UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTATE OF DONALD ZARDA,

Plaintiff-Appellant,

-against-

ALTITUDE EXPRESS, INC. d/b/a SKYDIVE LONG ISLAND and RAYMOND MAYNARD,

Defendants-Appellees.

Docket No.: 15-3775

DECLARATION IN OPPOSITION TO MOTION TO EXTEND TIME TO FILE APPELLEE'S BRIEF

GREGORY ANTOLLINO, and attorney admitted to this Court does hereby declare under penalty of perjury as follows:

1. It would be oppressive and for me not to agree to a few days.

2. However, I otherwise strongly oppose the extension of time for appellees.

This is attorney Saul Zabell's modus operandi: He asks for an extension at the last minute to obtain a procedural advantage and prejudices his adversary's schedule. He delays litigation by fighting over trivia such as *where* the deposition is to take placing, forcing his adversary – as I experienced in five years of litigation in the lower court – to bring minutiae to have the district court decide, or to decide to let it go so and not to bother a busy judge. He wields power by fighting over everything. He walked out of his client's deposition, forced me to move for extra time, then adjourned an agreed upon date for the continued deposition at the last minute in the lower court. This caused my client to incur money and expense by having to extend his stay and reschedule his flight. He withheld information for a year so that we could not depose two material witnesses. In the very

end, he brought on 50 witnesses in the pre-trial order – and wouldn't tell us whom he really wanted to call – which was so prejudicial to us that we have made it one contention of our appeal. These are but a few examples. Because he like many attorneys has many cases, he can pick anything as an excuse for a delay. Because his associates go in and out through a revolving door – there have been five during the five and a half years of this litigation – he can invoke that excuse at will, at least two months out of the year, to convey distress.

3. The fact is that he chose the maximum date for his brief, and didn't use the time, even when the associate was working for him. Instead, he made two frivolous motions to strike the appendix. His aim was to delay the appeal. His associate could have written the brief then, but instead – get this – she assisted in making a motion to strike the entire appendix because there were some 15 pages that I annotated with "Exhibit 1," "Exhibit 2," and so on, and on one page I wrote at the bottom, "See next page." He made two motions in this regard, because the first time around he would not tell me, nor the Court, what the annotations were so that I could satisfy him to correct any alleged prejudice. The motion was denied without prejudice with him to identify these unknown annotations. Upon pointing them out, I looked at his list of "improper" annotations mouth agape. The Court, Carney, J. denied the motion with prejudice. Docket 124, 4/18/16.

4. Mr. Zabell also repeatedly delayed the CAMP conference to make it completely ineffectual. "This is the game he plays," I warned the *first* CAMP mediator. When the first highly experienced attorney assigned to mediate the appeal pressed Mr. Zabell to pick a date for a CAMP conference – again and again and again - Attorney Zabell kept putting him off , until he had to recuse himself because of his vacation. A

second CAMP mediation occurred, and by the time the conference was held, appellant had almost completed its brief and appendix, making the potential for settlement near to impossible. This is not to say the case *would* have settled; but by playing with, and disrespecting the first mediator's schedule, defense counsel greatly reduced the chances that it could.

5. It so happens that my original calculation of Plaintiff-Appellant's brief and appendix deadline, I miscalculated for reasons that I could have asked for, and perhaps gotten, a brief extension. In other words, I calculated January 29, but my brief was ordered to be completed January 11. I did not ask for an extension, knowing that they are disfavored, and that this Court is serious about deadlines - and knowing that if I did, Mr. Zabell would attempt to use any extension I got in making this motion that I anticipated. I therefore filed the papers within three weeks shorter than I had calculated, requiring me to rely on the offices of various district courts for extensions on other matters. I did file an amended brief a week later, which was only for typographical errors, and it is for this reason that I consent to an extra week, if the Court is so inclined. See RLI Ins. Co. v. JDJ Marine, Inc., 716 F.3d 41, 43 (2d Cir. 2013) ("counsel is expected to comply with the date chosen and extensions of time are granted grudgingly and only for brief periods of time.") (citing Local Rule 27).

6. In addition, I have planned other dates, including my summer trip, around the date that I would be writing a reply brief. I actually split up a road trip to return to New York, write the reply, and then fly back to rejoin my car. I write this, from all places, Oklahoma City, but will fly in New York on June 11.

7. Mr. Zabell chose the maximum time of 91 days, bragging in his statement

that this was despite my filing an amended brief. It is for that reason that (1) I would consent to the extension of one week; and (2) that appellants would be prejudiced in the scheduling of the writing of a reply brief. The time after the vacation, I had intended to be at least one, and perhaps two CLE's of importance to me. My summer and plans are his failure to abide by the rules. I am prejudiced, as are my clients, who want a resolution.

8. I would agree to a week that I would give any member of the bar, including someone who had used scheduling to prejudice me in adjourning and delaying the resolution of the lower-court case, until the very biggest prejudice of all, the death of my client. No one predicted that, but consider this: Mr. Zabell suggested death on the record within 24 hours that my client's death was known to anyone in the world (word gets around fast). Then he would not consent to substituting the Estate for plaintiff until we had to move for such relief before the district court. This is the way he plays procedurally, so I have no qualms about opposing this motion with vigor.

9. This is not revenge, but his suggestion of 45 days is outrageous. Whichever Judge decides this motion will know that, years ago, the Second Circuit revamped its briefing schedule to ward off last minute requests like this. Mr. Zabell blames the departure of his associate to complete the brief. See RLI Ins. Co.

10. In the district court, Mr. Zabell adjourned the trial for July 2015 – we had witnesses lined up – because his client allegedly had "the shingles." The Court granted the adjournment until the fall. A week before trial, he sent a letter to the judge that his client had suffered a stroke, suggesting he would ask for another adjournment, putting everyone on edge, then suddenly nothing came of it, and the defendant appeared at trial with no apparent deficiencies or inability to testify.

11. I do not have an associate. I have co-counsel who provided a draft, proposed points, advised, guided and commented on my work; however, I spent every minute available between the change in my scheduling request, to the time I submitted the brief and appendix to comply with deadlines and not ask for a request. It was exhausting, and I turned out what I believe to be a good, if imperfect, product – even with the amendment – but I got it done. I had other matters pending, including a trial and two oppositions to a summary judgment motion that I needed to file, but I found a way to complete both without an associate or any request for an adjournment of those matters. We all have other cases and responsibilities. The Circuit makes law and therefore should come first, especially where it gives attorneys a wide swath of dates from which to choose. Here, defendant took the entire 91 days available, and did nothing except move to strike the appendix on (in my opinion) frivolous grounds.

12. Mr. Zabell's appeal due in the First Department Appellate Division will be adjourned upon a mere request. The fact that he doesn't have an appeal number suggests that he is the appellant and can get that adjourned with a motion. He doesn't tell you the procedural posture, in any case. Having perfected scores of appeals to the First and Second Departments, I know that they will grant multiple adjournments, and that a motion stays the time to file the brief. But the Departments work in increments of only 30 days. Here you give up to 91 and expect counsel to take such a date seriously.

13. Mr. Zabell also suggests matters before the Department of Labor to warrant this extension. I do not see how an appearance at an agency that the Second Circuit oversees would trump the rules of the Circuit. What was so important at the DOL that he could not adjourn to work on an appeal in which he chose the maximum time to

file and instead only used it for a frivolous motion? Mr. Zabell doesn't say

14. For these reasons the motion should be denied in its entirety except for a week if the Court is so inclined.

Dated: Oklahoma City, Oklahoma
June 4, 2016

/s/
GREGORY ANTOLLINO, ESQ.