Counseling and Advising Clients Exclusively on Laws of the Workplace

Zabell & Associates, P.C.
EMPLOYMENT COUNSELING, LITIGATION, LABOR & BENEFITS LAW

ZABELL & ASSOCIATES, P.C.
4875 SUNRISE HIGHWAY
SUITE 300
BOHEMIA, NEW YORK 11716
TEL. 631-589-7242
FAX. 631-563-7475
www.Laborlawsny.com

**Saul Zabell**
Email: szabell@laborlawsny.com

February 11, 2011

***VIA* ELECTRONIC CASE FILING**

The Honorable Joseph F. Bianco
United States District Judge
United States District Court
Eastern District of New York
100 Federal Plaza
Central Islip, New York 11722

**Re: Zarda v. Altitude Express, Inc., *et al.***
**Case No.: CV-10-4334 (JFB)(ARL)**

Your Honor:

This firm is counsel to Altitude Express, Inc., *et al.*, Defendants in the above-referenced action. We write to apprise the Court of a serious dispute which has arisen between the parties surrounding three (3) deficiency letters served by Defendants, the responses issued by Plaintiff's counsel, and seek to compel full and accurate responses to our discovery demands. We have attempted in good faith to resolve these issues directly with Mr. Antollino to no avail. While customarily, counsel would not burden this Court with such matters, we fear that should this impasse not be immediately addressed, the parties' ability to complete discovery in a timely manner will be irreparably compromised.

Since the onset of discovery, material issues have arisen regarding the content of Plaintiff's responses to Defendants' discovery demands. Specifically, Defendants served their first combined set of discovery demands on December 16, 2010. Upon inspection of Plaintiff's response to Defendants' First Request for Admission, dated January 20, 2011, Defendants responded with a deficiency letter on January 28, 2011 (Ex. A). Similarly, Plaintiff's next set of discovery responses to Defendants' First Set of Interrogatories and Request for the Production documents, dated on January 28, 2011, necessitated an additional deficiency letter Defendants served on February 3, 2011 (Ex. A). Later under separate cover, Plaintiff provided bates-stamped documents responsive to Defendants' discovery requests. However, the documents were haphazardly assembled in contravention of F.R.C.P. 34(b)(2)(E). Accordingly, Defendants served a third deficiency letter advising Plaintiff of their improper document production (Ex. A).

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Plaintiff's counsel responded to Defendants' deficiency letters *via* electronic mail on February 10, 2011 (Ex. B). In this e-mail, Mr. Antollino states that he "skimmed" Defendants' letters and decided that he, "[does] not intend to waste time answering them,' and he, "won't be responding." Furthermore, Mr. Antollino instructed Defendants' counsel that if we, "want to discuss any individual item that you believe I am withholding, you pick up the phone and call." Later that day, we responded to Plaintiff *via* electronic and first class mail (Ex. B). We informed Mr. Antollino that the content of our three (3) deficiency letters is, "supported by the facts of this matter as well as relevant case law....Defendants are willing to meet and confer regarding this issue." In his e-mail response later that day, Mr. Antollino demonstrates his recalcitrance by refusing to confer in good faith to resolve the discovery disputes outlined in our deficiency letters (Ex. B):

> **"[I]f you want to meet and confer, you pick up the phone and call. It is not my obligation to call you. I don't intend to be drawn into you minutia or be write letters of response [sic]. You figure out what you really need and you pick up the phone as required and maybe we can work something out. If you don't do that before a motion without that, I'll call you on it to the judge [sic]."**

In addition to his refusal to engage in the inter-active process, Mr. Antollino felt compelled to include a series of attacks against Defendants' counsel (Ex. B):

> **"I find the way you practice - a letter writing war, with a proliferation and waste of paper - old-school and inefficient; frankly, from the very beginning you have struck me as a bit of a know it all and, in my opinion, you clearly don't know it all."**

Despite being properly served with multiple deficiency letters, Plaintiff's counsel has refused to engage in the interactive process necessary to resolve typical discovery disputes. In fact, Plaintiff's counsel has, on more than one occasion, advised in writing that he "will not read" Defendants' deficiency letters. Although Mr. Antollino's contempt for the rules of practice is noted, in a final effort to resolve this matter prior to seeking judicial intervention, the undersigned called Plaintiff's counsel earlier this afternoon. Unfortunately, during the telephone conversation, Mr. Antollino reiterated his position that he will not respond to any of Defendants' three (3) deficiency letters. Counsel's response necessitated this application.

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Based upon the foregoing, Defendants seek to compel discovery production in response to Defendants' demands and deficiency letters, as well as an in person conference to address what appears to be a rapidly deteriorating adherence to rules of civility. Defendants would welcome any guidance this Court may see fit to impart in an effort to resolve this untenable situation.

As always, counsel remains available should Your Honor require additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: Gregory Antollino, Esq. (*via* electronic case filing)

# EXHIBIT A

Counseling and Advising Clients Exclusively on Laws of the Workplace

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4875 SUNRISE HIGHWAY
SUITE 300
BOHEMIA, NEW YORK 11716
TEL. 631-589-7242
FAX. 631-563-7475
www.Laborlawsny.com

**Saul D. Zabell**
SZabell@laborlawsny.com

January 28, 2011

*VIA* FIRST CLASS MAIL

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

**Re: Zarda v. Altitude Express, Inc., *et al.***
**Case No.: CV-10-4334 (JFB)(ARL)**

Dear Mr. Antollino:

We are in receipt of Plaintiff's Response to Defendants' First Request for Admissions, but we have yet to receive responses to Defendants' First Request for the Production of Documents and First Set of Interrogatories.

As a preliminary matter, Plaintiff has failed to comply with the Federal Rules of Civil Procedure inasmuch as Plaintiff did not serve his responses in a timely manner, despite the fact that Plaintiff received an extension of time in which to do so. Pursuant to FRCP 26 and 34 and Local Civil Rule 26.3, Plaintiff is required to produce responses to Defendants' Discovery Demands within thirty (30) days of the date of service. Plaintiff's Discovery Demands were served on December 16, 2010, and after receiving a discovery extension, Plaintiff's Response to Defendants' First Notice to Admit was ultimately served on or about January 24, 2011. Accordingly, inasmuch as Plaintiff has failed to serve responses to Defendants' First Set of Interrogatories and First Request for the Production of Documents, Plaintiff has waived any and all objections to Defendants' Discovery Demands and any attempt to assert objections in the future would be improper. Kindly provide complete and adequate responses immediately.

## I. Plaintiff's Response to Defendants' First Request for Admissions:

**Request No. 6:** "Admit that in 2009, before working for Defendant, Plaintiff expressed to Defendant's employees that he is gay."

Plaintiff objected to this Request on the grounds that there was no reference to a particular employee and, as written, the Request is vague. Preliminarily, the temporal reference of "before working for Defendant" is intelligible; the Request is narrowed to the time period before Plaintiff began working for Defendant in 2009. Plaintiff already admitted that he was an employee of Defendant in 2009, so there should no issue concerning the Request's time-frame. Should Plaintiff have further difficulty understanding the Request, Defendants agree to amend their Request as follows:

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Admit that prior to Plaintiff's first working day for Defendants in 2009, Plaintiff expressed to any of Defendants' employees that he is gay.

**Request No. 8:** "Admit that in 2010, before working for Defendant, Plaintiff expressed to Defendant's employees that he is gay."

Again, Plaintiff objected to this Request on the grounds that there was no reference to a particular employee and, as written, the Request is vague. Plaintiff already admitted that he was an employee of Defendant in 2010, so there should no issue concerning the intelligibility of the Request's time-frame. Should Plaintiff have further difficulty understanding the Request, Defendants agree to amend their Request as follows:

Admit that prior to Plaintiff's first working day for Defendants in 2010, Plaintiff expressed to any of Defendants' employees that he is gay.

**Request No. 10, 11, 12:** "Admit that in 2001 [2009, and 2010], Plaintiff worked for Defendant as a seasonal employee."

Plaintiff objected to these requests on the grounds that the term seasonal "is undefined and may be a legal term." In Request 13, 14, and 15 Plaintiff admitted that he did not work for Defendant for a full calendar year in 2001, 2009, 2010. In light of Plaintiff's responses, Defendants agree to amend their requests as follows:

Admit that in 2001, Plaintiff only worked for Defendants during the months that Defendants actually performed tandem skydive jumps.

Admit that in 2009, Plaintiff only worked for Defendants during the months that Defendants actually performed tandem skydive jumps.

Admit that in 2010, Plaintiff only worked for Defendants during the months that Defendants actually performed tandem skydive jumps.

We request that Plaintiff provide amended responses to Defendants' Request for Admissions as detailed above within ten (10) days of the date of this letter. Additionally, Plaintiff's responses to Defendants' First Request for the Production of Documents and First Set of Interrogatories are due and owing and must be produced immediately. Should we not receive complete responses within ten (10) days, Plaintiff will seek court intervention to compel discovery, without further notice.

Kindly contact me should you have further questions regarding these matters.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell
cc: Client

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FAX. 631-563-7475
www.Laborlawsny.com

**Saul D. Zabell**
SZabell@laborlawsny.com

February 3, 2011

***VIA* FIRST CLASS MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

**Re: Zarda v. Altitude Express, Inc., *et al.***
**Case No.: CV-10-4334 (JFB)(ARL)**

Dear Mr. Antollino:

We are in receipt of Plaintiff's responses to Defendants' First Request for the Production of Documents and First Set of Interrogatories. As previously stated in our letter of January 28, 2011, Plaintiff has failed to comply with the Federal Rules of Civil Procedure, despite being granted an extension of time in which to serve discovery responses. Again, pursuant to FRCP 33 and 34 and Local Civil Rule 26.3, Plaintiff is required to respond to Defendants' Discovery Demands within thirty (30) days of the date of service (December 16, 2010); Plaintiff's Responses were received on January 31, 2011. Inasmuch as Plaintiff's mailed envelope is not date-stamped, does not include an affidavit of service, and was served under separate cover from Plaintiff's Response to Defendants' First Notice to Admit, Defendants take the position that Plaintiffs' responses are untimely and violative of the FRCP and Local Civil Rules. Accordingly, Plaintiff has waived any and all objections to Defendants' Discovery Demands and the inclusion of boilerplate objections is improper. Specific deficiencies identified in your client's discovery responses are listed as follows. Kindly provide complete and adequate responses immediately.

## I. Plaintiff's Response to Defendants' First Set of Interrogatories:

**Interrogatory No. 1:** "Set forth with particularity and detail any and all efforts on the part of Plaintiff to lodge complaints of alleged gender and/or sexual orientation discrimination with any managerial, supervisory or Human Resources employees of Defendant, from 2001 through the present."

Plaintiff objected to Defendants' Interrogatory on the grounds that it is "overly broad, unduly burdensome, not calculated to lead to admissible evidence and calls for a narrative covering a period of nearly ten years." Despite Plaintiff's belief to the contrary, Defendants' Interrogatory requests information that is clearly relevant and material to the case at hand. As Plaintiff alleges he was subject to both gender and sexual orientation discrimination, Defendants properly requests information regarding the instances of purported discrimination,

including Plaintiff's efforts to file complaints. Regarding the Interrogatory's scope, Defendants only employed Plaintiff for portions of 2001, 2009 and 2010; an approximate three (3) year period. As such, the scope of the Interrogatory is sufficiently narrow.

**Interrogatory No. 3:** "Set forth with particularity and detail the basis of Plaintiff's belief that "[i]t was known at work that [P]laintiff is gay and he was open about it," as alleged in ¶21 of Plaintiff's Complaint."

Plaintiff's response is deficient as it does not expressly provide the detail and information sought in Defendants' Interrogatory. If Plaintiff is implying that his failure to refute the "comments, jokes and at some times discussion regarding [his] sexuality" is the sole basis of his belief stated in ¶21 of his Complaint, then state so explicitly.

**Interrogatory No. 5:** "Set forth with particularity and detail each and every act of alleged gender discrimination against Plaintiff in connection with Plaintiff's employment with Defendant from 2001 through the present, including but not limited to:

a) the date and time any alleged instance of discrimination occurred;
b) the type of discrimination experienced by Plaintiff;
c) the manner in which Plaintiff was discriminated against;
d) the individual(s) that discriminated against Plaintiff;
e) any action taken in response thereto by Plaintiff; and
any action taken in response thereto by Defendant's employees."

In addition to boiler plate objections, all of which are waived, Plaintiff's response asserts that discrimination "is a term of art in this lawsuit that may have a legal connotation and cannot be answered by a lay witness." Despite Plaintiff's objections, the request is clear and unambiguous as written. Plaintiff failed to cite a legal justification for his failure to respond to this request and made no claim as to the alleged ambiguity of the request. Moreover, a party responding to discovery requests should exercise reason and common sense to attribute ordinary definitions to the terms and phrases utilized in the requests. See Coleman v. Dydula, 175 F.R.D. 177, 180 (W.D.N.Y. 1997); Johnson v. Kraft Foods North America, Inc., 238 F.R.D. 648 (D. Kan. 2006). Thus the answering party should generally attribute to allegedly ambiguous terms their common, everyday meaning. Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 1 Fed. R. Serv. 3d 167, 79 A.L.R. Fed. 763 (S.D.N.Y. 1984); Roesberg v. Johns-Mansville Corp., 85 F.R.D. 292, 298 (E.D.Pa.1980). However, in an effort to allay Plaintiff's concern regarding the equivocation of the term "discrimination," we direct Plaintiff to his Complaint and Demand for Discovery. The term discrimination or discriminatory appear no less than three (3) times in Plaintiff's Complaint, including in Plaintiff's First and Second Causes of Action. The term "discrimination" is also used in Plaintiff's third (3rd) request of his Demand for Discovery. To provide a semantic basis for future usage of the term "discrimination," Plaintiff is directed to the manner in which the term is used in his Complaint and his Demand for Discovery.

Additionally, unless counsel does not intend to aide Plaintiff in the preparation of his response to Defendants' Interrogatories, there should be no concern regarding discovery demands that contain terms "that may have a legal connotation" to which a "lay witness" cannot answer.

Other than the instances outlined in Plaintiff's response to Defendants' fourth (4th) Interrogatory, if Plaintiff contends that he was not subjected to further acts of alleged gender discrimination while in the employ of Defendants, then state so explicitly.

**Interrogatory No. 6:** "Set forth with particularity and detail each and every act of alleged sexual orientation discrimination against Plaintiff in connection with Plaintiff's employment with Defendant from 2001 through the present, including but not limited to:

a) the date and time any alleged instance of discrimination occurred;
b) the type of discrimination experienced by Plaintiff;
c) the manner in which Plaintiff was discriminated against;
d) the individual(s) that discriminated against Plaintiff;
e) any action taken in response thereto by Plaintiff; and
f) any action taken in response thereto by Defendant's employees."

Plaintiff again states in his response that discrimination "is a term of art in this lawsuit that may have a legal connotation and cannot be answered by a lay witness." Defendants do not agree with Plaintiff's assertion regarding the term "discrimination" and direct Plaintiff to Defendants' response to Plaintiff's objection to Interrogatory No. 5. Defendants reiterate their belief that as written, the Interrogatory is sound and intelligible. Other than the instances outlined in Plaintiff's response, if Plaintiff contends that he was not subjected to any further acts of alleged sexual orientation discrimination while in the employ of Defendants, then state so explicitly.

**Interrogatory No. 10:** "Identify with particularity and detail any and all of Plaintiff's accounts, profiles, memberships or postings on all social networking websites or internet communities and forums, from 2004 through the present."

Plaintiff objects to Defendants' Interrogatory on the basis that, "the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence and calls for an unwarranted invasion into his privacy." On the contrary, the request is relevant and probative of the allegations in Plaintiff's Complaint, as well as Plaintiff's measure of damages. The requested information will offer Defendants the ability to examine the extent to which Plaintiff documented instances of purported adverse working conditions and/or sexual orientation and gender discrimination. Accordingly, such information directly bears on Plaintiff's claims, Defendants' affirmative defenses, and Plaintiff's measure of damages. The requested information is clearly discoverable, particularly in light of Plaintiff's claim that outward expression of non-conformity to gender and sexual-orientation stereotypes, and the awareness of Defendants' employees thereof, resulted in an adverse working environment that eventually led to his termination. Moreover, courts have held that this information is relevant and discoverable, particularly where a Plaintiff has affirmatively placed his/her mental state in issue. See e.g., Bass v. Miss Porter's School, 2009 WL 3724968, *1 (D.Conn. 2009)("Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting. Therefore, relevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the eye of the beholder than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what may be reasonably calculated to lead to the discovery of admissible evidence."); Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y.Sup., 2010). Additionally, the Second Circuit has made it clear that individuals do not maintain a reasonable expectation of privacy in

internet postings. U.S. v. Lifshitz, 369 F.3d 173 (2d Cir.2004). Accordingly, Defendants demand that Plaintiff provide a complete and full response to their Interrogatory.

**Interrogatory No. 11:** "Identify with particularity and detail any and all email addresses and/or instant message screen names utilized by Plaintiff from 2004 through the present."

Plaintiff objects to Defendants' Interrogatory on the basis that, "the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence and calls for an unwarranted invasion into his privacy." Notwithstanding Plaintiff's boiler plate objection, Plaintiff's response only provides one email address and directs Defendants to, "do a search of Plaintiff's name, Don Zarda or Donald Zarda." It is disingenuous for Plaintiff to not provide a full and complete response to Plaintiff's Interrogatory, and to instead direct Defendants to undertake a search of Plaintiff's name. Plaintiff inexplicably seeks to shift to Defendants the burden of responding to Defendants own document request. Accordingly, Plaintiff's response is grossly deficient. Defendants requested any and all of Plaintiff's email address(es), including those not used in communication with Defendants. Plaintiffs do not state if Don@donzarda.com is Plaintiff's sole email account. If that is the case, please state so explicitly, and should Plaintiff have further email address(es)/accounts, please list them.

Additionally, Plaintiff's response is devoid of any mention of instant message screen names that are utilized by Plaintiff. Again, should Plaintiff not have any such accounts or screen names, please state so explicitly. Otherwise, provide a full list of Plaintiff's screen name(s).

**Interrogatories Nos. 14, 15, 16, 17:**

In response to all four of the above-referenced Interrogatories, Plaintiff objects as follows:

"Plaintiff objects on the grounds that this interrogatory brings the defendant into a number (including subparts) exceeding the allowable maximum under Rule 33 of the Federal Rules of Civil procedure. If the defendant obtains permission to seek interrogatories in excess of the amount permissible by the rule, plaintiff reserves the right to assert additional objections, including but not limited to the fact that the demand is overly broad, unduly burdensome, not calculated to lead to admissible evidence."

Courts have held that interrogatory subparts are not to be counted as discrete subparts if they are logically or factually subsumed within and related to the primary question. See Brown v. Artus, 2008 WL 268171 (N.D.N.Y. Jan. 29, 2008); Cramer v. Fedco Automotive Components Co., Inc., 2004 WL 1574691, *4 (W.D.N.Y. May 26, 2004) (citations and internal quotations omitted). Additionally, multiple interrelated questions may constitute a single interrogatory even though it requests that the time, place, persons present, and contents be stated separately. See Brown, 2008 WL 268171; Cramer, 2004 WL 1574691, *4. In light of the foregoing, Defendants have not exceeded the maximum number of Interrogatories as outlined in F.R.C.P 33. Accordingly, Plaintiff's responses to the four Interrogatories are deficient and Plaintiff must immediately provide complete and full responses thereto.

## II. Plaintiff's Response to Defendants' First Request for the Production of Documents:

In sum and substance, Plaintiff's response is devoid of substantive information and documentation regarding Defendants' document requests and is utterly unresponsive. Plaintiff has only provided two (2) Facebook correspondences in response to Defendants' eighty eight (88) document requests. There are no less than fifty two (52) instances in which Plaintiff responded to Defendants' requests by stating responsive documentation, should it exist, will be produced. In all fifty two (52) instances, Plaintiff did not explicitly state if he is actually in possession of responsive documentation and if so, when Defendants can expect to receive the future production of such documentation. Accordingly, in all instances that Plaintiff's response to a document request contains reference to the promise of future production of any responsive documentation on an undefined date, explicitly state whether Plaintiff is in possession of responsive documentation and if so, when said documentation will be served.

Additionally, Plaintiff indicates throughout his responses that documentation is being withheld due to a purported privilege. As previously instructed in ¶6 and ¶16 under the Definitions and Rules of Construction of Defendants' First Request for the Production of Documents, for all responsive documentation that is being withheld from any of Plaintiff's responses due to privilege, identify the documents in Plaintiffs' Privilege Log. Accordingly, Plaintiff is instructed to produce a Privilege Log should one not already exist.

**Requests Nos. 12, 13, 14, 15, 16, 17:** "Produce any and all documentation evidencing, referring, or supporting Defendant's purported discrimination against Plaintiff as alleged in [¶20, 21, 22, 23, 24, 25] of Plaintiff's Complaint, from 2004 through the present."

Plaintiff objects to the above-referenced document requests by stating, "these demands are duplicative." Each of these individual demands correspond to distinct allegations contained within different paragraphs of Plaintiff's Complaint. Therefore, Plaintiff's universal objection to these requests is without merit. Additionally, in asserting his objection to Defendants' document requests, Plaintiff implies that the paragraphs and individual allegations contained in his own Complaint are "duplicative". Nevertheless, Plaintiff's objection is baseless and a complete and full responses to Defendants' requests must be provided.

**Request No. 32:** "Produce any and all documentation evidencing Plaintiff's accounts, profiles, and/or memberships on all social networking websites or internet communities and forums, including but not limited to Facebook, Myspace, Twitter, and Friendster, from 2004 through the present."

Plaintiff's objection to this document request states that, "the demand is overbroad, unduly burdensome, and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." First, as previously stated, the Second Circuit has made it clear that individuals do not maintain a reasonable expectation of privacy in internet postings. U.S. v. Lifshitz, 369 F.3d 173 (2d Cir.2004). Insomuch as memberships and accounts on social networking sites invariably relate to internet communication and interaction, i.e. postings, Plaintiff does not have an expectation of privacy. Additionally, the requested documentation is clearly discoverable, especially in light of Plaintiff's claims that outward expression of non-conformity to gender and sexual-orientation stereotypes, and the awareness of Defendants' employees thereof, resulted in an adverse working environment that eventually

led to his termination. Moreover, as previously stated in Defendants' response to Plaintiff's objection to Interrogatory No. 11, courts have held that this information is relevant and discoverable, particularly where a Plaintiff has placed his/her mental state in issue. See e.g., Bass v. Miss Porter's School, 2009 WL 3724968, *1 (D.Conn. 2009)("Facebook usage depicts a snapshot of the user's relationships and state of mind at the time of the content's posting. Therefore, relevance of the content of Plaintiff's Facebook usage as to both liability and damages in this case is more in the "eye of the beholder" than subject to strict legal demarcations, and production should not be limited to Plaintiff's own determination of what may be reasonably calculated to lead to the discovery of admissible evidence."); Romano v. Steelcase Inc., 907 N.Y.S.2d 650 (N.Y.Sup., 2010). Accordingly, Plaintiff must provide a full and complete response to Defendants' request.

**Request No. 33:** "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, Friendster, and LinkedIn internet communities and internet forums, including but not limited to postings, messages, uploaded photographs, video and audio, from 2004 through the present."

Plaintiff's objection to this document request states that, "the demand is overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." Again, for the reasons stated above in Defendants' response to Plaintiff's objection to document request No. 32, Plaintiff's objection is without merit. Moreover, as memberships and accounts on social networking sites invariably relate to internet communication and interaction, i.e. postings, Plaintiff does not have an expectation of privacy, especially when such accounts are used to make postings or communication regarding the allegations contained in Plaintiff's Complaint. The two (2) documents produced thus far by Plaintiff perfectly evidence this point. In an effort to focus Defendants' request for the purpose of Plaintiff's response, Defendants agree to amend their request as follows:

"Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, Friendster, and LinkedIn internet communities and internet forums, including but not limited to postings, messages, uploaded photographs, video and audio, from 2004 through the present regarding the allegations contained in Plaintiff's Complaint."

**Request No. 34:** "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, LinkedIn, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding Plaintiff's expression of an emotional feeling, from 2004 through the present."

Plaintiff's objection to this document request states that, "the demand is overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." Defendants' request is clearly discoverable in light of the reasons outlined in Defendants' response to Plaintiff's objection to document request No. 32. However, should Plaintiff provide an affidavit stating that he is not pursuing emotional damages in this case, and claims to not suffer severe and lasting embarrassment, humiliation and anguish due to any conduct by Defendants, we will agree to withdraw the request. See Hodge v. City of Long Beach, 2006 WL 1211725 (E.D.N.Y. 2006). Failing such

an occurrence, Plaintiff must immediately provide a full and complete response to Defendants' request.

**Requests Nos. 35:** "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding Plaintiff's employment with Defendant, from 2004 through the present."

In response to this request, Plaintiff states that, "[w]ithout waiving the objection, plaintiff has produced the emails that Joanne Maynard Sent him on Facebook." Please state if Plaintiff has produced all responsive documentation in his possession. Should Plaintiff have additional responsive documentation, please produce same immediately.

**Requests Nos. 36:** "Produce any and all documentation evidencing Plaintiff's utilization of social networking websites, including but not limited to Facebook, Myspace, Twitter, and Friendster, internet communities and internet forums relating to, reflecting and/or regarding any of the allegations contained in Plaintiff's Complaint, from 2004 through the present."

See the above response to Plaintiff's objection to Defendants' document request No. 35.

**Request No. 51:** "Produce any and all documentation referencing Plaintiff's employment status subsequent to his employment with Defendant, including but not limited to (a) personnel files, (b) job description, (c) applications, (d) resumes, (e) references, (f) recommendations, (g) diplomas, (h) salary and proof of wages and (i) and other documents provided during Plaintiff's initial application for a position, from July 2010 through the present."

Beyond Plaintiff's general objections, Plaintiff states that the request is, "unintelligible insofar as it references an 'initial application.'" First, Plaintiff's effort to respond to this request is insincere. Plaintiff should not have been inhibited from responding to the request even if he had a semantic issue with the meaning of "initial application." Additionally, as previously stated, a party responding to discovery requests should exercise reason and common sense to attribute ordinary definitions to the terms and phrases utilized in the requests. See Coleman v. Dydula, 175 F.R.D. 177, 180 (W.D.N.Y. 1997); Johnson v. Kraft Foods North America, Inc., 238 F.R.D. 648 (D. Kan. 2006). Thus the answering party should generally attribute to allegedly ambiguous terms their common, everyday meaning. Compagnie Francaise d'Assurance Pour le Commerce Exterieur v. Phillips Petroleum Co., 105 F.R.D. 16, 1 Fed. R. Serv. 3d 167, 79 A.L.R. Fed. 763 (S.D.N.Y. 1984); Roesberg v. Johns-Mansville Corp., 85 F.R.D. 292, 298 (E.D.Pa.1980). Should Plaintiff require further clarification of the term, Defendants request documents provided during the beginning of the application process of any sought after employment subsequent to Plaintiff's termination with Defendants.

**Request No. 53:** "Provide a properly executed HIPAA Compliant Medical Authorization for any and all health care providers Plaintiff has treated or consulted with during his term of employment with Defendant, including but not limited to therapists, psychologist, psychiatrists and /or other mental health practitioners."

Plaintiff objects to this document request on the grounds of, "doctor-patient and/or therapist privilege. See In re Sims, 534 F.3d 117 (2nd Cir. 2008)." However, it is a longstanding

tenet of New York law that by claiming emotional damages in an employment discrimination lawsuit, the plaintiff has placed his mental state in issue, thus waiving his right to confidentiality of probative medical documentation relevant to his mental state. See, e.g., Anderson v. City of New York, No. 05 Civ. 54422(ERK)(MDG), 2006 WL 1134117, at *1 (E.D.N.Y. Apr. 28, 2006) (where plaintiff claims to have suffered emotional distress as a result of the defendant's conduct, "plaintiff has placed her mental condition at issue ... and consequently has waived her right to prevent the disclosure of her mental health records"); Cuoco v. United States Bureau of Prisons, No. 98 Civ. 9009(WHP), 2003 WL 1618530, at *2 (S.D.N.Y. Mar. 27, 2003) ("[Plaintiff] directly put her mental and emotional state at issue when she claimed damages for emotional distress in this action. That damages claim consequently waived any psychotherapist-patient privilege for ... psychologist's notes and statements relevant to the time and subject matter of this action."). Should Plaintiff provide an affidavit stating that he is not pursuing emotional damages in this case, and claims to not suffer severe and lasting embarrassment, humiliation and anguish due to any conduct by Defendants, we will agree to withdraw the request. See Hodge v. City of Long Beach, 2006 WL 1211725 (E.D.N.Y. 2006)(stating that upon placing his mental state at issue, the plaintiff had the option of either producing a HIPAA compliant release form or withdrawing any and all claims for emotional damages).

**Request No. 54:** "Produce a properly executed authorization for the release of Plaintiff's employment records for each position held subsequent to the cessation of Plaintiff's employment with Defendant."

Plaintiff's objection to this request states that, "the demand is retaliatory, overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." Defendants' inquiry into Plaintiff's employment subsequent to his termination by Defendants is relevant. Defendants' request is probative of Plaintiff's efforts to mitigate his damages and directly relate to the causes of action outlined in Plaintiff's Complaint and, when applicable, his corresponding damage calculations. As such, it is evident that the purpose of Defendants' document request is not retaliatory and is relevant to the case at bar. Moreover, the timeframe established by the request is sufficiently narrow. Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 63:** "Produce any and all documentation concerning, relating to, and/or reflecting income earned by Plaintiff from 2004 through the present, including but not limited to a) 1099 and/or IRS Form W-2's, (b) payroll records, (c) pension documents, (d) 401(k) documents, (e) pay stubs, (f) deposit records and the like, and (i) any other compensation-related documents."

Plaintiff's objection to this request states that, "the demand is duplicative of other demands, overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." Again, Defendants' inquiry into Plaintiff's income subsequent to Defendants' termination of Plaintiff is relevant. Defendants' request is probative of Plaintiff's efforts to mitigate his damages and directly relate to the causes of action outlined in Plaintiff's Complaint and, when applicable, his corresponding damage calculations. As such, the purpose of Defendants' document request is relevant to the case at bar, as it evidences Plaintiff's earned income both before and after his termination. Moreover, the timeframe established by the request is sufficiently narrow and not overbroad. Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 64:** "Produce any and all of Plaintiff's banking records, including statements, notices, and other similarly responsive documentation, from 2004 through the present."

Plaintiff's objection to this request states that, "the demand is duplicative of other demands, overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." Again, Defendants' inquiry into Plaintiff's income subsequent to Defendants' termination of Plaintiff is relevant. Moreover, the timeframe established by the request is sufficiently narrow and not overbroad. Additionally, Plaintiff has placed his mental state at issue by alleging damages in this action. Courts have held that a Plaintiff's spending patterns and financial activity provide evidence of their activity and mental state. Chiquelin v. Efunds Corp., 2003 WL 21459581 (S.D.N.Y, 2003) (Complete credit card statements of former employee relevant to age discrimination lawsuit, since statements reflected employee's activity and mental state). Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 65:** "Produce any and all of Plaintiff's credit card statements from 2004 through the present."

Plaintiff's objection to this request states that, "the demand is duplicative of other demands, overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." For the reasons outlined in Defendants' response to Plaintiff's objection to document request No. 64, Defendants' inquiry is clearly relevant. Chiquelin v. Efunds Corp., 2003 WL 21459581 (S.D.N.Y, 2003) (Complete credit card statements of former employee relevant to age discrimination lawsuit, since statements reflected employee's activity and mental state). Moreover, the timeframe established by the request is sufficiently narrow and not overbroad. Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 66:** "Produce all documents concerning Plaintiff's application and qualifications for employment with Defendant, including, but not limited to, (a) application forms, (b) notes, (c) memoranda, (d) e-mails, and (e) verification forms."

Plaintiff's objection to this request states that, "the demand is duplicative of other demands, overbroad, and unduly burdensome." Contrary to Plaintiff's assertion, the request is not overbroad and is sufficiently narrowed to documentation relating to Plaintiff's employment with Defendants. Moreover, the requested documentation is probative of Plaintiff's employment with Defendants, and as such, materially relevant to the case at bar. Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 67:** "Provide all documentation concerning the termination of Plaintiff's employment with any employer (whether by discharge, layoff, mutual agreement, resignation, voluntary quit, or any other matter) including, but not limited to, all documents concerning any charges, complaints, claims, or applications made or filed with any federal, state, or local government agency, court, or other tribunal concerning any such termination, from 2004 through the present."

Plaintiff's objection to this request states that, "the demand is duplicative of other demands, overbroad, unduly burdensome and seeks information of a private nature that is

irrelevant and not calculated to lead to admissible evidence." The requested documentation is clearly relevant and is probative of his employment application with Defendants and the allegations in Plaintiff's Complaint regarding claims made about his employment history. As such, the demand is discoverable and Plaintiff's objection is improper. Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 72:** "Produce all documents concerning any communications with any individual(s) whom Plaintiff believes possesses knowledge of the facts, allegations, and claims involved in this case, from 2004 through the present."

Plaintiff's objection to this request states that, "the demand is duplicative of other demands, overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." In an effort to resolve this discovery dispute, Defendants agree to narrow their request to those communications relating to or concerning the allegations in Plaintiff's Complaint and Plaintiff's claims for damages.

**Request No. 83:** "Produce any and all documentation supporting any alleged emotional damages suffered by plaintiff from 2004 through the present."

Plaintiff objects to these document requests on the grounds of, "doctor-patient and/or therapist privilege. See In re Sims, 534 F.3d 117 (2nd Cir. 2008)." However, it is a longstanding tenet of New York law that by claiming emotional damages in an employment discrimination lawsuit, the plaintiff has placed his mental state in issue, thus waiving his right to confidentiality of probative medical documentation relevant to his mental state. See, e.g., Anderson v. City of New York, No. 05 Civ. 54422(ERK)(MDG), 2006 WL 1134117, at *1 (E.D.N.Y. Apr. 28, 2006) (where plaintiff claims to have suffered emotional distress as a result of the defendant's conduct, "plaintiff has placed her mental condition at issue ... and consequently has waived her right to prevent the disclosure of her mental health records"); Cuoco v. United States Bureau of Prisons, No. 98 Civ. 9009(WHP), 2003 WL 1618530, at *2 (S.D.N.Y. Mar. 27, 2003) ("[Plaintiff] directly put her mental and emotional state at issue when she claimed damages for emotional distress in this action. That damages claim consequently waived any psychotherapist-patient privilege for ... psychologist's notes and statements relevant to the time and subject matter of this action."). Should Plaintiff provide an affidavit stating that he is not pursuing emotional damages, and claims to not suffer severe and lasting embarrassment, humiliation and anguish due to any conduct by Defendants, we will agree to withdraw the request. See Hodge v. City of Long Beach, 2006 WL 1211725 (E.D.N.Y. 2006)(stating that upon placing his mental state at issue, the plaintiff had the option of either producing a HIPAA compliant release form or withdrawing any and all claims for emotional damages).

**Request No. 84:** "Produce all documents concerning, relating to and/or regarding consultation with and/or treatment by any medical and/or mental health professional concerning and/or regarding Plaintiff's allegations and/or claims for emotional distress and psychological injuries."

Plaintiff objects to these document requests on the grounds of, "doctor-patient and/or therapist privilege. See In re Sims, 534 F.3d 117 (2nd Cir. 2008)." For the reasons outlined in Defendants' response to Plaintiff's objection to document request No. 83, Defendants' inquiry

is clearly relevant. Accordingly, Plaintiff must provide a full and complete response immediately.

**Request No. 85:** "All documents concerning any other claims and/or complaints of harassment and/or discrimination made and/or filed by Plaintiff against any prior or current employer."

Plaintiff's objection to this request states that, "the demand is overbroad, unduly burdensome and seeks information of a private nature that is irrelevant and not calculated to lead to admissible evidence." The requested documentation is clearly relevant and is probative of the allegations in Plaintiff's Complaint regarding claims made about his employment history. As such, the demand is discoverable and Plaintiff's objection is improper. In an effort to resolve this discovery dispute, Defendants agree to narrow their request from 2005 through the present. Accordingly, Plaintiff must provide a full and complete response immediately.

Failure to produce complete and adequate responses to these demands within ten (10) days of the date of this letter will result in Defendants seeking judicial intervention to compel discovery in this matter

Kindly contact me should you have further questions regarding these matters.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell
cc: Client

Counseling and Advising Clients Exclusively on Laws of the Workplace

Zabell & Associates, P.C.
EMPLOYMENT COUNSELING, LITIGATION, LABOR & BENEFITS LAW

ZABELL & ASSOCIATES, P.C.
4875 SUNRISE HIGHWAY
SUITE 300
BOHEMIA, NEW YORK 11716
TEL. 631-589-7242
FAX. 631-563-7475
www.Laborlawsny.com

**Saul D. Zabell**
SZabell@laborlawsny.com

February 7, 2011

***VIA* FIRST CLASS MAIL & ELECTRONIC MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

**Re: Zarda v. Altitude Express, Inc., *et al.***
**Case No.: CV-10-4334 (JFB)(ARL)**

Dear Mr. Antollino:

We write in furtherance of our letter of February 3, 2011 and to confirm that we are in receipt of Plaintiff's document production bates stamp No. 000001 – 000081 and two (2) audio files. Upon review, we find that Plaintiff's document response is again violative of F.R.C.P. 34 (b)(2)(E). The documents are not produced as they are maintained in the ordinary course of business and further, Plaintiff failed to identify which documents are responsive to each of Defendants' numbered requests. Accordingly, Plaintiff must amend his document response and comply with the rules of document production as outlined in the F.R.C.P. 34.

Kindly contact me should you have further questions regarding this matter.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: Client

# EXHIBIT B

**Tdomanick@laborlawsny.com**

**From:** SZabell@laborlawsny.com
**Sent:** Thursday, February 10, 2011 2:00 PM
**To:** Tdomanick@laborlawsny.com
**Subject:** Fwd: Zarda v. Altitude Express, Inc.

Sent from a mobile location

Saul D. Zabell
Zabell & Associates, P.C.
4875 Sunrise Highway
Bohemia, NY 11716

631-589-7242

Begin forwarded message:

**From:** Gregory Antollino <gregory10010@verizon.net>
**Date:** February 10, 2011 1:37:30 PM EST
**To:** "SZabell@laborlawsny.com" <SZabell@laborlawsny.com>
**Subject: Re: Zarda v. Altitude Express, Inc.**

Mr. Zabell,

In response to your letter, I do not intend to give you an explanation for the amendment, which should be readily apparent with the modified and additional causes of action, as well as the more detailed pleading of facts. Leave to amend is freely given. Let me know your position on amendment: consent or no consent. Based on your representation about the videotape, I intend to clean up those allegations to denote deliberate loss of custody rather than destruction.

As for your bilious letters about discovery, I do not intend to waste time answering them and address each of your frivolous exhaltations of form over substance - i.e., the idea that plaintiff must reproduce documents as "kept in the regular course of business." What could that mean for an individual who likely keeps his documents in a box in his closet? I've skimmed your other points and won't be responding. If you want to discuss any individual item that you believe I am withholding, you pick up the phone and call. I don't intend to get into a letter writing campaign so that you can bill your client more and attempt to impress him by cc'ing him lots of letters. If after discussing the items you don't like what I'm willing to do, then you have your recourse.

Gregory Antollino

On 2/9/11 4:57 PM, "Robert Garafola" <RGarafola@laborlawsny.net> wrote:

Please see attached.

Robert M. Garafola, Paralegal
Zabell & Associates, PC
4875
<blocked::blocked::blocked::blocked::http://maps.google.com/maps?f=q&hl=en&geocode=&q=945+E+Jericho+Turnpike,+Huntington,+New+York+11746&sll=37.0625,-95.677068&sspn=42.310334,82.265625&ie=UTF8&z=16&iwloc=addr&om=1> Sunrise Highway
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Bohemia, NY 11716 Office: 631-589-7242
E-mail: SZabell@laborlawsny.com
Fax: 631-563-7475
Website: LaborLawsNY.com



Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010
(212) 334-7397
www.antollino.com

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FAX. 631-563-7475
www.Laborlawsny.com

**Saul D. Zabell**
SZabell@laborlawsny.com

February 10, 2011

***VIA* FIRST CLASS MAIL & ELECTRONIC MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

**Re: Zarda v. Altitude Express, Inc., *et al.***
**Case No.: CV-10-4334 (JFB)(ARL)**

Dear Mr. Antollino:

We write in response to your February 10, 2011 email. As an initial matter, we find your overall disposition unwarranted. Your accusations concerning our intentions by serving routine discovery demands and deficiency letters to properly defend our client are groundless.

Defendants have served three (3) deficiency letters to which Plaintiff refuses to provide a substantive response. If you had not merely "skimmed" the content of these letters, which is supported by the facts of this matter as well as relevant case law, you would see Defendants are entitled to the discovery sought. Your refusal to respond to these points evidences Plaintiff has no intention to meet and confer in good faith as required by the Federal Rules of Civil Procedure and the Local Rules. Notwithstanding your unreasonable position, Defendants are willing to meet and confer regarding this issue.

Regarding the format of Plaintiff's document production, the Federal Rules of Civil Procedure requires the production of discovery responses to be organized and labeled to correspond to the individually numbered discovery requests. Failure to do so is in direct contravention of FRCP 34 (b)(2)(E)(i). This provision was added to Rule 34(b) to prevent parties from "deliberately ... mix[ing] critical documents with others in the hope of obscuring significance." See Advisory Committee Note for 1980 Amendment to Rule 34 (quoting Report of the Special Committee for the Study of Discovery Abuse, Section of Litigation of the American Bar Association (1977)). Accordingly, Defendants' multiple requests for Plaintiff to organize his discovery production are merely reflective of Plaintiff's legal obligations, and are not intended to be duplicative, harassing or burdensome.

Concerning Plaintiff's Proposed Amended Complaint, we will consider your request to amend once we are provided with a factual and legal basis as to why the Complaint needs to be amended.

Zabell & Associates, P.C.
EMPLOYMENT COUNSELING, LITIGATION, LABOR & BENEFITS LAW

Please be advised I will be on trial the entire week of February 14th. Accordingly, should you wish to meet and confer concerning Plaintiff's numerous discovery deficiencies, kindly call me tomorrow morning to discuss this matter in greater detail.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: Client

**SZabell@laborlawsny.com**

**From:** Gregory Antollino <gregory10010@verizon.net>
**Sent:** Thursday, February 10, 2011 5:30 PM
**To:** SZabell@laborlawsny.com
**Subject:** Re: Zarda v. Altitude Express
**Attachments:** image.png

Counsel, I don't appreciate *your* disposition. I find your manner overbearing and rudely dismissive. I find the way you practice – a letter writing war, with a proliferation and waste of paper - old-school and inefficient; and, frankly, from the very beginning you have struck me as a bit of a know it all and, in my opinion, you clearly don't know it all.

As I said, if you want to meet and confer, you pick up the phone and call. It is not my obligation to call you. I don't intend to be drawn into your minutia or be write letters of response. You figure out what you really need and you pick up the phone as required and maybe we can work something out. If you don't do that before a motion without that, I'll call you on it to the judge.

As for the amendment, I have given you a proposed pleading, in which I have clarified the facts and added a cause of action. There is nothing more I need to do for you, or the Court if you won't consent. It's not rocket science: I'm adding a cause of action and leave to amend is freely granted.

Gregory Antollino

On 2/10/11 5:17 PM, "Robert Garafola" <RGarafola@laborlawsny.net> wrote:

Robert Garafola
Zabell & Associates, P.C.
4875 Sunrise Highway, Suite 300
Bohemia, New York 11716
631-589-7242
www.LaborLawsny.com <http://www.laborlawsny.com/>


Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010
(212) 334-7397
www.antollino.com