

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

ESTATE DONALD ZARDA,

Plaintiff-Appellant,

15-3775

-against-

ALTITUDE EXPRESS, INC.
AND RAYMOND MAYNARD,

REPLY
DECLARATION

Defendants-Appellees.

GREGORY ANTOLLINO, attorney for plaintiffs-appellants, an attorney admitted to this Court does hereby declare under penalty of perjury as follows:

1. In the process of putting together the Appendix, it is the appellant's obligation to gather documents that were submitted to the lower court or admitted into evidence at trial.
2. In this case, one audio and some videotapes were admitted into evidence or put forth on summary judgment by plaintiff in support of his motion for partial summary judgment. The defense knows this because it produced some of the files in discovery.
3. The files were produced with a program that is not easily accessible to any viewer. Plaintiff appellant has every interest in making sure that the clearest, most accurate videos and audios are made available to the Court in a single appendix.

4. The point of this motion is not to file one specific document, but to permitted us to file an electronic supplemental appendix. Appellants have not put it together yet, but the request is merely: Since electronic evidence was submitted to the lower court, can appellant file a disk or them drive as a supplemental appendix? The clerk's office advised that this was the procedure.
5. When we have an answer to that question, if defendants-appellees feel that the appendix does not accurately reflect what was admitted to the lower court, then he has the opportunity to object, or file his own supplemental appendix. The Court will not consider anything dehors the record and appellant does not intend to include anything as such. Appellants will endeavor to prepare this appendix before the filing deadline for appellees' review, but this request is not substantive, and they have remedies, including potential costs of producing their own appendix if ours is not faithful to the record.
6. In the lower court, defense counsel agreed to nothing, not even something so simple as the wording of the Joint Pre-trial Order. He filed his own, because plaintiff made some objections to his list of witnesses. It is not a surprise that he would object this simple form of relief.
7. The question is simply this – since appellees must agree that the court on summary judgment saw and heard certain electronic files, and the

jury at trial saw and heard such electronic files, can we take those and put them in a non-paper appendix? We do not intend to include anything not part of the record below, and were appellant to do such an impractical thing, appellees have remedies.

8. The question is procedural. We have not put the file together, but defendant knows what electronic documents were part of the record, and, further, we seek the advice of the Court as to whether we may put the supplemental appendix on a disk or a thumb drive. There is no legitimate objection to this motion. If the Court grants the motion, appellees will see what appellant intends to file and can act accordingly if they feel the electronic files do not accurately reflect what was entered into evidence below. Again, we will endeavor to get them done before the deadline, but we don't intend for defense counsel to frustrate that deadline in any manner.

For these reasons, the Court should grant appellant leave to file an electronic appendix to include electronic documents part of the record. Accompanied with the documents will be an inventory explaining where each document was admitted or filed in support of appellant's summary judgment motion. We ask for guidance as to whether the appendix can be on a thumb

drive or must be on a disk.

Dated: New York, New York
January 22, 2016

/s/

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MOTION

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