UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DONALD ZARDA,

Plaintiff,

-against-

ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,

Defendants.
----------X

NOTICE OF MOTION

10-cv-04334-JFB -ARL

PLEASE TAKE NOTICE that Gregory Antollino, Esq., counsel for Plaintiff, will move this Court, before the Honorable Joseph F. Bianco, at the United States District Courthouse for the Eastern District of New York, located at 100 Federal Plaza Central Islip, New York, pursuant to the scheduling order entered on May 6, 2011, or as soon thereafter as counsel can be heard, for the following orders,

1. Disqualifying Saul Zabell or his firm or his associates from representing non-party witnesses;

2. Sanctioning defendant and/or his attorney for obstructing discovery and failing to comply with a valid subpoena; and

3. Ordering Rosanna Drellana and David Kengle to show cause as to why they should not be held in contempt for failing to appear at a

deposition pursuant to a validly served subpoena; and

4. Ordering that Drellana and Kengle pay monetary sanctions, including reasonable attorneys fees, deposition transcript "bust" fees and plaintiff's airline fees for their contempt;

5. Ordering defendant to tender Rosanna Drellana and David Kengle's unredacted releases, complete with addresses; and

6. Such other relief as may be deemed just and proper

Dated: New York, New York
June 6, 2011

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff
18-20 West 21st Street, Suite 802
New York, NY 10010

TO: Saul Zabell, Esq
Zabell & Associates, PC
4875 Sunrise Highway
Bohemia, NY 11716

Rosanna Drellana and David Kengle
c/o of Saul Zabell

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
----------X

DONALD ZARDA, DECLARATION

Plaintiff, 10-cv-04334-JFB -ARL

-against-

ALTITUDE EXPRESS, INC.,
dba Skydive Long Island, and RAY MAYNARD,

Defendants.
----------X

GREGORY ANTOLLINO, attorney for plaintiff, hereby declares under penalty of perjury as follows:

1. I make this declaration in furtherance of the annexed motion to disqualify Saul Zabell from representing third-party witnesses and otherwise obstructing discovery. This action has been pending since October, and a Rule 26 conference was held by the Court in early December 2010. Cross motions to compel discovery are now pending, as is a motion to quash a subpoena.

2. Whatever its intricacies, this case arose from the following circumstances: Plaintiff Donald Zarda, a highly experience tandem skydive instructor took one Rosanna Drellana on a sky jump on or about June 3, 2010. During said sky jump (upon information and belief) plaintiff

mentioned to Drellana that he is gay, something he is proud of and does not hide in any circumstance. Upon information and belief, as Mr. Zarda and Ms. Drellana were strapped together tightly, the conversation occurred along the lines of Mr. Zarda saying something like, "don't worry about how close we are because I am gay."

3. The sky jump was videotaped, and while not necessary for the motion, it is available for review at http://www.youtube.com/watch?v=tzTHzY-FRMM . While it does not appear from the video that Ms. Drellana appeared in any way distressed from being next to an admitted homosexual – she even posed with him for the camera after the jump – a day or two later, either she or her boyfriend, David Kengle, called defendant Maynard to complain that as a result of Rosanna's learning of plaintiff's homosexuality, her birthday was ruined. Plaintiff was thereupon fired by defendant Maynard from his position for "revealing inappropriate personal information," which Maynard characterized as plaintiff's "personal escapades." This lawsuit was shortly thereafter filed.

4. Plaintiff was entitled to, as part of initial disclosures, the names and addresses of all witnesses. Defendants' initial disclosures dated December 17 listed Drellana and Kengle as witnesses to be reached "in care

of defendants' counsel." An amended disclosure dated December 22 listed their addresses as "unknown."

5. Stating that the addresses for Drellana and Kengle were unknown was a falsehood. The defendant takes releases from each jumper, an exemplar of which is attached as "Exhibit A." Plaintiff requested production of the Drellana release in his initial demand for documents; said release, if tendered, would have contained her address and this motion practice would not now be necessary. While defendant did not object to providing the release, the document, as signed by Drellana, still has not been tendered. The document very clearly states the name and address of each of the jumpers on the front page. While defendant can make every excuse in the book for not tendering Drellana's releases at an appropriate time, it defies credibility any releases from liability for such a potentially dangerous activity as skydiving would be lost for months upon end. I contend that defendant and/or his counsel knew where that release was at all times, but merely refused to tender because he knew it contained the address.

6. While defendants deny withholding the address what they and Zabell admit is that Zabell wrote to these witnesses and asked them whether they would permit being identified as witnesses as required by the initial disclosure rules. The undersigned was not asked for permission, nor was the Court asked whether the addresses could be withheld.

7. On or about April 20, some four months after initial disclosures were due, defense counsel wrote me that the witnesses refused to give their addresses voluntarily and that he, Mr. Zabell, would accept the service of subpoena on him. The letter is attached as "Exhibit B."

8. I thereupon (on May 6, 2011) subpoenaed Drellana and Kengle through Zabell for a deposition to take place on May 26, 2011, a date that my client, a Missouri resident, planned to be in town. The subpoenas are attached as "Exhibit C."

9. Had I known that the witnesses had any special need or preference for a deposition to take place on a certain day, I would have tried to accommodate that, however, because I was not given contact information, I could not so inquire of the witnesses directly, and defense counsel did not inform me of any in the letter attached as "Exhibit B." Therefore, I chose a day in which I knew my client would be in town. It was very important for my client and for me to have my client at the deposition of Drellana and Kengle. Mr. Zarda has the right to be in the room and look these witnesses directly in the eye to see how they respond to the question, "How did knowledge of my client's homosexuality ruin your birthday?" among others.

10. Rather than call to discuss the date of the deposition, Zabell simply sent me a letter by regular mail two weeks later objecting to the

location and the timing of the deposition. I explained to him in detail, though several phone calls and emails that I was not willing to adjourn the deposition for more than a couple of days given that my client was going to be in town for only a week. I further agreed to change the location of the deposition, but, again, only if my client could be present. I assured Mr. Zabell that I would carry forward with the deposition if we could not agree on a date and time.

11. Primary among Mr. Label's objections is that the witnesses preferred Wednesdays, something that could have been accomplished – on either Wednesday May 25 or Wednesday June 1, both days of which my client was here -- but for the fact that Zabell was not available on either Wednesday, and was unwilling to send an associate to cover for him.

12. I informed Zabell that, while I would have accommodated anyone's schedule with advanced notice, I could not under the circumstances – although I further offered to arrange to have my client stay in New York beyond his scheduled departure date of June 2. I made my points in an Email on May 27, attached as "Exhibit D." This was the last communication we had, after several that took place, by phone and email, over the previous eight days.

13. I received no response from the email, and went ahead with the subpoenaed deposition. The transcript, in which the deponents did not appear, is attached as "Exhibit E." Because the subpoena was validly served according to the witnesses' own instructions, and given that they did not appear, they should be held in contempt; in the alternative, defendants and/or Saul Zabell should be sanctioned for obstructing discovery by not disclosing the witnesses' addresses in violations of his obligations under initial disclosures and discovery. Their address should be turned over forthwith to avoid future difficulties at trial.[1]

14. Does Mr. Zabell represent Drellana and Kengle? He has never stated one way or the other, though he has certainly acted as their agent and speaks for them. What is clear is that he solicited them by contacting them for purposes of restricting permission to tender their address – something neither they nor Zabell had the right to restrict. No privilege has been offered to shield their address and none would. This is a public lawsuit and plaintiff expects a public trial. People who are afraid of learning a persona's

[1] Defendant also objected to the location of the deposition in Brooklyn. Because I was not aware as to where the witnesses lived, I had no reason to think that Brooklyn would be a hardship. Having learned they lived in Suffolk, I agreed to change the location *if* they would be deposed before my client left New York. My agreement to compromise notwithstanding, a deposition noticed in the district within 100 miles (which translates to all of Long Island except for the east half of the south fork) is presumptively valid.

sexual orientation, in this day and age – and more importantly, in this state – do not have more rights of privacy than witnesses in any other case, and they certainly do not have the right to disobey a subpoena. Since I did not release them from the subpoena, they are in contempt.

15. This solicitation of non-parties for the purposes of obstructing plaintiff's attempt to obtain discovery is something that is unfortunately common in this case. As set forth in a motion to compel that is currently pending, defendant refuses to tender the addresses of employees who worked at the defendant company during the period of their tenure. I have explained in my motion to compel how these employees have knowledge of discoverable information. For the purposes of this motion, however, Mr. Zabell has made clear that he represents these witnesses and that therefore I cannot contact them. On April 7, 2011 (see Exhibit F), Zabell represented to me that he would refuse to tender the list of witnesses because, in part, "inasmuch as these individuals are represented by counsel, you would be precluded from contacting them directly." Later, in response to a pre-motion letter in which this motion was discussed, defense counsel did not deny soliciting witnesses, but instead stated "the undersigned [Zabell] has not *actively* solicited any employee of Defendants[.]" See Zabell April 12 letter, attached as "Exhibit G." Because an indirect solicitation is still a solicitation,

and for the reasons set forth in the accompanying memorandum, Mr. Zabell should be disqualified from representing non-party witnesses in this action. None of these witnesses need representation, and, indeed, in some cases he has conflicting loyalties in representing them.

16. In truth, Zabell is representing witnesses to maintain a monopoly on information. In the offing, he has grossly delayed discovery in this matter. He should not only be disqualified from representing non-parties, but also sanctioned for his obstructive behavior.

Dated: New York, New York
June 6, 2011

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff
18-20 West 21st Street, Suite 802
New York, NY 10010

Altitude Express Inc
DBA Skydive Long Island

Date _____

Last Name MI **First Name**

Street Address

City/ Town State Zip Code

Mailing Address

Home Phone Mobile Phone E-Mail Address

_____/_____/_____ Birth Date _____ Age _____ Height _____ Weight lbs.

Would you like to be on our mailing list?
Yes / No (Please circle one)

Drivers License # _____ Occupation_____

How Did You Hear About Us?_____

Emergency Contact Information:

Name Relationship

Street Address

Home Phone Alternate Phone

Medical Certificate:

USPA recommends that all parachutists either receive an FAA Class III Medical Examination or be examined by a medical physician prior to making parachute jumps. In lieu of these qualifications, members must complete the following medical certificate if they are to participate in parachute jumps.

I hereby certify that I have no physical infirmity, am not under treatment for any physical infirmity or chronic ailment, or injury of any nature, and that I have never been treated for any of the following: cardiac or pulmonary condition or disease, diabetes, fainting spells or convulsions, nervous disorder, kidney or related disease, high or low blood pressure.

I certify that all statements in this application are true and correct to the best of my knowledge, and that the medical facts are correct as stated.

Signature **Date**

Experienced Skydivers Only:

USPA # Exp. Date License Number & Current Ratings

_____/_____/_____ Reserve Pack Date Date of Last Jump & Location Total Number of Jumps

Information we can release: Phone Number / Address / E-mail / None

Last Name

First Name

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 sure 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

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

April 20, 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 April 16, 2011 email. As an initial matter, it is important to note that during the March 24, 2011 telephone conference, you agreed to provide a release of Plaintiff's educational records without any precondition. Now, for the first time, you state you will only provide this document if we provide a signed release so that you may obtain your client's unemployment records. While such behavior is wholly unacceptable, and is further evidence of your attempts to delay this case, in an attempt to avoid yet additional judicial intervention for your pedantic behavior, enclosed please find a copy of your requested release executed by the undersigned as attorneys for Altitude Express.

Regarding your repeated requests for the contact information for Rosanna and her boyfriend, our client has located the relevant documents. However, upon discussing the situation with Rosanna and her boyfriend, they do not wish us to disclose this information to you. Rather, they have authorized us to accept service of a subpoena on their behalf.

Please do not hesitate to contact me should you have any further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

Encl.

cc: client

Waiver to Permit Release of Information

I, Ray Maynard, am owner of Altitude Express Inc. of Calverton, New York, Employer Registration Number 83-74949. I do hereby consent to release any information in concerning my response to the claim for unemployment insurance benefits by Donald Zarda social security number 489-86-2464, and such documents may be released to:

Gregory Antollino
Attorney at Law
18-20 West 21st Street # 802
New York, NY 10010

Saul D. Zabell
Zabell & Associates, P.C.
4875 Sunrise Highway,
Suite 3000

Bohemia, New York 11716

A facsimile of this waiver shall be valid if it comes from either of the above-named individuals.

Date: 4/20/11 Signature: _____

as attorneys

Submit two copies of the waiver to: NYS
Department of Labor
W. Averell Harriman
State Office Campus Building 12
Albany, NY 12240

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

ZARDA
Plaintiff
v.
ALTITUDE EXPRESS
Defendant

Civil Action No. 10-4334

(If the action is pending in another district, state where: _____ District of _____)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: ROSANA DRELLANA

☑ *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: BEE REPORTING, 32 COURT STREET #1102, BROOKLYN, NY	Date and Time: MAY 26, 2011, 1 PM

The deposition will be recorded by this method: stenographer

☑ *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:

ANY AND ALL CORRESPONDENCE (INCLUDING BUT NOT LIMITED TO EMAIL, LETTER, FAX, CABLE, FEDEX) FROM ALTITUDE EXPRESS, RAY MAYNARD, SAUL ZABELL, ANY PERSON ACTING ON BEHALF OF OR EMPLOYED BY SAUL ZABELL OR ZABELL & ASSOCIATES, PC, OR ANY PERSON ANY PERSON ACTING ON BEHALF OF OR EMPLOYED BY ALTITUDE EXPRESS OR RAY MAYNARD

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: 5/16/11

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)* _____, who issues or requests this subpoena, are:

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

ZARDA
Plaintiff
v.
ALTITUDE EXPRESS
Defendant

Civil Action No. 10-4334

(If the action is pending in another district, state where: _____ District of _____)

SUBPOENA TO TESTIFY AT A DEPOSITION IN A CIVIL ACTION

To: DAVID KENGLE

☑ *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:	Date and Time:
BEE REPORTING, 32 COURT STREET #1102, BROOKLYN, NY	MAY 26, 2011, 3 PM

The deposition will be recorded by this method: stenographer

☑ *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:

ANY AND ALL CORRESPONDENCE (INCLUDING BUT NOT LIMITED TO EMAIL, LETTER, FAX, CABLE, FEDEX) FROM ALTITUDE EXPRESS, RAY MAYNARD, SAUL ZABELL, ANY PERSON ACTING ON BEHALF OF OR EMPLOYED BY SAUL ZABELL OR ZABELL & ASSOCIATES, PC, OR ANY PERSON ANY PERSON ACTING ON BEHALF OF OR EMPLOYED BY ALTITUDE EXPRESS OR RAY MAYNARD

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: 5/6/11

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)* _____, who issues or requests this subpoena, are:

Subject: Zarda
Date: Friday, May 27, 2011 3:33 PM
From: Gregory Antollino <gregory10010@verizon.net>
To: "SZabell@laborlawsny.com" <SZabell@laborlawsny.com>

I called as you requested. We need to resolve this and take those depositions of the non-parties before my client leaves on Thursday or I will have to file a motion. My client flew out to appear at those depositions and the witness' insistence on being deposed on Wednesdays only is not a valid excuse. That seems to leave us with this coming Wednesday, given the holiday, though I will endeavor to be available on Tuesday afternoon. I will also ask my client if he can postpone his departure, though that would give us at best Friday.

Attached please find a document that my client came across – a print out of am email that Lauren Callanan gave to him. The document is certainly responsive to your demands. However, it was also responsive to mine and the fact that it was not produced suggests that your client did not do a proper computer search for electronic information. Please have your client do a thorough search of his electronic files.

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

UNITED STATES DISTRICT COURT

EASTERN DISTRICT COURT OF NEW YORK

----------x

DONALD ZARDA,

Plaintiff,

-against-

INDEX NO.:
CV-10-4334

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND & RAY MAYNARD,

Defendants.

----------x

32 Court Street
Brooklyn, New York

May 26, 2011
4:15 p.m.

STATEMENT ON THE RECORD in the above-captioned matter, held at the above-mentioned time and place, before Rivka Kaplan, a Notary Public of the State of New York.

* * * *

ORIGINAL

A P P E A R A N C E S:

GREGORY ANTOLLINO, ESQ.
Attorney for the Plaintiff
18-20 West 21st Street, Suite 802
New York, New York 10010

BY: GREGORY ANTOLLINO, ESQ.

ZABELL & ASSOCIATES, ESQS.
Attorneys for the Defendants
4875 Sunrise Highway, Suite 300
Bohemia, New York 11716

BY: NOT PRESENT

ALSO PRESENT:

Donald Zarda

MR. ANTOLLINO: We were here at 2:10 and the court reporter was here at two o'clock, and no witness appeared and it is now 4:15 and no witness has appeared and since I understand that the two witnesses are linked together that they're not going to appear and so we declare both depositions as a bust.

(Whereupon, at 4:16 p.m. the within statement was closed.)

C E R T I F I C A T I O N

I, Rivka Kaplan, a Notary Public of the State of New York do hereby certify:

THAT the foregoing is a true and accurate record of my stenographic notes.

IN WITNESS WHEREOF, I have hereunto set my hand this 2nd day of June, 2011.

Rivka Kaplan

RIVKA KAPLAN

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

April 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 response to your April 5, 2011 email. We respond to each open issue as follows:

Initial Disclosure #15:

This information was previously provided to you in connection with our March 24, 2011 letter.

Initial Disclosure #24:

While Defendant Altitude is in possession of its own jump log, this information is not relevant in the case at bar. Despite your assertions to the contrary, Defendants are not under any duty to produce these documents. According to the 1993 Committee Note of FRCP 26, the listing of documents does not waive objections to their production, even on grounds of relevance. ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.") Committee Note, 146 F.R.D. at 631. Inasmuch as you have failed to articulate how Defendant Altitude's entire jump log for 2010 is relevant to Plaintiff's claims of discrimination, Defendants' objections are well founded. Based upon the foregoing, Defendants will not produce this information absent court Order.

Initial Disclosure #26:

This information was previously provided to you in connection with our March 24, 2011 letter.

Initial Disclosure #27:

While Defendant Altitude is in possession of the contact information for its employees, this information is not relevant in the case at bar. Despite your assertions to the contrary, Defendants are not under any duty to produce this information. According to the 1993 Committee Note of FRCP 26, the listing of documents does not waive objections to their production, even on grounds of relevance. ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.") Committee Note, 146 F.R.D. at 631. Inasmuch as you have failed to articulate how a list of every single employee, along with their contact information, is relevant to Plaintiff's claims, Defendants' objections are well founded. Moreover, inasmuch as these individuals are represented by counsel, you would be precluded from contacting them directly. Based upon the foregoing, Defendants will not produce this information.

Customer Contact Information:

Similar to the above discussion concerning Defendants' employees, the identity of every single passenger that Plaintiff jumped with is irrelevant to Plaintiff's claims of discrimination. By Plaintiff's own admission, as discussed in Plaintiff's Complaint, the only relevant passenger in the case at bar is "Rosanna" as Plaintiff alleges it was her complaint that was the impetus behind Plaintiff's termination. As stated in your April 5, 2011 email, you have no proof that any of these individuals possess relevant information. Rather, you state they "may have discoverable information." Such speculation and conjecture does not meet the burden necessitating the production of every single passenger who jumped with Plaintiff. Absent a court Order or convincing case law, Defendants will not produce this information.

Depositions:

Regarding Plaintiff's deposition, in order to avoid having to recall Plaintiff for additional deposition dates, and to avoid the added expense imposed upon him for having to fly to New York multiple times, Defendants will not depose Plaintiff until paper discovery is substantially complete. Inasmuch as you have already conceded deposition priority, Defendant Maynard will only be deposed after Plaintiff.

Concerning Mrs. Maynard, your email references a subpoena you have sent out for service. We have not been provided a copy of this subpoena previous to your attempts to serve Mrs. Maynard. Moreover, while you state in your email a copy of the subpoena is attached, no such attachment is found in the email. Kindly remedy this situation so that we may file a motion to quash.

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Regarding the marital privilege, it is unlikely we would agree to Mrs. Maynard's deposition in the event this action was discontinued against Mr. Maynard. However, we will broach that topic with our client.

Please do not hesitate to contact me should you have any further questions regarding the enclosed.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: client

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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 Zabell
Email: szabell@laborlawsny.com

April 12, 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 in opposition to Plaintiff's April 8, 2011 letter motion seeking to compel discovery. For all the reasons set forth below, Defendants respectfully request Your Honor deny Plaintiff's letter motion.

As an initial matter, during the previous court conference, Your Honor directed the parties, after meeting and conferring, to file any motions to compel *via* formal motion practice, and not letter motion. Accordingly, Plaintiff's motion is procedurally defective, violates Your Honor's directive, and therefore requires dismissal.

Notwithstanding Plaintiff's claims for alleged discrimination based on sexual orientation and sexual stereotyping, Plaintiff was terminated due to inappropriate workplace behavior. Moreover, while Plaintiff alludes to the potential withdrawal of his overtime claims due to the fact Defendants are exempt under the Fair Labor Standards Act, any such withdrawal also requires withdrawal of his federal minimum wage law claim. See 29 U.S.C. § 213(a)(3).

Defendants respond to Plaintiff's specific arguments as follows:

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

While Defendant Altitude is in possession of the contact information for its employees, this information is not relevant in the case at bar. Plaintiff is correct that Defendants identified they were in possession of this information in its Automatic Disclosure Statement. However, this fact alone does not mandate disclosure. According to the 1993 Committee Note of FRCP 26, the

listing of documents does not waive objections to their production, even on grounds of relevance. ("The disclosing party does not, by describing documents under subparagraph (B), waive its right to object to production on the basis of privilege or work product protection, or to assert that the documents are not sufficiently relevant to justify the burden or expense of production.") Committee Note, 146 F.R.D. at 631. Moreover, while Plaintiff argues co-workers regularly engaged in sexual banter, and although appropriately demanded in discovery, he has yet to identify any specific co-worker he believes to have done so. Accordingly, this vague request for identifying information is nothing more than an attempt to annoy and harass Defendants and their employees. We have previously stated that should Plaintiff identify any specific employee he thinks possesses relevant information, we would revisit this position. See Exhibit "A." To the extent Plaintiff alleges his co-workers regularly engaged in this conduct, he should be able to identify, with specificity, any employee who has purportedly engaged in this conduct.

Regarding Plaintiff's renewed threats of a motion to disqualify, Plaintiff misstates the relevant case law. In U.S. v. Occidental Chemical Corp., 606 F.Supp. 1470 (W.D.N.Y. 1985), Counsel for the defendants offered, by letter, to represent any non-party employee witnesses who were subpoenaed for deposition in that case. The Court held that this constituted an improper solicitation of business, but did not warrant disqualification. The Court did not preclude defendant's counsel from representing non-party employees at future depositions, but stopped the defendant's counsel from soliciting such representation. Occidental, 606 F.Supp. at 1476-1477, 1478. In Rivera v. Lutheran Medical Ctr., 22 Misc.3d 178, 866 N.Y.S.2d 520 (Kings Cnty. 2008), the Court found that defendant's counsel should be disqualified from representing non-party witnesses (but not the defendant), based upon similar solicitation and because of a history in that case of defendant's counsels "improperly thwarting plaintiff's attempts to obtain discovery." Rivera, 22 Misc.3d 178 at 186, 866 N.Y.S.2d 520. In the case at bar, Plaintiff ignores the fact the undersigned has not actively solicited any employee of Defendants. However, should an employee request representation in the course of this proceeding, we intend to undertake such representation.

2. Names and addresses of customers with whom plaintiff jumped in 2009 and 2010

The identity of every single passenger with whom Plaintiff jumped is irrelevant to Plaintiff's claims of discrimination. By Plaintiff's own admission, as confirmed in the Complaint, the only relevant passenger in the case at bar is "Rosanna;" Plaintiff alleges it was her complaint that was the impetus behind his termination. Additionally, Plaintiff cannot identify with specificity any relevant information these individuals possess, but rather, has routinely stated they "**may** have discoverable information." Such speculation and conjecture does not meet the burden associated with Defendants' review of their records and corresponding production of contact information for every single passenger who jumped with Plaintiff.

Regarding the complaining witnesses, Defendants are in the process of obtaining the contact information for "Rosanna" and anticipates producing same shortly. However, Plaintiff has identified a customer by the name "Steve." See Exhibit "B." Defendants do not know the individual to which Plaintiff refers. To that end, Defendants requested additional contact information, but Plaintiff denied this request. See Exhibit "C." As such, Defendants cannot provide this information.

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3. Plaintiff's Jump Logs

Once again, while Defendants confirmed they are in possession of this information, Defendants have not waived their objections to its production, and are under no obligation to produce it. See 146 F.R.D. at 631. In his April 8, 2011 application, Plaintiff makes the conclusory statement that "in unusual case[s]" a document identified in an Automatic Disclosure Statement can be withheld, this case is "surely not… one." Inasmuch as the jump logs contain information beyond dates worked (including customer identification information) Defendants have properly withheld production as such information is both confidential and irrelevant. Plaintiff's conclusory statement that this information is improperly withheld is insufficient to warrant production.

4. Depositions

Plaintiff's hyperbole concerning deposition priority would have this Court believe that Defendants are delaying the process. However, that is simply not the case. Defendants do not wish to depose Plaintiff until they are in possession of the requisite paper discovery necessary to do so. As Plaintiff admits, he is in possession of significant paper discovery which remains outstanding. As a consequence, Defendants will move to compel shortly. Defendants wish to avoid prejudice associated with starting Plaintiff's deposition before he has met his discovery obligations, and having to recall him after he has finished producing the relevant documentation in discovery. As Your Honor is aware, Plaintiff is not a resident of New York, and will be required to fly to New York for his deposition. This added expense on the part of Plaintiff, as well as the potential scheduling difficulty that will likely exist when attempting to schedule future flights, requires the parties to complete paper discovery prior to commencing depositions.

Additionally, as Plaintiff stated, he has conceded deposition priority. See Exhibit "D." Plaintiff should not be permitted to renege on this earlier concession due to his failure to adequately provide documentation in discovery. If allowed, Your Honor would be rewarding Plaintiff for purposefully failing to meet his discovery obligations.

Based upon the foregoing, Plaintiff respectfully requests Your Honor deny Plaintiff's application as it is both procedurally and substantively defective.

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)