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)

DEFENDANTS' MEMORANDUM OF LAW SUBMITTED IN OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY AND FOR SANCTIONS

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I. INTRODUCTION

Altitude Express, Inc. d/b/a Skydive Long Island, and Ray Maynard, Defendants, in this action, submit this memorandum of law in opposition to Plaintiff's June 6, 2011 letter motion seeking to disqualify the undersigned from representing third-party witnesses and "otherwise obstructing discovery." For the reasons set forth below, Plaintiff's motion should be denied in its entirety.

II. FACTS

Once again, Plaintiff goes to great lengths to contort the underlying "facts" of this matter in connection with a discovery dispute, under the mistaken impression that such a recitation will bolster his otherwise flawed position. However, Counsel's efforts are irrelevant for purposes of this motion. The undisputed facts of this matter and the course of discovery are outlined below.

In or about July 2010, Plaintiff filed his Charge of Discrimination with the Equal Employment Opportunity Commission ("EEOC") claiming that he was subjected to discrimination because of his sexual orientation. This Charge was dismissed without a finding of probable cause, and a Right to Sue letter was issued. On or about September 24, 2010, Plaintiff filed suit in the Eastern District of New York, seeking damages for purported violations of Title VII, the New York State Human Rights Law, the Fair Labor Standards Act, and the New York State Labor Law while alleging many of the same allegedly unlawful actions outlined in his EEOC Charge. Relatively soon thereafter, the parties engaged in discovery.

During the course of discovery, numerous disputes arose, many of which have necessitated several motions before Your Honor. Plaintiff now files a motion to disqualify, and seeks additional relief.

III. STANDARD OF REVIEW

"District courts have broad discretion to disqualify attorneys, but it is a 'drastic measure' that is viewed with disfavor in this Circuit." Ritchie v. Gano, No. 07 Civ. 7269, 2008 WL 4178152, at *2 (S.D.N.Y. Sept. 8, 2008). "Disqualification is only warranted in the rare circumstance where an attorney's conduct 'poses a significant risk of trial taint.'" Decker v. Nagel Rice LLC, 716 F.Supp.2d 228, 231 (S.D.N.Y. 2010)

The Second Circuit has directed that courts faced with disqualification motions take a 'restrained approach that focuses primarily on preserving the integrity of the trial process.'" Papyrus Tech. Corp. v. New York Stock Exch., Inc., 325 F.Supp.2d 270, 276 (S.D.N.Y. 2004) (citations omitted). "Although any doubts are to be resolved in favor of disqualification, the party seeking disqualification bears a heavy burden of demonstrating that disqualification is necessary." Decker v. Nagel Rice LLC, 716 F.Supp.2d 228, 231-232 (S.D.N.Y.2010) (citing Murray v. Metro. Life Ins. Co., 583 F.3d 173, 178 (2d Cir. 2009) (emphasis added).

When applying the above legal standard, it is clear that Plaintiff's motion should be denied in its entirety.

IV. ARGUMENT

POINT I

PLAINTIFF MISREPRESENTS THE FACTS OF THIS CASE AND UNREASONABLY SEEKS TO HOLD THIRD PARTY WITNESSES IN CONTEMPT

Once again, Counsel for Plaintiff's bases his latest motion before Your Honor on mere supposition. Initially, Mr. Antollino opines that Defendants have gone to great lengths to not turn over the contact information for third parties Ms. "Drellana" and Mr. Kengle. (Antollino Declaration, ¶¶4-5). However, Mr. Antollino's contentions are of no consequence. Despite Mr. Antollino's assertions to the contrary, we do not represent Ms. "Drellana" or Mr. Kengle, nor

have we solicited them as clients. Once again, Mr. Antollino takes his mere suspicions, and states them as fact.

Inasmuch as Ms. "Drellana's" and Mr. Kengle's contact information was unknown (a fact confirmed by Defendants' Automatic Disclosure Statement) Defendants began a search of its records. Upon locating the relevant records, the undersigned advised Ms. "Drellana" and Mr. Kengle their contact information was sought in connection with a lawsuit. In response, Ms. "Drellana" and Mr. Kengle informed us they did not want their personal contact information disclosed, and in exchange, authorized us to accept service of a subpoena on their behalf. See Ex. "A."

Approximately two and one-half weeks later, Plaintiff served a Subpoena seeking to depose third parties Ms. "Drellana" and Mr. Kengle on May 26, 2011 in Brooklyn, New York. Through the exchange of letters, emails, and telephone calls, we advised Mr. Antollino the timing and location of the proposed depositions were unacceptable. Specifically, the location was inconvenient for the witnesses; residents of Suffolk County. More importantly, the proposed date of the depositions was objectionable as the third party witnesses and all members of Zabell & Associates, P.C. were unavailable on this date. Mr. Antollino was advised of this fact ten (10) days before the return date of the Subpoena. See Ex. "B." We invited Mr. Antollino to discuss additional proposed dates, preferably on Wednesdays for the convenience of the witnesses. Id. Unfortunately, the collective schedules of the undersigned, the witnesses, Mr. Antollino, and Plaintiff could not be reconciled during the narrow window established by Mr. Antollino. Thus, the undersigned offered on numerous occasions to amicably resolve this dispute. See Ex. "C." Notwithstanding the fact Mr. Antollino knew it was impossible for the depositions to be conducted on May 26, 2011, he decided to have his client travel to New York

from Missouri, attend the deposition in Brooklyn, enter his appearance, and now unreasonably seeks to hold third party witnesses in contempt.

According to Rule 45(e), "[f]ailure by any person without adequate excuse to obey a subpoena served upon that person may be deemed a contempt of the court from which the subpoena issued." Fed.R.Civ.P. 45(e). In the case at bar, there is clearly an adequate excuse for the third party witnesses' failure to attend the May 26, 2011 depositions. Specifically, the witnesses and the undersigned were unavailable to attend the depositions on that express date; a fact by which Mr. Antollino was well aware ten days before the sought after date. Knowing the depositions could not go forward on this date, Mr. Antollino affirmatively damaged his client by having him incur the expense of flying to New York. Thus, any purported damage Plaintiff suffered was of his own doing, and not due to any conduct of the Defendants or third party witnesses.

The postponement of third party depositions has not delayed this matter. As Your Honor has been advised, this matter has been unnecessarily delayed due to Plaintiff's dilatory actions in discovery. By failing to meet his discovery obligations, Plaintiff delayed party depositions and necessitated motion practice. Once again, Plaintiff's actions and that of his Counsel delayed another aspect of this action. Rather than attempt to resolve the dispute surrounding third party witness depositions amicably (which could have occurred this past month) Plaintiff filed the instant motion seeking sanctions. Inasmuch as a plethora of issues exist in this case, the majority of which should be resolved before taking third party depositions of Mr. Kengle and Ms. "Drellana;" postponement of these depositions has not damaged Plaintiff in any way. Instead, Plaintiff's purported injury (all costs incurred by traveling to New York), were self inflicted.

POINT II

PLAINTIFF'S MOTION TO DISQUALIFY MUST BE DENIED

Despite the fact Your Honor previously advised Counsel mere suspicion is not sufficient to meet Plaintiff's burden to disqualify Zabell & Associates, P.C. from representing individuals, Plaintiff disregarded this advisement, and has made the instant motion. Additionally, Mr. Antollino levies serious accusations, with no factual support, regarding purported witness "coaching" and "intimidation" against the undersigned. Such conclusory statements should be wholly ignored as they are untrue, and Plaintiff offers no factual support, save his own previously made allegations, for such statements. Moreover, wielding such unsupported allegations may warrant sanctions.

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

In the case at bar, we have previously represented to Your Honor that we have not actively solicited any employee of Defendants. Mr. Antollino asserts that this statement alone is

an admission that we have indirectly solicited employees and witnesses. However, a fair reading of this statement alone does not warrant such a conclusion. As stated in our April 12, 2011 submission, we have not solicited any employee of Defendants. We only represent the named defendants in this action: Altitude Express, Inc. and Ray Maynard. However, should an employee of Defendants request representation in the course of this proceeding, and our clients seek to have us represent that employee, we intend to undertake such representation.

Plaintiff's conflict of interest claims, are stated in a conclusory manner, assume Plaintiff will be victorious on his wage and hour claims, and assume Plaintiff's claims for owed wages will exactly mirror potential claims by other employees. In addition to assuming these facts, Plaintiff presupposes Zabell & Associates, P.C.'s potential representation of witnesses during the course of this matter will automatically result in a conflict of interest. Additionally, Mr. Antollino claims these individuals do not need legal representation (once again, based purely upon his own opinion). All of these statements are stated in a conclusory manner and are unsupported by the facts of this case and precedent. Accordingly, such supposition is irrelevant to this case and the issues at bar, and should be ignored.

As discussed *supra*, the prosecution of this action has indeed been delayed. However, this delay is purely due to the dilatory tactics of Plaintiff, and not due to the undersigned. Defendants should not be made to bear the weight of the repercussions of Plaintiff's actions. Such a potentially inequitable result is not supported by the facts of this case. Accordingly, Defendants respectfully request Your Honor deny Plaintiff's application in its entirety and deny Plaintiff's request for sanctions.

V. CONCLUSION

For all of the foregoing reasons, Plaintiff's application should be denied in its entirety, and Defendants should be awarded costs and attorneys' fees incurred with this submission.

Dated: Bohemia, New York
July 6, 2011

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

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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)** **DECLARATION OF SAUL D. ZABELL, ESQ. IN OPPOSITION TO PLAINTIFF'S MOTION TO DISQUALIFY AND FOR SANCTIONS**

SAUL D. ZABELL, ESQ., an attorney duly admitted to practice before this Court, hereby declares under penalty of perjury as follows:

1. I am the managing principal of Zabell & Associates, P.C., attorney for Defendants in the above-captioned case.
2. I am fully familiar with the facts and circumstances of this case, based on a review of the files and records in this matter and conversations with Defendants.
3. I submit this declaration in opposition to Plaintiff's motion to disqualify and for sanctions.
4. For the reasons set forth in the accompanying memorandum of law and upon the documents attached hereto, Plaintiff's motion should be denied with prejudice.

DECLARATION

5. Upon obtaining the contact information of Ms. "Drellana" and Mr. Kengle, I advised their contact information was being sought in connection with this lawsuit.
6. In response, they informed me they did not want their personal contact information disclosed, and in exchange, authorized us to accept service of a subpoena on their behalf.

7. Mr. Antollino served this office with a subpoena seeking to depose third parties Ms. "Drellana" and Mr. Kengle on May 26, 2011 in Brooklyn, New York.

8. Over the course of the next several weeks, I advised Mr. Antollino the timing and location of the proposed depositions were unacceptable.

9. Specifically, inasmuch as Mr. Kengle and Ms. "Drellana" are residents of Suffolk County, being deposed in Brooklyn is unreasonable.

10. Additionally, the proposed date of the depositions was objectionable as the third party witnesses, as well as all members of Zabell & Associates, P.C. were unavailable on May 26, 2011.

11. Additionally, we advised the third party witnesses were only available for depositions on Wednesdays.

12. Unfortunately, the collective schedules of Zabell & Associates, P.C., the witnesses, Mr. Antollino, and Plaintiff could not be reconciled during the unilaterally imposed narrow window established by Mr. Antollino.

13. Knowing the depositions could not occur on May 26, 2011, Mr. Antollino still had his client incur the expense of traveling to New York from Missouri.

14. Such a course of action was wholly unreasonable as Mr. Antollino was well aware the third party witnesses would be unavailable for deposition on May 26, 2011.

15. Regarding Plaintiff's claims of improper solicitation of clients, we have not solicited any employee of Defendants or third party witnesses.

16. Zabell & Associates, P.C. only represent the named Defendants; Altitude Express, Inc. and Ray Maynard.

17. However, should an employee of Defendants request representation in the course of this

proceeding, and our clients seek to have us represent that employee, we intend to undertake such representation.

18. Furthermore, notwithstanding Mr. Antollino's suspicions, Zabell & Associates, P.C. has neither coached, nor intimidated any witness in this case.

EXHIBITS

19. Attached hereto as "Exhibit A" is a true and correct copy of Defendants' April 20, 2011 letter to Plaintiff.

20. Attached hereto as "Exhibit B" is a true and correct copy of Defendants' May 16, 2011 letter to Plaintiff.

21. Attached hereto as "Exhibit C" are true and correct copies of Defendants' May 23, 2011 and May 26, 2011 letters to Plaintiff.

22. I have read the above twenty-one (21) numbered paragraphs and know them to be true to my own knowledge or upon information and belief.

WHEREFORE, for the reasons set forth in Defendants' accompanying Memorandum of Law, Defendants respectfully requests that this Court deny Plaintiff's motion in its entirety.

Dated: Bohemia, New York
July 6, 2011

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

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EXHIBIT "A"

Counseling and Advising Clients Exclusively on Laws of the Workplace

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

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Saul D. Zabell
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April 20, 2011

***VIA* ELECTRONIC MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

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

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

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

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

Encl.

cc: client

EXHIBIT "B"

Counseling and Advising Clients Exclusively on Laws of the Workplace

Zabell & Associates, P.C.
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Saul D. Zabell
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May 16, 2011

***VIA* FIRST CLASS MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your May 6, 2011 correspondence. Preliminarily, we disagree with the proposed location for the depositions of "Rosana Drellana" and "David Kengle." As both individuals reside in Suffolk County, any attempt to depose these non-party witnesses outside their county of residence will be unduly burdensome. Thus for the convenience of the witnesses, and as a courtesy, depositions should occur in Suffolk County. Accordingly, we will make our office available to you for any deposition of "Mrs. Drellana" and "Mr. Kengle." Should you not wish to accept our offer, these depositions can occur in the Federal Courthouse for the Eastern District in Central Islip.

Additionally, the witnesses and counsel for Defendants are not available on May 26, 2011. Kindly propose additional dates so that we may find a mutually agreeable time for all individuals involved for the depositions of "Mrs. Drellana" and "Mr. Kengle." They have advised that Wednesdays are preferable.

Please do not hesitate to contact me should you have any further questions regarding the content of this letter.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: client

EXHIBIT "C"

Counseling and Advising Clients Exclusively on Laws of the Workplace

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May 23, 2011

***VIA* ELECTRONIC MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your May 20, 2011 email. Regardless of your recent demands that the depositions of "Rosana Drellana," "David Kengle" and "Lauren Callanan" occur within the next two weeks, you have been advised on numerous occasions that our firm is unavailable during your self-imposed time frame. Moreover, as you have already been previously advised, "Ms. Drellana" and "Mr. Kengle" are only available on Wednesdays. Rather than unreasonably seek to hold third-party witnesses in contempt, I suggest we work together to amicably resolve this dispute.

Kindly contact me upon receipt should you wish to discuss this matter in greater detail.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: client

Counseling and Advising Clients Exclusively on Laws of the Workplace

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May 26, 2011

***VIA* ELECTRONIC MAIL**

Gregory Antollino, Esq.
18-20 West 21st Street, Suite 802
New York, NY 10010

Re: Zarda v. Altitude Express, Inc., *et al.*
Case No.: CV-10-4334 (JFB)(ARL)

Dear Mr. Antollino:

We write in response to your May 25, 2011 email. Frankly, we are a bit perplexed as to why the depositions of "Rosana Drellana," "David Kengle" and "Lauren Callanan" remain an issue on this matter. You have been advised numerous times that both our firm and the witnesses are unavailable today. Additionally, we have repeatedly instructed that "Ms. Drellana" and "Mr. Kengle" are only available on Wednesdays.

In light of the numerous discovery motions currently pending before Judge Bianco, and in attempt to meet and confer in good faith regarding this discovery dispute, we invite you to call us tomorrow to discuss this issue and attempt to reschedule these depositions.

Very truly yours,

ZABELL & ASSOCIATES, P.C.

Saul Zabell

cc: client