

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT
Thurgood Marshall U.S. Courthouse 40 Foley Square, New York, NY 10007 Telephone: 212-857-8500

MOTION INFORMATION STATEMENT

Docket Number(s): 15-3775 Caption [use short title] _____

Motion for: Deeming the appendices filed in Estate of Zarda
compliance with Local Rule 32.1(b)(2) and (3)

Set forth below precise, complete statement of relief sought:

Six Volumes of the Appendix were filed,
none exceeding 300 pages, and each com-
plying with Rule 32.1(b)(3) insofar as a search
for the page numbers in each volume reaches
the page desired. However, in the some
volumes, less than 300 pages were utilized for reasons explained.

v.

Altitude Express

MOVING PARTY: Estate of Donald Zarda OPPOSING PARTY: Altitude Express, Inc.
 Plaintiff Defendant
 Appellant/Petitioner Appellee/Respondent

MOVING ATTORNEY: Gregory Antollino OPPOSING ATTORNEY: Saul Zabell
(name of attorney, with firm, address, phone number and e-mail)
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gantollino@nyc.rr.com szabell@laborlawsny.com

Court-Judge/Agency appealed from: Bianco, J., EDNY

Please check appropriate boxes:

Has movant notified opposing counsel (required by Local Rule 27.1):
 Yes No (explain): _____

Opposing counsel's position on motion:
 Unopposed Opposed Don't Know

Does opposing counsel intend to file a response:
 Yes No Don't Know

FOR EMERGENCY MOTIONS, MOTIONS FOR STAYS AND INJUNCTIONS PENDING APPEAL:

Has request for relief been made below? Yes No
Has this relief been previously sought in this Court? Yes No
Requested return date and explanation of emergency: _____

Is oral argument on motion requested? Yes No (requests for oral argument will not necessarily be granted)
Has argument date of appeal been set? Yes No If yes, enter date: _____

Signature of Moving Attorney:  Date: 3/15/2016 Service by: CM/ECF Other [Attach proof of service]

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

-----X

ESTATE OF ZARDA,

Plaintiffs-Appellants,

15-3775

-against-

ALTITUDE EXPRESS

DECLARATION IN
SUPPORT OF MOTION

Defendant-Appellee.

-----X

GREGORY ANTOLLINO, an attorney admitted to practice in this court does hereby declare under penalty of perjury that the following is true

1. I am plaintiffs-appellants' attorney and make this declaration in support of my motion to deem the appendices in substantial compliance with the local rule 32.1 and deem properly filed, nunc pro tunc, the appendices despite one error that the case manager identified to me yesterday. (There is an error she, Dana Ellwood, pertaining to the cover that I will correct presently and is not the subject of this motion.)

2. I have briefed many appeals, perhaps even most as appellant. However, this is the first time under the Court's new rules that I make as appellant with a multi-volume appendix. Because of a misunderstanding in reading Local Rule 32.1, I made an error in my six-volume appendix, which is as follows: The material needed for the Joint Appendix was definitely going to require six Volumes. The rules require that only necessary materials be included, and of course sometimes "necessary" is a grey area. However, I included all of the testimony and rulings, as well as all pre-trial documents materially necessary for my appeal. There were some other things I could have put in, but decided they were colorably, but not truly necessary.

3. I wanted to have the trial in the last three volumes so that, in my head, I would know

where to look for something. They are 300 pages each in Volumes IV, V & VI. Volumes I, II and III are short some pages, however, anywhere from 4 to 80. This was as a result of (1) my wanting to start a new appendix at the beginning of a document rather than in the middle; and more significantly (2) problems I had Donald Zarda's deposition testimony, and the parties' requests for designations of that to be read at trial.

4. Mr. Zarda died after summary judgment and before trial. As such, there was some debate about which of his testimony would come in at trial. His deposition was 319 pages, and what each party did was to mark in color the portions they wanted to read, and submit them *in toto*. The judge did not rule on the testimonial questions until trial, and he ruled on them for substance, not form, nor did he refer to page numbers for the most part. The parties then each read Mr. Zarda's testimony at trial, referring to the deposition testimony by line and page number, and this was recorded at trial transcript verbatim.

5. I decided originally to put in Mr. Zarda's deposition transcript with two pages on each side, but that printed awkwardly, with a reader having to turn the volume sideways to read. Therefore, what I did instead was divide the testimony into four sheets per page, which is allowed by the rules, and which eliminated the awkwardness of turning the page. However, it also eliminated about 161 pages from the first three volumes. I distributed these empty pages among the first three volumes, with the biggest emptiness in Volume I.

6. The ability of an e-reader to obtain the exact page number cited in a brief volume is still easy insofar as each volume begins at 1, 301, 601, 901, 1201, and 1501. The only thing missing is that I did not fill each volume to 300 pages.

7. I respectfully ask the Court to overlook this defect. I could *add* material that is colorably necessary to the appeal and fill up the volumes with fewer than 300 pages. What I would

probably do is take the pages the parties designated for Zarda's deposition and print them out and redo the shorter page Volumes without changing the appendix references in the brief. However, I believe that this would be to elevate form over substance; the deposition is already in Volume I for the purposes of summary judgment. For the purposes of admission at trial, it is discussed by topic area where in dispute, sometimes referenced by page number. Where there were no disputes, or after the court ruled on some testimony, the designations were read aloud to the jury and the speakers noted the page and line numbers.

8. So the deposition is now in the appendix, Volume 1, in toto. The portions admitted at trial were read at trial and discussed, where in dispute, by topic area. I can, but do not believe it is necessary to add more pages to the shorter appendixes. I now understand Local Rule 32.1(b)(2) and (3) to mean not only that Appendix Volumes must not *exceed* 300 pages, but that they must *complete* the entire 300 pages before starting a new volume; that was not clear to me when I read the rule, but it is now. But for the reasons described in paragraph 5, however, I would have been able to achieve this. I ask that the decision I made to correct the awkwardness for the reader be forgiven and the appendixes deemed filed without any do-over.

9. I also note that when I discovered this, there were only a couple of days to fix the problem, and I still needed time to work on the brief. I had originally chosen March 30 as my filing date, but I miscalculated, and it was ordered to be filed by March 11. Dana Ellwood, the case manager, told me I could move for additional time, but of course that relief was not guaranteed, and I was able to rearranged my other cases to correct my mistake in scheduling my due date. So there was some pressure on me when this error arose, and I did the best I could.

10. For all of these reasons, I ask that the Court accept the appendixes as filed that do not reach three hundred pages. I do not believe anyone is prejudiced by this and I believe that the

goal in complying with the rule would not be worth the paper resources and attorney time expended to fix it, though I certainly am on notice for the future if I am in this position again.

Dated: New York, New York
March 16, 2016

_____/S/_____
GREGORY ANTOLLINO, ESQ.