March 8, 2011

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)(ARL)

Dear Judge Bianco:

I represent plaintiff in this action and write in advance of a court conference currently scheduled for Friday at 9:30. In addition to the matters discussed in that conference, there are some additional matters I would like to discuss, if possible. Specifically, I forecast some attorney-client privilege and attorney ethical issues that are likely to arise. As such, after grappling with it, I believe that plaintiff will likely have to move to disqualify Mr. Zabell as counsel to the defendants at trial. Therefore, at the conference on Friday, a scheduling order should be discussed on this proposed motion, or at such conference time as the court may prefer. I called Mr. Zabell to discuss this in advance, but he was unavailable.

This case, as you might remember involves a gay skydiver who was terminated because he told a customer that he is gay. When all is said and done, the central question in this case will be whether, from plaintiff's perspective, telling a customer that one is gay is a protected activity and not a legitimate non-discriminatory reason to terminate an employee; or, whether, from defendant's perspective, telling a customer that one is gay is inappropriate behavior for the workplace. What happened in this case, the evidence will show, is that my client, a tandem skydive instructor was up in the air under a parachute in intimate proximity to a female customer. In extremely close contact for the safety of the passenger, my client said, in the attempt to make the customer more comfortable words to the effect that, "Don't worry about how close we are because I am gay." He had done this on any number of other occasions, with only a positive or neutral response.

This time, however, the customer complained, and plaintiff was immediately suspended, then, a week later, fired. During the period of the suspension, the defendant, Ray Maynard, sought legal counsel, and thereafter met with my client and repeatedly stated, in a meeting that my client taped, that Maynard had received legal advice, and that because of the legal advice he had to fire plaintiff. If the Court is interested, the audio of this conversation has been uploaded it to Youtube and is

available at http://www.youtube.com/watch?v=APQs-0d9TkE. The recording is about seven minutes long. During the conversation, Maynard invokes his having discussed the matter with counsel numerous times. At approximately 0:43 of the conversation he states that he spoke to his attorney about the situation and that "he said that I have to let you go." At 1:19, Maynard states, that his decision was "all on my attorney's advice." At 3:06, Maynard states, "I got legal advice on what I should do here."

Maynard's repeated invocation of what would otherwise be a privileged conversation brings up several issues. The first is of waiver of the privilege. Where a party waives a privileged conversation, the substance of that conversation is waived. See Bowne of New York City, Inc. v. Ambase Corporation, 150 F.R.D. 465; 1993 U.S. Dist. LEXIS 7377, **63 (discussing subject-matter waiver under federal and New York law). As such - and this is the easiest part of this application - plaintiff should be entitled to enquire of Maynard the substance of his conversation that he refers to in the tape.

Of course, if the Court wishes to wait until an objection has been raised at a deposition, we will follow that procedure. I raise this issue now, however, because Maynard's waiver of the substance of the otherwise privileged conversation raises other concerns that may require the disqualification of Saul Zabell and his firm at trial.[1] The reasons for this are threefold. First, if the Court holds that the privilege has been waived as I believe you should, Mr. Zabell will likely become a witness in the case as to what was discussed in the conversation that he had with Maynard. It is beyond cavil that an attorney must be disqualified if he is to be a witness. United States v. Kliti, 156 F.3d 150, 156, n.8 (2d Cir. 1998) (citing ethical rules and other authorities).

Secondly, Zabell's remaining on the case would prejudice plaintiff at trial because, even if he were not to testify as an actual witness, he would be an unsworn witness. As Judge Gleeson explained:

> Where an attorney has first-hand knowledge of events presented at trial, his role as an advocate may result in giving his client an unfair advantage over the [plaintiff]. Having experienced some of the events in question first-hand, [defense counsel] may be able to subtly impart to the jury his first-hand knowledge of the events without having to swear an oath or be subject to cross examination. . . . When an attorney acts as an advocate with respect to events in which he was a participant, the fact-finding process is impaired, and since the defendant is not the party prejudiced by the impairment, a waiver by the defendant cannot solve the problem. Even if [defense counsel]

[1] I am almost certain that this legal counsel referred to in the tape was Saul Zabell. I believe this because the day after this action was filed – and before the complaint was served – the New York Post caught wind of the lawsuit and contacted both parties. Maynard spoke through his attorney, Saul Zabell. I wanted to discuss this issued with Mr. Zabell by phone, but he was unavailable, as noted above.

> does not explicitly address the evidence at issue, his mere appearance at counsel table may distort the fact-finding process and require disqualification.

United States v. Orgad, 132 F. Supp. 2d 107, 124 (E.D.N.Y. 2001) (citations omitted). Where the Court finds that the attorney would be an unsworn witness, the proper action is to disqualify the attorney, not exclude the evidence. Kiliti at 156.

There might also be conflicts with Zabell's remaining on the case, though waivable conflicts. I propose making this motion chiefly because of the sworn or unsworn witness problem. Plaintiff will be prejudiced at trial if – as I am almost certain – Zabell was the attorney that Maynard consulted before firing plaintiff. Therefore I believe I have no choice but to make this motion and request a pre-motion conference on Friday.[2]

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell by ecf

[2] Of course, in the remote contingency that Mr. Zabell was not the attorney that Maynard refers to in the tape, the privilege waiver issue will still be in contention and a motion will need be made on that issue.