Gregory Antollino, Esq.
275 Seventh Avenue Suite 705
New York, NY 10001
(212) 334-7397

March 28, 2015

U.S. District Judge Joseph F. Bianco
Long Island Federal Courthouse
814 Federal Plaza
Central Islip, New York 11722

RE: Zarda v. Altitude Express, Inc. & Ray Maynard, 10 Civ 4334 (JFB)

Dear Judge Bianco:

I represent the estate in this action and write in reply to my adversary's Mr. Zabell's March 19 letter regarding various issues in advance of trial.

1. The first issue I would like to address is Mr. Zabell's suggestion that my deceased client's friend Ira Helfand should not testify. Mr. Zabell admits that he was provided the name and address in an amended initial disclosure one month before the close of discovery. Mr. Zabell had a month to serve me with a notice of deposition, but decided not to. He made a strategic decision not to depose Helfand, whom he was aware would testify as to Don's emotional distress. Mr. Zabell made this decision – it would have cost money - and perhaps at his option extended discovery. However, the date discovery ended, he sent a pre-motion conference letter for summary judgment. That is what he wanted and that is what, in part, he got. But plaintiff is not responsible for that decision. I certainly couldn't have objected to an extension of the discovery deadline.

When the case started, defendant sent an amended initial disclosure taking Maynard's girlfriend off the list. That was a strategic decision. I didn't probe that, significantly; it was a strategic decision. Early on in the case, I wanted to depose the ex-Ex-Mrs. Maynard. I got pushback from that from Zabell, and you expressed you wanted to table the issue, which was a wise strategic decision on your part; I eventually gave up the fight and never sought to depose Mrs. Maynard. I have to live with that strategic decision. I'm confident I could have gotten some admissible evidence out of her not subject to the marital privilege, but I decided it was not worth the battle. It would have been ugly, for little gain, and you would have had to babysit the dispute, because Mr. Zabell would have objected to every question. Discovery is closed. I can't say now, "Hey wait a minute, we want to depose Mrs. Maynard." Mr. Zabell is in the same boat. He had a month simply to serve a notice of deposition, and he did not. Case closed.

The reason the decision was made late in discovery was frankly, that we didn't know whom to call for emotional distress purposes. One of Don's sisters has an imperfect past; Melissa Zarda does not in the least, but Don didn't think she would be able to

provide the "before and after" detail that such a witness can provide. We also thought about Bill Moore, plaintiff's ex-partner, but with the gossip that runs around the drop-zone mill, we assumed that there would be plenty to impeach him with. You'll note that Mr. Zabell – *the day after Don died* – filed a suggestion of death on the record. He found out about Don's death because the rumor mill in this tiny industry flies like snow.

After Don's death, we considered putting Bill in place of Don – a request you granted - but when we had that tele-conference, after objecting that "we didn't get into Mr. Moore's background during discovery" Mr. Zabell, smacking his lips (metaphorically), demanded that Mr. Moore appear in Eastern Long Island for the deposition if he were to testify. This came at a time when Bill would be getting married, and, as Bill Moore my client now, I had a duty to tell him how aggressive and demanding and unpleasant Mr. Zabell sounded when the suggestion of his testimony came up. I've reported every tactic that Mr. Zabell has employed during this litigation and I've made it clear to the Court that I don't like the way he practices. I didn't want to subject Bill to this either, and I did not want to deal with more angst and bothering of the Court with minutia, so I made the strategic decision not to call Bill as a witness. Bill was intended to replace Don on the subject of his emotional distress damages, so we are losing something here. But instead of substituting Bill for Don, we decided to simply to stick with Ira Helfand, who knew Don well and was always going to testify. Discovery is over, and Mr. Zabell has no grounds whatsoever to depose or preclude Ira Helfand.

2. As to Mr. Zabell's points pertaining to Don's Zarda's testimony, I'll respond point by point.

• 4:2-11- Defendants object on the grounds that this is not the deponent's words;

RESPONSE: Yes, obviously some of them are, and the others are merely a statement that the witness has been sworn, just as occurs in any trial.

• 5:13-22- Defendants object on the grounds that this testimony is wholly irrelevant;
• 6:2-13- Defendants object on the grounds that this testimony is irrelevant;

RESPONSE: Relevance is defined by Rule 101 as "**(a)** [having] any tendency to make a fact more or less probable than it would be without the evidence; and **(b)** the fact is of consequence in determining the action. Plaintiff meets both of these tests insofar as he is testifying that he knows that everything he says at the deposition is truthful. It is not self-evident that a sworn witness will imply that to a jury. Mr. Zabell asked these questions for a reason.

• 21:3-23 -Defendants object on the grounds that this testimony contains impermissible hearsay;

RESPONSE: I will agree that the small reference to what Mr. Zarda's sister says is hearsay, but not the rest.

• 40:2-11; 17-25- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 12 through 14 to provide the jury with the entire context of the testimony;

RESPONSE: I don't think the verbal "click clucks" are necessary. If the Court believes it has any bearing on the testimony, then we'll put it in.

• 44:17-25; 45:2-6 - Defendants object on the grounds that this testimony contains impermissible hearsay;

RESPONSE: This is present sense impression, describing an event in which Mr. Zarda was distressed and how he dealt with it. The alleged "hearsay" is just a conduit that takes the trier of fact from one moment to the next.

• 52:9-25; 53:3-2- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer line 2 on page 53 to provide the jury with the entire context of the testimony;

RESPONSE: We will add this line.

• 40:7-25 - Defendants object on the grounds that this testimony contains impermissible hearsay;

RESPONSE: This is not hearsay – any statement by Maynard is a party admission.

• 67:2-17; 67:23-25; 68:2-7- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 18 through 20 on page 67 to provide the jury with the entire context of the testimony;

RESPONSE: Again this is a verbal tick in which Don is trying to understand the question. If the Court believes this verbal tick needs to be included for context, then so be it.

• 74:21-25; 75:2-11 - Defendants object on the ground that this testimony is wholly irrelevant and contains impermissible hearsay;

RESPONSE: This provides context for which plaintiff was out of the season after he had his ankle and when he is referring to other people's statements, he is referring to his doctor's opinions, so that is considered non-hearsay. FRE 803(4)

• 78:2-11; 78:18-22- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 11 through 17 to provide the jury with the entire context of the testimony;

RESPONSE: The lines 11-17 refer to rank speculation. I would put it in to save the

rest of the testimony, but it's just Don speculating and therefore inadmissible.

• 81:20-21- Defendants object on the ground that this testimony is irrelevant;

RESPONSE: Defendant doesn't object to the lines that follow on the next page, thus he is just describing the workplace, which is relevant as background material – i.e., his ability to get along with co-workers. By "characters" he's referring to co-workers, and believe me, tandem skydivers are often "characters" as the word is traditionally known. Don was a "character" to be sure. That's how Don characterized his co-workers, so it doesn't harm to leave these two sentences here.

• 85:21-22; 86:2-16- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 23 through 25 on page 85 and line 2 on page 86 to provide the jury with the entire context of the testimony;

RESPONSE: The testimony here is excessive verbiage that provides no "context." Rule as you wish, but to me, this thinking aloud is of no help to the jury.

• 109:2-4; 109:12-15- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 5 through 11 to provide the jury with the entire context of the testimony;

RESPONSE: The testimony here is excessive verbiage that provides no "context." Rule as you wish, but to me, this thinking aloud is of no help to the jury.

• 113: 12-19 - Defendants object on the ground that this testimony contains impermissible hearsay;

RESPONSE: This refers to the tape of the termination. That tape can be authenticated by almost any witness at the trial. Maynard authenticated it at his deposition. Don was not asked to authenticate the tape at his deposition, but in order to authenticate a tape, all I have to do is have witnesses identify voices. Again, Maynard has authenticated the tape and in this portion of the testimony, Zarda is just talking about the tape generally. The people he speaks to about why he should tape is not offered for the truth but for Don's state of mind: why he taped the conversation. Why he taped the conversation is relevant to the case because he strongly suspected he was going to get fired.

• 119:3-9- Defendants object on the ground that this testimony is wholly irrelevant;

RESPONSE: This is totally relevant insofar as it describes Don as a person. There are many gay people who follow sports, there are a few "out and proud" sports players, but sports is largely not part of the gay culture and vice versa. My client is dead and this answer paints a picture as to who he was and what he stood for. Many gay men growing up feigned an interest in sports to avoid being outed; many gay men are made fun of because of their poor abilities in sports. This is who Don was and it is part of the picture I want to paint of him – because it is real.

• 130:16-25 - Defendants object on the ground that this testimony does not provide the

context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 18 through 23 to provide the jury with the entire context of the testimony;

RESPONSE: There is no reason for this verbal false start.

• 131:22-22; 131:25; 132:2-10- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 23 through 24 on page 131 to provide the jury with the entire context of the testimony;

RESPONSE: We will include 23-24 and the objection is moot.

• 133:2-5 -Defendants object on the ground that this testimony beginning with the word "but" on line 2 contains impermissible hearsay;

RESPONSE: This is relevant to mitigation; if the defendants want to remove the mitigation defense then fine. But this is precisely the type of non-prejudicial testimony allowable under Rule 807

• 133:13-24- Defendants object on the ground that this testimony beginning with the word "I felt" on line 13 contains impermissible hearsay;

RESPONSE: This is not offered for the truth: it is present sense impression, and it talks about a conversation, not what was said in the conversation.

• 134:12-22- Defendants object on the ground that this testimony contains impermissible hearsay;

RESPONSE: This is not offered for the truth, it is present sense impression, not hearsay.

• 137:18-24; 138:2-25; 139:2- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 2 through 12 on page 138 to provide the jury with the entire context of the testimony;

RESPONSE: The back and forth about Don not understanding the question does not make it easier for the jury to put the other statements in context.

• 139:8-10 - Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer line 11 to provide the jury with the entire context of the testimony;

RESPONSE: This line should have been added.

• 147:18-25; 148:2-10 -Defendants object on the ground that this testimony is wholly irrelevant;

RESPONSE: This is relevant, and it describes plaintiff's experience in the profession. Remember, you denied plaintiff's summary judgment motion on the slim grounds that there was a second-hand complaint made against Zarda. There is no dispute that Maynard did not speak to the first hand "complainer," who actually saw no reason to complain. Plaintiff is entitled to counter Maynard's pretext by demonstrating that he was an excellent skydiver and that Maynard used the pretext of a "complaint" to fire him when the real reason is that he fired plaintiff is that he was enraged that a gay person self-identified to a customer.

• 183:15-25; 184:2-25 - Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer line 2 on page 184 to provide the jury with the entire context of the testimony;

RESPONSE: The line should have been included.

• 210:25; 211:2-13 - Defendants object on the ground that this testimony contains impermissible hearsay.

RESPONSE: This is not hearsay – it refers to the state of mind of the person who could have hired plaintiff.

• 226:2-14- Defendants object on the ground that this testimony is wholly irrelevant;

RESPONSE: This is plaintiff's opinion as to why Maynard discriminated against him – he fired a good employee based on flimsy second hand complaint with no investigation. If Maynard wants to counter that somehow, he'll be alive for the trial to testify why he conducted no investigation.

• 227:6-22 -Defendants object on the ground that this testimony is wholly irrelevant;

RESPONSE: If the defendants intend to raise the ridiculous issue that plaintiff improperly touched a client of Maynard's, then Don Zarda and his estate are entitled to contest that. Mr. Zabell asked a question and got an answer he didn't like. Notably, he insists on "context" in every other instance of verbal tics, but not here where it pertains to the very matter at issue.

• 229:16-18; 230:16-25; 231:2-25; 232:2-7- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer line 19 through 23 on page 229 to provide the jury with the entire context of the testimony;

RESPONSE: Line 19 "No." is proper. The rest of the testimony is plaintiff asking the questioner whether he is finished with an earlier question. I do not see the purpose in including that.

• 252:7-15; 254:20-15; 255:2-22- Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer lines 2 through 25 on page 253 and lines 2

through 19 on page 254 to provide the jury with the entire context of the testimony; and

RESPONSE: Plaintiff has no problem with adding this, though it is cumulative.

• 281:21-25; 282:3-15 -Defendants object on the ground that this testimony does not provide the context of the testimony for the jury. However, Defendants will not object to this testimony should Plaintiff also offer line 2 on page 282 to provide the jury with the entire context of the testimony.

RESPONSE: The Line should have been added.

3. The testimony of Lauren Callanan.

If the Court orders me to bring her in by subpoena, I would like a separate written order denying my application to read her deposition testimony. I do think she has relevant evidence. I do think she is barely within 100 miles, but I do believe that to bring her in would be a hassle for her and I want her to know that Maynard's attorney is forcing this. I don't want her to take it out on us.

4. Don Zarda's Diploma.

Before Don died he had completed all of his credits for a BA in Aeronautical Engineering, which he had revved up during the period after he was terminated from Altittude Express. However, he had not gathered together the paperwork to get his diploma. His sister, Melissa Zarda did, however, and he was awarded a diploma posthumously. We have offered the defense releases of Don's records at Embry Riddle University. We would like to offer the diploma into evidence. The JPTO was written before the credits were completed and, of course, before the diploma was obtained. I would like to discuss the admissibility of the diploma, which pertains to mitigation.

5. Maynard's Cross Designations

These cross designations are so lengthy that I will deal with them in another letter to be filed as soon as possible. While most of them I have no problem with, I won't be reading most of them with mine (as is my usual practice) because they aren't related and I don't want to put the jury to sleep. However, several of the cross designations are immaterial and or irrelevant because they involve matters not in dispute or that are otherwise objectionable.

Sincerely,

/s/
Gregory Antollino

Cc: Saul Zabell by ecf