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Case No. 12-10010 (KG)

In re:
COACH AM GROUP HOLDINGS CORP.
Debtor

Michael Yusim
7499 Eagle Point Drive
Delray Beach, Florida 33446

March 14, 2012

Honorable Kevin Gross
United States Bankruptcy Judge
United States Bankruptcy Court District of Delaware
824 North Market Street
Wilmington, Delaware 19801

Dear Judge Gross,

I am writing this letter in response to:
DEBTORS OBJECTION AND REQUEST TO STRIKE LETTER FILED BY NON-ATTORNEY MICHAEL YUSIM ON BEHALF OF ZACHARY JOYNER SEEKING RELIEF FROM THE AUTOMATIC STAY (Docket No. 203)

Counsel for Midnight Sun Tours is objecting to the fact that I am not an attorney; and as such, I should not be allowed to represent Zachary. Counsel for Midnight Sun Tours makes a good point. I should not be representing Zachary. In fairness to Zachary, an attorney should be representing Zachary.

The problem though, is that Zachary and I cannot afford an attorney for Zachary. Most of the attorneys we have been to wanted thousands of dollars up front to represent Zachary, which we could not pay. The other attorneys did not think that they could help Zachary.

We recently approached the Legal Aid Society of Palm Beach County, FL, for help. They may be able to get us a Pro Bono attorney for Zachary; but there is no guarantee of that. Legal Aid helps people who have to file for bankruptcy because they cannot afford to pay their medical bills; not people who are trying to lift a stay on an Administrative Action against an interstate motor carrier that filed for bankruptcy. Zachary and I therefore have to continue to pursue Zachary's case on our own, because that is all we can afford to do. I have included a letter from

the Legal Aid Society of Palm Beach County, FL.

I filed the initial complaint for Zachary with OSHA, because 49 USC 31105(b)(1) allowed me to do that.

49 USC § 31105 - EMPLOYEE PROTECTIONS
(b) Filing Complaints and Procedures.—*(1) An employee alleging discharge, discipline, or discrimination in violation of subsection (a) of this section, or another person at the employee's request, may file a complaint with the Secretary of Labor not later than 180 days after the alleged violation occurred. All complaints initiated under this section shall be governed by the legal burdens of proof set forth in section 42121 (b). On receiving the complaint, the Secretary of Labor shall notify, in writing, the person alleged to have committed the violation of the filing of the complaint.*

I represented Zachary at the Administrative hearing before Department of Labor Administrative Law Judge Daniel Solomon at the US District Courthouse in Palm Beach County FL, on December 6 and 7 of 2011, because 29 CFR 18.34(g)(2) allowed me to act in that capacity. Counsel for Midnight Sun Tours did not object to my representation of Zachary at that time.

§ 18.34 Representation.
(g) Qualifications-(2) Persons not attorneys. *Any citizen of the United States who is not an attorney at law shall be admitted to appear in a representative capacity in an adjudicative proceeding. An application by a person not an attorney at law for admission to appear in a proceeding shall be submitted in writing to the Chief Administrative Law Judge prior to the hearing in the proceedings or to the administrative law judge assigned at the commencement of the hearing. The application shall state generally the applicant's qualifications to appear in the proceedings. The administrative law judge may, at any time, inquire as to the qualification or ability of such person to render legal assistance.*

I would therefore ask that the bankruptcy court allow me to submit this letter in order to ask that the stay on Zachary's case be lifted, so that the Department of Labor Administrative Law Judge may be permitted to render a decision as to whether Midnight Sun Tours violated 49 USC 31105(a)(1)(C) by firing Zachary because Zachary accurately recorded his hours on duty.

§ 31105. EMPLOYEE PROTECTIONS
(a) Prohibitions.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—(C) the employee accurately reports hours on duty pursuant to chapter 315;

Please allow me to address the merits of Zachary's case. Counsel for Midnight Sun Tours states the following:

Further, in light of the Debtor's potential liability in the Administrative Action, if the Administrative Action is permitted to go forward at this time, the Debtor's senior management, and other employees of the Debtors would be distracted by burdensome litigation which would detract from the Debtor's efforts to reorganize. Such a distraction should not be countenanced.

When balancing the hardships in lifting the stay, the most important factor is the effect of such litigation on the administration of the estate; even slight interference with the administration may be enough to preclude relief.

Zachary's case is not a distraction from the administration of the Midnight Sun Tours estate. On the contrary, Zachary's case is essential to the administration of the Midnight Sun Tours estate. Zachary's case raises serious questions about how Midnight Sun Tours is administering the logs that drivers must fill out as part of the administration of the estate.

Midnight Sun Tours is an interstate motor carrier. Part of the administration of Midnight Sun Tours' estate requires the administration of the logs that Midnight Sun Tours' drivers must fill out, in order that Midnight Sun Tours be compliant with FMCSR 395.8(a).

§395.8 Driver's record of duty status.
(a) Except for a private motor carrier of passengers (nonbusiness), every motor carrier shall require every driver used by the motor carrier to record his/her duty status for each 24 hour period using the methods prescribed in either paragraphs (a)(1) or (2) of this section.

We are alleging that Midnight Sun Tours is administering the logs as part of the administration of the estate in a manner that violates the Federal Motor Carrier Safety Administration hours of service regulations. The proof of that is the manner in which Midnight Sun Tours administered Zachary's logs, my logs, as well as other driver's logs. We are alleging the following:

Midnight Sun Tours created false records of duty status for Zachary, by compelling Zachary to change his logs, and then presenting Zachary's changed logs as Zachary's original logs. Midnight Sun Tours ignored the suggestion in Question 8 of the Guidance to FMCSR 395.8 to distinguish a CORRECTED COPY of an ORIGINAL log from the ORIGINAL log. By so doing, we believe that Midight Sun Tours created false records of duty status for Zachary; and therefore violated FMCSR 395.8(e);

***Question 8**: May a motor carrier return a driver's completed record of duty status to the driver for correction of inaccurate or incomplete entries?*
***Guidance**: Yes, although the regulations do not require a driver to submit "corrected" records of duty status. A driver may submit corrected records of duty status to the motor carrier at any time. It is suggested the motor carrier mark the second submission "CORRECTED COPY" and staple it to the original submission for the required retention period.*

§395.8 Driver's record of duty status.
(e) Failure to complete the record of duty activities of either this section, §395.15 or §395.16 failure to preserve a record of such duty activities, or making of false reports in connection with

such duty activities shall make the driver and/or the carrier liable to prosecution.

Midnight Sun Tours shredded Zachary's original logs before the mandatory six months retention period. By so doing, Midnight Sun Tours violated FMCSR 395.8(k).

§395.8 Driver's record of duty status.
(k) ***Retention of driver's record of duty status****. (1) Each motor carrier shall maintain records of duty status and all supporting documents for each driver it employs for a period of six months from the date of receipt.*

Midnight Sun Tours required Zachary to log off-duty under a Midnight Sun Tours company log policy that eliminated Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty. By so doing, Midnight Sun Tours violated the FMCSA guidance for logging off-duty during a tour of duty established in Question 2 of the Guidance to FMCSR 395.2.

Question 2: *What conditions must be met for a CMV driver to record meal and other routine stops made during a tour of duty as off-duty time?*

Guidance:
1. The driver must have been relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, and any cargo or passengers it may be carrying.

2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV will be significantly reduced.

3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer. There are no record retention requirements for these instructions on board a vehicle or at a motor carrier's principal place of business.

4. During the stop, and for the duration of the stop, the driver must be at liberty to pursue activities of his/her own choosing and to leave the premises where the vehicle is situated.

Midnight Sun Tours required Zachary to log off-duty for segments of a tour of duty that were not of a finite duration. By so doing, Midnight Sun Tours violated the guidance in Provision 2 in Question 2 of the Guidance to FMCSR 395.2.

2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV will be significantly reduced.

Midnight Sun Tours knowingly dispatched Zachary into tours of duty that required Zachary to record 10/15 hours of service violations on his logs. By so doing, Midnight Sun Tours violated FMCSR 395.5(a)(1) and FMCSR 395.5(a)(2).

§395.5 Maximum driving time for passenger-carrying vehicles.
Subject to the exceptions and exemptions in §395.1:
(a) No motor carrier shall permit or require any driver used by it to drive a passenger-carrying commercial motor vehicle, nor shall any such driver drive a passenger-carrying commercial motor vehicle:
(a)(1) More than 10 hours following 8 consecutive hours off duty; or
(a)(2) For any period after having been on duty 15 hours following 8 consecutive hours off duty.

We are alleging that Midnight Sun Tours fired Zachary because Zachary refused to change his logs when counseled to do so by Midnight Sun Tours. By so doing, Midnight Sun Tours violated 49 USC 31105(a)(1)(C).

§ 31105. EMPLOYEE PROTECTIONS
(a) Prohibitions.—(1) A person may not discharge an employee, or discipline or discriminate against an employee regarding pay, terms, or privileges of employment, because—(C) the employee accurately reports hours on duty pursuant to chapter 315;

We cite several examples from Zachary's Administrative Action of how Midnight Sun Tours administered the logs. Those examples raise serious doubts about Midnight Sun Tours' ability to administer the logs as part of the administration of the estate in a manner that is compliant with the FMCSRs, and the Guidance to the FMCSRs.

On July 30, 2010, Zachary was assigned to the Belle Glade Bus Service tour of duty. That tour of duty is a scheduled bus service that begins at 6:30 AM and ends at 6:30 PM. It is made known to Zachary by the Belle Glade Bus Service Passenger Tracking Sheet, that Zachary may only log off-duty for half an hour from 1:30PM until 2:00PM.

The following is how the Belle Glade Bus Service tour of duty is described to OSHA in a letter from Mr. George W. Hanthorn, Senior Vice President and General Counsel for Coach America. The letter is dated December 13, 2010.

Joyner also appears to allege that his termination was based on his refusal to incorrectly log hours worked on service performed by MST in Belle Glade,FL. As noted above, Joyner was terminated for multiple unsafe driving events. However, MST vigorously denies that Joyner was asked to log the time he worked on the Belle Glade service incorrectly.

The Belle Glade Service is a transit type service that operates on a schedule through the day. Although the service operates between 6:30AM and 6:30PM, drivers assigned to the service are not constantly driving during those hours. Instead, the drivers drive a route for approximately 20-40 minutes, return to the terminal where they are on-duty, not driving for approximately 10-20 minutes and then drive another route. This routine continues throughout the day. In total,

drivers on the Belle Glade service drive for 10 or fewer hours and are on-duty, not driving approximately two hours. ***Additionally, each driver receives a 30-40 minute meal break when they are off-duty.*** *Driving the Belle Glade service does not require any driver to violate the hours of service regulations.* (Note: Bold added for emphasis)

Zachary submitted an ORIGINAL log for the July 30, 2010 tour of duty in Belle Glade, in which Zachary logged off-duty for the half hour made known to Zachary by the Belle Glade Passenger Tracking Sheet. This is consistent with the requirement for logging off-duty during a tour of duty established in Provision 3 in Question 2 of the Guidance to FMCSR 395.2.

3. If the driver has been relieved from duty, as noted in (1) above, the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer. There are no record retention requirements for these instructions on board a vehicle or at a motor carrier's principal place of business.

Ms. Dorothea Moore, the Log Manager at Midnight Sun Tours, then counseled Zachary to change his log. In the changed log, Zachary logged off-duty for 4 hours. In fact, Zachary logged "off-duty" at times when Zachary was scheduled to be driving the bus.

We know that Zachary was counseled by Ms. Moore to change his log for the July 30, 2010 tour of duty in Belle Glade, because the OSHA Findings discuss that. The following is taken from the OSHA Findings in Zachary's case::

On July 30, 2010 Complainant did not provide his own transportation to his bus driving job in Belle Glade, FL, as he normally did. To accommodate the Complainant's need of a vehicle, Respondent provided him with a non-commercial van to use. Following his normal work day in Belle Glade, FL, complainant submitted his log for the day. Complainant was counseled by Log Manager Dorothea Moore that his daily log for the day was not accurate. Ms. Moore said the Complainant marked his daily log "On-Duty" while driving to the worksite in Belle Glade, FL, where Respondent's buses are stored, in violation of "On-Duty" as defined in 49 CFR 395.2.

In accordance with the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, the Passenger Tracking Sheet, Zachary may only log off-duty for half an hour. However, Midnight Sun Tours compelled Zachary to submit a changed log for the July 30, 2010 tour of duty in Belle Glade, in which Zachary logged off-duty for four hours. How can that be?

We asked Mr. Don Redden, the Operations and Safety Manager of Midnight Sun Tours, about the log for Zachary's July 30, 2010 tour of duty in Belle Glade at the hearing. The following is taken from Don's testimony [TRANSCRIPT 122,123]

Q Can you explain to us, Don? How is it that He's logging off duty for four hours?
A I cannot explain that.
Q You can't explain it?
A No.
Q Okay, I'm having trouble understanding this. He is given a ticket, a schedule, right, on the Belle Glade Bus Service, is that true?
A Yes.
Q On that schedule, it is made known to him that he has a lunch break, is that true?
A Which appears to be from 1:30 to 2:30
Q From 1:30 to 2:30. From that period, from 1:30 to 2:30, he is expected to log off duty, is that true?
A [No Audible Response]
Q Right. Can he log off duty outside of that period on the Belle Glade Bus Service?
A Not it he's doing the route.
Q That's right. Even if he -- Don, he's logging off duty for -- whose responsibility is this log? Who has responsibility for accepting this log?
A Ultimately, me.
Q And you --
A At that time.
Q And you accepted this?
A If I had seen it, I would not have accepted it.
Q But this was accepted by whoever was managing the logs at Midnight Sun Tours.
A Whoever was processing the logs apparently accepted it.
Q Should they have accepted this?
A No.

Zachary's log for the July 30, 2010 tour of duty in Belle Glade was accepted by Ms. Dorothea Moore, the Log Manager for Midnight Sun Tours. We asked Ms. Moore about the log for the July 30, 2010 tour of duty in Belle Glade. The following is taken from Dorothea's testimony [TRANSCRIPT 434, 435]

Q Page 31, yeah, was that Zachary's original log?
A Apparently this is the one that was scanned.
Q So that's his original log?
A I'm going to say I guess so.
Q Is there anything on that log that makes it look like a corrected copy of an original log?

A This is the a log that was done on the Belle Glade shuttle, and it's done properly.
Q Okay, good, okay. So this log represents the tour of duty that he did for Belle Glades on July 30th, 2010, is that correct
A This is the one that -- if this is the one that I scanned, yes, sir
Q And you accepted this log? Did you make any indications about this log?
A Such as?
Q I don't know, arithmetic errors or anything.
A This is a Belle Glade log. This is his log.
Q And it was acceptable to you?
A Yes.

We could not understand how Ms. Moore, the Log Manager at Midnight Sun Tours, would accept a log for the Belle Glade Bus Service tour of duty, in which Zachary is logging off-duty for four hours, when the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, the Belle Glade Bus Service Tracking Sheet, make it known to Zachary that Zachary was only authorized to log off-duty for half an hour.

We questioned Ms. Moore, the Log Manager at Midnight Sun Tours, about her understanding of the conditions that are necessary for a driver to log off-duty during a tour of duty; the conditions specified in Question 2 of the Guidance to FMCSR 395.2. The following is taken from Dorothea's testimony [TRANSCRIPT 449,450]

Q So would you agree that there are four conditions that have to be met in order for a driver to log off duty during a tour of duty?
A And basically those four conditions are listed in number one, you have no care and custody of the vehicle, its accessories, and any cargo. That's three right there. The fourth one is passengers it may be carrying. So it just listed you four right there.
JUDGE SOLOMON: So the the answer to the question is no?
THE WITNESS: It listed you four in that one paragraph.
BY MR. YUSIM:
Q So your saying if I satisfy condition one that I could log off- duty?
A Yes. If you have no care and custody of the vehicle --
Q Yeah.
A -- and its accessories and its cargo and/or

15 passengers it may be carrying. That's four right there.
16 That's four things right there.
17 Q Right.
18 A You can log off duty.
19 Q Just on the basis of what's in number one?
20 JUDGE SOLOMON: You've made your point.

Based upon Ms. Moore's answers, Midnight Sun Tours is administering the logs as part of the administration of the estate in a manner that requires drivers to log off-duty just on the basis of Provision 1 in Question 2 of the Guidance to FMCSR 395.2.

Midnight Sun Tours actually produced as evidence at Zachary's Administrative hearing an off-duty authorization that required drivers to log off-duty only on the basis of Provision 1 in Question 2 of the Guidance to FMCSR 395.2. The following is taken from that off-duty authorization:

The Motor Coach Operator of the charter/trip/shuttle/route shall be required to log Off-duty during the tour of Duty under the following condition.

The Driver has no responsibility for the care and custody of the vehicle, its accessories, cargo and passengers.

In order for a driver to log off-duty during a tour of duty, all four conditions specified in Question 2 of the Guidance to FMCSR 395.2 must be satisfied; not just Provision 1 in Question 2 of the Guidance to FMCSR 395.2. However, Midnight Sun Tours does not believe that to be the case.

Midnight Sun Tours' position in regard to the administration of the logs as part of the administration of the estate, is that Midnight Sun Tours does not have to strictly abide by the Guidance to the Federal Motor Carrier Safety Administration hours of service regulations. That was made evident during Zachary's Administrative hearing.

Mr. Don Redden, the Operations and Safety Manager of Midnight Sun Tours, was being questioned about the conditions necessary for a driver to log off-duty during a tour of duty; the conditions specified in Question 2 of the Guidance to FMCSR 395.2. The following is an exchange between Judge Solomon, and Counsel for Midnight Sun Tours, Mr.Tuschman. [TRANSCRIPT 77,78]

17 JUDGE SOLOMON: Well, I think that you sort of
18 opened the barn door when you talked about the fact that he
19 was the supervisor, and a supervisor is supposed to know
20 what the rules are. So these are the rules, right?

MR. TUSCHMAN: Well, I --
JUDGE SOLOMON: Would you stipulate that these are the rules, that this applies to your client?
MR. TUSCHMAN: This is an interpretive guidance. But, no, I don't -- other than with the caveat that it's an interpretive guidance, not the regulation itself.
JUDGE SOLOMON: You know, we have a brief colloquy in the last go-around when we were talking about the motions for summary decision, and I told you that sometimes I have to be educated. You know, sometimes there are things like this. Guidance may not be a written regulation, per se. So the question I'm asking you is, do you know whether or not your client was required to follow this?
MR. TUSCHMAN: Well, I don't --
JUDGE SOLOMON: I mean, you have a corporate officer here. I'm going to ask him, I guess.
MR. TUSCHMAN: Yes.
JUDGE SOLOMON: The interests of justice probably require that I put him under oath and ask him.
MR. TUSCHMAN: Yes, Your Honor. I think my answer is that it's an interpretive guidance, it doesn't have the force and effect of law, and the company is not required strictly to adhere to an interpretive guidance. It's not a regulation.
JUDGE SOLOMON: Okay, just so we can move on. Mr. Redden, I guess this is the time I had better ask a question. Prior to this moment, were you aware of this guidance at all?
THE WITNESS: Yes.

It is also Midnight Sun Tours' position that it is permissible for drivers to log off-duty for non-driving segments of a tour of duty that are not of a finite duration; for the duration of the event, whatever that duration might be.

At one point, Midnight Sun Tours actually had an off-duty authorization that made the duration of the driver's relief from duty dependent upon whenever a passenger decided to return to the bus. The following is taken from that off-duty authorization:

Passenger carriers: You may remain in your vehicle and log off-duty only when no passengers remain on board, and when you are fully satisfied that your duties are completed. In the event a passenger returns to the vehicle for assistance or for seating, you must return to duty.

This is not permissible under Provision 2 in Question 2 of the Guidance to FMCSR 395.2.

2. The duration of the driver's relief from duty must be a finite period of time which is of sufficient duration to ensure that the accumulated fatigue resulting from operating a CMV will be significantly reduced.

Also, logging off-duty while a driver is in or upon a commercial motor vehicle is a violation of FMCSR 395.2(4):

§395.2 Definitions.
On duty time *means all time from the time a driver begins to work or is required to be in readiness to work until the time the driver is relieved from work and all responsibility for performing work. On-duty time shall include:*
(4) All time, other than driving time, in or upon any commercial motor vehicle except time spent resting in a sleeper berth;

Mr. Don Redden, the Operations and Safety Manager for Midnight Sun Tours, was being questioned at the time by Counsel for Midnight Sun Tours in regard to logging off-duty for segments of a tour of duty that are not of a finite duration. The following is taken from Mr. Redden's testimony:

[TRANSCRIPT 101,102,103]

Q Now, you also were asked some questions about the logging off duty policy and you mentioned football games and NASA space shuttle launch, and you didn't go into a lot of detail. Can you educate the Judge -- and us -- about how it is that drivers are expected to log off duty at Midnight Sun when they drop passengers off at, say , a baseball game at a stadium?
A Sure. Once the passengers are brought to the venue and are dropped off, they are all safe and inside, normally the driver would park in the parking lot of the venue and shut down the coach, and that would be the end of the driver's responsibility to the coach or the people or their possessions until they started coming out.
Normally, they would come out in a ball game in the eight or ninth inning and come back on the bus. During the game itself, the driver would be asked to have the coach shut down and to log off duty because the driver has no responsibilities to the people or their possessions to do anything during that time period.
So, when the people started coming out again, then the driver would be expected to go back on duty. But while the game is in progress the driver could -- and many do -- go for a walk, go shopping, go get a coffee, go get something to eat.

In some of the venues that we go to, like Dolphin Stadium or the University of Miami Games, the company will provide pizza and soft drinks for the drivers, so the drivers just lock up their coaches and walk a hundred yards and get something to eat and drink.

Q And they are off duty during that time?

A Yes

Q Now, does Midnight Sun know -- you took the example of a baseball game -- precisely how long the driver is going to be off duty?

A That cannot be known because a game is not a finite period. It may go into overtime or extra innings. A space launch may be delayed due to clouds.

Q The baseball game may be rained out?

A If it's rained out, then the people would come back early.

Q Or the baseball game may go into extra innings?

A Sure.

Q And even a baseball game doesn't have a clock, correct?

A A baseball game doesn't last two hours and 15 minutes

Q Right

A It will be a varying time period.

Q So you give drivers a work ticket, correct?

A Yes.

Q And what does the work ticket tell the driver about how long he's going to be -- again, let's take the example of a baseball game -- how long the driver is going to be off-duty? What can the driver discern from the work ticket about the duration of time he's going to be off-duty?

A That he would be off-duty during the period of the game.

Q And you just don't know how long the game is going to be?

A No.

Q And you don't know how long the football game is going to be?

A No.

Q And you don't know how long the shuttle launch is going to be.

A No.

Q Is it your understanding that MST's practice of telling drivers on the work ticket that they're going to be off duty during the duration of the event is consistent

23 with the federal regulations?
24 A I believe so, because otherwise it would be an
25 impossibility to set a specific time.

In spite of what Mr. Redden claims in his testimony, Midnight Sun Tours does not give drivers such written instructions on their work orders when they are waiting at a venue for their passengers to return to the bus. On October 3, 2009, I was waiting at Dolphin Stadium for my passengers to return to the bus. The written instructions I received for that tour of duty were "Shuttle as Directed" and

ALL BUSES MAY BE NEEDED FOR MORE THAN ONE TRIP TO THE GAME AND MORE THAN ONE TRIP FROM THE GAME, THIS IS A SHUTTLE. DO NOT LEAVE STADIUM - LUNCH WILL BE PROVIDED AT STADIUM (MIAMI STAFF)

Because I did not log off-duty under those written instructions, I was written up and given a one-day suspension.

On October 24, 2009, I was waiting for my passengers to return to the bus at the Palm Beach County Convention Center. There was nothing on my work order to indicate that I was to log off-duty during that tour of duty. Because I did not log off-duty during that tour of duty, on October 26, 2009, I was fired.

Provision 3 in Question 2 of the Guidance to FMCSR 395.2 establishes a standard of "made known" for logging off-duty during a tour of duty. A driver may not log off-duty during a tour of duty unless it is made known to the driver, in writing, that the driver is indeed off-duty during the tour of duty.

the duration of the relief from duty must have been made known to the driver prior to the driver's departure in written instructions from the employer.

Midnight Sun Tours expects drivers to log off-duty during a tour of duty because it is "reasonable to conclude" that drivers are off-duty during the tour of duty; not because it is "made known" to the drivers that they are off-duty during the tour of duty.

Midnight Sun Tours, of course, gets to decide what is "reasonable to conclude" in regard to logging off-duty during a tour of duty. In the case of Zachary's CHANGED log for the July 30, 2010 tour of duty on the Belle Glade Scheduled Bus Service, Midnight Sun Tours decided that it was "reasonable to conclude" that Zachary was off-duty while Zachary was driving the bus.

Even more outrageous than Zachary logging off-duty during a tour of duty while Zachary was driving the bus, was the case of Driver Robert DuBose.

As part of Mr. Joyner's case, we asked to see the work orders and logs of Mr. Robert DuBose, because Mr. DuBose was involved in an accident while driving a Midnight Sun Tours bus in which a pedestrian suffered a fatal injury. On February 24, 2011, the day before the accident, Mr. DuBose worked a tour of duty, as indicated by the work order that Midnight Sun Tours produced for Zachary's case. Midnight Sun Tours also produced a log for Mr. DuBose for February 24, 2011 that indicated that Mr. DuBose was off-duty for the entire day of February 24, 2011.

Mr. DuBose recalls working on February 24, 2011; however Mr. DuBose does not recall submitting a log in which he logged off-duty for the entire day of February 24, 2011. We do not understand how Midnight Sun Tours could produce a log for Mr. DuBose that showed Mr. DuBose was off-duty on a day in which Mr. DuBose worked.

The Midnight Sun Tours practice of requiring a driver to log off-duty during a tour of duty because it is "reasonable to conclude" that the driver is off-duty during the tour of duty also extends to how drivers log their "driving" times, and "on-duty, not driving" times. Midnight Sun Tours decides what is "reasonable to conclude" in regard to those times, as well.

On July 18, 2010, Zachary worked a tour of duty in which he transported soldiers from Camp Blanding, FL, to Brooksville, FL. Once Zachary dropped the soldiers off at Brooksville, FL, Zachary then returned to the Midnight Sun Tours bus yard in Lake Worth, FL. In the ORIGINAL log that Zachary submitted for that tour of duty, Zachary recorded the drive from Brooksville, FL, to Lake Worth as taking 4.50 hours. Zachary was then counseled by Midnight Sun Tours to change the log; and to record the drive from Brooksville, FL, to Lake Worth as taking 3.00 hours.

Midnight Sun Tours decided that it was reasonable to conclude that Zachary did the drive from Brooksville, FL, to Lake Worth, FL, in 3.00 hours; not 4.50 hours. Furthermore, Midnight Sun Tours presented Zachary's CHANGED log as Zachary's ORIGINAL log.

It is a business practice at Midnight Sun Tours to discriminate against drivers who accurately report their hours on duty, in violation of 49 USC 31105(a)(1)(C). That business practice was codified on September 10, 2009, when Midnight Sun Tours adopted a company log policy that eliminated Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty. The following is taken from the Midnight Sun Tours company log policy:

All Midnight Sun Tours Drivers are hereby authorized and instructed to log Off Duty when these conditions are met: (FMCSA 395.2 and Interpretations)
1. You have been relieved of all duty and responsibility for the care and custody of the motor coach, its accessories, and any cargo or passengers that may have been on the motor coach.

2. The duration of your relief from duty is of a set time of sufficient duration to ensure that the fatigue of operating a motor coach is significantly reduced.
3. You are at liberty to pursue activities of your own choosing and may leave the premises where the motor coach is located.
4. You are hereby instructed to log Off Duty when these conditions are met.
5. You are also authorized and instructed to record meal and other routine stops made during your tour of duty as Off Duty time.
The purpose of this authorization and Instruction is to preserve your available hours of service while keeping you rested in between portions of your driving assignments. You are required to log Off Duty when the above conditions are met.

Mr. Don Redden, the Operations and Safety Manager of Midnight Sun Tours, was questioned at the hearing about the elimination of Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty. The following is an exchange between myself, acting as Mr. Joyner's non-attorney representative, and Mr. Redden.

[TRANSCRIPT 113,114]

Q No, no. I'm asking you about the meal and other routine stops interpretation. I have satisfied provision 1, I have no responsibility. I have satisfied provision 2, I know it's a finite duration. I satisfied provision 4, I don't have to stay by the bus, I can go wherever I want, do whatever I want. But provision 3 hasn't been satisfied. Can I log off-duty?
A No, but it doesn't apply to Midnight Sun, because Midnight Sun has given --
Q I'm not asking that. I'm just asking about this guidance. If all I have satisfied is 1, 2, and 4, can I log off duty? I haven't satisfied 3.
A Apparently not.
Q So I can't log off-duty, okay. If you look at the Midnight Sun Tours log policy, it says there are three conditions that I have to meet in order to log off duty. Let's take a look at that.
A What tab, please?
Q This is the code -- the Midnight Sun Tours log policy, and this is the page 13.
A Okay
Q Okay?
A Paragraph 3 is satisfied --
Q Okay
A -- by the memo itself.

At issue in Mr. Joyner's case, as well as in my case, is whether the Midnight Sun Tours

company log policy, dated September 10, 2009, actually does satisfy Provision 3 in Question 2 of the Guidance to FMCSR 395.2. It is our position that a company log policy that eliminates Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty, does not satisfy Provision 3 in Question 2 of the Guidance to FMCSR 395.2.

If a driver refuses to log "off-duty" during a tour of duty without the written instructions mandated by Provision 3 in Question 2 of the Guidance to FMCSR 395.2, then that driver has violated the Midnight Sun Tours company log policy.

It should also be noted that by eliminating Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty, Midnight Sun Tours requires its drivers to violate the Coach America log policy, dated August 1, 2007. Coach America is the parent company of Midnight Sun Tours. The Coach America log policy demands a very strict adherence to Provision 3 in Question 2 of the Guidance to FMCSR 395.2. The following is taken from the Coach America log policy:

A driver must have a written statement, specific to the exact trip that he or she is performing which expressly authorizes the driver to log Off Duty for specific breaks and sufficient time to relieve fatigue during a Tour of Duty, Chartered Trip, Fixed Route or Shuttle.

The written statement should be part of the charter order, printed onto the charter order or attached to the charter order, trip sheet or route sheet, with specifics that relate to that exact piece of work.

In general, a driver may log Off Duty if:

The Driver is relieved of all duty and responsibility for the care and custody of the vehicle, its accessories, cargo and passengers. This means the bus is securely parked, there are no passengers on board and the driver is not responsible for the bus's cargo.

The duration of the driver's relief must be a finite time with a starting time and a return to duty time.

The duration of the relief time Off Duty must be made known to the Driver prior to the driver's departure, in writing.

Contrary to what Coach America claims in its log policy, Midnight Sun Tours does not give drivers "a written statement, specific to the exact trip that he or she is performing which expressly authorizes the driver to log Off Duty for specific breaks and sufficient time to relieve fatigue during a Tour of Duty, Chartered Trip, Fixed Route or Shuttle". What Midnight Sun Tours does give drivers is a written statement that eliminates Provision 3 in Question 2 of the Guidance to FMCSR 395.2 as a necessary condition for logging off-duty during a tour of duty. That cannot stand.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that Provision 3 in Question 2 of the Guidance to FMCSR 395.2 is not a necessary condition for logging off-duty during a tour of duty.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that only Provision 1 in Question 2 of the Guidance to FMCSR 395.2 is necessary for a driver to log off-duty during a tour of duty.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that drivers can log off-duty for segments of a tour of duty that are not of a finite duration; in violation of Provision 2 in Question 2 of the Guidance to FMCSR 395.2.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that the company can require drivers to change their ORIGINAL logs, and then present the CHANGED logs as the ORIGINAL logs.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that drivers can be required to log off-duty while they are driving the bus; as Midnight Sun Tours required of Zachary on July 30, 2010 during Zachary's tour of duty in Belle Glade.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that drivers can be required to log off-duty on days when the drivers are working; as Midnight Sun Tours required of Mr. DuBose on February 24, 2011.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that drivers can be required to change the number of hours the drivers actually drove; as Midnght Sun Tours required of Zachary on July 18, 2010 for the trip between Brooksville, FL, and Lake Worth, FL.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that drivers can be required to log off-duty during tours of duty under written instructions that read "DO NOT LEAVE STADIUM"; as Midnight Sun Tours required of Driver Michael Yusim on October 3, 2009 at Dolphin Stadium.

Midnight Sun Tours cannot properly administer the logs as part of the administration of the estate as long as Midnight Sun Tours demonstrates a belief that the company can shred logs that are less than six months old; as Zachary claims the company did in his case.

By allowing the automatic stay in Zachary's Administrative Action against Midnight Sun Tours to remain in effect, the bankruptcy court is enabling Midnight Sun Tours to administer the logs as part of the administration of the estate in a manner that defeats the purpose of the Federal

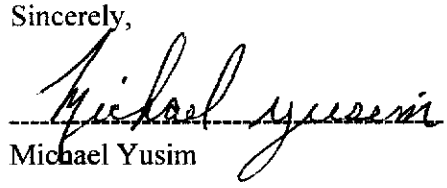
Motor Carrier Safety Administration hours of service regulations; to remove fatigued drivers from the road.

We also believe that because Zachary's case deals with "other laws of the United States regulating organizations or activities affecting interstate commerce", that Zachary's case falls within the scope of 28 USC 157(d); and should therefore be withdrawn from the bankruptcy proceedings, and returned to the Department of Labor Administrative Law Judge to which Zachary's case was first assigned.

(d) *The district court may withdraw, in whole or in part, any case or proceeding referred under this section, on its own motion or on timely motion of any party, for cause shown. The district court shall, on timely motion of a party, so withdraw a proceeding if the court determines that resolution of the proceeding requires consideration of both title 11 and other laws of the United States regulating organizations or activities affecting interstate commerce.*

We therefore ask that the bankruptcy court lift the stay on Mr. Zachary Joyner's Administrative Action against Midnight Sun Tours, so that the Department of Labor Administrative Law Judge may be permitted to render a decision as to whether Midnight Sun Tours violated 49 USC 31105(a)(1)(C) by counseling Mr. Joyner to change his logs; and then firing Mr. Joyner moments after Mr. Joyner refused to do so.

Sincerely,



Michael Yusim

cc:

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March 9, 2012

Zachary Joyner
107 Rich Drive
West Palm Beach, FL 33460

Dear Mr. Joyner:

Your case has been referred to the Pro Bono Project of the Legal Aid Society of Palm Beach County. The Pro Bono Project provides volunteer attorneys to individuals in Palm Beach County who qualify for services. If your case is accepted, you will be contacted by someone from our office with further information. If you have any questions or concerns, you may contact me at (561) 655-8944 Ext. 296.

Sincerely,

Tequisha Myles

Supervising Attorney