

**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.:**

**10-CV-4334 (JFB)(ARL)**

**REPLY MEMORANDUM OF LAW  
IN SUPPORT OF DEFENDANTS' MOTION  
TO DISMISS**

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## **I. PRELIMINARY STATEMENT**

Defendants, Altitude Express, Inc. d/b/a Skydive Long Island (“SDLI”) and Ray Maynard, respectfully submit this reply memorandum of law in support of their Fed. R. Civ. P. 12 motion to dismiss for lack of diversity jurisdiction.

## **II. ARGUMENT**

In Plaintiff’s opposition to Defendants’ motion to dismiss for lack of diversity jurisdiction, Plaintiff states that “[t]he standard for a jurisdictional amount statement in a pleading is one of good faith, not how you can gerrymander the evidence and spin after discovery is completed.” [ECF Doc. 155] As explained in Defendants’ memorandum of law in support of the instant motion [ECF Doc. 154], and as Your Honor has stated, “[t]he Second Circuit has ‘allowed . . . resort to materials developed in discovery to be used to amplify the meaning of the complaint allegations.’” Scarpinato v. E. Hampton Point Mgt. Corp., 12-CV-3681 (JFB) (GRB), 2013 WL 5202656, \*14 (E.D.N.Y. Sept. 13, 2013) (citing Zacharia v. Harbor Island Spa, Inc., 684 F.2d 199, 202 (2d Cir. 1982)). Therefore, Defendants can rely on evidence obtained through discovery in evaluating Plaintiff’s pleadings and, in doing so, Defendants aver that Plaintiff has not made “‘good faith representation of the actual amount in controversy.’” Intl. Christian Broadcasting, Inc. v. Koper, 928 F. Supp. 2d 559, 562 (E.D.N.Y. 2013) (citing Wood v. Maguire Automotive, LLC, 2013 WL 309979 \*1 (2d Cir. Jan. 28, 2013) (citation omitted) (see Wolde-Meskel v. Vocational Instruction Project Community Services, Inc., 166 F.3d 59, 63 (2d Cir.1999)).

Further, in his letter in opposition, Plaintiff’s counsel relies on, and refers the Court to, Plaintiff’s affidavit in support of summary judgment to establish that Plaintiff cannot bring himself to jump with another person because “he feels so terribly about his termination.” [ECF

Doc. 155] However, as Defendants' highlighted in their memorandum of law [ECF Doc. 154], Plaintiff testified to applying for at least two (2) skydiving jobs shortly after he was terminated. Therefore, Plaintiff's affidavit should be disregarded as disingenuous and contradictory to the evidence obtained through discovery and depositions. (See Zenni v. Hard Rock Cafe Intern., Inc. (N.Y.), 903 F. Supp. 644, 651 (S.D.N.Y. 1995) ("It is well settled in this circuit that a party's affidavit which contradicts his own prior deposition testimony should be disregarded on a motion for summary judgment." (citing Buttry v. General Signal Corp., 68 F.3d 1488, 1493 (2d Cir. 1995) (quoting Mack v. United States, 814 F.2d 120, 124 (2d Cir. 1987))). Plaintiff's affidavit was initially submitted in opposition to summary judgment; however, Defendants aver that the same core principles should apply when considering the contents Plaintiff's affidavit referenced in connection with the instant motion.

While Plaintiff relies, in part, upon a self-serving, hearsay document, Defendants' position is bolstered by binding precedent and admissible evidence. Therefore, Plaintiff has not set forth a good faith representation regarding the amount in controversy and, as such, the Court should dismiss this matter for lack of diversity jurisdiction.

**III. CONCLUSION**

For the reasons set forth above and in Defendants' memorandum of law in support of their motion to dismiss, this Court should grant Defendants' Fed. R. Civ. P. 12 motion to dismiss for lack of diversity jurisdiction.

Dated: Bohemia, New York  
April 29, 2014

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*Attorneys for Defendants*

By: \_\_\_\_\_

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