**SUPREME COURT OF THE STATE OF NEW YORK**
**COUNTY OF NEW YORK**

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JOHN M. ROAZZI

Index No.: 152129/2016

Plaintiff,

-vs.-

UA BUILDERS CORP., UNITED ALLIANCE ENTERPRISES LLC, GRANIT GJONBALAJ and ALBERT GJONBALAJ,

Defendants.

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**REPLY AFFIRMATION IN SUPPORT OF ORDER TO SHOW CAUSE**

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## TABLE OF AUTHORITIES

**Cases**

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William Cafaro, being an attorney duly licensed to practice law before the Courts of the State of New York, does affirm in reply as follows pursuant to Rule 2106 of the Civil Practice Law and Rules under the penalties of perjury as follows:

1. The only First Department authority dealing with an employment case which either side has presented is *Pecile v Titan Capital Group, LLC*, 113 A.D.3d 526, 526-527, (1st Dep't 2014), which limited the discoverability to plaintiff's wage and job title history only. The *Pecile* court also struck defendants' demand for plaintiffs' social media sites because they failed to offer any proper basis for the disclosure, relying only on vague and generalized assertions that the information might contradict or conflict with plaintiffs' claims of emotional distress, which she had surely placed in issue in a sexual harassment case. In *Forman v Henkin*, the Appellate Division specifically said that ***this same rationale applies in all other situations***, [emphasis added] this threshold factual predicate, or "reasoned basis" in the words of the dissent, stands as a check against parties conducting "fishing expeditions" based on mere speculation. *Forman v.* Henkin, 134 A.D.3d 529, 532, (App. Div. 1st Dep't 2015). In the words of the *Forman* court:

> Contrary to the dissent's view, **this Court's prior decisions do not stand for the proposition that different discovery rules exist for social media information**. The discovery standard we have applied in the social media context is the same as in all other situations — a party must be able to demonstrate that the information sought is likely to result in the disclosure of relevant information bearing on the claims This threshold factual predicate, or reasoned basis in the words of the dissent, stands as a check against parties conducting fishing expeditions based on mere speculation

*Id.* (emphasis added) (internal quotations and citations omitted).

2. Defendants here claim: i) they fired the Plaintiff for incompetence, and he may have also been considered incompetent by a prior employer, which might help their defense, and ii) they might find some after acquired basis which would provide some justification for firing him other than age discrimination. The former claim is made in 100% of the employment discrimination cases in which the plaintiff was fired, and the latter is available to, if not actually made by, every employment discrimination defendant who fired the plaintiff.

3. Of the First Department authorities cited in *Forman*, above, the most apropos are two first department cases *Manley v. New York City Hous. Auth.* and *Budano v. Gurdon*. In *Manley*, plaintiff stepped into an open elevator shaft and alleged permanent disability from employment as a consequence of the accident. Defendants there asserted that there was a history of possible alcoholism which may have had some bearing on the medical testimony. The Appellate Division saw this for what it was - "hypothetical speculations calculated to justify a fishing expedition" *Manley v. New York City Hous. Auth.*, 190 A.D.2d 600, 601 (1st Dep't 1993). Similarly, in *Budano*, plaintiff claimed that his slip and fall accident rendered him permanently disabled from employment, and the defense alleged a history of treatment for addiction based on plaintiff's deposition testimony. Demands for authorizations for alcoholism and drug addiction

records were similarly characterized as a fishing expedition based upon vague suspicions, as follows:

> Similarly in this case, it is impossible to tell from defendant's submissions, also consisting almost exclusively of the affirmation of an attorney not claiming to have personal knowledge, whether plaintiff has a drug or alcohol dependency or whether he has HIV. Defendant's counsel asserted that plaintiff admitted in his deposition that he had been treated for addiction, but he failed to annex the transcript so it is impossible for us to independently evaluate it. The affirmation was completely silent on the issue of HIV. Further, simply because plaintiff's counsel represented in his submission that Lincoln Hospital could not feasibly redact information concerning chemical dependency and HIV status from plaintiff's records does not establish that plaintiff had a substance abuse problem or was HIV-positive.
>
> In any event, even if defendant had established that plaintiff suffered from chemical dependency and mental illness and had HIV, the requested discovery would not be warranted. Defendant failed to submit an expert affidavit or any other evidence that would establish a connection between those conditions and the cause of the accident, nor did he make any effort to link those conditions to plaintiff's ability to recover from his injuries or his prognosis for future enjoyment of life. Without such support, we are presented with nothing other than hypothetical speculations calculated to justify a fishing expedition.

*Budano v. Gurdon*, 97 A.D.3d 497, 499 (1st Dep't 2012) (internal citations and quotations omitted).

4. In both *Manley* and *Budano*, it is true that the discovery sought *might* have been desirable to the defense, because it might have shown a propensity for drugs or alcohol, similarly, defendants here would like to show an inadmissible propensity for incompetence, which, even if it existed, would not be admissible. This is a nothing but a similar fishing expedition. If defendants want to justify their termination of Plaintiff for incompetence, in favor of hiring a young lady in her 20's with little or no construction experience in his place, they have to do it based on his performance on this job. Additionally, the defense opposition has presented no claims he has made with respect to his prior employment, other than that he has been in the construction industry for 30 years.

5. *Johnson v. Nat'l R.R. Passenger Corp.*, 83 A.D. 2d 916 (1st Dept. 1981) and *O'Neill v. Oakgrove Constr.*, 71 N.Y.2d 521 (1988) are negligence cases in which plaintiffs are required to submit to much broader disclosure, however, as defendant astutely points out, The test in such cases is usefulness and reason." [Tuttle p. 3, emphasis in original]. *Velez v. Hunts Point Multi-Serv. Ctr., Inc.*, 29 A.D.3d 104, 113, (N.Y. App. Div. 1st Dep't 2006) dealt only with the issue of relevance, because no question of unreasonable annoyance embarrassment, disadvantage, or other prejudice was raised. This discovery is done for the principal purpose of harassment in employment litigation to dissuade those who had the audacity to sue, or to induce them to settle for nuisance value. Although *Matter of Kapon v. Koch*, 23 N.Y.3d 32 (2014) involved an application for a protective order, it was only sought in connection with the specific issue of the discovery in related out of state litigation between the parties, and did not touch on any of the issues of the protection of an employee from harassment which are raised here.

6. Because the employment law authority cited by the defendants in support of its position is primarily federal, Plaintiff submits that the federal cases they cited are outliers and relatively old. The overwhelming weight of the more recent federal authority supports Plaintiff's position squarely on these facts. *See*, *Vale v. Great Neck Water Pollution Control Dist.*, 2016 U.S. Dist. LEXIS 41139 (E.D.N.Y Mar 29, 2016) (Finding that the Plaintiff's overall job performance at unrelated subsequent employment is irrelevant and that it is nothing inadmissible propensity evidence); *Warnke v. CVS Corp.*, 265 F.R.D. 64, 69 (E.D.N.Y. 2010) (Finding discovery related to subsequent employment not reasonable likely to lead to discoverable evidence); *Gambale v. Deutsche Bank AG*, 2003 U.S. Dist. LEXIS 27412, *5 (S.D.N.Y. Jan. 10, 2003) (granting motion to quash subpoenas served on executive search firms with which plaintiff worked before and after her termination because such discovery "would subject plaintiff to necessary annoyance and

embarrassment"); *Conrod v. Bank of New York*, 1998 WL 430456, at *2 (S.D.N.Y 1998) ("Because of the direct negative effect that disclosers of disputes with past employers can have on present employment, subpoenas in this context, if warranted at all, should be used as a last resort"); *See also EEOC v. Princeton Healthcare System*, 2012 U.S. Dist. LEXIS 65115, (D.N.J. 2012) ("[i]f filing what ... [appears to be] a fairly routine case alleging individual employment discrimination opens up the prospect of discovery directed at all previous, current, and prospective employers, there is a serious risk that such discovery can become an instrument of delay or oppression").

7. With respect to the issuance of subpoenas by the defense in the future, there is no prejudice to the defendants if the requested relief is granted. Defendants are not being denied the right to serve subpoenas; they merely have to give advance notice. If the Court decides to quash the subpoenas, the subpoenas should never have been received by their desired targets in the first place. If the Court denies the motion to quash, the greatest imposition imposed will be a 30 day delay.

8. The defense cavalierly says Plaintiff can suffer no conceivable harm from the dissemination of the fact that he is suing a prior employer for discrimination in his work community. However, imagine the difficulties of finding new employment for someone who is approaching 65, and then compound those difficulties by throwing a history of suing for age discrimination into the mix. This will effectively lock him out of the labor market, which should be taken into consideration in weighing any competing interests here.

**WHEREFORE**, Plaintiff respectfully requests that this Court make an order pursuant to CPLR § 3103(a) striking Item 12 of Defendants' Notice for Discovery and Inspection dated July

11, 2016 in its entirety, and prohibiting the Defendants from contacting or serving any subpoenas on any entities or individuals identified by documents produced in response to Item 15 of the same demand unless Plaintiff's counsel is given 30 days advance notice to allow time to move for a protective order as appropriate.

Affirmed this 25st day of
August, 2016 at New York, New York

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