CAUSE NO. 12345678

MICKEY HARRIS,	**§**	**IN THE UNITED STATES DISTRICT**
Plaintiff,	**§**	
	§	**COURT**
V.	**§**	
	§	**FOR THE**
BOBBIE ROSENBAUM	**§**	
And	**§**	**NORTHERN DISTRICT**
GOOD GROCER	**§**	
Defendants.	**§**	**OF NEW YORK.**

DEFENDANTS' MOTION IN LIMINE TO EXCLUDE MARTIN FLASK'S TESTIMONY ABOUT PRICE DISCREPANCIES AND HIS TERMINATION

Defendants, by and through counsel file this motion requesting that this Court exclude the testimony of Martin Flask. The testimony is inadmissible under Rules 403 and 404(b). Defendant presents the following memorandum in further support:

FACTS

Plaintiff, Mickey Harris, seeks to introduce the testimony of Martin Flask, a former employee of Good Grocer. Mr. Flask has a history of notifying his bosses of overcharging. Prior to working at Good Grocer, Mr. Flask was relieved of his position at a gas station, after he accused his boss of overcharging for fuel. He only held that position for one month. After he left Good Grocer, Mr. Flask lasted one day as a dry cleaner. His boss terminated him when Flask claimed she overcharged for extra starch. Unsurprisingly, Mr. Flask accused Defendant, Bobbie Rosenbaum, of overcharging for goods at the register of his store. Mr. Rosenbaum subsequently terminated him because he thought Mr. Flask was unstable.

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Comment [L1]: Don't give them too much credit. Was Flask terminated? I thought he quit.

Comment [L2]: One sentence saying what the claim is about would give the necessary context. Then, as you do, focus only on the motion facts.

Comment [L3]: I think he quit. Better he quit for you because your case is really about what happens to employees who accuse Rosenbaum of fraud.

DISCUSSION

1. Rule 403 Bars Flask's Testimony because it is prejudicial, misleading, and confusing.

The Court may exclude evidence if "its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury." FED. R. EVID. 403. In the present case, Harris wishes to enter into evidence the deposition of Martin Flask, a previously terminated employee of Good Grocer. Mr. Flask claims that Bobbie Rosenbaum terminated his employment after he discovered price discrepancies between prices on the shelf and at the register. This is the identical allegation that Harris makes before this Court. The evidence supports the prohibited inference, if "he was accused of it before and he is accused of it now, he must have engaged in this activity." This witness' testimony confuses the issues. The issue before this Court is not whether Mr. Rosenbaum engaged in pricing fraud, but whether Harris blew the whistle on consumer fraud, exhausted the appropriate remedies, and was terminated because of it. If Martin Flask's testimony were admitted, the jury would be misled into a trial within a trial about whether Good Grocer defrauded customers.

Comment [L4]: Good point in this sentence.

2. Rule 404(b) Bars Flask's Testimony Because Propensity Is the only Conclusion It Supports.

"Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." FED. R. EVID. 404(b). In *Zublake*, the Court excluded character evidence because the defendant offered it to show the

"plaintiff was a bad employee before 1995 . . . to prove that he was an equally bad employee after 1995." *Zubulake v. UBS Warburg LLC*, 382 F. Supp. 2d 536, 541 (S.D.N.Y. 2005). "That, of course, is exactly what a litigant cannot do." *Id.* This case is just like *Zublake*. The Plaintiff wishes to lead the jury to believe that if Mr. Rosenbaum engaged in pricing fraud a year ago, then he does it now. Admitting Martin Flask's deposition into evidence would result in improper character evidence. The jury would be encouraged to find for Plaintiff because Bobbie Rosenbaum on the grounds that he is a "bad man."

Comment [L5]: Good use of Zublake.

3. Mr. Flask Is an Unreliable Witness.

Comment [L6]: It's true, but don't overdo this argument. Courts are not to weigh credibility when deciding 403 motions. That is left for the jury. Make this a minor point at your motion hearing.

Worst of all, the reliability of the witness is at best questionable. Martin Flask is currently unemployed. He depends on a friend for financial support and housing. Prior to his employment at Good Grocer, Mr. Flask worked at a gasoline station for just one month. He claims he lost his job there because the owner charged an extra 6 cents per gallon. After he lost his job at Good Grocer, Mr. Flask worked at a dry cleaner for only one day because he complained the cleaners' charged too much for additional starch. Only if one could believe that the entire town of Weedsport is full of crooked bosses would Flask be credible. Mr. Flask's history of claiming his bosses charge too much for their services makes his claims unreliable.

4. Flask Testimony Is Not Admissible For Another Purpose.

Martin Flask's deposition does not meet the "another purpose" exception to the Rule. It is up to the Court to determine whether Flask is a qualified witness and whether his testimony is admissible in this trial. *See Huddleston v. United States*, 415 U.S. 814, 780

(1974) (quoting Fed. R. Evid. 104(a)) ("Rule 104(a) provides that 'preliminary questions concerning the qualification of a person to be a witness . . . or the admissibility of evidence shall be determined by the court, subject to the provisions of subdivision (b).'"). "The threshold inquiry a court must make before admitting similar acts evidence under 404(b) is whether that evidence is probative of a material issue other than character." *Id.* The Plaintiff's best argument is that Mr. Flask's testimony is admissible to prove knowledge—that Bobbie Rosenbaum knew about the differences in prices between the shelf and at checkout. This argument fails for one simple reason: There is no proof that there was any pricing fraud in 2010. The only "proof" that the Plaintiff can offer comes from a year after Mr. Flask's allegation. If the Court were to find that the fact that the evidence shows Rosenbaum engaged in fraud in 2011 suggests he did it in 2010, then the Court would be using improper character evidence as the vehicle to prove knowledge.

A jury could not reasonably find that there was pricing fraud in 2010 because there is no admissible evidence to support that conclusion. This Court's duty is to "examine() all the evidence in the case and decides whether the jury could reasonably find the conditional fact . . . by a preponderance of the evidence." *Id.* at 782-3. In *Huddleston*, the Court allowed evidence under 404(b) to prove knowledge that the petitioner received stolen goods. *Id.* The conditional fact in that case was whether the goods were in fact stolen; meaning, the evidence was only admissible if a reasonable jury could have found that the goods were stolen. *Id.* The conditional fact in the present case is whether the prices on the shelf were in fact lower than the prices at the register in 2010. With the new allegations against Mr.

Comment [L7]: I think their bnest argument is that since Rosenbaum seems to claim he does not know how to operate the scanner equipment, Flask's observation of him doing so is admissible to undermine his lack of knowledge claim.

Comment [L8]: Except for Flask's testimony, if it is found to be admissible.

Rosenbaum, a jury is very likely to believe the prices were different. However, the only way to reach that conclusion is through those new allegations. If it were Mr. Rosenbaum's word against Mr. Flask's, then there would be no question that a jury would discount Mr. Flask's story because of his modus operandi—his signature —of accusing his bosses of fraud and being quickly terminated.

5. Engaging in Fraudulent Activity is Not a Habit

"'A habit . . . is the person's regular practice of meeting a particular kind of situation with a specific type of conduct, such as the habit of going down a particular stairway two stairs at a time, or of giving the hand-signal for a left turn, or of alighting from railway cars while they are moving. The doing of the habitual acts may become semi-automatic.'" Fed. R. Evid. 406, Advisory Committee Note (quoting McCormick on Evidence, § 195 at 462-63 (2d. ed. 1972)). *Id.* at 542. Looking at prices on a shelf, then adding a few cents to some, but not others is hardly a habit. It requires intelligence and forethought.

5. Character Is Not at Issue in this Case.

"Under the 'character in issue' doctrine, character evidence is admissible where character itself is 'an element of a crime, claim or defense.'" *Zubulake*, 382 F. Supp. 2d at 541 (quoting FED. R. EVID. 404(a), Notes of Advisory Committee on Proposed Rules). If the plaintiff brought a defamation claim, then maybe this evidence would be relevant. However, this is a claim for wrongful termination and retaliation. The success of Plaintiff's claim depends on whether he blew the whistle on the pricing fraud to the proper authority and whether the Defendant terminated him because of it. This is not a case about character.

Comment [L9]: Trial courts may not decide who is more believable as a way of deciding what evidence to admit. Dangerous argument here.

Comment [L10]: But defendant has brought a defamation counterclaim and this evidence might show something about his character or at least reputation (the damage question in a defamation claim).

Allowing Mr. Flask's testimony, however, would turn it into one.

CONCLUSION

Admitting Mr. Flask's testimony would be highly prejudicial to Mr. Rosenbaum because his termination was all too similar to that of Plaintiff's: Mr. Flask alleges the same fraud that Mr. Rosenbaum does and Flask was a former employee of Good Grocer. The testimony confuses the issue and would mislead the jury into believing this is a consumer fraud case, rather than a retaliation and wrongful termination case. Furthermore, admitting the testimony would stand as a direct violation of Rule 404(b) because the evidence's only resulting purpose would be to tell the jury that Mr. Rosenbaum of poor moral character. This testimony fails to survive any of the exceptions to 404(b). Finally, character is not in issue in the present case.

WHERFORE, Defendants' Bobbie Rosenbaum and Good Grocer request that this Court grant this motion and enter the attached order to exclude the testimony of Martin Flask related to his employment, termination, and alleged statement about fraud and grant any other remedy the Court may deem just.

Comment [L11]: Have you abandomned the defamation claim in your second amended answer? Can you amend twice without agreement of counsel or leave of court? See FRCP 15.

Respectfully Submitted,

BOBBIE ROSENBAUM and GOOD GROCER
By Counsel,

MOLITERNO AND ASSOCIATES, L.L.P.

By: _____
[redacted]

Sydney Lewis Hall
Lexington, VA 24450

Telephone: [redacted]

Attorney for Defendants, Bobbie Rosenbaum and Good Grocer

CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing instrument was sent by e-mail to the following counsel of record on September 4, 2011.

[redacted]
Bruck & Associates
Sydney Lewis Hall
Lexington, VA 24450
Telephone: [redacted]
Email: [redacted]

_____
[redacted]

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Plaintiff,	**§**	
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Defendants.	**§**	**OF NEW YORK.**

ORDER ON PLAINTIFF'S MOTION IN LIMINE

After considering Defendants' Motion in Limine to exclude the testimony of Martin Flask, any response and the arguments of counsel, the Court **GRANTS** Plaintiff's Motion in Limine.

IT IS THEREFORE ORDERED that the testimony of Martin Flask, including his oral deposition, implicating Defendants in any way is barred from admission in this cause of action.

IT IS FURTHER ORDERED that any reference to Martin Flask's termination or past allegations of pricing fraud by Plaintiff, witness(s), or counsel is prohibited.

IT IS FURTHER ORDERED that this Court can and will impose appropriate sanctions if this order is violated.

SIGNED on _____, 2011.

_____

PRESIDING JUDGE

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NOTICE OF ORAL HEARING
ON DEFENDANT GOOD GROCER'S MOTION IN LIMINE

TO THE HONORABLE COURT:

PLEASE TAKE NOTICE that an oral hearing on Defendants' Motion in Limine has been set for Monday, August 5, 2011 at 1:00 PM in Section A of the Faculty Lounge.

BOBBIE ROSENBAUM and GOOD GROCER

By Counsel,

MOLITERNO AND ASSOCIATES, L.L.P.

By: _____

[redacted]

Sydney Lewis Hall
Lexington, VA 24450
Telephone: [redacted]

Attorney for Defendants, Bobbie Rosenbaum and Good Grocer

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