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April 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 furtherance of my attempt to get reasonable discovery (and cooperation in discovery) from the defendant. My adversary and I have discussed these issues verbally and in writing without resolution, therefore they are appropriate for judicial review.

This is the case of the skydive instructor who was fired for telling a customer that he is gay. Claims are brought under the New York State Human Rights Law as well as Title VII for sex stereotyping. Plaintiff also brings a claim for unpaid wages. He is likely to withdraw an overtime claim, but he will continue to claim that the defendant's business model, wherein employees wait around being paid nothing until customers to show up for a skydive is a violation of federal and state minimum wages laws.

Plaintiff seeks an order requiring the defendant to tender the following information, and otherwise to cooperate in discovery in the following manner:

1. Names and addresses of co-workers at the defendant company for the summers of 2009 and 2010.

Defendant refuses to turn over this information even though it has identified a list of employees' names and numbers as part of its initial disclosures. Plaintiff's right to this relevant information is well-founded, common in cases of this nature, and not unduly burdensome to the defendant. Plaintiff alleges in his complaint that, although he was fired for telling a customer that he is gay, banter of a heterosexual nature, both in the presence of customers and out, was common. The defendant denies this. The co-workers (there are less than twenty five, in my estimation) are witnesses to what went on in the workplace, and thus provision of this discovery is reasonably calculated to lead to discoverable information. Fed. R. Civ. P. 26(b)(1).

Defense counsel has steadfastly refused to provide this information, and as of yesterday, has suddenly stated – in apparent violation of the disciplinary rules – that all the employees are represented by counsel (presumably him, though not explicitly stated). If this is so, it is an improper attempt to impede plaintiff's access to witnesses with discoverable information. If, indeed, Mr. Zabell or his client has gone to the employees and solicited his representation, there will be motion practice to disqualify him from representing these employees. The Second Department recently affirmed a decision disqualifying defense counsel from representing non-party employees for this exact reason. Rivera v Lutheran Med. Ctr., 73 A.D.3d 891 (N.Y. App. Div. 2d Dep't 2010), affirming Rivera v. Lutheran Med. Ctr., 22 Misc. 3d 178 (Kings Sup. 2008). One federal court has cited Rivera with approval. See Matusick v. Erie County Water Auth., 2010 U.S. Dist. LEXIS 15161 (W.D.N.Y. Feb. 22, 2010) (distinguishing Rivera but warning defense counsel not to interfere with plaintiff's access to employee witnesses for the reasons set forth in Rivera). I ask that you do order the witnesses' names addresses and phone numbers be turned over, and to the extent that this needs to be argued as a disqualification motion, I am prepared to so move.

2. Names and addresses of customers with whom plaintiff took skydives with in the summers of 2009 and 2010.

The defendant company takes customer information from each person who pays for a Skydive. Attached as "Exhibit 1" is a form that the defendant company requires of every skydiver. The defendant not only has this information, but withheld it from me with regard to the very customers who made the complaint about my client.

This information is relevant and could lead to admissible testimonial evidence for several reasons. First, for all of the reasons set forth in point 1: These customers were witnesses to what went on in the workplace that is in dispute in this matter. Second, the defendant did not evaluate plaintiff's performance, therefore, testimony as to the good service he provided to the defendant's customers is relevant to the case. Furthermore, customer information is not something that the defendant can claim is confidential, either. See Minnesota Mining And Manufacturing Co. v. Graham-Field, Inc., 1997 U.S. Dist. LEXIS 2022 (Mukasey, J. citing Chesa International, Ltd. v. Fashion Associates, Inc., 425 F. Supp. 234 (S.D.N.Y. 1977)). Furthermore, it will not be unduly burdensome insofar as plaintiff only worked a total of two months during this period: during the summer of 2009 he suffered an injury after a month and stopped doing jumps and in 2010 he was fired after a month.

Finally, the contact information as to the complaining customers who got plaintiff fired is centrally relevant. Defendant recognizes this, but pointedly has withheld the information.

3. Plaintiff's Jump Logs.

Defendants have identified this information on their initial disclosures but refuse to tender it.¹ This information is relevant to determine the days in which plaintiff obtained compensation in order to determine the hours that he worked and did not work. My guess is that the only reason defendant is withholding that information is that it contains the customer information. Since that is not properly withheld, for the reasons set forth above, then any objection to this claim should fall.

4. Plaintiff seeks an order requiring defendant to commence depositions, or waive defendants' priority in taking plaintiff's deposition.

The federal rules do not provide either side with priority for taking depositions, however, I find it fairest to allow the party that serves a notice first to go first. In this case, the defendant noticed first. I was willing to allow priority, but now the defendant refuses to schedule a date for plaintiff's deposition on the grounds that it believes plaintiff must tender more documentary information. It also refuses to schedule defendant's depositions because of its priority. However, the defendant can't have it both ways and defense counsel is improperly delaying discovery. Plaintiff plans to be in New York in late May, and can be deposed then. It is far enough away from now for defendant to be able to plan and have the court resolve what additional documents, if any, plaintiff must tender in discovery (the defense motion to compel is expected shortly). In the alternative, the court should hold that defendant has waived its priority by delaying plaintiff's deposition. I believe priority is a near-meaningless advantage. If defense counsel believes otherwise, he can have it, but he cannot hold discovery hostage by insisting on priority and simultaneously refusing to schedule plaintiff's deposition. A pending application to obtain *some* documents that have not been produced has never in my experience been countenanced by a court a basis to delay depositions. Although there are no hard and fast rules on this issue, it would better to proceed with scheduling depositions at this juncture even if some paper discovery is in contention.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory Antollino', with a stylized flourish extending to the right. The initials 'G/A' are visible at the start of the signature.

Gregory Antollino

Cc: Saul Zabell by ecf

¹ Perhaps in an unusual case a document identified as relevant to the claims and defenses in an initial disclosure could be withheld on some basis, but surely not this one.

AGREEMENT, RELEASE OF LIABILITY & ASSUMPTION OF RISK

IN CONSIDERATION of being permitted to utilize the facilities and equipment of ALTITUDE EXPRESS INC., D.B.A. SKYDIVE LONG ISLAND (and its associated entities) to engage in parachute activities, ground instruction, flying and related activities, skydiving, freefall and Tandem jumping, hereinafter collectively referred to as “parachute/ skydiving activities”, as defined in paragraph 6 in this contract, I HEREBY AGREE AS FOLLOWS:

1. I understand that this document is a binding contract between myself and the entities described herein as SKYDIVE LONG ISLAND, and I certify that I am of legal age and under no legal disability which would prevent me from entering into a binding contract.

(____)

2. I am aware that “parachuting/ skydiving activities” are **inherently dangerous** and **may result in injury or death** and agree that the unforeseen may happen and no one can delineate all risks or possibilities of error. Therefore, I specifically include in this Release, any injury resulting from any occurrence, whether foreseen or unforeseen, and whether contemplated or not contemplated which is in any way connected with my “parachuting/ skydiving activities” and/ or on presence of the premises commonly know as CALVERTON ENTERPRISE PARK, the former GRUMMAN FACILITY, The Town of RIVERHEAD, or any other place or entity connected with SKYDIVE LONG ISLAND.

(____)

3. PARTIES INCLUDED: I understand that this Agreement, Release of Liability and Assumption of Risk includes but is not limited to, Ray Maynard, SKYDIVE LONG ISLAND, and any of its officers, board members, and shareholders, its or their agents, customers, associated entities, employees, volunteers, pilots, instructors, jumpmasters, the owners of the aircraft (which shall also include but not be limited to airfoils and balloons), SKYDIVE LONG ISLAND, CALVERTON ENTERPRISE PARK, the former GRUMMAN FACILITY, The Town of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY, and M-GBC, LLC, the owners of any land utilized for “skydiving/ parachuting activities”, adjacent property owners, the United States Parachute Association and its members, anyone working with or for SKYDIVE LONG ISLAND, any manufacturer of any piece of equipment or gear which I may use or am using at the time of my **INJURY** or **DEATH** and anyone involved in any way, shape, form, or manner in my “skydiving/ parachuting activities”, and specifically including but not limited to tandem or experimental test parachute jumping to include tandem parachute jumping, hereinafter collectively referred to in this Agreement, Release of Liability and Assumption of Risk as SKYDIVE LONG ISLAND.

(____)

4. This entire Contract, Release of Liability and Assumption of Risk is expanded to include all parties mentioned anywhere in the body of the document by name or by category, all vendors or suppliers of materials or equipment for “skydiving/ parachuting activities”, including but not limited to the manufacturer of the equipment, its employees, directors, officers and shareholders, and all associated entities, shareholders, partners, employees and all other persons in any way associated with any entity mentioned, either specifically or by implication, in the body of this document.

(____)

5. RISKS CONTEMPLATED: This Agreement is made in contemplation of all “skydiving/ parachuting activities”, which for purposes of this agreement shall include but not be limited to all occurrences contemplated or not contemplated, foreseen and unforeseen, instruction, parachute jumping, tandem or experimental test parachute jumping, ground instruction, flying and related activities, the exit from the aircraft, skydiving, freefall, time under the canopy, the landing, any rescue operations or attempts by SKYDIVE LONG ISLAND, whether on or off the designated landing area, or facilities used by SKYDIVE LONG ISLAND, ground transportation provided to me by any entity in any way associated

with SKYDIVE LONG ISLAND, and any activity whatsoever in any way, shape, form, or manner connected with my “skydiving/ parachuting activities” or my presence on or near the facility and grounds of SKYDIVE LONG ISLAND, and/or the airport which is used for my “skydiving/ parachuting activities”. These risks shall be referred to for the purposes of this Agreement as “skydiving/ parachuting activities”.

(____)

6. PARTIES BOUND BY THIS AGREEMENT: It is my understanding and intention that this Agreement, Release of Liability, and Assumption of Risk be binding not only on myself, but on anyone or any entity, including my estate and my heirs, that may be able to or do sue because of my **INJURY** or **DEATH**. It is further my understanding and agreement that this Release is intended to and does in fact release SKYDIVE LONG ISLAND as defined in paragraph 3 from any and all claims or obligations whatsoever, foreseen and unforeseen, contemplated or not contemplated, arising in any way from my participation in “skydiving/ parachuting activities”, even if caused by the negligence or other fault of SKYDIVE LONG ISLAND.

(____)

7. RELEASE OF LIABILITY: I hereby release and discharge SKYDIVE LONG ISLAND from any and all liability, claims, demands or causes of action that I may hereafter have for injuries or damages arising out of my participation in “skydiving/ parachuting activities” **even if caused by negligence or other fault** of SKYDIVE LONG ISLAND.

(____)

8. COVENANT NOT TO SUE: I further agree that I WILL NOT SUE OR MAKE CLAIM AGAINST SKYDIVE LONG ISLAND, CALVERTON ENTERPRISE PARK, or The Town of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY and M-GBC, LLC for damages or other losses sustained as a result of my participation in “skydiving/ parachuting activities” **even if caused by negligence or other fault** of SKYDIVE LONG ISLAND.

(____)

9. INDEMNIFICATION AND HOLD HARMLESS: I also agree to INDEMNIFY and HOLD SKYDIVE LONG ISLAND, CALVERTON ENTERPRISE PARK, The Town of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY, M-GBC, LLC HARMLESS from all claims, judgments and costs, including but not limited to actual attorney’s fees, and to reimburse them for any expenses whatsoever incurred in connection with any action brought as a result of my participation in “skydiving/ parachuting activities”, including but not limited to actions brought by myself or on behalf of my myself or my estate and further acknowledge that in the event of any lawsuit, this Release can and will be used against me by SKYDIVE LONG ISLAND.

(____)

10. ASSUMPTION OF RISK: I understand and acknowledge that “skydiving/ parachuting activities” are inherently dangerous and I EXPRESSLY AND VOLUNTARILY ASSUME ALL RISK OF DEATH OR PERSONAL INJURY SUSTAINED WHILE PARTICIPATING IN “SKYDIVING/ PARACHUTING ACTIVITIES” WHETHER SUCH RISK IS FORESEEN OR UNFORESEEN, CONTEMPLATED OR NOT CONTEMPLATED, AND WHETHER OR NOT CAUSED BY THE NEGLIGENCE OR OTHER FAULT OF SKYDIVE LONG ISLAND including but not limited to equipment malfunction from whatever cause, inadequate training, any deficiencies in the landing area, rescue attempts, bad landings or any other cause whatsoever, including but not limited to those set forth in paragraph 5, even if those injuries are caused by the negligence or any other fault of SKYDIVE LONG ISLAND.

(____)

11. LIMITATION OF WARRANTY: SKYDIVE LONG ISLAND hereby warrants that the equipment provided by SKYDIVE LONG ISLAND has been previously used for “skydiving/ parachuting

activities”. This warranty is the only warranty made and is made in lieu of any other warranties, expressed or implied, including but not limited to warranty of merchantability or fitness for a particular purpose.

I have read the above paragraph, acknowledge that I understand it and accept the limitation of warranty.

(____)

12. In the event any agent of SKYDIVE LONG ISLAND is guilty of willful and wanton, or any conduct outside the scope of this contract, I agree that that agent’s action shall be beyond the scope of his/her employment and not attributable to anyone on any agency theory, or any other theory.

(____)

13. If I am making a student jump, I understand that I will be wearing a harness which will need to be adjusted by the jumpmaster. If my jump is a tandem jump, I understand that the tandem master will attach my harness to his and that this will put my body in close proximity to that of the tandem master. I specifically agree to this physical contact between the tandem master and myself.

(____)

14. DURATION OF RELEASE: It is my understanding and intention that this Release and Agreement be effective not only for my first jump but for any subsequent jumps or “skydiving/parachuting activities” and shall be in full force and effect from the signing of this Agreement until such time it is cancelled by SKYDIVE LONG ISLAND.

(____)

15. I hereby agree to waive any and all duty of care, whether by omission or commission, or any other duty which may be owed to me by SKYDIVE LONG ISLAND.

(____)

16. ENFORCEABILITY: I agree that if any portions of this Agreement, Release of Liability and Assumption of Risk are found to be unenforceable or against public policy, that only that portion shall fall, but I specifically waive any unenforceability or any public policy argument that I may make or that may be made on behalf of my estate or by anyone who would sue because of my **injury or death**.

(____)

17. I am, by reading this paragraph, being made aware that the general rule is that this type of document is to be narrowly construed and ambiguities are to be decided against the person or entity preparing the document. By initialing this paragraph, I expressly waive that rule and specifically agree that this document be broadly construed in favor of SKYDIVE LONG ISLAND and against me and that all ambiguities be resolved in favor of SKYDIVE LONG ISLAND.

(____)

18. It is further agreed between the parties that no matter where venue lies, any lawsuits shall be filed in State Court of Suffolk County, New York. It is further agreed that in the event any lawsuit is filed other than in State Court of Suffolk County, New York or such other locations as SKYDIVE LONG ISLAND shall specify, on motion and at the option of SKYDIVE LONG ISLAND.

(____)

19. I hereby agree to reimburse SKYDIVE LONG ISLAND for loss or damage to any equipment of any kind whatsoever caused by my personal negligence or other wrongdoing.

(____)

20. I hereby authorize SKYDIVE LONG ISLAND or its assignee to take any photographs and videos as they may deem appropriate of myself or my party and to use those photographs and videos in such a manner as they may deem appropriate, including but not limited to uploading them on Facebook,

You-Tube, or any other social networking website. I specifically waive any interest, proprietary or otherwise, I may have in such photographs.

(____)

21. I further acknowledge that I have been shown a video featuring an attorney who in general terms has explained the terms and conditions of this Release. I further acknowledge that I have been told that I do not have to go forward at this time and that any monies that I have tendered prior to this date, will be refunded in the event I chose not to continue.

(____)

22. **I GIVE UP LEGAL RIGHTS: I understand that by signing this document I am giving up important legal rights and it is my intention to do so.**

(____)

23. **Even though I may have failed to initial some or all of the paragraphs of this document, I still intend to be bound by all paragraphs. I further understand that this document can only be amended in writing, with the amendment signed by the attorney for the drop zone and myself.**

(____)

24. UNDERSTANDING OF AGREEMENT: I HEREBY CERTIFY THAT I HAVE READ AND UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND I WISH TO BE BOUND BY ITS TERMS AND I UNDERSTAND THAT BY SIGNING THIS, I HAVE FOREVER GIVEN UP IMPORTANT LEGAL RIGHTS.

(____)

I UNDERSTAND THAT WHEN I SIGN THIS DOCUMENT, I WILL BE GIVING UP ANY AND ALL RIGHTS WHICH I OR MY HEIRS MAY HAVE TO SUE ANYONE IN ANYWAY, SHAPE OR FORM, ASSOCIATED WITH MY SKYDIVE, EVEN IF THE ENTITY I INTEND TO SUE HAS CAUSED MY **INJURY** OR **DEATH** BY THEIR NEGLIGENCE.

I HAVE BEEN GIVEN AN OPPORTUNITY TO READ THIS DOCUMENT. I HAVE DONE SO. I UNDERSTAND ITS CONTENT. I INTEND THAT NOT ONLY I, BUT ALSO MY HEIRS, MY FAMILY AND ANYONE WHO MIGHT ACT ON MY BEHALF IN ANY CAPACITY WHATSOEVER BE BOUND BY ITS TERMS.

READ BEFORE YOU SIGN. YOU ARE GIVING UP IMPORTANT LEGAL RIGHTS.

DATED THE _____ DAY OF _____ (MONTH), 20_____

_____ SIGNATURE

_____ PRINT YOUR NAME

_____ WITNESS SIGNATURE

_____ PRINT WITNESS NAME