UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MELISSA ZARDA and WILLIAM MOORE, co-independent executors second of the estate of DONALD ZARDA

10-CV-04334 (SJF) (AYS)

Plaintiffs,

NOTICE OF MOTION

- against –

RAYMOND MAYNARD as the predecessor in interest, the sole shareholder and alter ego to ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

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

PLEASE TAKE NOTICE that, pursuant to the briefing schedule established by the Honorable Sandra J. Feuerstein, U.S. District Court Judge, Defendant Raymond Maynard, by and through his counsel, Zabell & Collotta, P.C., shall respectfully move the Honorable Sandra J. Feuerstein, presiding at the United States District Court for the Eastern District of New York, 100 Federal Plaza, Central Islip, New York 11722, for an Order dismissing the Second Amended Complaint of Plaintiffs, Melissa Zarda and William Moore, co-independent executors of the estate of Donald Zarda [ECF Doc. No. 280], in its entirety and with prejudice pursuant to Fed. R. Civ. P. 12(b)(6).

PLEASE TAKE FURTHER NOTICE that in support of this Motion, Mr. Maynard relies upon, (1) Defendant's Memorandum of Law in Support of his Motion to Dismiss the Second Amended Complaint Pursuant to Fed. R. Civ. P. 12(B)(6), dated January 29, 2021; and (2) the Declaration of Saul D. Zabell, Esq., dated January 29, 2021, along with the exhibits attached thereto.

PLEASE TAKE FURTHER NOTICE that, pursuant to the January 25, 2021 directive of the Honorable Sandra J. Feuerstein, Plaintiffs' opposition to the instant motion, if any, shall be due on or before February 26, 2021, and reply papers March 9, 2021.

Dated: January 29, 2021
Bohemia, New York

Respectfully Submitted,

ZABELL & COLLOTTA, P.C.
Attorneys for Defendant
Raymond Maynard

By: _____

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK
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MELISSA ZARDA and WILLIAM MOORE, co-independent executors second of the estate of DONALD ZARDA

10-CV-04334 (SJF) (AYS)

Plaintiffs,

- against –

RAYMOND MAYNARD as the predecessor in interest, the sole shareholder and alter ego to ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

Defendants.
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DEFENDANT'S MEMORANDUM OF LAW IN SUPPORT OF HIS MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(b)(6)

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I. PRELIMINARY STATEMENT

Defendant, Raymond Maynard, sued in his individual capacity as well as the alleged "predecessor in interest", the sole shareholder and claimed "alter ego" of the now defunct Altitude Express, Inc., by and through his attorneys, Zabell & Collotta, P.C., respectfully submits the instant Memorandum of Law in support of his application, made pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") Rule 12(b)(6). Mr. Maynard seeks dismissal, with prejudice, of all claims pending against him contained in the Second Amended Complaint [ECF Doc. No. 280], interposed by Plaintiffs Melissa Zarda and William Moore, co-independent executors of the estate of Donald Zarda ("Plaintiffs").

As set forth below, Plaintiffs' Second Amended Complaint is factually and legally insufficient to withstand the instant application. Plaintiffs' claim of unlawful discrimination premised upon gender in violation of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq.* ("Title VII"), has already been adjudicated by a jury within the context of the New York State Human Rights Law, N.Y. Exec. Law § 296, *et seq.* ("NYSHRL"). The jury properly found that Mr. Zarda's sexual orientation was not a factor in his termination from Altitude Express, Inc. d/b/a "Skydive Long Island" ("Altitude Express"). Here, nothing has changed. Plaintiffs set forth no new factual allegations to change this outcome. No new evidence exists, nor can it: Mr. Zarda is deceased. Plaintiffs now seek to hold Mr. Maynard individually liable and as the alter ego of Altitude Express without regard to controlling precedent and statutory language, all of which confirms Title VII does not allow for individual liability, alter ego or otherwise.

Plaintiffs' remaining claims are similarly imperiled. Mr. Maynard was absolved of the charges of unlawful discrimination at trial. The subsequent decisions of the Second Circuit and the U.S. Supreme Court did not, in any way, alter the jury's verdict. The mere fact that Mr. Maynard's

name remained in the caption is not, standing alone, a proper basis for claiming his liability for costs. Moreover, Plaintiffs' claims grounded in New York's Business Corporation Law § 1006 and New York's Uniform Voidable Transactions Act have no application here. In any event, they are plead in conclusory fashion, merely restating the elements of a cause of action. They, too, are improper grounds for the relief Plaintiffs now seek.

II. BRIEF STATEMENT OF PROCEDURAL HISTORY

A. Prior District Court Proceedings

On September 23, 2010, Donald Zarda commenced this action by the filing of his original Complaint [ECF Doc. No. 1]. In the original Complaint, Mr. Zarda set forth four (4) causes of action against Altitude Express and Mr. Maynard: (1) unlawful discrimination based on nonconforming gender stereotypes in violation of Title VII; (2) unlawful discrimination premised on sexual orientation discrimination in violation of the NYSHRL; (3) overtime and minimum wage violations in contravention of the Fair Labor Standards Act, 29 U.S.C.S. § 201, *et seq*. ("FLSA"); and (4) overtime violations in contravention of the New York Labor Law, N.Y. Lab Law §§ 650 *et seq.* ("NYLL")[ECF Doc. No. 1]. Altitude Express and Mr. Maynard filed their responsive pleading on January 10, 2011 [ECF Doc. No. 13].

On March 11, 2011, Mr. Zarda filed hist First Amended Complaint against Altitude Express and Mr. Maynard [ECF Doc. No. 28]. This pleading alleged six (6) causes of action against Altitude Express and Mr. Maynard: (1) unlawful discrimination based on nonconforming gender stereotypes in violation of Title VII; (2) unlawful discrimination premised on sexual orientation in violation of the NYSHRL; (3) unlawful discrimination premised on gender in violation of the NYSHRL; (4) overtime and minimum wage violations in contravention of the FLSA; (5) overtime

violations in contravention of the NYLL; and (6) minimum wage violations in contravention of the NYLL [ECF Doc. No. 28].

On February 11, 2013, Altitude Express and Mr. Maynard moved for summary judgment, seeking the dismissal of each of Mr. Zarda's then-pending claims [ECF Doc. Nos. 109-111]. On April 8, 2013, Mr. Zarda filed his opposition to the dispositive motion [ECF Doc. Nos. 126-128]. On April 9, 2013, Mr. Zarda also moved for summary judgment on the issues of liability under his claims for sexual orientation discrimination and minimum wage violations [ECF Doc. Nos. 132].

On March 28, 2014, this Court (Bianco, J.) determined there existed a genuine dispute of material fact regarding the reasons for Mr. Zarda's termination and concluded that Mr. Zarda was entitled to a trial with respect to only his state-law cause of action. [ECF Doc. Nos. 145, 150]. However, Mr. Zarda's Title VII claim was properly dismissed because he failed to establish a *prima facie* case of gender stereotyping discrimination under Title VII. *See* [ECF Doc. No. 150, at 4:1-24].

On March 28, 2014, Mr. Zarda filed his Second Amended Complaint pursuant to the Court's March 28, 2014 Order [ECF Doc. No. 146]. This pleading alleged four (4) causes of action against Altitude Express and Mr. Maynard: (1) unlawful discrimination based on nonconforming gender stereotypes in violation of Title VII; (2) unlawful discrimination premised on sexual orientation in violation of the NYSHRL; (3) unlawful discrimination based on nonconforming gender stereotypes in violation of the NYSHRL; and (4) minimum wage violations in violation of the NYLL [ECF Doc. No. 146]. *See also* Zabell Decl. at Exhibit "A".

On October 6, 2014, a Suggestion of Death was filed concerning Mr. Zarda [ECF Doc. No. 173]. On October 7, 2014, Mr. Zarda's counsel confirmed Mr. Zarda's death as the result of a

base-jumping accident in Switzerland [ECF Doc. No. 174]. On December 3, 2014, the current Plaintiffs were substituted in place of Mr. Zarda [ECF Doc. No. 180].

Between October 13 and 21, 2015, all facts forming the basis of Mr. Zarda's sexual orientation claim against Altitude Express and Mr. Maynard were tried before a jury of his peers within the context of the NYSHRL [ECF Doc. Nos. 231-32, 236-38, 243]. Upon the completion of a fair and proper trial, on October 26, 2015, a jury found Mr. Zarda failed to prove, by a preponderance of the evidence, that his sexual orientation was a factor in the termination of his employment at Altitude Express [ECF Doc. No. 246]. *See also* Zabell Decl. at Exhibit "B". On October 28, 2015, Judgement was entered, with Plaintiffs taking nothing of Altitude Express or Mr. Maynard, and the action dismissed on the merits [ECF Doc. No. 247]. *See also* Zabell Decl. at Exhibit "C".

On November 20, 2015, Plaintiffs appealed from the Judgment [ECF Doc. No. 252].

B. The Appellate Proceedings

On April 18, 2017, a unanimous panel of the Second Circuit affirmed, *inter alia*, the District Court's holding in regard to Zarda's Title VII claim. *See Zarda v. Altitude Express*, 855 F.3d 76, 79 (2d Cir. 2017). Importantly, the *per curium* panel noted that Plaintiffs failed to establish the requisite proximity between Mr. Zarda's termination and his failure to conform to gender stereotypes. This determination was not challenged on appeal. The panel also found that Plaintiffs could receive a new trial only if Title VII's prohibition on sex discrimination encompassed discrimination based on sexual orientation – a result foreclosed at the time by *Simonton v. Runyon*, 232 F.3d 33, 34 (2d Cir. 2000) and its progeny. *Zarda*, 855 F.3d at 82.

On May 2, 2017, Plaintiffs petitioned the Second Circuit for a rehearing *en banc*, which was granted by a majority of the active judges of the Circuit Court. *See Zarda v. Altitude Express,*

Inc., 883 F.3d 100, 107 (2d Cir. 2018). On February 26, 2018, the *en banc* decision of the Second Circuit vacated the District Court's judgment on Plaintiffs' Title VII claim, remanded the case for further proceedings, and otherwise affirming the judgment in all other respects. *Id.* at 107.

On May 14, 2018, Plaintiffs' were awarded appellate costs in the amount of $3,693.80. *See* Zabell Decl. at Exhibit "D".

On May 29, 2018, Altitude Express filed a petition for writ of certiorari before the U.S. Supreme Court, which was granted on April 22, 2019. *See Altitude Express, Inc. v. Zarda*, 139 S. Ct. 1599 (2019). The case was consolidated with *R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC*, 139 S. Ct. 1599 (2019) and *Bostock v. Clayton County*, 139 S. Ct. 1599 (2019). The cases were argued before the Court on October 8, 2019 and decided on June 15, 2020. *See Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). Pertinent here, the Court affirmed the Second Circuit's February 26, 2018 decision.

On August 6, 2020, Plaintiffs (as Respondents) were awarded costs for printing of the record in the amount of $2,530.50. *See* Zabell Decl. at Exhibit "E".

C. The Instant Proceedings

On December 28, 2020, Plaintiffs filed their instant Second Amended Complaint [ECF Doc. No. 280]. This pleading alleges four (4) causes of action against *only* Mr. Maynard in his individual capacity and as the alleged "predecessor in interest", the sole shareholder, and alter ego of Altitude Express: (1) unlawful discrimination premised on sex in violation of Title VII; (2) collection of costs awarded to Plaintiffs'; (3) alter ego liability pursuant to New York's Business Corporation Law ("BCL") § 1006(b); and (4) the alleged fraudulent or voidable transfer pursuant to the New York Voidable Transfer Act [ECF Doc. No. 280]. *See* Zabell Decl. at Exhibit "F".

III. STANDARD OF REVIEW

The standard of review on a motion made pursuant to Fed. R. Civ. P. 12(b)(6) is that a plaintiff plead sufficient facts "to state a claim for relief that is plausible on its face." *Wolo Mfg. Corp. v. ABC Corp.*, 349 F. Supp. 3d 176, 199-201 (E.D.N.Y. 2018) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)). "[W]here the well-pleaded facts do not permit the court to infer more than the mere possibility of misconduct, the complaint has alleged – but it has not 'show[n]' – 'that the pleader is entitled to relief.'" *Id.* (quoting *FCC v. Fox TV Stations, Inc.*, 556 U.S. 502, 679 (2009)) (brackets in original)). "Determining whether a complaint states a plausible claim for relief will[] … be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense." *Id.*

"A pleading that offers 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action will not do.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555, 127 S. Ct. 1955 (2007)). "Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 557 (2007)). "Factual allegations must be enough to raise a right to relief above the speculative level, on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007).

The Court must liberally construe the claims, accept all factual allegations in the complaint as true, and draw all reasonable inferences in favor of the plaintiff when deciding a motion pursuant to Fed. R. Civ. P. 12(b)(6). *See Kim v. Kimm*, 884 F.3d 98, 102-03 (2d Cir. 2018); *Elias v. Rolling Stone L.L.C.*, 872 F.3d 97, 104 (2d Cir. 2017). However, "[t]hreadbare recitals of the elements of

a cause of action, supported by mere conclusory statements, do not suffice." *Ashcroft*, 556 U.S. at 678. "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Starr v. Sony BMG Music Ent.*, 592 F.3d 314, 321 (2d Cir. 2010) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 666 (2009)). Moreover, "[a] litigant cannot merely plop 'upon information and belief' in front of a conclusory allegation and thereby render it non-conclusory. Those magic words will only make otherwise unsupported claims plausible when 'the facts are peculiarly within the possession and control of the defendant or where the belief is based on factual information that makes the inference of culpability plausible.'" *Citizens United v. Schneiderman*, 882 F.3d 374, 384-85 (2d Cir. 2018) (quoting *Arista Records L.L.C. v. Doe*, 604 F.3d 110, 120 (2d Cir. 2010)).

Fundamentally, "[t]he court's function on a Rule 12(b)(6) motion is not to weigh the evidence that might be presented at a trial but merely to determine whether the complaint itself is legally sufficient." *Holloway v. King*, 161 F. App'x 122, 124 (2d Cir. 2005) (quoting *Goldman v. Belden*, 754 F.2d 1059, 1067 (2d Cir. 1985)).

Here, Plaintiffs present no cognizable legal theory sufficient to survive the instant motion. The only federal claim Plaintiffs allege is grounded in Title VII. This claim, however, is fatally flawed. As is discussed, *infra*, that statue provides no individual liability.

Further, the Second Circuit instructs that "absent exceptional circumstances," where federal claims can be disposed of pursuant to Fed. R. Civ. P. 12(b)(6) or summary judgment grounds, courts should "abstain from exercising pendent jurisdiction." *Walker v. Time Life Films, Inc.*, 784 F.2d 44, 53 (2d Cir. 1986), *cert. denied*, 476 U.S. 1159 (1986); *see also Klein & Co. Futures, Inc. v. Bd. of Trade*, 464 F.3d 255, 262 (2d Cir. 2006) (where federal claims are eliminated in the early stages of litigation courts should generally decline to exercise supplemental jurisdiction

over remaining state claims) (citing *Kolari v. N.Y.-Presbyterian Hosp.*, 455 F.3d 118, 122 (2d Cir. 2006)).

Since Plaintiffs cannot support their federal claim seeking to impose liability upon Mr. Maynard – individually or otherwise – we respectfully submit that this Court should also decline to exercise jurisdiction over Plaintiffs' claims based on New York State law. Should the Court see fit, however, to entertain Plaintiffs' state law claims, these causes of action, too, should be dismissed for the reasons addressed below.

IV. ARGUMENT

A. Plaintiffs' First Cause of Action arising under Title VII Should be Dismissed

As a threshold matter, Plaintiffs' claims of unlawful discrimination premised on Mr. Zarda's sexual orientation were already tried before a jury in the NYSHRL context. By a preponderance of the evidence, the jury found that Mr. Zarda's sexual orientation was not a factor in the termination of his employment at Altitude Express [ECF Doc. No. 246]. *See* Zabell Decl. at Exhibit "B". There exists no new evidence as concerns this claim. The record here is the same as the record from trial.

Claims brought under Title VII and the NYSHRL are analyzed and adjudged using the same standard. *See McGill v. Univ. of Rochester*, 600 F. App'x 789, 790 (2d Cir. 2015) (applying the same standard for analyzing discrimination claims under both Title VII and the NYSHRL); *Rojas v. Roman Catholic Diocese of Rochester*, 660 F.3d 98, 107 n.10 (2d Cir. 2011) ("[w]e have observed that 'claims brought under New York State's Human Rights Law are analytically identical to claims brought under Title VII") (quoting *Torres v. Pisano*, 116 F.3d 625, 629 n.1 (2d Cir. 1997)).

Again, these matters have already been fully briefed and decided upon in competing motions for summary judgment (*see* [ECF Doc. Nos. 109-111; 126-128; 132; 145; 150]), and tried before a jury, the verdict for which dismissed, on the merits, Plaintiffs' claims of unlawful discrimination against Mr. Maynard. [ECF Doc. No. 247]. *See also* Zabell Decl. at Exhibit "C". Since a jury has already found Mr. Maynard free from liability with respect to Mr. Zarda's NYSHRL claims of unlawful discrimination premised on his sexual orientation, Plaintiffs' instant claims based on identical evidence are thus both factually and legally insufficient to hold Mr. Maynard liable for the same under Title VII.

Indeed, Mr. Zarda's Second Amended Complaint (*see* Zabell Decl. at Exhibit "A") and Plaintiffs' instant Second Amended Complaint (*see id.* at Exhibit "F") are factually indistinguishable as concerns the claims of unlawful discrimination premised on gender or sexual orientation. For example, in each, Mr. Zarda is alleged to have been an openly gay man under the employ of Altitude Express and Mr. Maynard as a "Tandem and Accelerated Freefall Instructor." *Compare* [ECF Doc. No. 146, at ¶¶ 9, 25] *with* [ECF Doc. No. 280, at ¶¶ 34, 45, 48]. *See also* Zabell Decl. Exhibit "A", at ¶¶ 9, 25; Zabell Decl. Exhibit "F" at ¶¶ 34, 45, 48. Each opines of the "intimate experience" of a tandem skydive and the jokes supplied by instructors to clients to ease the tensions of the experience. *Compare* [ECF Doc. No. 146, at ¶¶ 17-22] *with* [ECF Doc. No. 280, at ¶¶ 38-44]. *See also* Zabell Decl. Exhibit "A", at ¶¶ 17-22; Zabell Decl. Exhibit "F" at ¶¶ 38-44. Each allege that a comment to a client concerning his sexual orientation was the factor or the motivating factor leading to the termination of Mr. Zarda's employment with Altitude Express. *Compare* [ECF Doc. No. 146, at ¶ 32] *with* [ECF Doc. No. 280, at ¶ 55]; *see also* Zabell Decl. Exhibit "A", at ¶ 32; Zabell Decl. Exhibit "F" at ¶ 55. Each also allege Mr. Maynard failed to properly investigate the customer complaint by seeking Mr. Zarda's version of events. *Compare*

[ECF Doc. No. 146, at ¶¶ 42, 44-45] *with* [ECF Doc. No. 280, at ¶¶ 64, 66-67]; *see also* Zabell Decl. Exhibit "A", at ¶¶ 42, 44-45; Zabell Decl. Exhibit "F" at ¶¶ 64, 66-67. Each also allege that Mr. Maynard used the customer complaint as a "pretext" for terminating Mr. Zarda. *Compare* [ECF Doc. No. 146, at ¶¶ 46, 50] *with* [ECF Doc. No. 280, at ¶¶ 64, 66, 72]; *see also* Zabell Decl. Exhibit "A", at ¶¶ 46, 50; Zabell Decl. Exhibit "F" at ¶¶ 64, 66, 72. Each also allege Mr. Maynard was "hostile to any expression of sexual orientation that did not conform to sex stereotypes." [ECF Doc. No. 146, at ¶¶ 26-31] *with* [ECF Doc. No. 280, at ¶¶ 49-54]; *see also* Zabell Decl. Exhibit "A", at ¶¶ ¶¶ 26-31; Zabell Decl. Exhibit "F" at ¶¶ 49-54.[1]

Plaintiffs cannot now, using the same allegations against the same established record, set forth factual content sufficient to allow this Court to draw a reasonable inference that Mr. Maynard is liable under Title VII when identical standards are applied to both the federal and state discrimination statutes and Plaintiffs' claims of unlawful discrimination already dismissed on their merits. *See McGill v. Univ. of Rochester*, 600 F. App'x 789, 790 (2d Cir. 2015). We therefore respectfully submit Plaintiffs' pending Title VII claim should be dismissed on these grounds alone.

Notwithstanding the above, Plaintiffs cannot establish individual or alter ego liability against Mr. Maynard on Title VII grounds. *See Tomka v. Seiler Corp.*, 66 F.3d 1295, 1317-19 (2d Cir. 1995) (holding "an employer's agent may not be held individually liable under Title VII" and that "[c]ourts which have held that there can be no individual liability under Title VII have

[1] Notably, the Court's March 28, 2014 Order (Bianco, J.) addressing the parties' respective motions for summary judgment dismissed Mr. Zarda's claim based upon unlawful gender stereotyping in violation of Title VII, holding in pertinent part:

> Having reviewed the evidence under the applicable standard I'm granting the motion for summary judgment on that claim because I find that the plaintiff has failed to meet even the *prima facie* burden, as minimal as it is, that the adverse action gave rise to an inference of discrimination based up gender stereotyping.

[ECF Doc. No. 150, at pp. 4-5].

uniformly failed to identify any rare and exceptional circumstances or other indicia making 'plain the intent of Congress that the letter of the statute is not to prevail"), *abrogated on other grounds by Burlington Indus. v. Ellerth*, 524 U.S. 742 (1998); *Mandell v. Cnty. of Suffolk & John Gallagher, 316* F.3d 368, 377 (2d Cir. 2003) ("under Title VII individual supervisors are not subject to liability"); *Patterson v. County of Oneida*, 375 F.3d 206, 221 (2d Cir. 2004) (affirming dismissal because "individuals are not subject to liability under Title VII") (citations omitted); *Tolbert v. Smith*, 790 F.3d 427, 434 n.3 (2d Cir. 2015) (Title VII does not allow for individual liability) (citing *Spiegel v. Schulmann*, 604 F.3d 72, 79 (2d Cir. 2010) (*per curiam*).

The lack of individual liability under Title VII applies with equal force to Plaintiffs' theory of alter ego liability.[2] Indeed, identical arguments in favor of alter ego liability have been squarely rejected by Courts within the Title VII context. *See Dearth v. Collins*, 441 F.3d 931, 933-34 (11th Cir. 2006) (finding, after discussing the statute, that the alter ego doctrine does not create an exception to the rule against individual employee liability in Title VII cases); *Worth v. Tyer*, 276 F.3d 249, 262 (7th Cir. 2001) (noting that Congress's intent in drafting Title VII would tend to negate alter ego liability for individuals); *Miner v. Town of Cheshire*, 126 F. Supp. 2d 184, 200 (D. Conn. 2000) (noting that district courts are increasingly disallowing official capacity claims against supervisors because [Tomka] and Title VII's language compel a holding that only employer-entities are liable under Title VII); *Lafferty v. Owens, Schine & Nicola, P.C.*, No. 3:09cv1045 (MRK), 2012 U.S. Dist. LEXIS 5276, at *32 (D. Conn. Jan. 18, 2012) ("[e]mploying the alter ego doctrine to accomplish the same result would undermine the purpose of the doctrine and constitute an end run around the Tomka decision").

[2] Although not expressly pled, we assume for purposes of the instant motion that Plaintiffs assert claims premised in Title VII against Mr. Maynard in his individual capacity and as the alter ego of Altitude Express.

Plaintiffs present no factual or legal theory sufficient to survive this Court's Fed. R. Civ. P. 12(b)(6) analysis. Mr. Zarda's claims arising from unlawful discrimination based upon gender and sexual orientation discrimination have, within the context of the NYSHRL, already been decided in Mr. Maynard's favor. The **identical** record cannot now lead to Plaintiffs' relief on Title VII grounds. Indeed, Title VII does not allow for Mr. Maynard to be held liable individually or as the alter ego of Altitude Express.

Accordingly, we respectfully submit this Court should dismiss Plaintiffs' First Cause of Action in its entirety and with prejudice. We further submit that since Plaintiffs' sole federal claim is factually and legally deficient, the Court should refrain from exercising pendent jurisdiction over their remaining claims.

B. Plaintiffs' Second Cause of Action Should be Dismissed

On October 26, 2015, a jury found Mr. Zarda's failed to prove, by a preponderance of the evidence, that his sexual orientation was a factor in the termination of his employment at Altitude Express [ECF Doc. No. 246]. *See also* Zabell Decl. at Exhibit "B". On October 28, 2015, Judgement was entered, with Plaintiffs taking nothing of Altitude Express or Mr. Maynard, and the action dismissed on the merits [ECF Doc. No. 247]. *See also* Zabell Decl. at Exhibit "C". Accordingly, Mr. Maynard was absolved of liability. This outcome was not altered by virtue the rulings made by first the Second Circuit (*see Zarda*, 883 F.3d 100) or the U.S. Supreme Court (*see Bostock*, 140 S. Ct. at 1734). Although these decisions overturned longstanding precedent concerning Title VII's inclusion of sexual orientation within that statute's definition of "sex", they did not reverse the jury's verdict concerning Mr. Maynard. Put differently, Mr. Maynard's involvement in this matter ended when: (1) a jury concluded, after considering testimony that a female patron was subjected to sexually abusive behavior from Mr. Zarda, that Mr. Zarda was

terminated for reasons other than workplace discrimination [ECF Doc. No. 246]; and (2) judgment was entered in Mr. Maynard's favor [ECF Doc. No. 247]. *See* Zabell Decl. at Exhibits "B" and "C".

However, using their "predecessor in interest" theory, Plaintiffs now seek to hold Mr. Maynard personally responsible for the costs associated with the appeals of this matter. First, as set forth in Section "IV.C", *supra*, Plaintiffs'' "predecessor in interest" theory is legally insufficient to hold Mr. Maynard responsible for the debts and liabilities of the corporate entity Altitude Express.

Second, it was Plaintiffs who appealed to the Second Circuit and Altitude Express who petitioned the U.S. Supreme Court. The mere fact that Mr. Maynard's name remained in the caption as a procedural formality is not, standing alone, a proper basis for claiming liability for the collection of costs. Indeed, Fed. R. App. P. 12(a) requires the Circuit Clerk, "[u]pon receiving the copy of the notice of appeal and the docket entries from the district clerk under Rule 3(d) … must docket the appeal **under the title of the district-court action** and must identify the appellant, adding the appellant's name if necessary." Fed. R. App. P. 12 (emphasis added). Similarly, Sup. Ct. R. 14(1)(b)(i) mandates that a writ of certiorari contain "[a] list of all parties to the proceeding in the court whose judgment is sought to be reviewed (unless the caption of the case contains the names of all the parties)."

Despite Plaintiffs' allegations, Mr. Maynard is not liable for the collection of costs "personally and as predecessor-interest" to Altitude Express [ECF Doc. No. 280, at ¶ 80]. *See also* Zabell Decl. Exhibit "F", at ¶ 80. Accordingly, we respectfully submit that Plaintiffs' Second Cause of Action be dismissed, in its entirety and with prejudice, inclusive of its attempt to recover "double costs" and undefined sanctions.

C. Plaintiffs'' Third Cause of Action arising under New York's Business Corporation Law § 1006 Should be Dismissed

Citing to New York's Business Corporation Law ("BCL") § 1006, Plaintiffs Third Cause of Action seeks to hold Mr. Maynard liable as the alter ego of Altitude Express [ECF Doc. No. 280, at ¶¶ 82-92]. *See* Zabell Decl. Exhibit "F" at ¶¶ 82-92]. BCL § 1006, entitled "[c]orporate action and survival of remedies after dissolution," provides:

> (a) A dissolved corporation, its directors, officers and shareholders may continue to function for the purpose of winding up the affairs of the corporation in the same manner as if the dissolution had not taken place, except as otherwise provided in this chapter or by court order. In particular, and without limiting the generality of the foregoing:
>
> (1) The directors of a dissolved corporation shall not be deemed to be trustees of its assets; title to such assets shall not vest in them, but shall remain in the corporation until transferred by it in its corporate name.
>
> (2) Dissolution shall not change quorum or voting requirements for the board or shareholders, or provisions regarding election, appointment, resignation or removal of, or filling vacancies among, directors or officers, or provisions regarding amendment or repeal of by-laws or adoption of new by-laws.
>
> (3) Shares may be transferred and determinations of shareholders for any purpose may be made without closing the record of shareholders until such time, if any, as such record may be closed, and either the board or the shareholders may close it.
>
> (4) The corporation may sue or be sued in all courts and participate in actions and proceedings, whether judicial, administrative, arbitrative or otherwise, in its corporate name, and process may be served by or upon it.
>
> (b) The dissolution of a corporation shall not affect any remedy available to or against such corporation, its directors, officers or shareholders for any right or claim existing or any liability incurred before such dissolution, except as provided in sections 1007 (Notice to creditors; filing or barring claims) or 1008

> (Jurisdiction of supreme court to supervise dissolution and liquidation).

N.Y. Bus. Corp. Law § 1006. This statute governs the procedure for non-judicial dissolution of a corporation. It does not, contrary to Plaintiffs' position, provide any independent or additional rights or remedies to creditors of a dissolved corporation. BCL § 1006 states only that dissolution of a corporation does not affect a creditor's rights or claims existing before such dissolution. Thus, to the extent that Plaintiffs' Third Cause of Action relies upon BCL § 1006, it should be dismissed as legally insufficient.

The content of Plaintiffs' pleadings, however, specifically request the Court "pierce the corporate veil" and hold Mr. Maynard liable as the "predecessor in interest for the former Altitude Express...." [ECF Doc. No. 280, at ¶¶ 83, 91]. *See also* Zabell Decl. Exhibit "F" at ¶¶ 83, 91.

First, Plaintiffs present no cognizable legal theory in support of their request for "predecessor in interest" liability. Mr. Maynard is not the "predecessor in interest" to Altitude Express. With this language, Plaintiffs attempt to redefine the definition of, and the standard for adjudging, "successor liability." Indeed, silent within each of the cases cited by Plaintiffs within the Second Amended Complaint are the factual underpinnings which Plaintiffs now attempt to force within the current circumstances. That is, the cases used in support by Plaintiffs – *Battino v. Cornelia Fifth Ave., L.L.C.*, 861 F. Supp. 2d 392 (S.D.N.Y. 2012); *Xue Ming Wang v. Abumi Sushi, Inc.*, 262 F. Supp. 3d 81 (S.D.N.Y. 2017) – do not concern a finding of successor liability as respects a selling party. This is precisely what Plaintiffs now attempt. The "predecessor in interest" theory which Plaintiffs argue is nonexistent. And for good reason: what Plaintiffs attempt to set forth, unsuccessfully, is a theory of traditional liability.

As set forth *infra*, Plaintiffs did not appeal the March 28, 2014 dismissal of Mr. Zarda's Title VII gender stereotyping claim. *See Zarda*, 855 F.3d at 82. Moreover, although the Second

Circuit's February 26, 2018 *en banc* decision vacated the District Court's judgment on Plaintiffs' Title VII claim, it affirmed the judgment in all other respects., inclusive of Plaintiffs' NYSHRL claims. *See Zarda*, 883 F.3d at 132. Put differently, even if, *arguendo*, "predecessor in interest" liability was cognizable, there is still no liability on the part of Altitude Express that that Mr. Maynard could be deemed to assume as the role of "predecessor."

Second, Plaintiffs fail to adequately plead facts to support their request to "pierce the corporate veil" and hold Mr. Maynard as the alter ego of Altitude Express. The New York Court of Appeals has described the doctrine of piercing the corporate veil as follows:

> The doctrine … is typically employed by a [claimant] seeking to go behind the corporate existence in order to circumvent the limited liability of the owners and to hold them liable for some underlying corporate obligation [citations omitted]. The concept is equitable in nature and assumes the corporation itself is liable for the obligation sough to be imposed [citation omitted]. Thus, an attempt of a [claimant] to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; rather it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners [citation omitted].

EED Holdings v. Palmer Johnson Acq. Corp., 387 F. Supp. 2d 265, 273-74 (S.D.N.Y. 2004) (brackets orginial) (quoting *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 (1993)).

"Generally, 'piercing the corporate veil requires a showing that: (1) the owners exercised complete domination of the corporation in respect to the transaction attacked; and (2) **that such domination was used to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury**.'" *Careccia v. MacRae*, No. 05-CV-1628 (ARR), 2005 U.S. Dist. LEXIS 48970, at *6 (E.D.N.Y. July 15, 2005) (quoting *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 141 (1993) (emphasis added)). The New York Court of Appeals has held that both of these elements must be established in order to justify application of the veil-piercing doctrine. *See TNS*

Holdings Inc. v. MKI Sec. Corp., 92 N.Y.2d 335, 339 (1998) ("[e]vidence of domination alone does not suffice without an additional showing that it led to inequity, fraud or malfeasance") (citing *Morris v. State Dep't of Taxation & Fin.*, 82 N.Y.2d 135, 140-41 (1993)). "This standard is 'very demanding' such that piercing the corporate veil 'is warranted only in extraordinary circumstances, and conclusory allegations of dominance and control will not suffice to defeat a motion to dismiss." *Graham v. HSBC Mtge. Corp.*, No. 18-CV-4196 (KMK), 2020 U.S. Dist. LEXIS 174435, at *22 (S.D.N.Y. Sep. 23, 2020) (citing *Capmark Fin. Grp. v. Goldman Sachs Credit Partners L.P.*, 491 B.R. 335, 347 (S.D.N.Y. 2013)) (citation and quotation marks omitted); *see also EED Holdings*, 387 F. Supp. 2d at 274 ("it is well established that purely conclusory allegations cannot suffice to state a claim based on veil-piercing …") (citations and quotation marks omitted). Consequently, "courts routinely dismiss alter ego claims pursuant to Fed. R. Civ. P. 12(b)(6)." *Hamlen v. Gateway Energy Servs. Corp.*, 2017 U.S. Dist. LEXIS 205799, at *25 (S.D.N.Y Dec. 8, 2017) (quoting *Key Items, Inc. v. Ultima Diamonds, Inc.*, No. 09-CV-3729 (HBP), 2010 U.S. Dist. LEXIS 84830, 2010 WL 3291582, at *10 (S.D.N.Y. Aug. 17, 2010)); *see also De Jesus v. Sears, Roebuck & Co.*, 87 F.3d 65, 70 (2d Cir. 1996) (dismissing alter ego claim where complaint was "devoid of any specific facts or circumstances supporting" plaintiff's conclusory allegations); *Two Kids from Queens, Inc. v. J&S Kidswear, Inc.*, No. 09-3690 (DRH) (AKT), 2010 U.S. Dist. LEXIS 10620, 2010 WL 475319, at *10 (E.D.N.Y. Feb. 8, 2010) (dismissing alter ego claim on the grounds that the "complaint fails to set forth facts, as opposed to legal conclusions to support its assertion of alter ego liability").

Plaintiffs offer no allegations to meet the above standard. Instead, as outlined below, Plaintiffs merely interpose conclusory allegations relevant to their veil-piercing request:

- "Between 2015 to approximately March 2017 (when it dissolved), Maynard worked for had been [*sic*] planning to sell Altitude Express. Indeed, Skydive

Long Island, Inc. ["S.D.L.I."], was incorporated in 2016, well before he dissolved Altitude Express. Since Altitude Express used the dba moniker 'Skydive Long Island,' there was a continuity of using the goodwill that the S.D.L.I. enjoyed, and the new and the old S.D.L.I. used it at the same time." Zabell Decl. Exhibit "F", at ¶ 3;

- "These intentions were never made known to the Plaintiff, who found out by happenstance. Indeed, Maynard could well have turned over the rights reigns [*sic*] to the New Skydive Long Island and was just waiting as long as he could until the lawsuit was over." *Id.* at ¶ 4;

- "Defendant Ray Maynard was the Chief Executive Officer of Skydive Long Island and its sole shareholder, as outlined in its corporate documents." *Id.* at ¶ 14;

- "Maynard sold the goodwill and name (and perhaps more) to an entity known as Sky Dive Long Island, Inc., which – although S.D.L.I. was the name Altitude Express did business as – incorporated before Altitude Express dissolved." *Id.* at ¶ 15;

- "In the contract of sale – as reported to plaintiffs after an in-camera review – S.D.L.I., Inc. bought the entity but disclaimed liability for any pending civil litigation on account of Altitude Express." *Id.* at ¶ 16;

- "Maynard, who sold and benefitted from the sale, is the only possible defendant in interest (or more appropriately, predecessor in interest) to the original defendant. The law does not allow an employer to divest itself from liability by selling a business, profiting from the exchange, receiving some consideration – and leaving a civil-rights plaintiff without a remedy." *Id.* at ¶ 17;

- "However, although there was a continuity of operations between the former Altitude Express and S.D.L.I., the sole predecessor in interest is Raymond Maynard. He can pay his former corporation's debts as the sole shareholder of a defunct corporation which he dissolved." *Id.* at ¶ 19;

- Here it is almost certain to these plaintiffs that S.D.L.I. knew about this lawsuit, and that is why it expressly disclaimed liability for it in the sales contract. *Id.* at ¶ 22;

- "Furthermore, under New York law, an aggrieved party can still seek to impose liability on an individual associated with the successor entity under a corporate veil-piercing theory, whereby plaintiffs must establish: (i) that the owner exercised complete domination over the corporation for the transaction at issue; and (ii) that Maynard used this power to commit a fraud or wrong that injured the party seeking to pierce the veil.'" *Id.* at ¶ 25;

- "Such fraud need not be actual; it may be constructive." *Id.* at ¶ 26;

- "Maynard planned this sale to time with the lawsuit and delayed the deal for that purpose. The case proceeded before the appeal, and Maynard and his and the [*sic*] counsel appeared in court as if there had been no corporate machinations behind the scenes." *Id.* at ¶ 27;

- "Maynard planned the sale before the trial on the state law claim in 2015. At or about that time, Maynard and his wife appeared on numerous local T.V. spots bidding 'farewell' to the community." *Id.* at ¶ 28;

- "Maynard, the sole decision-maker for the defunct Altitude Express, agreed to S.D.L.I.'s terms in signing the sale agreement." *Id.* at ¶ 29;

- "If S.D.L.I., Inc. is not the liable successor in interest, then liability logically devolves to Raymond Maynard as a matter of law." *Id.* at ¶ 30;

- "Maynard planned the sale during the litigation. He knew what he was doing and intended to disclaim liability by dissolving the corporation." *Id.* at ¶ 31;

- "Here, as alleged above, Raymond Maynard was the sole shareholder and C.E.O. of Altitude Express." *Id.* at ¶ 86;

- "There were no other corporate officers, and other niceties of the corporate form were not always followed upon information and belief." *Id.* at ¶ 87;

- "Significantly, before the new S.D.L.I. acquired Altitude Express, both of them were using the moniker 'Skydive Long Island' at the same time – one as an official corporate name and the other as the name Altitude Express did business as." *Id.* at ¶ 88;

- "Maynard alone had the power to allow a prospective purchaser (or anyone) to use his corporation's dba, which shows a manifest disregard for the corporate form." *Id.* at ¶ 89;

- "As the former sole shareholder of Altitude Express, Maynard has sufficient assets to pay for this litigation, and the liability should not be imposed upon S.D.L.I., Inc. as a knee-jerk reaction as a matter of fundamental fairness." *Id.* at ¶ 90; and

- "Under New York law, Maynard (1) exercised complete domination of the corporation concerning the pre-sale and sale; and (2) his power was used to commit a fraud or wrong against the plaintiffs – to confuse the issue of liability, to attempt to extinguish it on grounds other than the merits. It also prejudices Plaintiffs insofar as collecting the modest costs awarded in their favor." *Id.* at ¶ 91.

Even assuming, *arguendo*, that Plaintiffs sufficiently allege Mr. Maynard's level of control as the sole shareholder of Altitude Express – which they do not, since their substantive allegations in this respect are made upon information and belief (*see* Zabell Decl. Exhibit "F". at ¶ 87) – they still fail to offer additional factual background sufficient to meet the second prong of the analysis: that Mr. Maynard used his control "to commit a fraud or wrong against the plaintiff which resulted in plaintiff's injury.'" We respectfully submit that the timing of the underlying proceedings and the sale of Altitude Express defeat any finding necessary to pierce the proverbial veil.

On October 26, 2015, a jury found that Plaintiffs failed to prove that Mr. Zarda's sexual orientation was a factor in the termination of his employment at Altitude Express [ECF Doc. No. 246]. *See also* Zabell Decl. at Exhibit "B". On October 28, 2015, Judgement was entered further memorializing this verdict, with Plaintiffs taking nothing of Altitude Express or Mr. Maynard, and the action was dismissed on the merits [ECF Doc. No. 247]. *See* Zabell Decl. at Exhibit "C".

On April 20, 2016, nearly six (6) months after being cleared of Plaintiffs' civil charges, Mr. Maynard entered into the Purchase and Sale Agreement of Altitude Express.[3] And, on April 18, 2017, a unanimous panel of the Second Circuit affirmed, *inter alia*, the District Court's holding in regard to Zarda's Title VII claim. *See Zarda v. Altitude Express*, 855 F.3d 76, 79 (2d Cir. 2017). Put differently, the sale was affected only after a jury returned a verdict in favor of Altitude Express and Mr. Maynard and approximately one (1) year before the Second Circuit affirmed that outcome. No fraud was perpetrated upon Plaintiffs in connection with this transaction, nor did they suffer any injury as a result of the sale. Indeed, the required "fraud or injustice" may not be established merely because the alleged corporation may now be judgment proof. *See Secured Sys. Tech. v. Frank Lill & Son, Inc., No.* 08-CV-6256, 2012 U.S. Dist. LEXIS 141845, at *14 (W.D.N.Y. Oct.

[3] Copies of the referenced Purchase and Sale Agreement were submitted to Your Honor under seal for an *in camera* inspection on November 13, 2020.

1, 2012) (citation omitted); *see also Trevino v. Merscorp, Inc.*, 583 F. Supp. 2d 521, 530 (D. Del. 2008) ("Delaware courts have held that the possibility that a plaintiff may have difficulty enforcing a judgment is not an injustice warranting piercing the corporate veil").

Accordingly, Plaintiffs have failed to adequately allege facts sufficient to disregard the corporate entity and hold Mr. Maynard liable in place of Altitude Express. Plaintiffs' Third Cause of Action should be dismissed, in its entirety, and with prejudice.

D. Plaintiffs' Fourth Cause of Action Should be Dismissed

Sections 270(c) through (f) of New York's Uniform Voidable Transactions Act provides the following relevant definitions:

> (c) "Claim" … means a right to payment, whether or not the right is reduced to judgment, liquidated, unliquidated, fixed, contingent, matured, unmatured, disputed, undisputed, legal, equitable, secured or unsecured.
>
> (d) "Creditor" means a person that has a claim.
>
> (e) "Debt" means liability on a claim.
>
> (f) "Debtor" means a person that is liable on a claim.

2019 N.Y. ALS 580, 2019 N.Y. Laws 580, 2019 N.Y. Ch. 580, 2019 N.Y. AB 562.

Under the construction of this statute, Plaintiffs are not a "creditor". They were in no manner whatsoever parties to the Purchase and Sale Agreement between the former Altitude Express and Mr. Maynard and its successor. Plaintiffs do not have standing to assert a claim to void the sale, a fact Plaintiffs allude to within the pleadings. *See* Zabell Decl. Exhibit "F", at ¶ 96 ("[u]nder New York Law, a transfer made by a debtor (here Maynard, who is an actual debtor and a putative debtor" is voidable as to a creditor (here S.D.L.I., Inc.) …"). Moreover, Plaintiffs merely insert the statutory language while attempting, through rank speculation and "upon information and belief", to shoehorn themselves into a claim to recover on the sale of Altitude Express. Put

differently, Plaintiffs fail to plead sufficient facts "to state a claim for relief that is plausible on its face." *Wolo Mfg. Corp.*, 349 F. Supp. 3d at 199-201 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007)). In any event, the statute of limitations for a claim under the New York's Uniform Voidable Transactions Act in four (4) years. *See* 2019 N.Y. ALS 580, 2019 N.Y. Laws 580, 2019 N.Y. Ch. 580, 2019 N.Y. AB 5622. The sale of Altitude Express was effectuated on April 20, 2016, and the subject Second Amended Complaint filed on December 28, 2020. Even if Plaintiffs pled a cognizable cause of action, they did so beyond the expiration of the application limitations period.

Accordingly, we respectfully submit that Plaintiffs' Fourth Cause of Action should be dismissed, in its entirety, and with prejudice.

V. CONCLUSION

Absent legitimate ground by which to advance their claims, it would appear Plaintiffs' counsel seeks to capitalize upon the perceived momentum of the 2020 U.S. Supreme Court decision as a means by which to legitimize his arguments. However, the Court's holding in *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020) has no true impact on Plaintiffs' pending claims.

Plaintiffs have failed, in any meaningful sense, to submit valid claims sufficient to garner the relief they request. For the foregoing reasons, we respectfully submit that Plaintiffs' subject Second Amended Complaint should be dismissed, it its entirety and with prejudice, together with such other relief as the Court deems just, proper, and equitable.

Dated: January 29, 2021
Bohemia, New York

Respectfully Submitted,

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Raymond Maynard

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

MELISSA ZARDA and WILLIAM MOORE, co-independent executors second of the estate of DONALD ZARDA

10-CV-04334 (SJF) (AYS)

Plaintiffs,

- against –

RAYMOND MAYNARD as the predecessor in interest, the sole shareholder and alter ego to ALTITUDE EXPRESS, INC., and RAYMOND MAYNARD, individually,

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

DECLARATION OF SAUL D. ZABELL, ESQ., IN SUPPORT OF RAYMOND MAYNARD'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT PURSUANT TO FED. R. CIV. P. 12(B)(6)

Saul D. Zabell, Esq., declares under penalty of perjury and in accordance with 28 U.S.C. § 1746, as follows:

1. I am the managing principal of Zabell & Collotta, P.C., counsel for Defendant, Raymond Maynard, in the above-captioned action. I am familiar with the facts and circumstances set forth herein based upon the file maintained by this office.
2. I submit this Declaration in support of Mr. Maynard's pending application, made pursuant to Federal Rules of Civil Procedure ("Fed. R. Civ. P.") Rule 12(b)(6), which seeks dismissal, with prejudice, of all claims pending against him contained in the Second Amended Complaint [ECF Doc. No. 280], interposed by Plaintiffs Melissa Zarda and William Moore, co-independent executors of the estate of Donald Zarda ("Plaintiffs").

3. I further submit this Declaration to introduce certain exhibits referenced within Plaintiff's opposition.

4. Annexed hereto as Exhibit "A" is a true and accurate copy of Mr. Zarda's Second Amended Complaint, dated and filed March 28, 2014 [ECF Doc. No. 146].

5. Annexed hereto as Exhibit "B" is a true and accurate copy of the jury verdict sheet of this action, dated and filed October 21, 2015 [ECF Doc. No. 246].

6. Annexed hereto as Exhibit "C" is a true and accurate copy of the prior Judgment of this action, dated and filed by the Clerk of the Court on October 28, 2015 [ECF Doc. No. 247].

7. Annexed hereto as Exhibit "D" is a true and accurate copy of the Second Circuits' Statement of Costs, dated May 14, 2018 [App. Doc. No. 535].

8. Annexed hereto as Exhibit "E" is a true and accurate copy of the Second Amended Judgment of the U.S. Supreme Court, dated August 6, 2020 [App Doc. No. 553].

9. Annexed hereto as Exhibit "F" is a true and accurate copy of Plaintiffs' Second Amended Complaint, dated December 16, 2020 and filed December 28, 2020 [ECF Doc. No. 280].

10. For the reasons set forth more fully in the accompanying Memorandum of Law, it is respectfully submitted that Plaintiffs' Second Amended Complaint [ECF Doc. No. 280] be dismissed, with prejudice, in its entirety.

Dated: January 29, 2021
Bohemia, New York

Respectfully Submitted,

ZABELL & COLLOTTA, P.C.
Attorneys for Defendant Raymond Maynard

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EXHIBIT A

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

DONALD ZARDA,

Plaintiff,

-against-

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

Defendants.

----------X

SECOND AMENDED COMPLAINT

10-cv-04334-JFB

JURY TRIAL DEMANDED

Plaintiff hereby alleges upon personal knowledge and information and belief as follows:

NATURE OF THIS ACTION

1. This action is brought by Plaintiff, a gay man, to recover damages for Defendants' discriminatory and otherwise illegal conduct in, among other things, discharging him because of a homophobic customer.

THE PARTIES

2. Plaintiff at the time of the filing of this complaint was a citizen of the State of Missouri and is currently a citizen of the State of Texas. The amount in controversy concerning the dispute - including merely those claims that survived summary judgment - exceeds $75,000.

3. Defendants Altitude Express, Inc., operating as "Skydive Long Island" in Calverton, New York is a corporation organized under the laws of the State of New York, located in Suffolk County, and operates as a "drop zone," i.e., a place where individuals can come to Skydive under the close supervision of experienced Skydive instructors.

4. Defendant Ray Maynard is the Chief Executive Officer of Skydive Long Island and, upon information and belief, its sole shareholder. Upon information and belief he is a citizen of New York.

5. Plaintiff is an experienced Tandem and Freefall (i.e., Skydive) instructor, who was an employee at Skydive Long Island for various summers in the last decade until his termination in July 2010.

JURISDICTION AND VENUE

6. Jurisdiction is proper pursuant to 28 U.S.C. § 1331 in that this action arises under the Constitution and laws of the United States, among them Title VII of the Civil Rights Act of 1964 as amended and the Fair Labor Standards Act. Jurisdiction is also independently predicated on diversity of citizenship.

7. Venue is properly placed in this district pursuant to 28 U.S.C. § 1391(c) in that Defendants Skydive Long Island is deemed to reside in this judicial district.

FACTUAL ALLEGATIONS UNDERLYING PLAINTIFF'S CLAIMS

8. Plaintiff repeats and realleges the allegations set forth in all previous paragraphs as if fully set forth herein.

9. Plaintiff was employed at Altitude Express, Inc., dba Skydive Long Island (hereinafter "Skydive Long Island") as a Tandem & Accelerated Freefall Instructor in the summers of 2001, 2009 and 2010. Altitude Express has approximately 20-30 employees.

10. Plaintiff is has been a licensed instructor in this field since 1995. He has participated in 3500 jumps over the course of his distinguished career.

11. He worked for the defendants in the summers of 2001, 2009 and 2010. Skydiving is a seasonal sport and defendants operate mostly in the warmer weather, although not exclusively so.

12. While employed by Skydive Long Island, plaintiff was expected to be at work, seven days a week, until released.

13. The hours of operation were either 7:30 AM to sunset or 9:30 AM to sunset.

14. Plaintiff was expected not to leave the premises in case a potential customer came, unless it was raining.

15. Although expected to be on the premises approximately twelve (or more) hours per day, plaintiff was only paid per jump.

16. Some days went by when he would be there all day and not make a dime, not even minimum wage for the hours he spent at work at his employer's insistence.

17. A skydive is a forcibly intimate experience, for the safety of the passenger. Novices who yearn for the thrill of a skydive cannot do so on their own, and thus the instructor must strap himself hip-to-hip and shoulder-to-shoulder with the client.

18. Because of this, before they dive, students at Skydive Long Island must sign a release that contains the following language:

> 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.

19. Before the client and the instructor jump out of the plane, the client is typically sitting on the instructor's lap. The experience is typically tense for a novice, who is about to jump out of the plane with a stranger strapped to him or her.

20. Notwithstanding the waiver, in order to break the ice and make the client more comfortable, instructors often make light of the intimate situation by making a joke about it.

21. For example, when a man is strapped to another man, plaintiff witnessed instructors saying something like, "I bet you didn't know you were going to be strapped so close to a man." Plaintiff also heard instructors state, in reference to a budge protruding from the equipment, "That's the straps you're feeling.".

22. On more than one occasion, plaintiff heard straight instructors say, jokingly, when strapped to male clients, "Don't worry, I'm a lesbian." Or, when a straight man was strapped to a straight man (especially when his girlfriend was present), the instructor might say, "Does you're girlfriend know that you're gay?"

23. This was an openly tolerated form of banter. Plaintiff, as an openly gay man was often the butt of jokes about his sexual orientation. He had mixed feelings about that, but was not troubled when sexual banter was a way of breaking the ice in a tense situation. On occasion, over the years, when he was tightly strapped to a woman he might say something like, "You don't have to worry about us being so close because I'm gay."

24. This was never a problem until one homophobic customer complained about it. On June 18, 2010, plaintiff was suspended for

making this remark to a woman whose name, upon information and belief, is Rosanna.

25. It was known at work that plaintiff is gay and he was open about it. Notwithstanding this, however, the terms and conditions of employment were not the same as compared between plaintiff and other similarly situated employees.

26. Ray Maynard was hostile to any expression of sexual orientation that did not conform to sex stereotypes. Plaintiff has a typically masculine demeanor, but as one example, he criticized plaintiff's wearing of the color pink at work. Women at the workplace were allowed to wear pink, and did without criticism.

27. On one occasion, for example, plaintiff broke his ankle and had to wear a cast. It so happened that the color of the cast plaintiff chose was pink. When Ray saw the pink cast for the first time he scoffed at it and said, "That looks gay!" Later, at a staff meeting he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to plaintiff's cast. It was not a joke.

28. Plaintiff's toenails were also painted pink, which at the time was plaintiff's preference. Women often wore open-toed sandals to work, as well as pink toenail polish.

29. Additionally, many other instructors were barefoot at the drop zone. When Ray saw plaintiff's pink toenail polish, however, he insisted that plaintiff wear a sock and cover up his foot.

30. Plaintiff would have begrudgingly tolerated these backwards attitudes towards men and their use of certain colors, had plaintiff not been fired for expressing to a customer that he was gay.

31. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including on videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video.[1] Men often talked of their sexual exploits, and Ray openly discussed his problematic marriage.

32. Plaintiff mentioning the fact that he is gay to a passenger, however, got him fired.

33. In his termination interview, Ray said that plaintiff was being fired because plaintiff had discussed his "personal escapades" outside of the office with a passenger (Rosanna).

34. This was completely untrue plaintiff merely stated he was gay.

35. Being gay is not an escapade; it is an immutable condition.

[1] Customers who hired Altitude were referred to as "passengers."

36. All of the men at Altitude made light of the intimate nature of being strapped to a member of the opposite sex. Plaintiff was fired, however, because the levity he used honestly referred to his sexual orientation and did not conform to the straight male macho stereotype.

37. Mentioning one's sexual orientation is as much a protected activity as mentioning to someone that one is Catholic, Scottish, or Hispanic.

38. Ray made another statement in defense of his termination of plaintiff, including that plaintiff had allegedly touched Rosanna inappropriately, but he knew this to be a lie, as plaintiff is gay and Rosanna would have to be touched in order to protect her life.

39. Later, although he could have used the "touching" as a basis to get plaintiff's unemployment benefits denied, he did not and merely alleged that plaintiff should not get unemployment because he provided information of a "personal nature," or words to that effect, to Rosanna.

40. The "personal information" revealed was that plaintiff is gay; Maynard argued to the Unemployment Division that this was "misconduct" that should disqualify plaintiff from benefits.

41. Unemployment disagreed and plaintiff was awarded benefits. Neither Maynard nor Unemployment mentioned anything in connection

with the alleged touching, either because it did not happen or, in the alternative, even Maynard did not believe it.

42. It is unknown to plaintiff what Rosanna said before this complaint arose, but she did not complain to Maynard, merely said something to her boyfriend, who relayed it to Maynard, who immediately suspended plaintiff and docked his pay because he refunded the boyfriend's money.

43. The fact that Rosanna would simultaneously complain that plaintiff was gay *and* that he touched her inappropriately underscores the facially pretextual manner of this allegation, especially in light of the release that all passengers must sign, acknowledging that they will be in close bodily contact with instructors, and especially since plaintiff was regarded as an excellent skydive instructor, even by Maynard.

44. Maynard, however, did not even investigate Rosanna's allegations by inquiring of plaintiff's side of the story. He did not question plaintiff about the allegations – again, assuming she made them – but decided to accept them as true because, after all, she was a woman, and therefore would give Maynard cover for firing plaintiff since a woman, in general, would be more likely to be believed in the context of a complaint about inappropriate touching by a man.

45. Even though there was a videotape of the jump that showed no inappropriate touching, Maynard dismissed said evidence and purposely lost custody of the tape so that plaintiff could not use it in his defense.

46. In all, the allegation of touching, if it were even made by Rosanna, was a false pretext for plaintiff's termination, which happened because of one homophobic customer's complaint about being near a gay person and of because of plaintiff's failure to conform to stereotypical gender roles for men.

47. Maynard knew that plaintiff is a homosexual and would have no motive to touch a female passenger in any manner other than to protect her safety in accordance with proper procedures.

48. Maynard knew that Rosanna had signed a release wherein she knew she would in close bodily contact with an instructor.

49. Maynard's reaction to Rosanna's alleged complaint – without even as much as asking for plaintiff's side of the story -- is an instance of sex stereotyping, insofar as it validates a woman's complaint against a man whereas a man's complaint against a woman – gay or straight – would never have been accorded any credence in similar circumstances. Ray knew this, yet he was more than happy to use what he knew to be a

patently false touching complaint against a man as a pretext for firing for being – and saying – that plaintiff is gay.

50. In the alternative, if Maynard made up the allegation of touching, it was meant to bolster his justification for terminating plaintiff for stating he is gay. Maynard's invoking a sex stereotype – i.e., that a woman who complains of being touched by a man must be believed without investigation – in order to justify an unlawful termination is just as bad as if the sex stereotype originated in Rosanna's mind in order to give credence to her frivolous complaint about being told that someone is gay. Plaintiff now sues for relief.

FIRST CAUSE OF ACTION
DISCRIMINATION UNDER TITLE VII

51. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

52. Plaintiff was fired because his behavior did not conform to sex stereotypes and such actions were in violation of Title VII.

53. By virtue of the foregoing, Plaintiff has been damaged.

SECOND CAUSE OF ACTION
SEXUAL ORIENTATION DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

54. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

55. Plaintiff was fired because of his sexual orientation.

56. Such actions were in violation of the Executive Law of the State of New York.

57. By virtue of the foregoing, Plaintiff has been damaged.

THIRD CAUSE OF ACTION
GENDER DISCRIMINATION UNDER THE NEW YORK STATE HUMAN RIGHTS LAW

58. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

59. Plaintiff was fired because his behavior did not conform to sex stereotypes.

60. Such actions were in violation of the New York State Human Rights Law.

61. By virtue of the foregoing, Plaintiff has been damaged.

FOURTH CAUSE OF ACTION
VIOLATION OF THE NEW YORK MINIMUM WAGE LAW

62. Plaintiff repeats and realleges the allegations set forth in all previous allegations as if fully set forth herein.

63. At all material times herein Defendants failed to comply with, *inter alia*, NYLL **§** 663(1) and 12 NYCRR § 142-2.1 in that Plaintiff consistently worked for Defendants without being paid even a minimum wage for hours in which there were no paying customers.

64. Upon information and belief, Defendants were at all material times herein aware that minimum wage is mandatory.

65. Upon information and belief, Defendants' non-payment of minimum wages to Plaintiff was willful.

66. Based upon the foregoing, Defendants, for consistently violating New York's Labor Law and its implementing regulations are liable on Plaintiff's second cause of action in an amount to be determined at trial, plus a 100% statutory penalty and/or liquidated damages, attorney's fees and costs.

WHEREFORE, Plaintiff demands as follows:

A. Compensatory damages in excess of the jurisdictional amount required of this court;

B. Punitive damages;

C. Cost of suit and attorneys fees;

D. Liquidated damages;

E. Such other relief as the Court may deem just and proper.

Dated: New York, New York
March 28, 2014

/s/
GREGORY ANTOLLINO GA 5950
Attorney for Plaintiff
275 Seventh Avenue Suite 705
New York, NY 10001

EXHIBIT B

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

ESTATE OF DONALD ZARDA,

Plaintiff,

– against –

ALTITUDE EXPRESS INC., d/b/a SKYDIVE LONG ISLAND AND RAYMOND MAYNARD.

Defendants.

10-CV-04334 (JFB) (ARL)

PART I. LIABILITY

1. Did plaintiff prove, by a preponderance of the evidence, that Donald Zarda's sexual orientation was a determining factor in the termination of his employment at Altitude Express Inc., d/b/a Skydive Long Island in 2010?

Yes _____ No X

[If you answered "No" as to Question 1, then leave all the remaining questions blank, sign and date this verdict sheet, and inform the Courtroom Deputy that your deliberations are complete and that you have reached a verdict. Otherwise, proceed to Damages.]

PART II. DAMAGES

Lost Wages

2. State the amount, if any, that you award the plaintiff for lost wages (if you decide not to make an award as to this item, insert the word "None"):

$ _____

COURT EXHIBIT
3

Emotional Damages

3. State the amount, if any, that you award the plaintiff for emotional damages (if you decide not to make an award as to this item, insert the word "None"):

$ _____

Please sign and date the verdict sheet, and inform the Courtroom Deputy that your deliberations are complete and that you have reached a verdict.

Foreperson

Thomas Nyby

Dated: Central Islip, New York
October 21, 2015

3:30 PM

EXHIBIT C

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

----------X

ESTATE OF DONALD ZARDA,
Plaintiff

JUDGMENT IN A CIVIL CASE

-against-

Case Number: CV-10-4334

ALTITUDE EXPRESS INC., ET AL.
Defendants.
----------X

__X__ **Jury Verdict.** This action came before the Court for a trial by jury. The issues have been tried, and the jury has rendered its verdict.

____ **Decision by Court.** This action came to trial/hearing before the Court. The issues have been tried/heard, and a decision has been rendered.

IT IS ORDERED AND ADJUDGED that the plaintiff, estate of Donald Zarda, take nothing of the defendants, Altitude Express Inc. and Raymond Maynard, and that the action be dismissed on the merits.

Dated: Central Islip, New York
October 28, 2015

DOUGLAS C. PALMER
Clerk of Court

/S/
By: Michele Savona
Deputy Clerk

EXHIBIT D

UNITED STATES COURT OF APPEALS
FOR THE
SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals for the Second Circuit, held at the Thurgood Marshall United States Courthouse, 40 Foley Square, in the City of New York, on the 14th day of May, two thousand eighteen.

Melissa Zarda, co-independent executors of the estate of Donald Zarda, William Allen Moore,Jr, co-independent executor of the estate of Donald Zarda,

Plaintiffs - Appellants,

v.

Altitude Express, Inc, doing business as Skydive Long Island, Ray Maynard,

Defendants - Appellees.

STATEMENT OF COSTS

Docket No. 15-3775

IT IS HEREBY ORDERED that costs are taxed in favor of the Appellants in the amount of $3,693.80.

For the Court:

Catherine O'Hagan Wolfe,
Clerk of Court

A True Copy
Catherine O'Hagan Wolfe, Clerk
United States Court of Appeals, Second Circuit

EXHIBIT E

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 6, 2020

Clerk
United States Court of Appeals
for the Second Circuit
United States Courthouse
40 Foley Square
New York, NY 10007

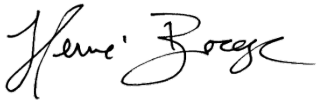
Re: Altitude Express, Inc., et al.
v. Melissa Zarda, et al.,
No. 17-1623 (Your docket No. 15-3775)

Dear Clerk:

Attached please find a certified copy of the **second amended** judgment of this Court in the above-entitled case.

Sincerely,

SCOTT S. HARRIS, Clerk

By 

Hervé Bocage
Judgments/Mandates Clerk

Enc.
cc: All counsel of record

Supreme Court of the United States
Office of the Clerk
Washington, DC 20543-0001

Scott S. Harris
Clerk of the Court
(202) 479-3011

August 6, 2020

Mr. Saul D. Zabell, Esq.
Zabell & Associates, P. C.
1 Corporate Drive, Suite 103
Bohemia, New York 11716

Re: Altitude Express, Inc., et al.
v. Melissa Zarda, et al.,
No. 17-1623

Dear Mr. Zabell:

Today, a certified copy of the **second amended** judgment of this Court in the above-entitled case was emailed to the Clerk of the United States Court of Appeals for the Second Circuit.

The respondents are given recovery of costs in this Court as follows:

Printing of record: $2,530.50

This amount may be recovered from the petitioners.

Sincerely,

SCOTT S. HARRIS, Clerk

By Herve' Bocage
Herve' Bocage
Judgments/Mandates Clerk

cc: All counsel of record
Clerk, USCA 2nd Cir.
(Your docket No. 15-3775)

AMENDED
8/6/2020

Supreme Court of the United States

No. 17-1623

ALTITUDE EXPRESS, INC., ET AL.,

Petitioners

v.

MELISSA ZARDA AND WILLIAM ALLEN MOORE, JR., CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

ON WRIT OF CERTIORARI to the United States Court of Appeals for the Second Circuit.

THIS CAUSE came on to be heard on the transcript of the record from the above court and was argued by counsel.

ON CONSIDERATION WHEREOF, it is ordered and adjudged by this Court that the judgment of the above court is affirmed with costs.

IT IS FURTHER ORDERED that the respondents Melissa Zarda and William Allen Moore, Jr., Co-Independent Executors of the Estate of Donald Zarda recover from Altitude Express, Inc., et al., Two Thousand Five Hundred and Thirty Dollars and Fifty Cents ($2,530.50) for costs herein expended.

June 15, 2020

Printing of record: $2,530.50

A True copy SCOTT S. HARRIS
Clerk of the Supreme Court of the United States

EXHIBIT F

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

MELISSA ZARDA AND WILLIAM MOORE, CO-INDEPENDENT EXECUTORS OF THE ESTATE OF DONALD ZARDA

Plaintiffs,

against

RAYMOND MAYNARD as the predecessor in interest, the sole shareholder and Alter Ego to ALTITUDE EXPRESS, Inc. & RAYMOND MAYNARD, individually.

Defendants.

SECOND AMENDED COMPLAINT

10-cv-04334 (SJF)(ARL)

JURY TRIAL DEMANDED

Plaintiffs (the executors of the Estate of Donald Zarda) now allege upon personal knowledge and information and belief as follows:

NATURE OF THE CASE AND PROCEDURAL HISTORY

1. This action was brought by now deceased Plaintiff, Donald Zarda, a gay man, to recover damages for Defendants' discriminatory conduct in discharging him because he told a customer he was gay. The termination was a violation under Title VII of the Civil Rights Act of 1964, as amended by 42 U.S.C. § 1981.

2. Plaintiff, before he died, filed a charge and complaint charge under Title VII. The district court dismissed the claim under Title based on Second

Circuit precedent (at the time). After his death, plaintiffs, who volunteered to substitute for Donald Zarda, appealed this issue and won after an en banc rehearing at the Second Circuit Court of Appeals.

3. Between 2015 to approximately March 2017 (when it dissolved), Maynard worked for had been planning to sell Altitude Express. Indeed, Skydive Long Island, Inc., was incorporated in 2016, well before he dissolved Altitude Express. Since Altitude Express used the dba moniker "Skydive Long Island," there was a continuity of using the goodwill that the S.D.L.I. enjoyed, and the new and the old S.D.L.I. used it at the same time.

4. These intentions were never made known to the Plaintiff, who found out by happenstance. Indeed, Maynard could well have turned over the rights reigns to the New Skydive Long Island and was just waiting as long as he could until the lawsuit was over.

5. But even as a former Officer and Sole Shareholder, Raymond Maynard and the now-defunct Altitude Express, Inc. petitioned for a Writ of Certiorari to the U.S. Supreme Court, which granted the petition in April 2019.

6. The decision speaks for itself, but it held, on June 15, 2020, that for an employer to consider sex – which includes a person's gender identity or sexual orientation – would be illegal under Title VII. This improper consideration would be unlawful whether the employer's focus was on the

employee's gender identity or sexual orientation, or whether the adverse taken was the "but for" cause of the termination or whether the information played a "motivating factor" in the decision.

7. Plaintiffs, having reopened the case, demand relief under Title VII as interpreted in *Bostock v. Clayton Cnty*., 140 S. Ct. 1731 (2020), which the Supreme Court consolidated with *Altitude Express v. Zarda*.

8. Though his purchasers disclaim liability for any pending lawsuits in the bill of sale, that is not necessarily the final answer. A court *could* hold Skydive Long Island liable under the "substantial continuity test." But because the question of the predecessor's ability to pay is a factor in determining successor liability, and since Maynard, as former C.E.O. and sole shareholder, can afford a judgment, plaintiffs choose not to shoehorn the new S.D.L.I. into this action – at least not based on what plaintiffs know now.

9. If Maynard pleads insolvency, that might change the inquiry. Without revealing details about Maynard's solvency, we choose not to lay it out publicly. If Maynard denies solvency, with what we know now plus additional discovery, plaintiffs can detail with specificity Maynard's ability to pay.

JURISDICTION AND VENUE

10. Jurisdiction is proper under 28 U.S.C. § 1331. This action arises under the Constitution and laws of the United States, including Title VII of the

Civil Rights Act of 1964 as amended. Ancillary claims arise under the same operative facts. Additionally, all parties are citizens of different states.

11. Venue is placed correctly in this district under 28 U.S.C. § 1391(b) in that a substantial portion of the acts or omissions occurred in this judicial district. Additionally, defendant Maynard resided in this judicial district at the time of the acts or omissions.

PLAINTIFFS

12. Plaintiff Melissa Zarda is a citizen of Kansas; William Moore and the Estate have domiciles in Texas. Donald Zarda was a citizen of the state of Missouri at the time he filed this lawsuit.

DEFENDANTS

13. Defendant Altitude Express, Inc. did business as "Skydive Long Island" in Calverton, New York. Maynard organized it under the State of New York laws. It operated as a "drop zone," i.e., a place where individuals went skydiving under the close supervision of experienced Skydive instructors. It was dissolved on or about March 16, 2016, though not before its predecessor in interest, starting using its corporate name "Skydive Long Island."

14. Defendant Ray Maynard was the Chief Executive Officer of Skydive Long Island and its sole shareholder, as outlined in its corporate documents.

15. Maynard sold the goodwill and name (and perhaps more) to an entity

known as Sky Dive Long Island, Inc., which – although S.D.L.I. was the name Altitude Express did business as – incorporated before Altitude Express dissolved.

16. In the contract of sale – as reported to plaintiffs after an in-camera review – S.D.L.I., Inc. bought the entity but disclaimed liability for any pending civil litigation on account of Altitude Express.

17. Maynard, who sold and benefitted from the sale, is the only possible defendant in interest (or more appropriately, predecessor in interest) to the original defendant. The law does not allow an employer to divest itself from liability by selling a business, profiting from the exchange, receiving some consideration – and leaving a civil-rights plaintiff without a remedy.

18. Indeed, in most situations, federal courts will apply the "substantial continuity test" as outlined in *Battino v. Cornelia Fifth Ave., L.L.C.*, 861 F. Supp. 2d 392, 404 (S.D.N.Y. 2012) and impose liability on the successor.

19. However, although there was a continuity of operations between the former Altitude Express and S.D.L.I., the sole predecessor in interest is Raymond Maynard. He can pay his former corporation's debts as the sole shareholder of a defunct corporation which he dissolved.

20. Furthermore, a court considering the imposition on the liability of a successor is whether the *predecessor* (Ray Maynard) can "provide adequate

relief directly, such that it would be unfair to place that obligation on the successor." Courts have also considered that "notice and the predecessor's ability to provide relief"— factors that collectively address whether successor liability would be equitable under any circumstances — and are "indispensable" to the inquiry, even if there are other factors. *Xue Ming Wang v. Abumi Sushi Inc.*, 262 F. Supp. 3d 81, 89-91 (S.D.N.Y. 2017) (collecting cases).

21. Here it is almost certain to these plaintiffs that S.D.L.I. knew about this lawsuit, and that is why it expressly disclaimed liability for it in the sales contract.

22. While a federal court might weigh the new corporation's in successor liability, it will never ignore its ability to pay.

23. Plaintiffs have done appropriate research into public records and have insight into Maynard's ability to pay a judgment.

24. Without going into detail to spare his privacy, Maynard can afford to pay a reasonable sum to resolve this lawsuit.

25. Furthermore, under New York law, an aggrieved party can still seek to impose liability on an individual associated with the successor entity under a corporate veil-piercing theory, whereby plaintiffs must establish: (i) that the owner exercised complete domination over the corporation for the transaction at

issue; and (ii) that Maynard used this power to commit a fraud or wrong that injured the party seeking to pierce the veil.'"

26. Such fraud need not be actual; it may be constructive.

27. Maynard planned this sale to time with the lawsuit and delayed the deal for that purpose. The case proceeded before the appeal, and Maynard and his and the counsel appeared in court as if there had been no corporate machinations behind the scenes.

28. Maynard planned the sale before the trial on the state law claim in 2015. At or about that time, Maynard and his wife appeared on numerous local T.V. spots bidding "farewell" to the community.

29. Maynard, the sole decision-maker for the defunct Altitude Express, agreed to S.D.L.I.'s terms in signing the sale agreement.

30. If S.D.L.I., Inc. is not the liable successor in interest, then liability logically devolves to Raymond Maynard as a matter of law.

31. Maynard planned the sale during the litigation. He knew what he was doing and intended to disclaim liability by dissolving the corporation.

UNDERLYING FACTS

32. Plaintiff repeats and realleges the allegations outlined in all previous paragraphs as if fully set forth herein.

33. Donald Zarda was an experienced Tandem and Freefall (i.e., Skydive)

instructor, and was an employee at Skydive Long Island for various summers in the last decade until his termination in July 2010.

34. Don worked at Altitude Express, Inc., dba Skydive Long Island (from now on "Skydive Long Island" or "S.D.L.I.") as a Tandem & Accelerated Freefall Instructor. His employment had initially been was in the summers of 2001, then in 2009 and 2010. Altitude Express has approximately 20-30 employees.

35. Plaintiff had been a licensed instructor in his field from 1995 until he died in 2014.

36. Don participated in approximately 3500 jumps throughout his distinguished career and never was a passenger injured in his care.

37. He worked for the Altitude Express in the summers of 2001, 2009, and 2010. Skydiving is a seasonal sport, and defendants operate mostly in the warmer weather, although not exclusively so.

38. A skydive is a forcibly intimate experience for the safety of the passenger. Novices who yearn for the thrill of a skydive cannot do so on their own; thus, the instructor must strap himself hip-to-hip and shoulder-to-shoulder with the client.

39. Because of this, before they dive, students at Skydive Long Island (or passengers, as they were known) must sign a release that contains the

following language:

> 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 know that the tandem master will attach my harness to his and 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.

40. Before the client and instructor jump leave the plane, the client sits on the instructor's lap. The tandem-skydiving experience is typically tense for a novice; she is about to jump out of a plane with a stranger strapped to her.

41. A person with no expectations or training might think nothing of the experience or think that it was so unusual as to be up to snuff.

42. Notwithstanding the waiver, to break the ice and make the client more comfortable, instructors often make light of the intimate situation by making a joke about it.

43. For example, when a man is strapped to another man, Plaintiff witnessed instructors saying something like, "I bet you didn't know you were going to be strapped so close to a man." Plaintiff also heard instructors state, about a bulge protruding from the equipment, "That's the straps you're feeling."

44. On more than one occasion, Plaintiff heard straight instructors say, jokingly, when strapped to male clients, "Don't worry, I'm a lesbian." For another example, a straight man is strapped to a straight man; his girlfriend is present, so the instructor might say something touching on teenage humor

such as, "Does your girlfriend know that you're gay?"

45. This was an openly tolerated form of banter, even if it bordered on the insensitive. Plaintiff, as an openly gay man, was often the butt of jokes about his sexual orientation. He had mixed feelings about that but was not troubled when sexual banter was a way of breaking the ice in a tense situation. On occasion, over the years, when tightly connected to a woman (whose boyfriend might be in tow), don might say something like, "You don't have to worry about us being so close because I'm gay."

46. This plan worked for him and was never a problem until one customer who wanted his money back – and got it – complained.

47. On June 18, 2010, Maynard suspended Plaintiff to so remark to a woman whose name is Rosanna.

48. Everyone at work knew that Plaintiff was gay, and he was open about it. Notwithstanding, however, employment terms and conditions were not the same compared between Plaintiff and other similarly situated instructors.

49. Ray Maynard was hostile to any expression of sexual orientation that did not conform to sex stereotypes. Plaintiff has a typically masculine demeanor, but as one example, he criticized Plaintiff's wearing of the color pink at work. Women at the workplace were allowed to wear pink and did without criticism.

50. On one occasion, for example, Plaintiff broke his ankle and had to wear a cast. It so happened that the color of the cast plaintiff chose was pink. When Ray saw the pink cast for the first time, he scoffed at it and said, "That looks gay!" Later, at a staff meeting, he said, "If you're going to remain here for the day, you're going to have to paint that black," pointing to Plaintiff's cast. It was not a joke.

51. Plaintiff also painted his toenails pink, which at the time was Plaintiff's preference. Women often wore open-toed sandals to work, as well as pink toenail polish.

52. Additionally, many other instructors were barefoot at the drop zone. When Ray saw Plaintiff's pink toenail polish, however, he insisted that Plaintiff wear a sock and cover up his foot.

53. The Plaintiff would have begrudgingly tolerated these backward attitudes towards men, and the use of manly colors was enforced, if not in policy, in practice.

54. Ray openly tolerated men discussing women and their physical attributes. Specifically, Ray and the men at the office would ogle at women's breasts, including videos that the company had procured for passengers who had hired the company for a joy ride skydive with an accompanying video. Men often talked of their sexual exploits, and Ray openly discussed his former problematic marriage. Richard Winstock, Maynard's second in

command, assuaged some passengers, mainly middle-aged women, by telling them, "Don't worry, I have a wife and kids, and I intend to go home to them tonight."

55. Plaintiff mentioning that he is gay to a passenger, however, got him fired – or at least the mention was a motivating factor in his termination.

56. In his termination interview, which Don recorded, Ray said that he was firing Plaintiff because Plaintiff had discussed his "personal escapades" outside of the office with passenger Rosanna.

57. All of the men at Altitude Express made light of the intimate nature of being strapped to a member of the opposite sex. Maynard fired Plaintiff, however, because the levity he used honestly referred to his sexual orientation – to extricate himself from a sexual joke imposed upon him – and did not conform to the straight male macho stereotype.

58. But mentioning one's sexual orientation is as much a protected activity as saying that one is Catholic, Scottish, or Hispanic.

59. Plaintiff stated he was gay – as immutable a characteristic as his German Ancestry– because the jokes in the plane suggested he was moving in on Rosanna, with her boyfriend present.

60. Ray also made other statements regarding Plaintiff's termination, including that Plaintiff had allegedly touched Rosanna inappropriately.

61. Rosanna never told this to Maynard, who did not investigate.

Maynard told Plaintiff that Rosanna had made such a statement about touching. But on the contrary, in a written objection to Plaintiff's request for unemployment benefits, a representative of Altitude Express did not mention the touching, but rather that Plaintiff had revealed "personal information" about himself to a customer.

62. The "personal information" revealed was that Plaintiff is gay; Maynard argued to the Unemployment Division that this was "misconduct" that should disqualify Plaintiff from benefits.

63. Unemployment disagreed, and the Plaintiff was awarded benefits. Neither Maynard nor the Labor Department mentioned anything connected with the alleged touching because it did not happen, was uninvestigated, or, more likely, Maynard did not believe it.

64. We will assume that Rosanna made this complaint of touching her boyfriend. Still, the fact that she would simultaneously complain that Plaintiff stated he was gay *and* that he touched her inappropriately underscores the facially pretextual manner of the reason for Plaintiff's termination – they seem inconsistent. Why would a gay guy have a desire to feel up a woman?

65. The idea that a gay man would do anything sexually inappropriate is a common – if antiquated – stereotype to which gay men are subject. And, in

this case, not only was Don gay, and not only did his job require close contact for safety, But the release that all passengers must sign, acknowledge that they will be in close bodily contact with instructors.

66. However, Maynard did not even investigate Rosanna's allegations by inquiring of Plaintiff's side of the story. He did not question Plaintiff about the claims. Still, he decided to accept her story as a pretextual reason for termination because, after all, she was a woman. Maynard was inconsistent in his use of the allegation as the reason for terminating him. However, grabbing for such low-hanging fruit such as Rosanna's second-hand complaint would give Maynard cover for firing Plaintiff. Maynard was of a generation that believed a woman's complaint, in general, would be more likely accepted in the context of alleged inappropriate touching by a man. That belief, often untrue, is sexist in itself.

67. Even though there was a videotape of the jump that showed no inappropriate touching, Maynard dismissed said evidence and purposely lost custody of the tape so that Plaintiff could not use it in his defense.

68. In all, the allegation of touching, if Rosanna even made it, was a false pretext for Plaintiff's termination, which happened because of her boyfriend's uninvestigated complaint about being near a gay person.

69. Maynard knew that Plaintiff was gay and would have no motive to touch a female passenger in any manner other than to protect her safety

following proper procedures.

70. Maynard knew that Rosanna had signed a release wherein she knew she would in close bodily contact with an instructor. Altitude Express used that release to defeat a wrongful death claim, yet Maynard conveniently ignored this, especially in the context of a gay man who had to be strapped tightly to a woman to do his job.

71. Maynard's reaction to Rosanna's baseless complaint – without even as much as asking for Plaintiff's side of the story - is an instance of sex stereotyping. It validates a woman's complaint against a man, whereas a man's protest against a woman – gay or straight – would never have been accorded credence.

72. Ray knew this, yet he was more than happy to use what he knew to be a patently false complaint against a man as a pretext for firing for being – and saying – that he was gay.

73. Plaintiff, sadly, died before this litigation ended, yet his Executors sue for redress.

FIRST CAUSE OF ACTION
SEX DISCRIMINATION UNDER TITLE VII

74. Plaintiffs repeat and reallege the allegations outlined in all previous paragraphs.

75. Plaintiff's sex was a motivating factor in his termination.

76. Such actions violated Title VII.

77. By the preceding, Plaintiffs have been damaged.

SECOND CAUSE OF ACTION
COLLECTION OF COSTS AWARDED TO PLAINTIFFS

78. Plaintiff repeats and realleges the allegations outlined in all previous allegations as if fully set forth herein.

79. The en banc court of the Second Circuit Court of Appeals and the U.S. Supreme Court awarded plaintiffs, respectively, and to counsel, Stephen Bergstein and Gregory Antollino $3,693; and to The Stanford University Clinic (which fronted the cost of an appendix it need not have), $2,530.50.

80. Raymond Maynard was responsible for those amounts personally and as predecessor-in-interest to Altitude Express.

81. Since Maynard has known about these judgments – as anyone must impute – through his counsel, which has been the same throughout, and though plaintiffs made several attempts at collecting them quietly – Maynard has willfully refused. He should pay double costs and such sanctions as the court deem appropriate.

THIRD CAUSE OF ACTION
RAY MAYNARD, ALTER EGO OF ALTITUDE EXPRESS, IS LIABLE

NEW YORK COPORATION LAW § 1006

82. Plaintiff repeats and realleges the allegations outlined in all previous allegations as if fully set forth herein.

83. Courts will disregard the corporate form or "pierce the corporate veil," whenever necessary "to prevent fraud or to achieve equity."

84. Plaintiffs assert this doctrine, which seeks to go behind the corporate existence to circumvent the owners' limited liability and hold them liable for some underlying corporate obligation.

85. Adequately understood, an attempt to pierce the corporate veil does not constitute a cause of action independent of that against the corporation; instead, it is an assertion of facts and circumstances which will persuade the court to impose the corporate obligation on its owners."

86. Here, as alleged above, Raymond Maynard was the sole shareholder and C.E.O. of Altitude Express.

87. There were no other corporate officers, and other niceties of the corporate form were not always followed upon information and belief.

88. Significantly, before the new S.D.L.I. acquired Altitude Express, both of them were using the moniker "Skydive Long Island" at the same time – one as an official corporate name and the other as the name Altitude Express did

business as.

89. Maynard alone had the power to allow a prospective purchaser (or anyone) to use his corporation's dba, which shows a manifest disregard for the corporate form.

90. As the former sole shareholder of Altitude Express, Maynard has sufficient assets to pay for this litigation, and the liability should not be imposed upon S.D.L.I., Inc. as a knee-jerk reaction as a matter of fundamental fairness.

91. Under New York law, Maynard (1) exercised complete domination of the corporation concerning the pre-sale and sale; and (2) his power was used to commit a fraud or wrong against the plaintiffs – to confuse the issue of liability, to attempt to extinguish it on grounds other than the merits. It also prejudices Plaintiffs insofar as collecting the modest costs awarded in their favor.

92. For the above-stated reasons, plaintiffs demand that Maynard be held to the predecessor in interest for the former Altitude Express, liable for any judgment herein and that plaintiffs be awarded attorneys' fees to the extent that New York Law allows.

FOURTH CAUSE OF ACTION
FRAUDULENT OR VOIDABLE TRANSFER
NEW YORK UNIFORM VOIDABLE TRANSACTIONS ACT

93. Plaintiff repeats and realleges the allegations outlined in all previous

allegations as if fully set forth herein.

94. N.Y. Debtor & Creditor Law Article 10 has been superseded by the nearly identical New York Uniform Voidable Transactions Act.

95. The update might not affect proceedings, acts, or omissions before the act was adopted as law in 2019 and begins its application in 2020. Without much discovery on this issue, plaintiffs cannot know which law would apply. Still, they know that when Raymond Maynard, as the sole shareholder, made every decision to divest himself as liable on any aspect of the case.

96. Under New York Law, a transfer made by a debtor (here Maynard, who is an actual debtor and a putative debtor) is voidable as to a creditor (here S.D.L.I., Inc.), whether the creditor's claim arose before or after the transfer, if the debtor made the transfer or incurred the obligation:

(A) with actual intent to hinder, delay or defraud any creditor of the debtor; or

(B) without receiving a reasonably equivalent value in exchange for the transfer or obligation, and the debtor:

(i) was engaged or was about to engage in a business or a transaction for which the remaining assets of the debtor were unreasonably small in relation to the business or transaction; or

(ii) intended to incur or believed or reasonably should have believed

that the debtor would incur, debts beyond the debtor's ability to pay as they become due.

93. In determining actual intent under paragraph one of subdivision (a) of this section, consideration may be given, among other factors, to whether:

(A) the debtor retained possession or control of the property transferred after the transfer. In this case, Maynard did not disincorporate after Skydive Long Island took its name. The delay was purely to disincorporate at the right time to defeat plaintiffs' rights.

(B) the transfer or obligation was disclosed or concealed. Here, it was. Plaintiffs knew nothing of it until the case was about to go to the U.S. Supreme Court.

(C) before the transfer was made or obligation was incurred, the debtor had been sued or threatened with suit. This is certainly true.

(D) the transfer was of substantially all the debtor's assets. Upon information and belief, this is true.

(E) the debtor absconded. Indeed, Maynard lives in a different part of the country. This is purely legal, even if he lived in Long Island for his entire life.

(F) the debtor removed or concealed assets. Plaintiffs need discovery on this question.

(G) the value of the debtor's consideration was reasonably equivalent to the value of the asset transferred or the amount of the obligation incurred. Plaintiffs needs discovery on this; we have no idea what a fair market price was or what the corporation sold for.

(H) the transfer occurred shortly before or shortly after a substantial debt was incurred. This is true in this case, at least potentially.

(I) and the debtor transferred the business's essential assets to a lienor that transferred the assets to an insider of the debtor. Plaintiffs need discovery on this issue.

94. Without discovery, Plaintiff knows some of these elements to be true; upon information and belief, they believe the rest to be accurate based on all of the information they have learned about the sale of Altitude Express, Inc. after 2018.

95. In an action for relief against a transfer or obligation under this article, a creditor, subject to the limitations, may obtain:

(1) avoidance of the transfer or obligation to the extent necessary to satisfy the creditor's claim.

(2) an attachment or other provisional remedy against the asset transferred or other property of the transferee if available under applicable law; and

(3) subject to applicable principles of equity and following applicable

rules of civil procedure:

(i) an injunction against further disposition by the debtor or a transferee, or both, of the asset transferred or other property.

(ii) appointment of a receiver to take charge of the asset transferred or of other property of the transferee; or

(iii) any other relief the circumstances may require.

96. If a creditor has obtained a judgment on a claim against the debtor, and if Maynard does not may the judgments for costs voluntarily, the court may levy execution on the asset transferred or the debtors' proceeds.

97. Separately from any other laws for which plaintiffs might be entitled to fees, attorneys' fees are also available under New York Debtor and Creditor law § 276-a.

98. The en banc court of the Second Circuit Court of Appeals and the U.S. Supreme Court awarded plaintiffs, respectively, and to counsel, Stephen Bergstein and Gregory Antollino $3,693; and to The Stanford University Supreme Court Clinic in the amount of $2,530.50.[1]

99. Raymond Maynard was responsible for those amounts personally and as the predecessor interested in Altitude Express. Maynard has known about these judgments – as anyone must impute; his counsel, who has been the same

[1] The parties in a Supreme Court litigation file a bill for expenses for the clerk such that it will be included in the mandate if one party is entitled to costs. Here, the Clerk imposed costs, but Maynard's counsel, in an email dated shortly after the imposition of costs, said the undersigned would have to "file a writ" in order to get those costs.

throughout the litigation, knew about them. Plaintiff's counsel has attempted to collecting them quietly. Though counsel, Maynard has willfully refused and should pay double costs and such fees and sanctions as the court deem appropriate.

100. To see an attorney so flagrantly ignore a judgment of the country's highest court is not only an insult to the profession but a demoralizing sign. The attorney cannot appeal the judgment, so he and his client expect to get away with it?

101. Plaintiffs hope not and pray the Court will enforce payment of the judgments, and any judgment that might be obtained in this lawsuit.

WHEREFORE, Plaintiffs demands as follows:

A. A finding that Raymond Maynard, as "Predecessor in Interest" to Altitude Express, Inc., and can pay the judgment.

B. Restraining Maynard or any person to whom he distributed assets from the corporation's sale from further waste of the assets.

C. A finding as a matter of law that sex was a motivating factor in Donald Zarda's termination.

D. Compensatory damages.

E. Punitive damages.

F. Cost of suit and attorneys' fees.

G. Such other relief as the court may deem just and proper.

Dated: New York, New York
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