertheless** hold a tiny bit of desire for the **opposite** sex will demonstrate it through criminal touching – or worse.
6. 57-58: Why plaintiff believes he was fired in 1990. Discrimination against gays was legal at the time. Plaintiff did not believe – at the time – that he was fired because he was gay. Maynard said he was fired for telling two women, who cried to Maynard, that he, Zarda, is gay. If this testimony comes in, I will ask for jury instructions as to whether discrimination against gays was legal in 1990. This request to exclude in some ways helps the defense, but it also prejudices my client because of juror confusion and the fact that it would it them to speculate as to what he told 1990 customers, whether that was illegal or evidence of gay discrimination, and what it has to do with 2010 when gay discrimination was illegal?
7. 68-69: Mention that I had a discussion with my client during a break is irrelevant unless Zabell established that I improperly coached Mr. Zarda, which was not asked.
8. 90: Whether my client suffers from a prior back injury? What difference would that make – he wasn't fired for that and to mention it would suggest that there was another reason why plaintiff was fired, where counsel has no good faith basis in suggesting.
9. 111-112: All discussions of Mrs. Maynard and my client's conversations must come out or I will be able to call Mrs. Maynard as a rebuttal witness. Do we want to go down that road?
10. 180: Zabell's question to Zarda as to whether he would meet me as a guest in Europe or vice versa suggests we had a relationship outside of being lawyers - and that would be irrelevant and potentially prejudicial – either to him or to

me as his lawyer, which would ultimately be to him. (I won't say whether we had a relationship outside of the attorney-client relationship, because I don't have to defeat this testimony.) There is no other reason such testimony would be designated and I am going to ask you now to control Mr. Zabell and not to allow him to attempt to bully me. I should not be put in the position of choosing whether to fight him back, and possibly be disliked by the jurors. ***Please, Judge, for trial: control Mr. Zabell***.

11. 205: Zabell asks a question, and the response is "could you repeat the question." This suggests that my client was dumb because he couldn't remember a question simply because he asked the questioner to repeat it. There could have been noise, or that the mere request to repeat question is no evidence of perjury. He shows no other example, and there is not even the propensity to ask for questions to be repeated.
12. 239-40, 257:60; 334, 335, 337, 347, 239-40: Irrelevant because this testimony it goes to the question of hostile work environment – there was gay-joking around and I'll concede there was not a hostile one. Defendant pled an opposition to one broader than we had alleged. You ruled against hostile work environment anyway; so why would it be relevant other than to suggest that the one decision maker in this case was Maynard was not a person who caused discriminatory hostility, in a quiet, singular way? He was the hostile in hostile work environment, not withstanding the gay banter that went on with co-workers. Therefore that evidence is misleading, and by being misleading tends to suggest that my client is so untruthful that he brought a hostile-work environment claim against this place of great people. Plaintiff surely thought the people of his workplace were great – except one.
13. 212-Zabell asks Zarda " as to his attorney's press releases." There is no evidence that I issued a press release, I declare under perjury. The case was publicly filed and I got a call about it from a nearby reporter with nothing better to do. That's not evidence.
14. 278, 244, 223-267, etc. This whole discussion of worker's compensation should be stricken. Plaintiff took worker's compensation in 2009. It is illegal to discriminate against a person who takes worker's compensation. Ray Maynard testified (and I can show the testimony) that he **had not** discriminated against plaintiff because of Worker's Compensation Discrimination. For Zabell to raise that issue would allow the jury to infer that it is ok to discriminate against a person against one thing that is illegal and not another thing against the law. Additionally this Court must agree that, an unlawful, unarticulated reason may never be a legitimate reason to fire someone as a matter of law. To go into worker's compensation would suggest otherwise, and would be tantamount it's ok to break the antidiscrimination laws, just break the right one you won't get caught one. (Whether or not Maynard actually did fire plaintiff because of his use of conversation is a claim that cannot be brought in this forum. Even if that is irrelevant, we never accused Maynard of it and to get into it would confuse the jury.
15. 380-81: Zabell asks several offensive questions about whether my client has ever been called a child molester, or talked about taking Viagra, had porn on

his phone. That's too low. One of Mr. Maynard's employee's said that plaintiff was a child molester and notwithstanding, we lost the hostile work environment claim; *you can't let them take that in now on an unnoticed, disgusting reason that my client was actually a child molester*.

16. Defendant refers repeatedly to defendant's release of all liability in this case. That release does not refer to employment - just injury or death. It cannot be suggested to the jury that plaintiff did or may not contract against himself the right to be discriminated against, otherwise the condition for any job would be to believe that one was going to be treated badly, and that would be bad public policy and illegal. The release doesn't refer to employment. It might come up in another context: The fact that the flyer would certainly be touched **is in the release**, but to raise the specter that my client signed a release pertaining to this lawsuit is a fraud on the jury.

17. Fifth Amendment. My client took the fifth amendment as to whether he used Marijuana or recreational drugs. If defendant can get into that, it is prejudicial because my client was not fired because of his drug use, as admits Maynard. Thus to raise the issue would suggest that my client was fired for something that had nothing to with his firing – as admitted by the defense. The focus must be on sexual orientation discrimination and the other stated reasons unless there is evidence that both the plaintiff and the defendant are lying. If Mr. Zabell believes that, then he must be accusing his client of commit perjury in his defense, which you don't want me bringing up to the jury in summation. Therefore, he Mr. Zabell should not argue that Mr. Zarda was fired for any reason other than that Maynard articulated, otherwise, it will be fair comment for me to say Mr. Zabell wants you to believe that Mr. Maynard is a liar. That would be fair comment under the circumstances, so to eliminate prejudice to the defense there should be no raising of suspicions by the defense that my client was fired for anything other than what Maynard testified or testifies to.

Sincerely,

/s/
Gregory Antollino

Cc: Saul Zabell by ecf