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Catherine O'Hagan Wolfe
Clerk
Second Circuit U.S. Court of Appeals
40 Centre Street
New York, NY 10007

RE: Estate of Zarda v. Altitude Express, 15-3775

Dear Ms. Wolfe or to whom it may concern

I write under Appellate Rule 28(j), having read two decisions discussing appellate procedure relevant to this appeal. As we discussed at Point I(c) of our opening brief, and Point I(a) of the reply brief, there are reasons for and a method to overruling precedent by a single panel. McCullough v. World Wrestling Entm't, 2016 U.S. App. LEXIS 17519 (2d Cir. Sep. 27, 2016) mentions this power briefly, **3-4, and it cites another case - also handed down after the appeal was perfected - which discussed the parameters wherein a three-judge panel stands in light of an intervening, inconsistent decision from the Supreme Court. The case cited is Doscher v. Sea Port Grp. Sec., LLC, 2016 U.S. App. LEXIS 14767 (2d Cir. Aug. 11, 2016). That panel did not indicate whether it had polled active judges before doing so, but it overruled a Circuit precedent that preceded Doscher. It noted the parameters in which this may be done:

To qualify as an intervening decision, the Supreme Court's conclusion in a particular case must have "broke[n] the link . . . on which we premised our [prior] decision," or "undermine[d] [an] assumption" of that decision." It is not, however, necessary that the Supreme Court have "address[ed] the precise issue decided by the panel for this exception to apply." If a panel concludes that a particular Supreme Court decision does not cast sufficient doubt on our precedent, the precedent continues to be binding. . . . [When] sufficient doubt exists, however, and the panel must reconsider whether that precedent should continue as the law of the Circuit, it not only applies the conclusions of the intervening Supreme Court case but also employs normal interpretive methods and examines such things as the internal consistency of the statute, statutory purpose and legislative history, analogous statutes, and even changes in the judicial landscape and the conclusions of other Circuits.

Doscher v. Sea Port Grp. Sec., LLC, 2016 U.S. App. LEXIS 14767, at *12 (2d Cir. Aug. 11, 2016).

Sincerely,

Greg S. Antollino 

Gregory Antollino

CC: All counsel by ecf