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October 10, 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:

As you know, I represent plaintiff in this action. One thing we did not get to in our Friday conference is the issue of voir dire. I had supplied you memo with my proposed voir dire, with a “trial motion” asking either for a questionnaire and a half hour of direct attorney questioning. I still would like there to be a brief amount of attorney questioning for the reasons I stated in that memo. Nevertheless, I thought it would be appropriate to include an abbreviated list of questions, since the Court did not suggest a questionnaire would be desirable. If not, plaintiff still asks for some small amount - one half hour or so for each side – of attorney voir dire. This is not going to prejudice the administration of justice, and I strongly believe it will help.

I have attached a shorter list of questions, as well the single page of transcript in which you agreed to ask question 23, about stating one is gay in the workplace. The single page encapsulates the issue, but the entire transcript is on ecf, item 101.

Moreover, the recent 9th Circuit case of SmithKline Beecham Corp. v. Abbott Labs., 740 F.3d 471 (9th Cir. 2014) stands for the proposition that sexual orientation in itself is a basis in which Batson analysis applies. Therefore, I believe it is fully appropriate for the court to ask question 21, which generally seeks to ascertain whether people, if not gay themselves, know close friends or family who are. We cannot apply the Batson analysis without knowing who is in the protected class. In cases involving race, we can identify it by site, but to avoid the use of peremptories against gay people, we must ascertain who they are – or at least the watered down question that I have provided in the attached questionnaire. I ask that this be deemed a trial motion because there is no ecf “event” that it would fall under.

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell (via ecf)

1. NAME
2. DO YOU SPEAK OR UNDER ENGLISH FLUENTLY
3. RESIDENCE (City or town & neighborhood)
4. LENGTH OF TIME IN YOUR CURRENT HOME
5. OCCUPATION
6. AGE
7. HIGHEST LEVEL OF EDUCATION
8. MARITAL STATUS
9. CHILDREN AND, IF EMPLOYED, THEIR OCCUPATIONS
10. HAVE YOU SERVED ON A JURY BEFORE?
11. IF YOU WERE A SWORN JUROR, DID YOU REACH A VERDICT IN EACH CASE IN WHICH YOU SERVED?
12. WOULD ANYTHING ABOUT YOUR PRIOR JURY SERVICE AFFECT YOUR ABILITY TO BE FAIR TO BOTH SIDES IN THIS CASE?
13. ARE YOU OR ANY OF YOUR FAMILY OR CLOSE FRIENDS CONNECTED TO THE COURT OR LEGAL SYSTEM? IF SO, PLEASE EXPLAIN.
14. WHERE DO YOU GET YOUR NEWS?
15. WHAT IS YOUR FAVORITE TV STATION?
16. DO YOU LISTEN TO TALK RADIO OR PODCASTS , AND, IF SO, WHICH PROGRAMS?
17. THIS CASE INVOLVES A CLAIM OF EMPLOYMENT DISCRIMINATION MADE BY THE DONALD ZARDA AGAINST HIS FORMER EMPLOYER, RAYMOND MAYNARD AND ALTITUDE EXPRESS, OTHERWISE KNOWN AS SKYDIVE LONG ISLAND. ARE ANY OF YOU

FAMILIAR WITH ANY OF THESE PARTIES? *THERE ARE BOTH A "LONG ISLAND SKYDIVE" AND A "SKYDIVE LONG ISLAND," THE LATTER BEING DEFENDANT IN THIS CASE

18. FOR REASONS HAVING NOTHING TO DO WITH THE CASE, THE EMPLOYEE MR. ZARDA DIED BEFORE TRIAL. IF THERE IS AN AWARD, IT WILL GO TO THE ESTATE, JUST LIKE AN INHERITANCE. KNOWING THIS, WOULD YOU HAVE ANY PROBLEMS SITTING ON THIS CASE?

19. WOULD YOU HAVE ANY SYMPATHY FOR THE PLAINTIFF *OR* THE DEFENDANT THAT WOULD MAKE YOU UNABLE TO DECIDE THE CASE ACCORDING TO THE PRINCIPLES THAT I WILL EXPLAIN IN DECIDING THE FACTS ACCORDING TO THE EVIDENCE AS THE COURT WILL EXPLAIN AT THE END OF THE TRIAL?

20. DO YOU HAVE ANY CONCERN WHATSOEVER THAT YOU WOULD NOT BE ABLE TO TREAT THE ESTATE OF A DECEASED PERSON AS FAIRLY AS YOU WOULD A LIVING PERSON, OR A CORPORATION?

21. THIS CASE INVOLVES A CLAIM OF SEXUAL ORIENTATION DISCRIMINATION. DO YOU, OR ANY OF YOUR FAMILY MEMBERS OR CLOSE FRIENDS IDENTIFY AS GAY, LESBIAN, BISEXUAL, TRANSGENDER, OR SOME OTHER SEXUAL MINORITY?

22. DO YOU THINK YOU WOULD HAVE ANY PROBLEM SITTING ON A CASE LIKE THIS?

23. DO YOU BELIEVE THAT IT IS WRONG FOR AN EMPLOYEE, IF HE OR SHE IS GAY, TO IDENTIFY AS GAY IN THE WORK PLACE?

24. THIS TRIAL IS EXPECTED TO LAST ABOUT A WEEK, PERHAPS A BIT LONGER. IN ADDITION, EVERY REASONABLE EFFORT WILL BE MADE TO ACCOMMODATE YOUR NEEDS. JURY SERVICE IS ESSENTIAL TO THE ADMINISTRATION OF JUSTICE.

INCONVENIENCE ALONE WILL NOT BE SUFFICIENT REASON TO EXCUSE A PROSPECTIVE

JUROR. TO BE EXCUSED, BUT YOU MUST SHOW AN UNACCEPTABLE AMOUNT OF PERSONAL HARDSHIP. DO YOU BELIEVE SERVICE AS A JUROR IN THIS CASE WILL CREATE AN UNACCEPTABLE HARDSHIP?

25. HAVE YOU EVER BEEN ACCUSED OF COMMITTING A CRIME, WHETHER OR NOT YOU WERE CONVICTED?

26. WHAT ARE YOUR PRINCIPAL LEISURE TIME ACTIVITIES?

27. ARE THERE ANY SOCIAL, RELIGIOUS, POLITICAL OR PROFESSIONAL ORGANIZATIONS TO WHICH YOU MAY BELONG?

28. HAVE YOU EVER BEEN IN THE UNITED STATES MILITARY (INCLUDING THE MILITARY NATIONAL GUARD OR ROTC)?

29. DO YOU HAVE ANY RELATIVES OR CLOSE FRIENDS WHO ARE EMPLOYED IN THE COURTS?

30. IF YES, PLEASE EXPLAIN AND INDICATE WHETHER IT COULD AFFECT YOUR ABILITY TO BE FAIR:

31. HAVE YOU, OR HAS ANYONE IN YOUR IMMEDIATE FAMILY, EVER SUED SOMEONE OR SUED BY ANYONE?

32. IF YOU OR AN IMMEDIATE FAMILY MEMBER HAVE SUED SOMEONE OR BEEN SUED, PLEASE EXPLAIN THE NATURE OF THE LAWSUIT AND WHETHER IT WOULD AFFECT YOUR ABILITY TO BE FAIR:

33. HAVE ANYONE, EVER SAID ANYTHING PUBLICLY ABOUT YOU ON THE INTERNET THAT YOU BELIEVE WAS NOT IN FUN, BUT WAS MADE WITH BAD INTENTIONS?

34. DO YOU HAVE ANY POLITICAL, MORAL OR RELIGIOUS BELIEFS THAT WOULD PREVENT YOU FROM PASSING JUDGMENT ON ANOTHER PERSON OR FROM SITTING ON THIS CASE?

35. YOU MAY HEAR THE NAMES OF THE CERTAIN INDIVIDUALS DURING THE TRIAL.

DONALD ZARDA

MELISSA ZARDA

RICHARD WINSTOCK

RAYMOND MAYNARD

LAUREN CALLANAN

ROSANNA ORELLANA

DAVID KENGLE

GREGORY ANTOLLINO

RICHARD CARDINALE

ZACHARY ZUNIGA

SAUL ZABELL

BARBARA SCHIANO aka BARBARA MAYNARD

CONCLUSION

36. IS THERE ANY MATTER NOT COVERED BY THIS QUESTIONNAIRE THAT YOU THINK THE ATTORNEY OR COURT MIGHT WANT TO KNOW ABOUT YOU WHEN CONSIDERING YOU AS A JUROR IN THIS CASE?

37. DO YOU KNOW OF ANY REASON WHATSOEVER WHY YOU CANNOT SIT AS A FAIR AND IMPARTIAL JUROR IN THIS CASE?

1 addressing that concern that some jurors might hold it against
2 him for having spoken his identity, sexual orientation to just
3 ask a question during jury selection do any of you believe that
4 it's inappropriate for an employee to identify the sexual
5 orientation in the work place and if they answer yes to that,
6 we could excuse them from the case. Wouldn't that be an easier
7 way?

8 MR. ANTOLLINO: And that would be --

9 THE COURT: Rather than having an expert come and try
10 to explain to all the jurors and we don't know whether this is
11 an issue with any of them or not, it's certainly not a legal
12 issue to try to talk them through that issue, rather than ask
13 them directly that.

14 MR. ANTOLLINO: They will be excused for cause if
15 they checked yes?

16 THE COURT: If they said that do you believe it's
17 wrong for someone under any circumstances to reveal their
18 sexual identity in the workplace? I think, in this particular
19 case, I probably excuse that person for cause because they
20 wouldn't be able to look at the legal elements then. They
21 would just start with the idea if he reveals it, it was wrong.
22 I'm not looking at the rest of the case.

23 MR. ANTOLLINO: Okay, that sounds good to me, Judge,
24 but that doesn't deal with the sex, if that were the case, I
25 would only need Professor Yoshino to testify on the sex