UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,

Plaintiff,

– against –

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

Defendants.

Case No.: CV-10-4334 (JFB)(ARL)

DEFENDANTS' COUNTER 56.1 STATEMENT OF MATERIAL FACTS

Pursuant to Rule 56.1 of the Local Civil Rules of this Court, Defendants Altitude Express, Inc. d/b/a Skydive Long Island and Ray Maynard (collectively "Defendants") submit herewith their counter statement of material facts:

1. Defendants admit the statement contained within paragraph 1 of Plaintiff's 56.1 Statement. Defendants aver that safety is not an issue in Plaintiff's termination. (See Maynard Dep. pg. 187, 196)
2. Defendants admit the statement of fact contained within paragraph 2 of Plaintiff's 56.1 Statement. Maynard opined that skydiving is not for everyone. (Maynard Dep. pg. 11-12). Defendants dispute that Maynard testified that you have to be a little bit crazy to skydive. Maynard testified that his opinion was "you don't have to be crazy, though it helps." (Maynard Dep. pg. 31).
3. Defendants admit the statement of fact contained within paragraph 3 of Plaintiff's 56.1 Statement. Maynard testified that he would not recommend a person who expresses a fear of being touched to skydive. (Maynard Dep. pg .17).

4. Defendants admit the statement contained within paragraph 4 of Plaintiff's 56.1 Statement. Defendants aver that inappropriate touching is not part of the activity. (Zarda Dep. pg. 173).

5. Defendants dispute the alleged statement of fact contained within paragraph 5 of Plaintiff's 56.1 Statement. Maynard testified that, if a customer complained that "I went up in the skydive and I was touched" he "would ask them to give [him] more detail." (Maynard Dep. pg. 19).

6. Defendants dispute the alleged statement of fact contained within paragraph 6 of Plaintiff's 56.1 Statement. Maynard investigated the complaint in several ways, including speaking to Kengle (Maynard Dep. pg. 181-182), reviewing the video . (Maynard Dep. pg. 199), and speaking with Zarda (Zarda Dep. pg. 36-37, 39; Maynard Dep. pg. 183).

7. Defendants admit the statement contained within paragraph 7 of Plaintiff's 56.1 Statement. Maynard did not speak with Orellana regarding her complaint of Zarda's behavior. (Maynard Dep. pg. 249). Maynard spoke with Kengle regarding Kengle and Orellana's complaint about the skydive with Zarda. (Zarda Dep. pg. 156; Orellana Dep. pg. 69; Maynard Dep. pg. 181-182). Maynard additionally spoke with Zarda to determine Zarda's position and what he recalled. (Zarda Dep. pg. 36-37, 39; Maynard Dep. pg. 183).

8. Defendants admit that Orellana described the skydive as "crazy and exhilarating." However, Orellana testified that during the car ride home she complained to her boyfriend, Kengle, about her dissatisfaction with the behavior of her instructor. (Orellana Dep. pg. 66-67). Defendants dispute that Orellana did not want to

complain. Orellana testified that she had no personal intention to call Ray to complaint, because she does not like confrontations. (Orellana Dep. pg. 69).

9. Defendants admit the statement contained within paragraph 9 of Plaintiff's 56.1 Statement, that Maynard testified that what could have made Orellana uncomfortable was Zarda adjusting the harness straps. However, most of the adjustments should be performed prior to entering the airplane and very little adjustments are performed on the passenger harness in the airplane. (Maynard Dep. pg. 250). Additionally, Orellana felt that Zarda's conduct, putting his hands on her hips and his chin on her shoulder during the jump, had crossed the line. (Orellana Dep. pg. 60). She felt that "he should have been more professional" in his interactions with her. (Orellana Dep. pg. 49). Orellana felt uncomfortable after Zarda disclosed information about his personal life to her. (Orellana Dep. pg. 52, 54, 55). It made her uncomfortable because she "wanted to learn about the scenery," and "wanted him to speak about what was going on around" them during the jump. She did not "want to hear about his personal life" during the jump. (Orellana Dep. pg. 52, 54, 55). She wanted information about her tandem jump instead. (Orellana Dep. pg. 52, 100). Additionally, Orellana's complaint was not limited to the inappropriate touching, she also complained that Zarda discussed his personal life with her. (Orellana Dep. pg. 52, 54-55, 100; Maynard Dep. pg. 182, 289; Zarda Dep. pg. 40, 176).

10. Defendants admit the statement contained within paragraph 10 of Plaintiff's 56.1 Statement, Maynard testified that a complaint regarding an instructor adjusting the harness straps would not be legitimate. However, Maynard additionally

testified that most of the adjustments to the harness are performed prior to entering the airplane. (Maynard Dep. pg. 250). Very little adjustments are required once the passenger is inside the airplane. Maynard Dep. pg. 250). Additionally, Orellana's complaint was not limited to the inappropriate touching, she also complained that Zarda discussed his personal life with her. (Orellana Dep. pg. 52, 54-55, 100; Maynard Dep. pg. 182, 289; Zarda Dep. pg. 40, 176).

11. Defendants dispute the purported statement of fact contained within paragraph 11 of Plaintiff's 56.1 Statement; the factual record cited does not support the statement that Maynard did not look at the photographs of the jump at the time. Defendants admit that Maynard's review of the photographs revealed a "normal skydive." (Maynard Dep. pg. 325). However, the photographs and video from the skydive do not depict the entirety of the skydive – the video is only approximately two (2) minutes in length, whereas the skydive takes 15-20 minutes in total. (Kengle Dep. pg. 100; Zarda Dep. 318; Ex. B to Decl. of Antollino).

12. Defendants admit the statement contained in paragraph 12 of Plaintiff's 56.1 Statement, Maynard did not speak with Orellana regarding the complaint. Maynard testified that there was no incentive for Kengle to lie about what occurred during the skydive; he "didn't want anything but to express his disappointment of what happened to his . . . girlfriend." (Maynard Dep. pg. 185).

13. Defendants admit the statement contained within paragraph 13 of Plaintiff's 56.1 Statement. Kengle did not request his money be refunded, Maynard refunded it anyway. (Maynard Dep. pg. 186). Kengle cashed the check. (Kengle Dep. pg. 32-33).

14. The alleged statement of fact contained within paragraph 14, that Kengle was an unemployed waiter, is unsupported by any citation to the factual record, and thus should be disregarded. Contradictorily, Kengle testified that at the time of his deposition he was currently unemployed. (Kengle Dep. pg. 7). However, he testified he had been employed by Four Food Studio until June; his deposition took place on November 9, 2011. (Kengle Dep. pg. 1, 7). Defendants have no knowledge of the alleged statement of fact regarding Kengle's home and car and cannot verify the accuracy of Plaintiff's exhibit, which was not produced in discovery in this case and not identified in Plaintiff's initial disclosure. Additionally, Zarda's actions, inappropriately touching Orellana and disclosing personal information, during the skydive provide sufficient motive for a customer to complain. (Orellana Dep. pg. 49, 52, 54-55, 60, 100; Maynard Dep. pg. 182, 289; Zarda Dep. pg. 40, 176).

15. The alleged statement of fact contained within paragraph 15 regarding Kengle's "motive" is argument, unsupported by any citation to the factual record, and thus should be disregarded. Defendants admit that Kengle noted the cost of the jump in his deposition. (Kengle Dep. pg. 35). However, he noted the cost in a comparison to a customer complaining about service at a restaurant, and the justification of complaints when service is poor. (Kengle Dep. pg. 35-36).

16. Defendants dispute the purported statement of fact contained within paragraph 16 of Plaintiff's 56.1 Statement. Plaintiff mischaracterizes the testimony. Kengle testified in a general context, that when "[y]ou go out for dinner for a hundred dollars and, you know, if the server or whoever – if you don't like the attitude,

people find no problem complaining. . ." (Kengle Dep. pg. 35-36). Kengle has received complaints about his own performance. (Kengle Dep. pg. 36). Kengle expressed no personal affinity for making complaints. (Kengle Dep. pg. 35-36).

17. Defendants admit the statement contained within paragraph 17 of Plaintiff's 56.1 Statement, Zarda appears cheerful in Exhibit B to the Declaration of Antollino. Defendants aver that the photo and video evidence do not depict the entirety of the skydive with Orellana. (Kengle Dep. pg. 100; Zarda Dep. 318; Ex. B to Decl. of Antollino; Ex. B to Decl. of Antollino). Also, the statement presupposes that Zarda must have had a non-cheerful attitude in order to inappropriately touch Orellana.

18. Defendants admit Kengle testified to that statement, although not at the page indicated in Plaintiff's 56.1 Statement. (See Kengle Dep. pg. 61). Kengle additionally testified that he has an understanding of proper behavior in any situation. (Kengle Dep. pg. 62). Kengle testified that while on the plane, none of the other instructors were behaving in the manner Zarda was behaving, indicating that Zarda's behavior was indeed improper in that situation. (Kengle Dep. pg. 62-63).

19. Defendants dispute that the cited deposition testimony supports the alleged statement of fact contained within paragraph 19 of Plaintiff's 56.1 Statement. Kengle testified that for all he knows, it could be procedure for instructors to remain attached at the hands and hips, but that none of the other instructors were behaving as Zarda was behaving, indicating that Zarda's behavior was improper. (Kengle Dep. pg. 62-63). Kengle additionally testified that he did not know

whether "the chin and hips" was according to protocol, but that the safety video and other instructors did not have to put their chin on the passenger's neck or rest their hands on the passenger's hips. (Kengle Dep. pg. 64-65).

20. Paragraph 20 of Plaintiff's 56.1 Statement does not contain a statement of fact, bears a citation to an inadmissible form of evidence; i.e., an improper self-serving declaration, and should be disregarded. Defendants do not possess knowledge sufficient to admit or dispute Zarda's "normal way" nor is any such information in the record.

21. Paragraph 21 of Plaintiff's 56.1 Statement does not contain a statement of fact, contains a citation to an inadmissible form of evidence; i.e., an improper self-serving declaration, and should be disregarded. Paragraph 21 of Plaintiff's 56.1 Statement also contains an impermissible citation to a secondary source which is not part of the factual record in this litigation, and should therefore be disregarded.

22. Defendants admit that Plaintiff was once injured. (Maynard Dep. pg. 150; Zarda Dep. pg. 73, 75). The remainder of paragraph 22 contains a citation to an inadmissible form of evidence; i.e., an improper self-serving declaration, which should be disregarded. Plaintiff's purported fact that Zarda has "never had as much as an injury in an inherently dangerous activity" is contradicted by the undisputed fact that Zarda once injured himself. (Zarda Dep. pg. 73, 75).

23. Defendants dispute the characterization of the testimony stated in paragraph 23 of Plaintiff's 56.1 Statement. Kengle testified that his girlfriend, Orellana, is very beautiful and that he is used to her getting attention. (Kengle Dep. pg. 23). Kengle

did not testify that he is "upset with the way men hit on her." Kengle merely testified that he has observed an attitude with gay men, that they have more contact with a women and it is nothing to worry about because they don't want to "sleep with her or anything like that." (Kengle Dep. pg. 37-38). Kengle testified that he does not agree with that attitude. (Kengle Dep. pg. 38).

24. Defendants admit the statement of fact contained within paragraph 24 of Plaintiff's 56.1 Statement.

25. Defendants dispute the alleged statement of fact contained within paragraph 25 of Plaintiff's 56.1 Statement. Kengle testified that at the time of his deposition, November 9, 2011, he was unemployed. (Kengle Dep. pg. 7). However, Kengle testified that up until June, he had been employed by Four Food Studio as a waiter. (Kengle Dep. pg. 7). The events which are the basis of this litigation occurred in June of 2010, a year prior to Kengle's unemployment. (Zarda Dep. pg. 36-37, 201-202, 218; Kengle Dep. pg. 7). The remainder of the purported statement of fact contained within paragraph 24 of Plaintiff's 56.1 Statement, namely characterizing Kengle as "relatively poor" and supposing $900 is financially difficult for him, constitutes an improper argument from Plaintiff's counsel, without citation to factual evidence, and should be disregarded.

26. Defendants admit that, in suspending and terminating Zarda, Maynard stated Zarda ruined Orellana's birthday. (Maynard Dep. pg. 229, 247). Defendants dispute that Kengle "did not think that anything Don did 'ruined' the day." While Kengle testified he believed "ruined" to be too strong of terminology, deeming "taint" more appropriate, Kengle also testified that "the experience was . . . ruined

to an extent." (Kengle Dep. pg. 44-45). Additionally, Orellana testified that Zarda's behavior ruined the entire jump for her. (Orellana Dep. pg. 54).

27. Defendants dispute the alleged statement of fact contained within paragraph 27 of Plaintiff's 56.1 Statement. Orellana testified that the skydive experience was "crazy and exhilarating" (Orellana Dep. pg. 65), but also testified that Zarda's behavior ruined the entire jump for her. (Orellana Dep. pg. 54).

28. Defendants admit that Webster's Online dictionary defines "exhilarate" as "to make cheerful and excited: enliven, elate," though denies the relevance of such.

29. Defendants admit Maynard testified that he has previously said "you don't have to be crazy, though it helps," referring to skydiving. (Maynard Dep. pg. 31). Defendants dispute the characterization of Maynard's testimony that craziness goes hand-in-hand with skydiving. (See Maynard Dep. pg. 31).

30. Defendants admit that Skydive Long Island requires all passengers to sign a waiver prior to skydiving. (Maynard Dep. pg. 41-42). The purported reasons for Skydive Long Island's requirement that passengers sign a waiver is denied, it contains no citation to admissible factual evidence to support the statement, and should be disregarded.

31. Defendants admit the statement contained within paragraph 31 of Plaintiff's 56.1 Statement. Maynard testified that a complaint that the plane went up to an altitude of 12,000 feet would not be a legitimate complaint. (Maynard Dep. pg. 31).

32. The purported statement of fact contained within paragraph 32 of Plaintiff's 56.1 Statement constitutes argument and/or a legal conclusion, is not accompanied by a citation to admissible evidence, and should be disregarded.

33. Defendants dispute the purported statement of fact contained within paragraph 33 of Plaintiff's 56.1 Statement. Maynard testified that he did not believe the complaint from the estate of a student who committed suicide at Skydive Long Island was legitimate. (Maynard Dep. pg. 21-22). Maynard did not testify that no complaint from the estate of a customer who dies while skydiving (even if the instructor is negligent) could be legitimate. (Maynard Dep. pg. 21-22). The waiver provides that Skydive Long Island is not liable for the death of any person, even if the instructor is negligent, during a skydive. (Ex. A to Antollino Decl., ¶ 7, 10).

34. Defendants admit that paragraph 13 of the waiver presented to Orellana specifically provides: "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." (Ex. A. to Antollino Decl. ¶ 13). Defendants admit that Orellana initialed the waiver. (Ex. A to Antollino Decl. ¶ 13; Orellana Dep. pg.35-36). Defendants dispute that Orellana did not read the waiver. Orellana testified that she probably did not the read the entire waiver, but probably read the first page. (Orellana Dep. pg. 36-37). Orellana additionally testified that Zarda and another instructor provided her and Kengle with instructions after reviewing the release. (Orellana Dep. pg. 38-39). These instructions included information about the harness and the proper positioning of arms and legs. (Orellana Dep. pg. 40). Orellana

additionally testified that she was aware, prior to jumping, that close proximity to the instructor was required. (Orellana Dep. pg. 90). Orellana further testified that close proximity does not "mean somebody is going to rest their chin on [her] shoulder." (Orellana Dep. pg. 89). Orellana also testified that it was not the close proximity to Zarda that upset her, it was his hand on her hip and his chin on her shoulder which upset her. (Orellana Dep. pg. 100-101). Orellana was also uncomfortable with Zarda discussing his personal life with her during the jump. (Orellana Dep. pg. 52, 54-55, Maynard Dep. pg. 182-183, 289). The disclosure of personal information is not covered by the waiver. (See Ex. A to Decl. of Antollino).

35. Defendants admit that Orellana testified she probably did not read more than the first page of the waiver. (Orellana Dep. pg. 36-37). However, Orellana testified she was aware of the close proximity, namely that she would be strapped to Zarda at the hip, prior to the jump. (Orellana Dep. pg. 89). Orellana also testified that it was not the close proximity to Zarda that upset her, it was his hand on her hip and his chin on her shoulder which upset her. (Orellana Dep. pg. 100-101). Defendants admit Kengle testified that he believed Orellana "probably left it for [him]. She trusts [his] judgment" and he's "the brains of the operation." (Kengle Dep. pg. 16).

36. Defendants admit that Maynard testified that he believes every customer should read the waiver very carefully. (Maynard Dep. pg. 54). Defendants dispute the purported statement of fact that "according to Ray this [Orellana not reading he waiver] was wrong." Maynard did not testify that failing to read the waiver was

"wrong," he merely testified that reading the waiver was important in his opinion. (Maynard Dep. pg. 54). The characterization that Orellana's behavior (not reading the waiver) as wrong is not supported a citation to the factual record, is argument by counsel, and should be disregarded. Defendants further aver that the contents of the waiver are unrelated to Zarda's complained of behavior, as Orellana and Kengle complained he touched her inappropriately and discussed his personal life with Orellana. (Kengle Dep. pg. 19-20, 22-23, 27; Orellana Dep. pg. 47-48, 50, 89, 100; Maynard Dep. pg. 182, 196, 289; Zarda Dep. pg. 40, 43-44). These complained of behaviors are not covered by the waiver. (Ex. A to Decl. of Antollino).

37. Defendants admit there are several points of attachment from the passenger to the tandem instructor, two at the hips. (Maynard Dep. pg. 19-20). Defendants admit that Exhibit T to the Declaration of Antollino depicts the apparatus which straps the passenger to the tandem master. (Ex. T to Decl. of Antollino). Defendants aver that the complained of behavior is unrelated to the attachment and adjustment of the tandem harness. Orellana and Kengle complained he touched her inappropriately and discussed his personal life with Orellana. (Kengle Dep. pg. 19-20, 22-23, 27; Orellana Dep. pg. 47-48, 50, 89, 100; Maynard Dep. pg. 182, 196, 289; Zarda Dep. pg. 40, 43-44).

38. Defendants admit that a lawsuit, commenced due to the death of a Skydive Long Island passenger, was dismissed. (Maynard Dep. pg. 21-22). The remainder of the purported statement of fact contained within paragraph 38 is rank supposition and

argument by counsel, not accompanied by a citation to the factual record, and should be disregarded.

39. Defendants dispute the purported statement of fact contained within paragraph 39 of Plaintiff's 56.1 Statement. Maynard testified that he did not refund the money of the student who died "because [he] didn't." (Maynard Dep. pg. 22). Maynard further testified that the family did not request a refund. (Maynard Dep. pg. 22). Defendants admit Maynard did not believe the complaint to be legitimate. (Maynard Dep. pg. 22). No testimony was provided indicating the legitimacy of the complaint was related to Maynard's refusal to provide a refund. (See Maynard Dep. pg. 22).

40. Defendants admit that Maynard testified that Zarda was a good instructor, a safe instructor, and a good guy. (Maynard Dep. pg. 149). Plaintiff's citation to Maynard deposition at page 34 does not support his statement of fact. The remainder of Plaintiff's purported statement of fact is argument from counsel, unsupported by citation an admissible factual evidence, which is inappropriate and should be disregarded.

41. Defendants dispute the purported statement of fact contained within paragraph 41 of Plaintiff's 56.1 Statement. Maynard testified that the straps of the tandem harness need to be adjusted for the safety and comfort of the passenger. (Maynard Dep. pg. 27-28). Maynard did not testify that such adjustments must be done in the air. (See Maynard Dep. pg. 27-28). Maynard additionally testified that most of the adjustments to the harness are performed prior to entering the airplane.

(Maynard Dep. pg. 250). Very little adjustments are required once the passenger is inside the airplane. (Maynard Dep. pg. 250).

42. Defendants admit the statement contained within paragraph 42 of Plaintiff's 56.1 Statement. Maynard testified that safety is the number one concern, comfort is number two. (Maynard Dep. pg. 28). Winstock testified that the secondary concern is ensuring the passenger has an enjoyable experience. (Winstock Dep. pg. 91).

43. Defendants dispute the purported statement of fact contained with paragraph 43 of Plaintiff's 56.1 Statement. Orellana did not testify that she "agrees that she would rather be safe than comfortable on a skydive." (Orellana Dep. pg. 98). Orellana testified only that she would have thought it professional for Zarda to have yelled instructions in her ear if it was "loud and it's for [her] safety." (Orellana Dep. pg. 98).

44. Defendants admit that at her deposition, Orellana could not recall if Zarda had moved close to whisper in her ear. (Orellana Dep. pg. 98-99). However, Orellana does recall Zarda resting his chin on her shoulder, an action she deemed inappropriate. (Orellana Dep. pg. 101).

45. Defendants dispute the purported statement of fact contained within paragraph 45 of Plaintiff's 56.1 Statement. Orellana specifically testified that Zarda crossed the line by putting his hand on her hip, resting his chin on her shoulder, and talking about his personal life. (Orellana Dep. pg. 60).

46. Defendants dispute the improper characterization of Kengle as "jealous." Such assertion is unsupported by any citation to a fact in evidence and should be

disregarded. Defendants admit Kengle testified that, if it meant saving Orellana's life, he would want Zarda to hold her breast. (Kengle Dep. pg. 25). However, Kengle additionally testified that, despite the requirement of close contact between instructor and passenger, not all contact is appropriate. (Kengle Dep. pg. 25). Kengle also testified that Zarda was resting his hands on Orellana's hips, holding her hips for the entire time, an action the other instructors, including his own, were not performing. (Kengle Dep. pg. 23-24, 62-63, 66). Kengle testified that he has an understanding of what is proper behavior, and judged Zarda was behaving inappropriately because the other instructors were not behaving in the same manner Zarda was. (Kengle Dep. pg. 62-63).

47. Defendants admit that the review attached to the Declaration of Antollino as Exhibit F, page 2, states, in pertinent part, "Costomer [*sic*] Service Does Not Exist Here!!!! Whatever you do DO NOT go to this place . . . I repeat DO NOT waste your money on these people. . . Skydive long island sucks. Stay away." (Ex. F, pg. 2, to Decl. of Antollino). Defendants dispute the characterization that "[t]here have been lots of complaints about skydive [*sic*] Long Island" contained within paragraph 47 of Plaintiff's 56.1 Statement. The cited exhibit contains two (2) complaints regarding Skydive Long Island, neither of which cannot be verified as accurate, or from the source claimed by Plaintiff. The statement that there have been "lots of complaints" constitutes a conclusory statement, unsupported by a citation to admissible evidence, and should be disregarded. Moreover, the document attached at Exhibit F constitutes inadmissible hearsay, has no probative value to the causes of action, and should be disregarded.

48. Defendants admit that the other review contained within Exhibit F of the Declaration of Antollino contains five (5) listed complaints, covering (1) the cost of video/pictures; (2) quality of video; (3) quality of pictures; (4) wait time; and (5) frustrated office staff. (Ex. F to Decl. of Antollino). Defendants dispute the characterization of the "ladies" in the office as "rude," the review contains no language supporting the statement that the women in the office were "rude." (See Ex. F to Decl. of Antollino). However, this review also includes a four (4) (out of five) star ranking and includes the following statement: "Aside from those little annoyances, I still had a great time here! . . . THAT was a blast!!!!!" (Ex. F to Decl. of Antollino). Defendants dispute that the review attached to the Declaration of Antollino is from a "yelp.com customer," as the documents bears no indication of its origin, bears no indication it is from "yelp.com," and cannot be verified as to its source or authenticity. Moreover, the document attached at Exhibit F constitutes inadmissible hearsay, has no probative value to the causes of action, and should be disregarded.

49. Defendants admit that complaints exist regarding Skydive Long Island. (Maynard Dep. pg. 55). However, Maynard testified that these complaints were not made to him personally, rather they are on the internet. (Maynard Dep. pg. 55). Maynard has never personally received a complaint about an instructor, other than the complaints about Zarda. (Maynard Dep. pg. 66, 69, 297). Defendants admit Maynard testified about reviews, represented to him as being from "wegoplaces.com." (Maynard Dep. pg. 59-60). Moreover, the alleged internet

complaints constitute inadmissible hearsay, have no probative value to the causes of action, and should be disregarded.

50. Defendants dispute the alleged statement of fact contained within paragraph 50 of Plaintiff's 56.1 Statement. Maynard did not testify, with regard to the review, represented by Plaintiff's counsel as from "wegoplaces.com," that the complaints were illegitimate, and the testimony cited does not state that. (Maynard Dep. pg. 62-62). The cited deposition testimony reflects Maynard's belief that the complaint regarding wait time was "unfair." (Maynard Dep. pg. 62). The remainder of the cited testimony does not indicate Maynard's beliefs regarding the legitimacy of the complaint. In fact, Maynard does not express an opinion as to whether the complaint regarding the "ladies" in the office, and merely notes that his review is not the whole story. (Maynard Dep. pg. 63-64). Additionally, with regards to the complaint about the photography, Maynard testified that he did not agree that the photography was "average." (Maynard Dep. pg. 61). Maynard even acknowledged that the complaint regarding the website prices may have legitimacy, as "[t]here were times that they had to be fixed." (Maynard Dep. pg. 61). Moreover, the alleged internet complaints constitute inadmissible hearsay, have no probative value to the causes of action, and should be disregarded.

51. Defendants admit Maynard testified that the complaint about the office staff was only one side. (Maynard Dep. pg. 64). Defendants dispute the purported statement of fact contained within paragraph 51 of Plaintiff's 56.1 Statement that Maynard does not know the subject of the complaint is true because it was only one side of

the story. Maynard's testimony merely notes that the complaint is only one side of the story. (Maynard Dep. pg. 64). The cited testimony does not support that purported assertion of fact and it should thus be disregarded. Moreover, the alleged internet complaints constitute inadmissible hearsay, have no probative value to the causes of action, and should be disregarded.

52. Defendants admit Maynard would not allow Zarda to review the video of the jump with Orellana. (Maynard Dep. pg. 184). Defendants dispute the purported statement of fact contained within paragraph 52 of Plaintiff's 56.1 Statement that Maynard did not allow Zarda to view the video in an effort to prevent Zarda from telling his "side of the story." Maynard did not testify that this was the reason he did not allow Zarda to view the video. Contradictorily, Maynard had a conversation with Zarda regarding the jump, providing Zarda with an opportunity to provide his side of the story. (Zarda Dep. pg. 36, 37, 39; Maynard Dep. pg. 183). However, Zarda could not recall the jump with Orellana, even when Maynard provided him with the circumstances. (Zarda Dep. pg. 37, 38, 362; Maynard Dep. pg. 187, 196). Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement and must be disregarded.

53. Defendants admit that a complaint about Skydive Long Island exists on the website "Ripoff Report" which was submitted in October 2009. (Ex. K to Decl. of Antollino). Defendants dispute the remaining purported statement of fact contained with paragraph 53 of Plaintiff's 56.1 Statement. There is no factual basis to support the characterization of this complaint as "irritating" for Maynard, nor did he testify that this complaint was "irritating." (See Maynard Dep. pg. 336, 360). Moreover, the alleged internet complaints constitute inadmissible hearsay, have no probative value to the causes of action, and should be disregarded. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement and must be disregarded. Moreover, the cited paragraph of the Zarda Declaration does not support Plaintiff's assertion that this complaint was made at "a time when plaintiff was contemplating coming back to skydive [*sic*] Long Island and therefore had no incentive to say anything bad about the place." Plaintiff's purported statement of fact should therefore be disregarded.

54. Defendants admit the complaint from "Ripoff Report" contains complaints regarding safety, instructor conduct, and customer service. (Ex. K to Decl. of Antollino). However, Maynard testified that the complaint on "Ripoff Report" was a skydiver trying to damage the reputation of Skydive Long Island. (Maynard

Dep. pg. 336-337). Maynard further testified that this complaint was discussed at length amongst the staff at Skydive Long Island and it was agreed that this complaint was an attempt to discredit Skydive Long Island. (Maynard Dep. pg. 360). The comments following the complaint state that its content is both unfounded and baseless. (See Ex. K to Decl. of Antollino, pg. 2-6). Moreover, the alleged internet complaints constitute inadmissible hearsay, have no probative value to the causes of action, and should be disregarded.

55. Defendants admit the statement contained within paragraph 55 of Plaintiff's 56.1 Statement. Defendants aver this has no bearing on the underlying dispute. (See Amended Complaint).

56. Defendants dispute the purported statement of fact contained within paragraph 56 of Plaintiff's 56.1 Statement. Plaintiff's alleged statement of fact that "Maynard finally at the second day of his deposition had to admit that he wrote the response on the Ripoff Report" is not supported by any citation to the factual record and is conclusory. Plaintiff's unsupported assertion should be disregarded. Defendants admit that the comment, beginning on page two (2) of Ex. K to the Decl. of Antollino identifies its author as the owner of Skydive Long Island. (Ex. K to Decl. of Antollino).

57. Defendants admit the comment, identified as being written by the owner of Skydive Long Island, indicates a customer broke his ankle on a skydive because he did not pick up his feet when so instructed. (Ex. K to Decl. of Antollino, pg. 3). Defendants dispute the purported fact that Ray Maynard admits that a passenger broke his ankle, as the cited evidence does not support that fact. The purported

author of the comment identifies as the owner of Skydive Long Island, but Plaintiff cites no evidence establishing Maynard actually authored the comment. (See Ex. K to Decl. of Antollino).

58. Defendants dispute the purported statement of fact contained within paragraph 58 of Plaintiff's 56.1 Statement. This alleged statement of fact contains no citation to admissible facts, is conclusory, and constitutes improper argument by counsel and should therefore be disregarded.

59. Defendants dispute the purported statement of fact contained within paragraph 59 of Plaintiff's 56.1 Statement. This alleged statement of fact contains no citation to admissible facts, is conclusory, and constitutes improper argument by counsel and should be disregarded. Defendants admit the comment contained on page 3 of Ex. K to the Decl. of Antollino indicates the passenger was at fault for breaking his ankle for not picking up his feet as instructed. (Ex. K to Decl. of Antollino). Defendants dispute Maynard specifically authored this conclusion, Plaintiff cites no facts in evidence to establish Maynard authored this comment, as such, this conclusion should be disregarded. (See Ex. K to Decl. of Antollino).

60. Defendants dispute the purported statement of fact contained within paragraph 60 of Plaintiff's 56.1 Statement. The alleged statement of fact consists of conclusory statements and argument by counsel, all of which are inappropriate in a 56.1 Statement and must be disregarded. Defendants dispute the purported statement of fact that "Ray had every reason to believe plaintiff was simply being safe and had no interest in Rosana given that he is gay," it is conclusory in nature, unsupported by the factual record, and should be disregarded. Zarda testified that it was his

belief that Maynard knows better than to believe that Zarda could have touched a woman inappropriately. (Zarda Dep. pg. 254-255) (emphasis added). Zarda's testimony does not cite to his sexual orientation as a reason he believed Maynard knew Zarda did not act as Kengle said. (Zarda Dep. pg. 254-255). Defendants dispute the purported statement of fact that the "video shows nothing inappropriate" to the extent it implies nothing inappropriate occurred. The video attached to the Declaration of Antollino as Ex. B is only represents a fraction of what occurred during the entirety of the skydive, as a jump typically takes anywhere from 15 to 20 minutes. (Ex. B to Decl. of Antollino; Kengle Dep. pg. 67; Zarda Dep. pg. 318).

61. Defendants dispute the purported statement of fact contained within paragraph 61 of Plaintiff's 56.1 Statement. The alleged statement of fact consists of conclusory statements and argument by counsel, all of which are inappropriate in a 56.1 Statement and must be disregarded. Additionally, Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Defendants admit Zarda was not permitted to view the video of his jump with Orellana, but dispute the characterization that Zarda was not allowed to defend himself. (Maynard Dep. pg. 184). Maynard approached

Zarda after the complaint to discuss the complaint and obtain Zarda's version of the events. (Zarda Dep. pg. 36, 37, 39, 362; Maynard Dep. pg. 183, 187).

62. Defendants admit the statement contained within paragraph 62 of Plaintiff's 56.1 Statement. Maynard testified that Zarda has more jumps than Maynard. (Maynard Dep. pg. 249). Defendants aver that jumping experience is not at issue in this litigation, but Plaintiff's inappropriate touching and disclosure of personal information which is the issue. (Kengle Dep. pg. 19-20, 22-23, 27; Orellana Dep. pg. 47-48, 50, 89, 100; Maynard Dep. pg. 182, 196, 289; Zarda Dep. pg. 40, 43-44).

63. Defendants dispute the alleged statement of fact contained within paragraph 63 of Plaintiff's 56.1 Statement to the extent it purports that Maynard and Winstock graded Zarda's performance outside the context of the actual skydive. Maynard graded Zarda's performance an eight or a nine, specifically referring to the actual skydive. (Maynard Dep. pg. 280). Winstock's evaluation of the jump as a 97 out of 100 also specifically referred to the actual skydive. (Winstock Dep. pg. 73-75). Defendants aver that Plaintiff's skydive performance is not at issue in this litigation, but Plaintiff's inappropriate touching and disclosure of personal information which is the issue. (Kengle Dep. pg. 19-20, 22-23, 27; Orellana Dep. pg. 47-48, 50, 89, 100; Maynard Dep. pg. 182, 196, 289; Zarda Dep. pg. 40, 43-44).

64. Defendants dispute the alleged statement of fact contained within paragraph 64 of Plaintiff's 56.1 Statement. Maynard's criticism of Zarda's jump was not, as Plaintiff states, that "Ray [*sic*] wasn't touching Rosana enough during the pre-

jump." (See Maynard Dep. pg. 280). In fact, Maynard's criticism was that he "didn't see any handle checks" performed by Zarda during the jump. (Maynard Dep. pg. 280).

65. Defendants dispute the purported statement of fact contained within paragraph 65 of Plaintiff's 56.1 Statement as it is conclusory, constitutes argument, and is unsupported by citation to any facts, and should thus be disregarded. Plaintiff's purported citation to "the evidence, supra" is insufficient to support his alleged factual assertion, violates the Fed. R. Civ. P. 56 and Local Rule of Practice in the Eastern District of New York 56.1. Additionally, Maynard investigated the complaint in several ways, including speaking to Kengle (Maynard Dep. pg. 181-182), reviewing the video . (Maynard Dep. pg. 199), and speaking with Zarda (Zarda Dep. pg. 36, 37, 39; Maynard Dep. pg. 183). Zarda was indeed told who lodged a complaint against him, Maynard discussed Kengle's complaint with Zarda and questioned him on his recollection of the events. (Zarda Dep. pg. 36, 37, 39, 362; Maynard Dep. pg. 183, 184, 187).

66. Defendants dispute the purported statement of fact contained within paragraph 66 of Plaintiff's 56.1 Statement. Orellana did not testify that she "did not want to file a complaint," rather, Orellana stated she personally had no intention to call Maynard, as she does not like confrontations. (Orellana Dep. pg. 69). Defendants dispute Plaintiff's improper characterization of Kengle as being "unemployed." Kengle did not testify that he was unemployed at the time of the skydive, he merely testified that he had been unemployed since June of 2011. (Kengle Dep. pg. 7). Defendants admit Kengle, not Orellana, called Maynard to voice their

complaint. (Kengle Dep. pg. 31; Maynard Dep. pg. 179-180). Defendants admit that Kengle received a refund of his jump from Maynard, despite not requesting a refund. (Kengle Dep. pg. 32, 33). Defendants dispute the assertion that Kengle "skillfully" obtained a refund, as it is unsupported by citation to the factual record, is a conclusion, constitutes argument by counsel, and is therefore properly disregarded.

67. Defendants admit Exhibit K annexed to the Antollino Declaration states "personally if someone was feeling up my girlfriend, I would do something on the spot to defend her dignity – unless of course I am fourth-grader." (Ex. K to Decl. of Antollino). Defendants dispute the purported fact that Maynard wrote this comment, as it is unsupported by the factual evidence cited by Plaintiff. The comment states it is authored by the owner of Skydive Long Island, but no evidence cited by Plaintiff demonstrates Maynard actually authored this comment. (See Ex. K to Decl. of Antollino). Moreover, Exhibit K constitute inadmissible hearsay, has no probative value to the causes of action, and should be disregarded.

68. Defendants admit Exhibit K to the Antollino Declaration states "it is a shame in today's world something like this can actually be put out there for all to see with no proof, and I have to respond to these lies and accusations." (Ex. K to Decl. of Antollino). Defendants dispute the purported fact that Maynard wrote this comment, as it is unsupported by the factual evidence cited by Plaintiff. The comment states it is authored by the owner of Skydive Long Island, but no evidence cited by Plaintiff demonstrates Maynard actually authored this comment.

(See Ex. K to Decl. of Antollino). Moreover, Exhibit K constitute inadmissible hearsay, has no probative value to the causes of action, and should be disregarded.

69. Defendants dispute the purported statement of fact contained within paragraph 69 of Plaintiff's 56.1 Statement. The alleged fact bears no citation to admissible facts, is conclusory, and constitutes impermissible argument by Plaintiff's counsel. Paragraph 69 should be disregarded in its entirety.

70. Defendants dispute the purported statement of fact contained within paragraph 70 of Plaintiff's 56.1 Statement to the extent the cited deposition testimony does not support the statement of fact asserted by Plaintiff. (See Maynard Dep. pg. 323-325). Maynard testified that he did not see evidence of Orellana and Kengle having an unsatisfactory experience, and that he observed a normal skydive. (Maynard Dep. pg. 323-325).

71. Defendants admit the statement contained within paragraph 71 of Plaintiff's 56.1 Statement.

72. Defendants deny possession knowledge or information sufficient to form a belief as to the truth or veracity of the alleged statement of fact contained within paragraph 72 of Plaintiff's 56.1 Statement. Plaintiff's assertion relies upon the Declaration of Zarda, a document comprised of inadmissible hearsay, conclusory and unsubstantiated assertions not based on admissible evidence, and should be disregarded.

73. Defendants dispute the purported statement of fact contained within paragraph 73 of Plaintiff's 56.1 Statement. Zarda testified that he was involved in relationships with people of the opposite sex, which were "friendly in nature." (Zarda Dep. pg.

54-55). Defendants deny having knowledge or information sufficient to form a belief regarding the alleged statement that Zarda is repulsed by the thought of being with a woman. Plaintiff's assertion relies upon the Declaration of Zarda, a document comprised of inadmissible hearsay, conclusory and unsubstantiated assertions not based on admissible evidence, and should be disregarded.

74. Defendants dispute the statement inasmuch as the citation to the deposition testimony does not the statement of fact asserted by Plaintiff. However, Defendants admit Orellana testified she probably did not read more than the first page of the waiver prior to her skydive. (Orellana Dep. pg. 36). The remainder of Plaintiff's purported statement of fact is conclusory, unsupported by factual evidence, impermissible argument, and should be disregarded. In fact, Orellana testified that she was aware that close proximity was required, as the safety video she viewed prior to the jump demonstrated that she would be attached to her tandem instructor at the hip. (Orellana Dep. pg. 89-90).

75. Defendants dispute the statement contained within paragraph 75 of Plaintiff's 56.1 Statement. Maynard testified that there are two attachments at the hips on the skydiving harness. (Maynard Dep. pg. 27-28). Maynard did not testify that for "safety purposes" Orellana would need "to be touched at various points on her body." (See Maynard Dep. pg. 27-28). Winstock testified that the harness has straps around the passenger's legs, which generally requires the passenger to just step into the harness and the straps are then tightened around their thigh. (Winstock Dep. pg. 14-15). The attachments at the hips, attaching the passenger to the instructor, generally do not need adjustment after being connected.

(Winstock Dep. pg. 77-78). Additionally, the hip attachments are attached while the airplane is on the ground, prior to take-off, not during the ascent. (Winstock Dep. pg. 78).

76. Defendants dispute the alleged statement of fact contained within paragraph 76 of Plaintiff's 56.1 Statement. When presented with what is now Ex. S to the Declaration of Antollino, Maynard testified that it points out several straps and points of attachment. (Maynard Dep. pg. 27). Maynard testified that the straps need to be adjusted. (Maynard Dep. pg. 27). Maynard did not testify that the attachment located at the hips needed to be adjusted. (See Maynard Dep. pg. 27). The attachments at the hips, attaching the passenger to the instructor, generally do not need adjustment after being connected. (Winstock Dep. pg. 77-78). Additionally, the hip attachments are attached while the airplane is on the ground, prior to take-off, not during ascent. (Winstock Dep. pg. 78). Kengle and Orellana's complaint was not that Zarda was adjusting the straps on the harness, it was that Zarda was holding Orellana's hips and resting his chin on her shoulder. (Kengle Dep. pg. 19, 22, 23, 27; Orellana Dep. pg. 60; Maynard Dep. pg. 182).

77. Defendants dispute the purported statement of fact contained within paragraph 77 of Plaintiff's 56.1 Statement. Plaintiff's statement is unsupported by the factual record. Maynard testified that if a customer expressed that he did not like to be touched, Maynard would explain the close contact and that touching would occur, and leave the decision to the customer as to whether he should skydive. (Maynard Dep. pg. 17-18). Plaintiff's assertion is an inferential leap, which should be disregarded.

78. Defendants dispute the statement contained within paragraph 78 of Plaintiff's 56.1 Statement to the extent the cited deposition testimony does not support Plaintiff's assertion. Defendants admit Maynard testified a complaint about the instructor adjusting the harness straps during the skydive was not legitimate. (Maynard Dep. pg. 19). However, Kengle and Orellana's complaint was not that Zarda was adjusting the straps on the harness, it was that Zarda was holding Orellana's hips and resting his chin on her shoulder. (Kengle Dep. pg. 19, 22, 23, 27; Orellana Dep. pg. 60; Maynard Dep. pg. 182).

79. Defendants dispute the alleged statement of fact contained within paragraph 79 of Plaintiff's 56.1 Statement to the extent it asserts the "overwhelming majority of tandem instructors are men." Maynard testified that the majority of skydive instructors at Skydive Long Island are men, not that a majority of all tandem instructors are men. (Maynard Dep. pg. 38-39). Defendants dispute that the joke suggesting a boyfriend did not know the girlfriend would be strapped to another man is "tired" and made often. Maynard testified that such a joke is made sometimes, not all the time. (Maynard Dep. pg. 40). The characterization of this joke as being "tired" is unsupported by factual evidence and should be disregarded.

80. Defendants admit the statement contained within paragraph 80 of Plaintiff's 56.1 Statement. Defendants aver that if a customer complained about an instructor making that statement Maynard would "deal with that." (Maynard Dep. pg. 41). Maynard further testified that he would instruct his instructors not make such a statement if a customer complained about that statement. (Maynard Dep. pg. 212).

81. Defendants admit the statement contained within paragraph 81 of Plaintiff's 56.1 Statement. Defendants aver that a customer getting injured is unrelated to the facts of this litigation; Plaintiff's inappropriate touching and disclosure of personal information is the issue. (Kengle Dep. pg. 19-20, 22-23, 27; Orellana Dep. pg. 47-48, 50, 89, 100; Maynard Dep. pg. 182, 196, 289; Zarda Dep. pg. 40, 43-44).

82. Defendants dispute the purported statement of fact contained within paragraph 82 of Plaintiff's 56.1 Statement to the extent it asserts Zarda was suspended on the spot. On the Monday following the June 18, 2010 jump with Orellana, Maynard had a conversation with Zarda regarding the jump. (Zarda Dep. pg. 36, 37, 39; Maynard Dep. pg. 183). During the conversation, Maynard questioned Zarda as to whether he remembered the jump with Orellana. (Zarda Dep. pg. 36). Zarda responded that he did not remember the specific jump. (Zarda Dep. pg. 37, 362). Maynard then informed Zarda "there were some customers that came out and jumped, and it was a boyfriend and a girlfriend, and that [he] had taken the girl, and they had called and made a complaint." (Zarda Dep. pg. 37; Maynard Dep. pg. 187, 196). Zarda again did not remember anything about the jump. (Zarda Dep. pg. 38). Maynard informed Zarda that the customer complained about how Zarda touched her, that he "touched her in a way that made her feel uncomfortable", and that he touched her inappropriately "at the hips." (Zarda Dep. pg. 43-44). Maynard explained that Zarda made Orellana feel "very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder" and that she was "very uncomfortable for the

entire jump" and his actions even led her to believe Zarda "was hitting on her". (Maynard Dep. pg. 196). Maynard then informed Zarda that the customers also complained that Mr. Zarda discussed his sexual orientation with the customer during the jump. (Zarda Dep. pg. 40). After this conversation, Maynard suspended Zarda for a week without pay. (Zarda Dep. pg. 40).

83. Defendants admit the statement of fact contained within paragraph 83 of Plaintiff's 56.1 Statement. Defendants aver that Maynard returned the wages he deducted from Zarda's pay. (Maynard Dep. pg. 188). Further, Plaintiff does not maintain a cause of action for unlawful deduction of wages under New York Labor Law § 198 and therefore this fact is irrelevant. (See generally Amended Complaint).

84. Defendants dispute the purported statement of fact contained within paragraph 84 of Plaintiff's 56.1 Statement. The purported fact asserted by Plaintiff is, in actuality, an argument, unsupported by facts in the record, and should be disregarded. Maynard testified that it would be illegal for someone to take his Blackberry and return it a week later. (Maynard Dep. pg. 190). Maynard did not testify that deducting the cost of the skydive from Zarda's wages was the equivalent of stealing, and therefore wrong. (See Maynard Dep. pg. 190). Additionally, Maynard testified that he did not steal when he deducted from Zarda's wages. (Maynard Dep. pg. 190). Plaintiff's characterization of the wage deduction as "stealing" and "wrong" is therefore unsupported by any factual evidence and must be disregarded. Additionally, Plaintiffs do not maintain a cause

of action for unlawful deduction of wages under New York Labor Law § 198 and therefore this fact is irrelevant. (See generally Amended Complaint).

85. Defendants dispute the purported statement of fact contained within paragraph 85 of Plaintiff's 56.1 Statement. Plaintiff's assertion is not accompanied by citation to any fact, is conclusory, and constitutes impermissible argument. This paragraph should be disregarded.

86. Defendants dispute the purported statement of fact contained within paragraph 86 of Plaintiff's 56.1 Statement to the extent it limits Kengle's complaint to only two (2) issues. Maynard informed Zarda that the customer complained about how Zarda touched her, that he "touched her in a way that made her feel uncomfortable", and that he touched her inappropriately "at the hips." (Zarda Dep. pg. 43-44). Maynard explained that Zarda made Orellana feel "very uncomfortable with the way he was touching her on her legs, the way he was putting his head on her shoulder" and that she was "very uncomfortable for the entire jump." (Maynard Dep. pg. 196). Maynard then informed Zarda that the customers also complained that Zarda discussed his sexual orientation with the customer during the jump. (Zarda Dep. pg. 40). This included Zarda telling Orellana, "don't worry that I'm so close because I'm gay" and that he "had recently broken up with his boyfriend." (Maynard Dep. pg. 182; Orellana Dep. pg. 89).

87. Defendants dispute the alleged statement of fact contained within paragraph 87 of Plaintiff's 56.1 Statement. Additionally, Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be

disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Zarda's unsubstantiated assertion that he may have said "and I have the ex-husband to prove it" is a speculation, unsupported by factual evidence and should be disregarded. Defendants deny possessing knowledge or information sufficient to form a belief regarding whether Zarda had in fact recently broken up with his boyfriend in June 2010.

88. Defendants admit Zarda asked Winstock to speak to Maynard during Zarda's period of suspension. (Zarda Dep. pg. 207). Defendants admit Winstock recommended a letter of reprimand instead of termination, as Zarda was an outstanding tandem instructor as far as safety was concerned. (Winstock Dep. pg. 24, 84).

89. Defendants dispute the purported statement of fact contained within paragraph 89 of Plaintiff's 56.1 Statement inasmuch as it asserts Winstock did not know what the complaint was about. The deposition testimony cited does not support Plaintiff's assertion that Winstock was unaware of the subject matter of the complaint by Kengle. (See Winstock Dep. pg. 84-85). Winstock merely testifies that he was not involved in the complaint, the investigation thereof, or the termination of Zarda. (See Winstock Dep. pg. 84-85). Zarda testified to discussing the conversation Maynard had with Zarda, wherein he was suspended, with Winstock, which is how Zarda requested Winstock speak to Maynard on his

behalf. (Zarda Dep. pg. 207-208). Defendants admit Winstock recommended the letter of reprimand in lieu of termination. (See Winstock Dep. pg. 84-85).

90. Defendants admit that Winstock quit Skydive Long Island to Maynard's dissatisfaction. Defendants admit Winstock sent Zarda a message indicating he quit Skydive Long Island because he "couldn't take Ray any longer." (Ex. E to the Decl. of Zarda). Defendants dispute the purported statement of fact that Winstock told Zarda his termination had been wrong. Winstock's message states only that he "did not agree with how it was handled," and does not state that Zarda's termination had been wrong. (Ex. E to the Decl. of Zarda).

91. Defendants dispute the alleged statement of fact contained within paragraph 91 of Plaintiff's 56.1 Statement as the cited evidence does not support the assertion. Plaintiff cites Exhibit B to the Declaration of Antollino, which is comprised of videos and photographs from the skydive and the safety video shown to Skydive Long Island's customers prior to jumping. (See Ex. B to Decl. of Antollino). These videos do not reflect Zarda's termination. (See Ex. B to Decl. of Antollino). Defendants dispute that Maynard was enraged during the termination of Zarda, the audio evidence does not support such a characterization. (See Ex. D to the Decl. of Zarda).

92. Defendants dispute the alleged statement of fact contained within paragraph 91 of Plaintiff's 56.1 Statement as the cited evidence does not support the assertion. Plaintiff cites Exhibit B to the Declaration of Antollino, which is comprised of videos and photographs from the skydive and the safety video shown to Skydive Long Island's customers prior to jumping. (See Ex. B to Decl. of Antollino).

These videos do not reflect Zarda's termination. (See Ex. B to Decl. of Antollino). Defendants dispute that Maynard's tone was angry or enraged during the termination of Zarda, the audio evidence does not support such a characterization. (See Ex. D to the Decl. of Zarda).

93. Defendants admit the statement of fact contained within paragraph 93 of Plaintiff's 56.1 Statement.

94. Defendants admit that Winstock believes that only rare occasion should such information be disclosed to passengers. (Winstock Dep. pg. 109-110). Winstock testified that he does not recommend brining up sexual orientation to customers. (Winstock Dep. pg. 110). However, Winstock has revealed that he is married with children in an effort to calm older women down prior to a jump, stating "I'm married, I have three children, I want to go home to my family, it's okay." (Winstock Dep. pg. 109-110). This is the only scenario he would reveal such information. (Winstock Dep. pg. 109-110).

95. Defendants admit that Maynard testified he did not believe there was anything wrong with Winstock informing passengers that he was married with kids. Defendants dispute the purported statement of fact that this is contrary to what Maynard told Zarda. During his termination, Maynard told Zarda that Winstock was telling a passenger of his escapades, he would be in a similar situation to Zarda. (Maynard Dep. pg. 226). Defendants admit Maynard did not want Winstock to quit. (Maynard Dep. pg. 347).

96. Defendants admit the statement of fact contained within paragraph 96 of Plaintiff's 56.1 Statement. Zarda testified that he disclosed his sexuality to

Orellana in an effort to allay her discomfort. (Zarda Dep. pg. 139-140; 173, 177). Zarda testified that he did so because he thought it would be the best thing to say after the joke was made. (Zarda Dep. pg. 203-204). Zarda additionally testified that he believes disclosing his sexuality takes him "out of the hot seat" with boyfriends of his female passengers. (Zarda Dep. pg. 205).

97. Defendants dispute the purported statement of fact contained within paragraph 97 of Plaintiff's 56.1 Statement. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Additionally, Plaintiff's assertion that Zarda's "experience with women is that they are cool about homosexuality" is irrelevant to this litigation.

98. Defendants admit the statement contained within paragraph 98 of Plaintiff's 56.1 Statement. (Zarda Dep. pg. 205). Defendants dispute the purported statement of fact that Maynard thought such a disclosure was appropriate, as the deposition testimony cited does not support Plaintiff's assertion. (See Maynard Dep. pg. 161-162).

99. Defendants dispute the purported statement of fact contained within paragraph 99 of Plaintiff's 56.1 Statement. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on

any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Defendants admit that Zarda has an athletic and masculine appearance. (Zarda Dep. pg. 116, 121-122, 364-365).

100. Defendants dispute the purported statement of fact contained within paragraph 100 of Plaintiff's 56.1 Statement. Plaintiff's assertion is largely conclusory and argument, improperly included in Plaintiff's 56.1 Statement. As such Plaintiff's assertion that "Don used his judgment to make the passenger more comfortable" and his comparison to Winstock should be disregarded. Plaintiff's only factual citation used to support this statement is Zarda's conclusory and argument-laden Declaration, which is not based in fact. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement.

101. Defendants dispute that Maynard's investigation was limited to reviewing the video of the jump with Orellana. Maynard investigated the complaint in several ways, including speaking to Kengle (Maynard Dep. pg. 181-182), reviewing the video. (Maynard Dep. pg. 199), and speaking with Zarda (Zarda Dep. pg. 36, 37, 39; Maynard Dep. pg. 183). Defendants dispute the remaining

purported statement of fact contained within paragraph 101 of Plaintiff's 56.1 Statement. Plaintiff's assertion is largely conclusory and argument, improperly included in Plaintiff's 56.1 Statement, and unsupported by citation to any facts. As such, the remainder of paragraph 101 should be disregarded.

102. Defendants admit that during the termination of Zarda, Maynard brought up Kengle's complaint that Zarda had touched Orellana on the hips and put his head on her shoulder, which made her and Kengle uncomfortable. (Maynard Dep. pg. 247). Defendants dispute the alleged statement of fact that this was a "second-hand allegation." Plaintiff's statement is not supported by citation to factual evidence, constitutes a conclusory statement, and should be disregarded. Additionally, Kengle testified that he observed Zarda holding Orellana's hips during the jump, which also made him uncomfortable. (Kengle Dep. pg. 19-20, 22-23, 27).

103. Defendants admit Maynard testified he had never been to a gay establishment. (Maynard Dep. pg. 114). Defendants dispute the remaining alleged facts contained within paragraph 103 of Plaintiff's 56.1 Statement, as the cited deposition testimony does not support Plaintiff's assertion. (See Maynard Dep. pg. 100, 114). Additionally, Maynard testified that he did know other gay people aside from his sister and his sister's widow. (Maynard Dep. pg. 108, 111).

104. Defendants dispute the purported statement of fact contained within paragraph 104 of Plaintiff's 56.1 Statement. Maynard did not testify that he "believes that being gay is an 'after hours' affair." Maynard testified that, in 2001, there were two women who were upset after their jump with Zarda because he

was telling them "about his after-hours activities and they didn't want to hear it." (Maynard Dep. pg. 137-138). He did not say that being gay is only for "after hours." (See Maynard Dep. pg. 137-138). Nor did Maynard characterize being gay as consisting of "escapades." (See Maynard Dep. pg. 226). Maynard testified that he did not want Zarda telling customers about his personal escapades. (Maynard Dep. pg. 226). Maynard also testified that Winstock would be in the same situation if he was telling customers "of his escapades." (Maynard Dep. pg. 226). Maynard's use of the term escapades was not limited to those who are gay. (Maynard Dep. pg. 226). Defendants admit paragraph 38 of Defendants' 56.1 Statement states "Zarda was open and notorious about his sexual orientation." Notorious is defined as "generally known and talked of" by Merriam Webster Online. (See http://www.merriam-webster.com/dictionary/notorious). By his own admission, it was well known at Skydive Long Island that Zarda was gay. (Zarda Dep. pg. 62-63).

105. Defendants deny the purported statement of fact contained within paragraph 105 of Plaintiff's 56.1 Statement. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Defendants deny possession knowledge or information sufficient to form a belief regarding whether Zarda gave Maynard an

"inclination of an idea that he was sexually gratified by women." Defendants admit Zarda stated he was gay during the meeting with Maynard in which he was suspended. (Zarda Dep. pg. 43).

106. Defendants admit the statement contained with paragraph 106 of Plaintiff's 56.1 Statement.

107. Defendants dispute the purported statement of fact contained within paragraph 107 of Plaintiff's 56.1 Statement. The cited deposition testimony does not support Plaintiff's assertion. Maynard testified that in 2001 two women had been upset after skydives with Zarda "because he was carrying on about his after-hours activities and they didn't want to hear it." (Maynard Dep. pg. 138-139). Maynard did not tell Zarda it was unacceptable to be gay or tell customers he was gay. (Maynard Dep. pg. 139-140). Maynard did not state being gay was only acceptable if Zarda did not flaunt it. (See Maynard Dep. pg. 139-140; 226). Maynard told Zarda he did not want any of his instructors talking about their personal escapades with customers. (Maynard Dep. pg. 226). Defendants admit paragraph 38 of Defendants' 56.1 Statement states "Zarda was open and notorious about his sexual orientation." Notorious is defined as "generally known and talked of" by Merriam Webster Online. (See http://www.merriam-webster.com/dictionary/notorious). By his own admission, it was well known at Skydive Long Island that Zarda was gay. (Zarda Dep. pg. 62-63).

108. Defendants dispute the purported statement of fact contained within paragraph 108 of Plaintiff's 56.1 Statement. Plaintiff's assertion that "Ray has an old fashioned notion of what it means to be gay, and didn't want to offend

Kengle's bigotry" is unsupported by citations to facts in evidence, is conclusory, constitutes impermissible argument and should be disregarded. Additionally, the cited deposition testimony from the Kengle deposition expresses no "bigotry" on the part of Kengle. (See Kengle Dep. pg. 24, 38). Both Kengle and Orellana testified that they did not maintain bias against homosexuals. (Kengle Dep. pg. 40-41; Orellana Dep. pg. 63-65). Orellana testified to having several gay friends and being in support of gay marriage and Kengle testified to having several gay co-workers in the past. (Kengle Dep. pg. 40-41; Orellana Dep. pg. 63-65).

109. Defendants dispute the purported statement of fact contained within paragraph 109 of Plaintiff's 56.1 Statement. Plaintiff's assertion that "[o]n several occasions when plaintiff did anything that was beyond the norm of masculinity, Maynard would make a derisive comment" is unsupported by citations to facts in evidence, is conclusory, constitutes impermissible argument and should be disregarded. Additionally, Plaintiff's assertion that Maynard "demanded plaintiff paint the cast black" relies upon the Zarda Declaration. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Further, the Zarda Declaration contradicts Zarda's prior sworn deposition testimony, and should be disregarded on that basis. Zarda testified that when he was on crutches and in a pink cast, Maynard requested

Zarda put a sock over his foot. (Zarda Dep. pg. 347). Zarda did not testify that Maynard requested he paint the cast black. (Zarda Dep. pg. 346-347).

110. Defendants admit that Zarda testified that Maynard requested Zarda put a sock on when he saw the cast. (Zarda Dep. pg. 347). Defendants further admit that Maynard made such a request because he did not "appreciate anyone being at the drop zone in a cast and on crutches. The students are nervous enough and if they see someone on crutches with a cast on, it's not going to be very good for the customers." (Maynard Dep. pg. 160-161; Winstock Dep. pg. 96-97).

111. Defendants admit the safety video and the waiver inform customers of the possibility of injury and/or death during a skydive. (See Ex. A and B to Decl. of Antollino). The assertion "the possibility of injury is affirmatively mentioned to all passengers" is an impermissible conclusion and should be disregarded.

112. Defendants dispute the purported statement of fact contained within paragraph 112 of Plaintiff's 56.1 Statement. Plaintiff's assertion that "the cast Don wore is large . . . and it is probably not feasible to find a sock that would fit over it" is unsupported by citations to facts in evidence, is conclusory, constitutes impermissible argument and should be disregarded. Additionally, Plaintiff's assertion that the cast is large is contradicted by the evidence – a review of Ex. A to the Zarda Declaration reveals the cast is of average size. (Ex. A to Decl. of Zarda).

113. Defendants dispute the purported statement of fact contained within paragraph 113 of Plaintiff's 56.1 Statement. Plaintiff's assertion that "assuming plaintiff had placed a huge sock on the cast, he still would have been on crutches,

and it would have looked like he had a cast with a sock on it" is unsupported by citations to facts in evidence, is conclusory, constitutes impermissible argument and should be disregarded. Plaintiff's assertion relies upon the Zarda Declaration, which consists of conclusory and speculative argument, unsupported by facts, and should be disregarded

114. Defendants dispute the purported statement of fact contained within paragraph 114 of Plaintiff's 56.1 Statement. Plaintiff's assertion that "[p]ink is the color of gay liberation, and that is why plaintiff chose that color for his cast" relies upon the Zarda Declaration. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Plaintiff's assertion that "Ray wanted him to paint it black and erase the color of the pink triangle" similarly relies upon the conclusory argument contained within the Zarda Declaration, and should also be disregarded. Further, the cited paragraph from Zarda Declaration contradicts Zarda's prior sworn deposition testimony, and should be disregarded on that basis as well. Zarda testified that when he was on crutches and in a pink cast, Maynard requested Zarda put a sock over his foot. (Zarda Dep. pg. 347). Zarda did not testify that Maynard requested he paint the cast black. (Zarda Dep. pg. 346-347).

115. Defendants dispute the purported statement of fact contained within paragraph 115 of Plaintiff's 56.1 Statement. Plaintiff's assertion that "[s]ometime later after the cast was taken off, plaintiff was at the drop zone in a boot" relies upon the Zarda Declaration, which consists of conclusory argument, unsupported by facts, and should be disregarded. Zarda did not testify to ever appearing at Skydive Long Island in a boot, only a cast. (Zarda Dep. pg. 344-347). Plaintiff's assertion that when Maynard saw Plaintiff's pink toenails he said "'That's Gay!' in a derisive tone" is unsupported by the factual record. Further, the cited paragraph from Zarda Declaration contradicts Zarda's prior sworn deposition testimony, and should be disregarded on that basis as well. Zarda testified that Maynard said his pink cast looked gay. (Zarda Dep. pg. 344). Not that Maynard said his pink toenails looked gay, and specifically did not testify that he said it in a "derisive tone." (Zarda Dep. pg. 344-347). Maynard testified that he did not remember saying "that's gay" when seeing Zarda's pink cast, and does not recall commenting about the color of the cast. (Maynard Dep. pg. 160-161).

116. Defendants dispute the purported statement of fact contained within paragraph 116 of Plaintiff's 56.1 Statement. Maynard did not state that Zarda's homosexuality was an escapade. (See Maynard Dep. pg. 226). Maynard used the word "escapade" referring to both sexual orientations, stating that if Winstock had been "telling some chick of his escapades" he would be in a similar situation. (Maynard Dep. pg. 226).

117. Defendants dispute the purported statement of fact contained within paragraph 117 of Plaintiff's 56.1 Statement. The statement "escapade is a derisive

term to describe one's sexuality" is unaccompanied by citation to factual evidence, is conclusory, and should be disregarded. Defendants dispute the statement that "this is a disrespectful way of discussing a person's being" as it is unsupported by factual evidence, is conclusory, constitutes impermissible argument, and should be disregarded. Defendants admit that Merriam Webster online contains the cited definition of "escapade." Defendants aver that Maynard used the word "escapade" referring to both sexual orientations, not just homosexuals, stating that if Winstock had been "telling some chick of his escapades" he would be in a similar situation. (Maynard Dep. pg. 226).

118. Defendants admit paragraph 38 of Defendants' 56.1 Statement states "Zarda was open and notorious about his sexual orientation." Notorious is defined as "generally known and talked of" by Merriam Webster Online. (See http://www.merriam-webster.com/dictionary/notorious). It was well known at Skydive Long Island that Zarda was gay. (Zarda Dep. pg. 62-63).

119. Defendants admit paragraph 38 of Defendants' 56.1 Statement states "Zarda was open and notorious about his sexual orientation." Notorious is defined as "generally known and talked of" by Merriam Webster Online. (See http://www.merriam-webster.com/dictionary/notorious). It was well known at Skydive Long Island that Zarda was gay. (Zarda Dep. pg. 62-63).

120. Defendants admit discussing personal information with customers is one of the reasons Maynard terminated Zarda. (Maynard Dep. pg. 226). Defendants dispute the statement that Maynard "discredited" Zarda, as it is unsupported by the cited evidence, and should thus be disregarded.

121. Defendants admit that Maynard testified that an instructor telling customers they are Cuban, Irish, or from New Zealand in not inappropriate, despite being personal information. (Maynard Dep. pg. 256-257). Maynard also testified that it would not be inappropriate for Zarda to wear a shirt that said "I love my husband." (Maynard Dep. pg. 255). Maynard also testified that he believed some information to be inappropriate to share with customers, such as wearing shirts that said "I'm gay" or "I'm heterosexual." (Maynard Dep. pg. 252). Defendants dispute the purported statement of fact that "the only personal issue that Ray testified he [*sic*] admonish or discipline in [*sic*] employee is for discussing homosexuality." Maynard did not testify that the only personal information he would discipline was discussing homosexuality; Maynard testified that he would request an instructor wearing a "I'm heterosexual" shirt to change. (Maynard Dep. pg. 252). Additionally, Maynard testified that he would not request Zarda change if he wore a shirt that said "I love my husband." (Maynard Dep. pg. 255). Defendants admit that at Zarda's termination Maynard stated Winstock would be in a similar situation if he had discussed his personal escapades with a customer. (Maynard Dep. pg. 226). Defendants dispute the remaining purported statement of fact as it is unsupported by the evidence cited by Plaintiff, as paragraph 97 of Plaintiff's 56.1 is unrelated to Winstock or Maynard's termination of Zarda. (See ¶ 97 of Plaintiff's 56.1 Statement).

122. Defendants admit the irrelevant statement of fact contained within paragraph 122 of Plaintiff's 56.1 Statement.

123. Defendants admit that the Human Rights Campaign has a shirt which states "Legalize Gay" on it. Defendants dispute the purported fact that Maynard testified that such a shirt would be inappropriate at Skydive Long Island as Plaintiff's assertion is unsupported by citation to any fact in evidence, and should therefore be disregarded. Defendants admit that Ex. X annexed to the Antollino Declaration contains information regarding Veterans Day. (Ex. X to Decl. of Antollino). Defendants deny the remaining purported statement of fact in paragraph 123 of Plaintiff's 56.1 Statement. Plaintiff's assertion that veteran's status is personal information, political information, and permitted to be discussed at the drop zone is unsupported by factual evidence. The cited deposition testimony does not discuss veterans or the permissibility of discussing such information at Skydive Long Island. (See Maynard Dep. pg. 256-257).

124. Defendants dispute the purported statement of fact contained within paragraph 124 of Plaintiff's 56.1 Statement. Maynard testified that wearing clothing that stated "I'm gay" or "I'm heterosexual" would be inappropriate because it would make some people uncomfortable. (Maynard Dep. pg. 252). However, Maynard also testified that wearing a shirt that said "I love my husband" would be acceptable for Zarda to wear. (Maynard Dep. pg. 255). Defendants additionally dispute Plaintiff's assertion as it is largely inappropriate argument, and should be disregarded.

125. Defendants dispute the purported statement of fact contained within paragraph 125 of Plaintiff's 56.1 Statement. The statement is unaccompanied by

citation to factual evidence, is conclusory, impermissible argument and should be disregarded.

126. Defendants dispute the purported statement of fact contained within paragraph 126 of Plaintiff's 56.1 Statement. The statement is unaccompanied by citation to factual evidence, is conclusory, impermissible argument and should be disregarded. Plaintiff's assertion that Defendants have no proof whatsoever that plaintiff is *not* 100% gay, has never been with a woman, and only did some pretend to date of women before he came out of the closet" similarly relies upon the conclusory argument contained within the Zarda Declaration. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Further, the cited paragraph from Zarda Declaration contradicts Zarda's prior sworn deposition testimony, and should be disregarded on that basis as well. Zarda testified that he had relationships with women prior to coming out as gay. (Zarda Dep. pg. 54).

127. Defendants dispute the purported statement of fact contained within paragraph 127 of Plaintiff's 56.1 Statement. The statement is unaccompanied by citation to factual evidence, is conclusory, impermissible argument and should be disregarded. Defendants additionally dispute the purported statement of fact that the evidence shows no impropriety by Zarda. The video evidence of the jump is

not a complete recitation of the skydive and only represents a portion of what occurred. (Kengle Dep. pg. 100).

128. Defendants dispute the purported statement of fact contained within paragraph 128 of Plaintiff's 56.1 Statement. The statement that "Maynard knows that this is normal" is unaccompanied by citation to factual evidence, is conclusory, impermissible argument and should be disregarded. Defendants dispute that whispering is required. Winstock testified that instructors prefer to have their head on either side of the passenger's, so that the passenger does not hit them in the face. (Winstock Dep. pg. 50). Winstock further testified that while the plane is loud, they can hear each other speak. (Winstock Dep. pg. 50). Maynard also testified that the passenger's head should be on the side of the instructor, so the instructor does not get hit in the mouth. (Maynard Dep. pg. 259). Neither testified that it is normal to "whisper" in the ear of the passenger. (See Maynard Dep. pg. 259; Winstock Dep. pg. 50.) Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Zarda did not testify that whispering into a customer's ear was necessary. (See Zarda Dep. pg. 230-232). Zarda testified that he leans forward to give instructions to the customer, but there was no whispering required. (Zarda Dep. pg. 230-232).

129. Defendants dispute the purported statement of fact contained within paragraph 129 of Plaintiff's 56.1 Statement. Plaintiff's statement is largely conclusory, impermissible argument and should be disregarded. Defendants admit the letter disputing Zarda's unemployment benefits did not contain information regarding Zarda's inappropriate touching. (Ex. O to Decl. of Antollino). However, Maynard did not author this document, Lauren Callanan did. (Ex. O to Decl. of Antollino; Maynard Dep. pg. 344-345).

130. Defendants dispute the purported statement of fact contained within paragraph 130 of Plaintiff's 56.1 Statement. Plaintiff's statement is largely conclusory, impermissible argument and should be disregarded. Additionally, Defendants dispute the statement that Maynard immediately credited Kengle's complaint and immediately suspended Zarda, as it is unsupported by citation to the factual record. Maynard investigated the complaint in several ways, including speaking to Kengle (Maynard Dep. pg. 181-182), reviewing the video (Maynard Dep. pg. 199), and speaking with Zarda (Zarda Dep. pg. 36, 37, 39; Maynard Dep. pg. 183). Defendants admit Maynard deducted the cost of the videos from Zarda's pay, however Maynard returned the money shortly thereafter. (Maynard Dep. pg. 188).

131. Defendants dispute the purported statement of fact contained within paragraph 131 of Plaintiff's 56.1 Statement. Plaintiff's statement is largely conclusory, impermissible argument and should be disregarded. Defendants dispute the purported fact that "Maynard couldn't bring himself to mention this allegation," as it is unsupported by any fact in evidence, and is impermissible

argument. Defendants admit the letter disputing Zarda's unemployment benefits did not contain information regarding Zarda's inappropriate touching. (Ex. O to Decl. of Antollino). However, Maynard did not author this document, Lauren Callanan did. (Ex. O annexed to Decl. of Antollino; Maynard Dep. pg. 344-345). Defendants admit there is financial incentive to bring up Zarda's inappropriate touching to defeat Zarda's claim for unemployment benefits. (Maynard Dep. pg. 343).

132. Defendants dispute the purported statement of fact contained within paragraph 132 of Plaintiff's 56.1 Statement. Plaintiff's statement is entirely conclusory, impermissible argument, with no citation to facts in evidence, and should be disregarded.

133. Defendants admit Plaintiff was paid per jump. (Zarda Dep. pg. 301-302, 309; Winstock Dep. pg. 61). Defendants dispute the purported statement of fact that Zarda was "expected to be on the premises that [*sic*] STLI [*sic*] approximately 12 hours per day." On the weekends the employees are expected "to be there at 7:30 because we try to get wheels up by 8 o'clock." (Maynard Dep. pg. 306; Callanan Dep. pg. 59). On the weekdays the employees are expected "to be there at 9:30 to have wheels up by 10 o'clock." (Maynard Dep. pg. 306; Callanan Dep. pg. 59). During any one day, "Skydiving goes on typically all the way until one half hour before sunset." (Zarda Dep. pg. 301).

134. Defendants dispute the purported statement of fact contained within paragraph 134 of Plaintiff's 56.1 Statement. Plaintiff's statement is unsupported by citation to admissible facts and thus must be disregarded. Additionally,

Plaintiff was paid per jump while employed by Skydive Long Island. (Zarda Dep. pg. 301-302, 309; Winstock Dep. pg. 61).

135. Defendants admit the statement of fact contained within paragraph 135 of Plaintiff's 56.1 Statement.

136. Defendants dispute the purported statement of fact contained within paragraph 136 of Plaintiff's 56.1 Statement. Plaintiff's citation to the Zarda Declaration as purported facts to support this alleged statement should be disregarded, as the Zarda Declaration is self-serving, is pure, inadmissible hearsay, does not rely on any facts produced during the previous three (3) years of this litigation, and attempts to introduce new facts into evidence through conclusory and unsubstantiated assertions. Such "evidence" may not be relied on as facts in a 56.1 Statement. Additionally, the records annexed as to the Zarda Wage Affidavit were not produced during the course of discovery, have not been authenticated, are tantamount to hearsay, and should therefore be disregarded. Moreover, there were days when there is bad weather or down time, on such occasions, the instructors were permitted to leave SDLI. (Zarda Dep. pg. 293). However, in those instances, Zarda chose not to leave SDLI because it was "more convenient." (Zarda Dep. pg. 293).

137. Defendants dispute the purported statement of fact contained within paragraph 137 of Plaintiff's 56.1 Statement. Plaintiff's statement is wholly conclusory, constitutes impermissible argument, with no citation to facts in evidence, and should be disregarded. Defendants aver that there were days when there is bad weather or down time, on such occasions, the instructors were

permitted to leave SDLI. (Zarda Dep. pg. 293). However, in those instances, Zarda chose not to leave SDLI because it was "more convenient." (Zarda Dep. pg. 293).

138. Defendants dispute the purported statement of fact contained within paragraph 138 of Plaintiff's 56.1 Statement. Plaintiff's statement is largely conclusory, impermissible argument, and should be disregarded. Defendants additionally dispute Plaintiff's statement as Maynard testified that there are stores and a "bagel place" within a mile of Skydive Long Island. (Maynard Dep. pg. 307). There were days when there is bad weather or down time, on such occasions, the instructors were permitted to leave SDLI. (Zarda Dep. pg. 293). However, in those instances, Zarda chose not to leave SDLI because it was "more convenient." (Zarda Dep. pg. 293).

139. Defendants dispute the purported statement of fact contained within paragraph 139 of Plaintiff's 56.1 Statement. Plaintiff's statement is wholly conclusory, impermissible argument, with no citation to facts in evidence, and should be disregarded. Plaintiff's statement relies upon the conclusory assertions in Zarda's Wage Affidavit, and should therefore be disregarded. Defendants further dispute that Plaintiff is owed any wages, as at all times he was compensated above the minimum wage rage. (See Exs. 5, 6, 7, and 9 to Decl. of Zabell). Plaintiff was paid on a piece-work basis, earning $40 per jump. (Zarda Dep. pg. 301-302, 309). Additionally, there were days when there is bad weather or down time, on such occasions, the instructors were permitted to leave SDLI.

(Zarda Dep. pg. 293). However, in those instances, Zarda chose not to leave SDLI because it was "more convenient." (Zarda Dep. pg. 293).

140. Defendants dispute the purported statement of fact contained with paragraph 140 of Plaintiff's 56.1 Statement. Maynard directed Callanan on how to perform the search and the information for which she was searching. (Maynard Dep. pg. 352). Maynard does not know exactly how the search was performed by Callanan. (Maynard Dep. pg. 352).

141. Defendants admit Callanan performed the search of electronic documents for Skydive Long Island. Defendants admit Callanan testified that there were multiple computers at Skydive Long Island and there was no server. (Callanan Dep. pg. 13).

142. Defendants admit Callanan testified as cited in paragraph 142 of Plaintiff's 56.1 Statement. Defendants aver that Callanan further testified that she merely could not recall which computer or computers she used to perform the search, and that it may have been multiple computers. (Callanan Dep. pg. 14). Callanan also testified that she searched the computers for documents and emails. (Callanan Dep. pg. 12).

143. Defendants admit the statement contained within paragraph 143 of Plaintiff's 56.1 Statement. Defendants aver that Callanan testified, with regards to Skydive Long Island's document retention, that an e-mail may be disregarded and not kept on file. (Callanan Dep. pg. 16).

144. Defendants dispute the purported statement of fact contained within paragraph 144 of Plaintiff's 56.1 Statement. Plaintiff's statement is wholly conclusory, impermissible argument, with no citation to facts in evidence, and should be disregarded.

Dated: Bohemia, New York
May 3, 2013

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

Saul D. Zabell
Amanda R. Griner
Zabell & Associates, P.C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716
Tel.: (631) 589-7242
Fax: (631) 563-7475
szabell@laborlawsny.com