

Counseling and Advising Clients Exclusively on Laws of the Workplace



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Saul D. Zabell
Email: SZabell@laborlawsny.com

April 14, 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., d/b/a Skydive Long Island, and Ray Maynard, Defendants in the above-referenced action. In accordance with Your Honor's Individual Rules of Practice, and after meeting and conferring with our adversary *via* letter and telephone, Defendants submit this letter in support of their request for a pre-motion conference with respect to their anticipated motion for a protective order and to quash a third-party subpoena served upon Defendant Maynard's wife.

Throughout the course of this litigation, Plaintiff has consistently identified Joanne Maynard as an individual who purportedly possesses relevant information to Plaintiff's claims of workplace discrimination. As such, Mr. Antollino has, on numerous occasions, threatened to serve Mrs. Maynard with a subpoena compelling her appearance at a deposition. See, e.g., Ex. "A" & "E." In response, we have advised Mr. Antollino that should he seek to serve Mrs. Maynard, we would move to quash the subpoena as any testimony he would seek to elicit would be privileged pursuant to the spousal confidential communications privilege. See, e.g., Ex. "B." On or about April 5, 2011, Plaintiff prepared a subpoena addressed to Mrs. Maynard, but did not provide Defendants with a copy. Ex. "C." On April 8, 2011, Plaintiff provided Defendants with a copy of the subpoena *via* email. Ex. "D." Regardless of Plaintiff's reasons to depose Mrs. Maynard, the sought after testimony is



privileged, necessitating Your Honor to quash the subpoena and issue a corresponding protective Order.

“In the absence of a claim of privilege a party usually does not have standing to object to a subpoena directed to a non-party witness.” Langford v. Chrysler Motors Corp., 513 F.2d 1121, 1126 (2d Cir. 1975). Importantly, the Court “must quash or modify a subpoena that ... requires disclosure of privileged or other protected matter, if no exception or waiver applies or ... subjects a person to undue burden.” Fed.R.Civ.P. 45(c)(3).

“Motions to quash a subpoena are entrusted to the sound discretion of the court.” Fitch, Inc. v. UBS Painewebber, Inc., 330 F.3d 104, 108 (2d Cir. 2003). Additionally, the broad scope of permissible discovery is curtailed by Rule 26(c), which permits motions for protective orders. Specifically, “[u]pon motion by a party ... and for good cause shown, the court ... may make any order which justice requires to protect a party or person ... including ... [an order] that the disclosure or discovery not be had ...” Fed.R.Civ.P. 26(c). In a motion for a protective order, “good cause” is established only on a “specific” and “particular” showing of harm to the party opposing disclosure. See Alfadda, et al. v. Fenn, et al., 149 F.R.D. 28, 34 (S.D.N.Y. 1993) (citations omitted); Cooper v. Welch Foods, Inc., 105 F.R.D. 4, 6 (W.D.N.Y. 1984) (citations omitted). “The burden of persuasion in a motion to quash a subpoena and for a protective order is borne by the movant.” Jones v. Hirschfeld, 219 F.R.D. 71, 74-75 (S.D.N.Y. 2003) (citing Dove v. Atl. Capital Corp., 963 F.2d 15, 19 (2d Cir. 1992)).

Federal common law recognizes two distinct forms of marital privilege: (1) the privilege against adverse spousal testimony, which gives the testifying witness the privilege to refuse to testify against a spouse, even about non-confidential communications or acts (see e.g., Trammel v. U.S., 445 U.S. 40, 100 S. Ct. 906 (1980)); and (2) the confidential marital communications privilege which may be asserted by either spouse to bar the testimony of the other regarding marital communications made in confidence. See, e.g., Wolfe v. U.S., 291 U.S. 7, 14, 54 S. Ct. 279, 280 (1934)). The marital communications privilege applies in both criminal and civil cases. See Engelmann v. National Broadcasting Co., Inc., 1995 WL 214500 (S.D.N.Y. 1995) (internal citations omitted) (“The communications privilege may be asserted by either spouse in both civil and criminal proceedings ...”).

There are three prerequisites to the assertion of the communications privilege: (1) at the time of the communication, there must have been a marriage recognized as valid by state law; (2) there must have been a communication with respect to which the privilege is asserted; and (3) the communication [must have been] made in confidence. See Engelmann, 1995 WL 214500 at *2; U.S. v. 281 Syosset Woodbury Road, 862 F. Supp. 847, 853-54 (E.D.N.Y. 1994).



Plaintiff's stated reason for seeking Mrs. Maynard's deposition is, upon the filing of this lawsuit, she contacted Plaintiff *via* a Facebook message, and indicated to him that, during the course of their marriage, Defendant Maynard allegedly made comments to her concerning Plaintiff's sexual preference. Ex. "E." Regardless of whether Defendant Maynard made such comments, which Defendants deny, such communications between spouses is privileged pursuant to the marital communications privilege.

In the past, Plaintiff has argued that due to the fact the Maynards are currently involved in a divorce proceeding, the marriage is "obviously destroyed," rendering the marital communications privilege inapplicable. Ex. "F." However, Plaintiff possesses no evidence that these purported communications occurred during a time that the Maynards' marriage could be considered "destroyed," or that the purported communications were not intended to be made in confidence.

The indisputable fact is that any confidential communication the Maynards had during the course of the marriage, regardless of the subject matter, is privileged pursuant the marital communications privilege, and that the pending divorce action does not destroy that privilege. See Pereira v. U.S., 347 U.S. 1, 7 (1954). Accordingly, Defendant Maynard seeks to assert this privilege, and prevent Mrs. Maynard from disclosing any confidential communications they have had, regardless of the subject matter.

Inasmuch as Plaintiff's sole stated basis for attempting to depose Mrs. Maynard is to elicit any confidential communications she allegedly had with Defendant Maynard concerning Plaintiff, and that such communications would be privileged under the marital communications privilege, Mrs. Maynard cannot be deposed. Accordingly, Defendants respectfully request Your Honor issue an Order quashing Plaintiff's subpoena, and issue a protective Order preventing Mrs. Maynard from being deposed in the future.

Counsel remains available should Your Honor require additional information regarding this submission.

Respectfully submitted,

ZABELL & ASSOCIATES, PC



Saul D. Zabell

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

EXHIBIT A

SZabell@laborlawsny.com

From: Gregory Antollino <gregory10010@verizon.net>
Sent: Monday, March 14, 2011 4:59 PM
To: SZabell@laborlawsny.com
Subject: Re: Zarda
Attachments: image.png

As it happens I am no longer available on the afternoon of the 16th. Please pick Tuesday or Thursday afternoon or suggest another time.

We can discuss the issues pertaining to depositions in our conversation, however, I would ask also that, prior to the conversation, you review the scope of the "spousal privilege" and how it is applied in federal court. In a civil case, the privilege is held by the deponent, and it only applies to certain types of conversations, and there are waiver issues. If you still disagree on that after investigation, I would prefer to get guidance from the court in advance of the service of the subpoena.

GA

On 3/14/11 4:48 PM, "Robert Garafola" <RGarafola@laborlawsny.net> wrote:

Please see attached.

Robert M. Garafola, Paralegal
& Associates, PC

Zabell

4875

<blocked::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>>

95.677068&sspn=42.310334,82.265625&ie=UTF8&z=16&iwloc=addr&om=1> Sunrise Highway

<blocked::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>> Bohemia,

NY 11716 Office: 631-589-7242

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EXHIBIT B

Counseling and Advising Clients Exclusively on Laws of the Workplace

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

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Saul D. Zabell
SZabell@laborlawsny.com

March 16, 2011

VIA 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:

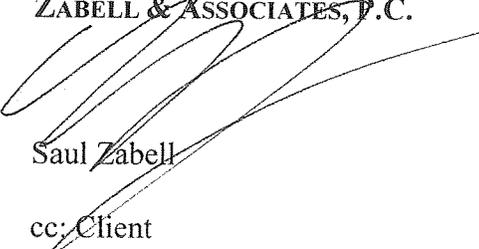
We write in response to your March 14, 2011 email. Regarding the outstanding issues in discovery, we are currently available to discuss these issues on March 21, 2011 at 3:00 p.m. or March 23, 2011 at 3:00 p.m. Please advise as to your availability.

Concerning the potential deposition of Mrs. Maynard, we find your position unavailing. We still take the position that any communications that may have occurred between Mr. & Mrs. Maynard during their marriage would be protected by the spousal confidential communications privilege. This privilege applies in both criminal and civil cases, and is held jointly by both Mr. & Mrs. Maynard. As such, to the extent Mr. Maynard invokes the privilege and does not wish for such confidential communications to be disclosed, Mrs. Maynard would be precluded from revealing same in any forum. Based upon the foregoing, should Plaintiff attempt to subpoena Mrs. Maynard, Defendants will immediately move to quash the subpoena. Notwithstanding our position, should you still wish to serve a subpoena, kindly provide your analysis in writing with any applicable legal support.

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

Very truly yours,

ZABELL & ASSOCIATES, P.C.


Saul Zabell

cc: Client

EXHIBIT C

AO 88A (Rev. 06/09) Subpoena to Testify at a Deposition in a Civil Action

UNITED STATES DISTRICT COURT

for the

Eastern District of New York

Donald Zarda)	
<i>Plaintiff</i>)	
v.)	Civil Action No. CV-10-4334 (JFB)
Altitude Express, Inc. et al.)	
<i>Defendant</i>)	(If the action is pending in another district, state where:)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: Joanne Maynard (Joanne DAvanzo Lopez)

Testimony: YOU ARE COMMANDED to appear at the time, date, and place set forth below to testify at a deposition to be taken in this civil action. If you are an organization that is *not* a party in this case, you must designate one or more officers, directors, or managing agents, or designate other persons who consent to testify on your behalf about the following matters, or those set forth in an attachment:

Place: United States Courthouse, 100 Federal Plaza, Central Islip, NY 11722. (Meet outside Courtroom 920 and a location will be designated.)	Date and Time: 06/15/2011 1:00 pm
--	--------------------------------------

The deposition will be recorded by this method: stenographic transcription

Production: You, or your representatives, must also bring with you to the deposition the following documents, electronically stored information, or objects, and permit their inspection, copying, testing, or sampling of the material:

The provisions of Fed. R. Civ. P. 45(c), relating to your protection as a person subject to a subpoena, and Rule 45 (d) and (e), relating to your duty to respond to this subpoena and the potential consequences of not doing so, are attached.

Date: 04/05/2011

CLERK OF COURT

OR

Signature of Clerk or Deputy Clerk



Attorney's signature

The name, address, e-mail, and telephone number of the attorney representing *(name of party)* Donald Zarda, who issues or requests this subpoena, are:
Gregory Antollino, 18-20 West 21st Street #802, New York, NY 10010 212-334-7397 gantollino@nyc.rr.com

EXHIBIT D

Tdomanick@laborlawsny.com

From: SZabell@laborlawsny.com
Sent: Friday, April 08, 2011 1:54 PM
To: Tdomanick@laborlawsny.com
Subject: FW: Subpoena
Attachments: sub.pdf

Saul D. Zabell
Zabell & Associates, PC
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Bohemia, NY 11716

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From: Gregory Antollino [<mailto:gregory10010@verizon.net>]
Sent: Friday, April 08, 2011 1:40 PM
To: SZabell@laborlawsny.com
Subject: Subpoena

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EXHIBIT E

GREGORY ANTOLLINO

A T T O R N E Y A T L A W

GREG@ANTOLLINO.COM

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NEW YORK, NEW YORK 10010

TEL. (212) 334-7397
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February 4, 2011

Magistrate Judge Arlene R. Lindsay
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 Lindsay:

I represent plaintiff in this action and write to request close supervision of an aspect of discovery because I believe a witness is being intimidated.

This is a civil rights action alleging sexual orientation and gender discrimination. My client is a tandem skydive instructor, a trained skydiver who straps himself onto those novices who wish to enjoy the thrill of jumping out of a plane and descending to earth with a parachute. Defendant Altitude Express, d/b/a Long Island Skydive, provides this service to the public. In June 2010, Mr. Zarda mentioned to a female skydive customer who he was strapped onto and about to jump out of an airplane that he is gay, something he had done any number of times before with women passengers in order to ease the tension. After the skydive was over, plaintiff learned from the defendant that this customer complained about the revelation. Soon thereafter, defendant also told plaintiff that the customer complained that Mr. Zarda had touched her "in a way that made her feel uncomfortable." Plaintiff was then fired without even being asked to tell his side of the story. Believing this allegation of touching to be facially pretextual – given both his sexual orientation as well as the fact that he needed to touch the passenger in order to protect her from falling to earth – and believing telling any customer that he is gay to be a protected act, plaintiff brought this action.

The day after the action was filed, the New York Post found it and ran a story about it, which spawned additional publicity. Presumably as a result of this publicity, Mr. Zarda received an email from defendant Ray Maynard's wife, Joanne Maynard, whom he had known before only in passing. In the email, Ms. Maynard stated,

i will be willing to help you in any way possible to stop this monster. he made a lot of negative comments about you during our marriage. i plan on stopping him. contact me if i can help you in any way in your suit against him, believe

me he hated your sexual preference

Shortly thereafter, Ms. Maynard sent another email to my client stating, "What i am really upset about and think is unfair is that at other times other customers have complained about tandem masters behavior but those people were not fired."

I tried contacting Ms. Maynard at that point and she did not get back to me. Shortly thereafter, my client contacted Ms. Maynard who told him that she couldn't get involved because Ray Maynard's lawyer – the person was not named – had threatened to sue her and that her own lawyer (the two are apparently in the midst of a divorce) had advised her that she could not testify in this action.

At that point, my intention simply was to serve a subpoena on Ms. Maynard, let the chips fall as they may, and seek Court assistance if appropriate. But yesterday there were other disturbing developments and I believe I cannot wait any longer. Recently, I served on defense counsel Rule 26 initial disclosures and some documents that I had in my possession, including the emails from Ms. Maynard, as was my obligation. I also listed Ms. Maynard as a person with discoverable information, as was also my obligation. Yesterday, however, my client received another email from Ms. Maynard in which she stated that Ray Maynard's lawyer (again not named) had contacted and shown her the emails that I had sent defense counsel. Ms. Maynard also stated, "don i will never be able to help you. ray is trying to destroy me[.]"

I am troubled by this, and I believe the Court should be concerned as well. There are two inferences to draw from these communications, both of which are contrary to the administration of justice. The first is that a witness who has *highly* relevant information is being intimidated. Since this is a civil rights case, so she is also potentially being retaliated against. Even assuming a complete absence of intimidation or retaliation, the second inference is that a witness who has highly relevant information is scared, and believes that she does not have to give truthful testimony about evidence central to plaintiff's case.¹

I believe that the appropriate remedy at this point is a hearing in which Ms. Maynard, and perhaps others, can be compelled to testify as to who, if anyone, is intimidating them. At that point, further remedies such as sanctions can be explored, if

¹ In addition to this, yesterday, a person who plaintiff last week truthfully identified in response to an interrogatory – his name is Marco -- "unfriended" plaintiff on Facebook. While a social slight such as an "unfriending" should not be blown out of proportion, the timing between the identification of the witness and the "unfriending" – days – cannot go unnoticed. The ineluctable conclusion is someone is contacting witnesses and exerting pressure on them. While, again, the Marco incident should not be blown out of proportion, taken with Ms. Maynard's statements that her husband is trying to destroy her and his lawyer trying to sue her should give the Court significant pause.

appropriate. I don't think the hearing would take very long. At a minimum, I'd ask for a tele-conference to explore alternatives and seek guidance as to how to protect potential witnesses, and plaintiff's right to truthful testimony without intimidation.

Sincerely,

A handwritten signature in black ink, appearing to read 'Gregory Antollino', with a long horizontal flourish extending to the right.

Gregory Antollino

Cc: Saul Zabell by ecf

EXHIBIT F

GREGORY ANTOLLINO

ATTORNEY AT LAW

GREG@ANTOLLINO.COM

18-20 WEST 21ST STREET, SUITE 802
NEW YORK, NEW YORK 10010

TEL. (212) 334-7397
FAX (212) 334-7399

March 22, 2011

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

RE: Zarda v. Altitude Express

Dear Mr. Zabell:

In accordance with your request, these are the matters that I believe, on your end, need to be addressed to avoid a motion to compel on my part:

1. Names and addresses and phone numbers of all employees in last two years. You have objected to this demand, yet simultaneously identified a list of employee telephone numbers as one of your initial disclosures. Please turn over the list of names and numbers identified, plus the addresses, for 2009 and 2010.

2. Please tender your identified initial disclosures 2,4, 15 (up to December 2010), 17, 18, 19, 20, 21, 24 (and 2009), 25, 26, 27, 28, 37-42. Some of these will permit me to make an informed decision, based on documentary evidence, to withdraw the FLSA claim. We had discussed this in November.

3. In response to plaintiff's second document demand: Have you completed your "search of corporate records?" Furthermore, has the individual defendant searched his personal records? Please indicate, and tender any responsive documents.

4. Furthermore, with respect to the aforementioned demand, my client has indicated that Mr. Maynard has video surveillance running in his office at all times. A videotape of my client would be an electronic record. My client would like the videotape of his suspension and termination meetings with Mr. Maynard, plus any other videotapes of him in your clients' possession.

5. With respect to demands # 2, 9, 10 and 12, are you certain you have tendered all documents, including emails, and that none exist? I would hate to depose Mr. Maynard, find out there were additional documents, and have to recall him for another round of questioning after a supplemental production. Notably, Mrs.

Maynard told Don that there had been other customer complaints, yet there were none tendered by you. This makes me suspect that your response is inadequate.

6. With respect to demand # 5, please interpret this as documents reasonable related to your defenses, and produce documents accordingly.

7. Please tender the identifying information in response to demand number 11. This is obviously relevant to the good service my client provided to satisfied Skydive customers. Plaintiff may choose to contact one or more for trial.

8. With respect to demand number 13, please also tender Mr. Kengle's video. It appears to me that he made the complaint against Don, and Don will also appear on that video. Furthermore, is it your position that you have no identifying information (address, phone number) for Mr. Kengle or Rosanna, his purported fiancé? If not, I will want incoming phone records for the day they called Mr. Maynard, which we can certainly ascertain.

9. Please be ready to discuss deposition dates. I will respect your priority, however, I want to do them back to back.

10. Please consider a more judicially economical manner to proceed vis a vis Mrs. Maynard, and consider the case law. First, there are two spousal type privileges in federal court, and only one applies in the civil context. United States v. 281 Syosset Woodbury Rd., 71 F.3d 1067, 1070 (2d Cir. N.Y. 1995). In the civil context, an adverse inference in a civil case may be drawn by the assertion of a marital privilege. United States v. 281 Syosset Woodbury Rd., 862 F. Supp. 847 (E.D.N.Y. 1994), *aff'd*, 71 F.3d 1067 (2d Cir. N.Y. 1995). Furthermore, even if the stronger privilege were to apply, it only exists to *private* communications that are not waived to third parties. *Id.*; Thomsen v. County of Erie, 2006 U.S. Dist. LEXIS 5401 (W.D.N.Y. Jan. 26, 2006) (citing Pereira v. United States, 347 U.S. 1, 7 (1954).) Finally, the privilege does not extend to a marriage "so obviously destroyed as the one here." *See, e.g.*, United States v. Fisher, 518 F.2d 836, 841 (2d Cir. 1975).

I would be willing to consider any possible manner in which to address this issue – including, potentially, dismissing Ray Maynard as a defendant to obviate any assertion of the privilege – but in the absence of same, I will definitely be serving a subpoena on Ms. Maynard. We never would have contacted her, but she let the cat out of the bag. I will would be remiss if I were to let that go based on your threatened assertion of a privilege that I can derive an adverse inference from. Please think this over and I would be willing to entertain any proposal.

Sincerely,



Gregory Antollino