

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

MELISSA ZARDA, et al.,

**DECLARATION IN  
SUPPORT OF MOTION  
FOR PAYMENT OF  
APPELLATE JUDGMENTS  
AND SANCTIONS**

Plaintiffs,

-against-

10-4334-CV (SJF) (AYS)

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

Defendants.

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Gregory Antollino, an attorney admitted in this district, does now declare under penalty of perjury of the United States as follows:

1. I represent plaintiffs in this matter. I represented them in this Court after Donald Zarda died, then at the trial on the New York cause of action, then at the Second Circuit Court of Appeals, then, with others, at the United States Supreme Court.
2. This motion concerns only the affirmative enforcement of the judgment and sanctions against Saul Zabell for his vexatious conduct in refusing to recognize plaintiffs' right to collect the judgments entered by the appellate courts against Raymond Maynard individually – at least. We know Maynard won the trial on the state cause of action. We don't need to see the jury verdict sheet yet another time. Congratulations to the defense on the trial, under a higher standard of proof, but the case went further than the trial, and Maynard remained a party – a strategy the defense might not have adopted, but it did. The appellate courts entered the

judgments, and the defense cannot controvert them at the lower court as a matter of elementary federal and appellate jurisdiction.

3. Plaintiffs make this motion before the deadline to respond to the defendants' motion to dismiss to give thought proper time to the defendants to answer this affirmative motion.<sup>1</sup> This motion is affirmative and does not purport to respond to the defendants' motion.

#### APPELLATE PROCEDURAL HISTORY

4. THE SECOND CIRCUIT. Plaintiffs never asked for costs on the three-judge panel appeal, even after the en banc. But after the full Circuit granted our petition to the en banc, Maynard remained on the caption. The issues were limited to Title VII. There was no attempt by Maynard or his attorneys to extricate him from the case. This might have been a strategy; I assume it was. After the plaintiffs won the en banc, they moved, through the undersigned, for costs. Exhibit A.

5. Saul Zabell ("Zabell") opposed the entry of a judgment of costs, as demonstrated by his memorandum. Exhibit B. He never sought to limit the cost as to Maynard.

6. In his opposition, Zabell wrote, "[O]nly the appellate court retains discretion to award or not award costs." (citing *Essex Ins. Co. v. Zota*, 2008 WL 11333322, at \*2 (S.D. Fla. Dec. 3, 2008).) *See id.*, p. 2. Now Zabell turns this proposition on its head, suggesting this Court has discretion – let alone jurisdiction – *not* to enforce the costs awarded, or to modify them. Zabell's argument is facially frivolous. A district court cannot change or reverse an appellate court judgment. Zabell, an experienced attorney, must know he is skating on water.

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<sup>1</sup> We contend that Maynard is responsible on these claims as the predecessor in interest to the underlying claim, but we make this motion on Maynard's personal liability for the costs as a party to the appellate proceedings. The corporate predecessor liability issues need not be reached to determine this motion.

7. Zabell argued to each of the higher courts that plaintiffs should not get costs. Not only did he lose his arguments, but he didn't even discuss the points he's arguing now. That constitutes waiver. It is elementary that a district court has no jurisdiction to modify the Circuit Mandate or the Supreme Court Judgment. The Mandate is attached as Exhibit C, the Supreme Court judgment is attached as Exhibit D.

8. Zabell was correct when he briefed the Circuit, at least on the point quoted above. Exhibit B. His attempt to backtrack on his contention – which is a legal admission – fails, even if it were not evident that a District Court has no jurisdiction to alter any appellate courts' order.

9. He argued that the Circuit Court could award as it saw fit, he argued that the initial appeal did allow for the award of costs, he argued that plaintiffs had to prevail on the merits (for mere appellate printing costs). Not so. While the Mandate is facially explicit on the award of costs, the plaintiff did not seek printing costs before the initial panel. *See* statement of costs, attached as Exhibit A. These costs were in the mid-four figures, but plaintiffs tried to be fair by not asking for the panel costs. We were granted less than we asked for. Exhibit C, order on costs.

10. Zabell could have, but did not, move to stay execution of enforcement of costs. He did not seek to reargue; he did not argue Maynard was not personally liable. His argument that this Court should – or can – nullify the orders of the higher courts is a passenger on ship with nowhere to disembark. Zabell knows this.

11. Zabell did not inform the Circuit that Maynard had sold his corporation. Perhaps Zabell wanted to keep the information a secret. It is a reasonable assumption that he did; but, if not, Plaintiffs themselves unaware that Altitude Express had been sold until the Mandate issued and as we prepared to return to the District Court.

12. Soon, Zabell sought a monetary demand from plaintiffs and hinted that there was a sale. Upon further research, I learned a sale had occurred, though the sale dates, in planning or execution, was – and remains – fuzzy.

13. Zabell could, but did not, argue to the Circuit that because Altitude Express, Inc., had disincorporated, Maynard was not liable for costs. He remained mute on this point, which, again, has been waived.

14. THE SUPREME COURT: In their Brief in Opposition to certiorari, plaintiffs opposed the grant because Maynard personally – though not as a matter of his being a successor in interest, which is a different question – had no liability under Title VII. (Again, this does not mean that Maynard is not liable as a predecessor in interest, etcetera, for claims against Altitude Express.) The Brief in Opposition is attached as Exhibit E. *See* pp.12-13.

15. The reply, wherein, Zabell argued that, as a party to the lower court proceedings, Maynard had a right to be a party at the Supreme Court. *See* relevant portions, Exhibit F.

16. In the attempt to win the grant of certiorari, his reply was correct on the Supreme Court rules, and he made precisely the points we make in the second amended complaint, to wit

There is no riddle nor ruse in Maynard seeking review of the decision below; he was a Defendant-Appellee. *See* generally Pet. App. 1. Pursuant to the Rules of the Court, Maynard is entitled to seek review of the Second Circuit decision. Whether he may ultimately face personal liability under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e, et seq. (“Title VII”), has no relevance to the question presented by Petitioners or the Court’s review of the same.

Notably, it has not yet been decided whether Maynard may face Title VII liability for the acts of his company. Respondents assert that the Second Circuit’s decision “permit[ed] respondents to sue the corporation.” Br. in Opp. 13. But the Second Circuit actually held that “Zarda is entitled to bring a Title VII claim for discrimination based on sexual orientation” without specifying which defendant or defendants could be held liable. Pet. App. 61a. Nowhere in the decision does the Second Circuit categorically decide that question of who might be liable.

In addition, and consistent with Rule 12(6), there are multiple theories by which Maynard could be held responsible if Altitude Express is ultimately found liable for violating Title VII. Respondents could argue that the corporate veil be pierced, that Maynard is a mere “alter ego” of Altitude Express, or that Maynard is otherwise vicariously liable for his company’s wrongful acts. E.g., *Milliner v. Enck*, 1998 WL 303725, \*2 (E.D. Pa. 1998) (“[E]xempting owner liability from Title VII does not permit owners who discriminate to\ escape unscathed. Owners will necessarily feel the pinch of the employing entity’s liability if plaintiffs successfully ‘pierce the corporate veil’ and demonstrate that the owner is actually the ‘alter ego’ of the employer.”). Respondents could also pursue a theory of respondeat superior.

See Exhibit F, pp. 2-4

17. Now Maynard makes a different argument altogether. Predecessor liability aside for now, was a strategic choice that Zabell did not have to adopt but did. Perhaps he wanted to put a “face” on the petition. Arguably, his strategy succeeded insofar as the Court granted certiorari.

18. After the Supreme Court’s published opinion, there were arguments back and forth to Scott Harris, the Clerk of the Supreme Court, regarding whether Zabell’s clients were liable for costs. After plaintiffs clarified confusion about whether the Supreme Court rules allowed plaintiffs cost, the final judgment awarded these plaintiffs their costs. Exhibit D. During the exchange of emails – even if it mattered now – at no point did Zabell argue that Maynard was immune from costs.

19. When the Supreme Court ordered judgment for costs, the undersigned tried to have them paid without further litigation. We could have moved into this stage of the case without Zabell’s meritless argument leading the dispute. Zabell, in response to the demand, took (and take) exactly the opposite position it took in seeking the writ. This reversal of reality is of demagogic proportions masked in a corporate shell game, denying that Maynard did not have to be a petitioner. His counsel decided he would do so any way, and his client lost. No arguments can change that now.

## SANCTIONS

20. Zabell's steadfast refusal to abide by the appellate court orders – and, instead, argue them to the district court – is a textbook example of obstruction and the promotion of vexatious litigation. Zabell has waived the arguments he makes on behalf of Maynard and the Court should sanction him. If a refusal to abide by a judgment – by an “appeal” to a court without jurisdiction – is not sanctionable, then what is? To be sure, there are many other things, but not abiding by a Supreme Court order, or a Circuit order is high on the list of frivolity and vexatiousness. Zabell not only impedes plaintiff's rights but requires an extraordinary waste of time. Plaintiffs will respond to the Zabell's argument as to Maynard's liability for the corporation. But the costs on appeal – the undersigned has spent hours on this and Zabell has not only wasted my time, but the Court's. Plaintiffs should not have to waste otherwise uncompensated attorney time on his attempt to controvert appellate orders.

21. Because Zabell's position is frivolous and vexatious, the Court should sanction him in the amount of time and attorneys' fees it takes to make this motion and further enforce the judgment. Another appropriate sanction, in addition to the fees, could be to make Zabell and his firm liable for the costs.

22. Finally, if the costs remain unpaid, in addition to attorneys' fees, Maynard or his lawyers should be required to post a bond. The cases discussed in the attached memorandum indicate this is a proper remedy. Zabell has shown outright contempt for the appellate process by threatening not to comply with payment unless plaintiffs file an extraordinary writ. That is extreme, unwarranted and brings up issues that have been waived and that are res judicata. Zabell's disappointment that his strategy to petition for certiorari is not a basis for his client not to pay the costs. If the client is angry, he must pay the costs, he should have been advised that his personal liability for costs was one potential outcome. Most people thought the

employees would lose at the Supreme Court, but we won by a considerable margin. The chips fall as they may.

23. For these reasons and those outlined in the accompanying memorandum, the Court should be ordered costs paid. The Court should sanction Zabell for patently frivolous, vexatious conduct. The idea that a district court can vacate an order of an appellate court has never been argued in any court – at least as my research shows – and for good reason.

Dated: New York, New York  
February 15, 2021

/s/ Greg S. Antollino

Gregory Antollino  
Attorney for Plaintiffs

UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT

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ESTATE OF ZARDA,

Plaintiff-Appellant,

-against-

**DECLARATION IN  
SUPPORT OF  
BILL OF COSTS**

ALTITUDE EXPRESS, et ano.

15-3775

Defendants-Appellees

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GREGORY ANTOLLINO, an attorney admitted to this court who represents,

with Steven Bergstein, on appeal and en banc review, does hereby declare under penalty of perjury of the United States as follows:

1. This was an appeal of a federal summary judgment motion under Title VII (and, at the panel stage, a trial under the New York State Human Rights Law). Insofar as the plaintiff estate obtained no relief under its state claim from the panel appeal, it will not seek any costs for the panel appeal. We ask that costs for plaintiff-appellant be included in the Mandate in the amount of \$3600.80 as described below, merely for the en banc portion, and ask for a small additional amount for color copies.

2. Federal Rule of Appellate Procedure 39(a)(4) allows the Court to decide whether costs are taxable if there is an affirmance in part and reversal in part. We believe it would be fair to tax defendants the Executor’s costs for the en banc portion of this appeal. This would be reasonable because costs for the en banc review were not insubstantial, and appellants prevailed on a question of law allowing us a new trial under Title VII, with substantially more relief available to plaintiff (and to other similarly situated plaintiffs). We expended the following in order to reach the result in Zarda v.

Altitude Express, 15-3775 (en banc, February 26, 2018): 15 copies of the brief; 15 copies of three volumes of the Appendix; and 2 copies of the reply brief; plus the filing fee.

3. Plaintiff used Fedex/Kinko's for 13 of the reply briefs, whose cost was nominal, and we will waive it. We ask only for the 2 reply briefs that were printed by Cockle Briefs, whose statement is attached as an Exhibit.<sup>1</sup> Cockle is the most cost-effective appellate printer in the country, I have found. We could not have used Fedex/Kinko's to complete the initial round of briefing.

4. The Exhibit includes a compendium of each document that Cockle charged, and we paid for this printing. We have calculated the rate under the Court's Fee Schedule, but we ask for the actual amount expended because color copies increased the cost by about \$500.

5. For clarification purposes, the reason Cockle, in the first bill, bills only 6 copies, then 6 more, then 2 more is that, first, someone unnamed from the Clerk's office originally said we needed only 6 briefs. This seemed too good to be true, and it was; the case manager was on vacation, the information incorrect, and we were told to file an additional 7 of everything to make 13. We did that. Then, again, the clerk requested an additional two copies of everything in or about the end of June/early July 2017. Additionally, although the Cockle bill says "Brief (Corrected)" only the corrected Opening Brief was published since the case manager bounced the original electronic brief for incorrect pagination printing. Cockle did not bill us for nor do we ask costs of the uncorrected brief.

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<sup>1</sup> At the conclusion of briefing, the Clerk requested two extra copies of every document, which explains why only two of fifteen reply briefs were done by Cockle.

6. I used my own FedEx shipping number for shipping, thus the entry on the exhibit for “proofs and postage” charges are only for proofs.

7. Because these documents came in three waves, and were billed by date, it is difficult to extricate how much the Opening Brief and special appendix cost specifically, and the appendices, and the reply, but they are supported by receipts and calculated using the Court’s Fee Schedule.

8. The filing fee of \$505 is set by statute, and we could not have obtained the result we did without paying it. There were no other charges from the Court.

9. For these reasons, plaintiff-appellant asks for costs solely for en banc rehearing and not the panel appeal insofar as we did not seek en banc review of the trial determination, which obviated the need for all but a few pages of the trial transcript on the en banc.

10. We think this is fair and reasonable and hope the Court will enter costs in the amount of at least \$3,600.80, which includes (1) the filing fee; (2) the 15 copies of the Opening brief (with Special Appendix); (3) the Joint Appendices from Cockle Briefs; and (4) 2 copies of the reply brief from Cockle. The divisions on the verified bill, plus the known filing fee, add up to this amount, although we spent more as indicated by the receipt attached.

11. I separated on the verified bill of costs as follows:

- Brief and special appendix, 15 copies of a 97-page document, 1 binding and one cover;
- The Joint Appendix Volumes I and II: 15 of these volumes of 300 pages each (plus 5 pages table of contents), 1 binding each and one cover each. Two hundred

eighty-eight of these pages of one of these volumes were printed in color, at a total cost of \$720. We believed it important if not essential to include color copies of the specific events that led to plaintiff's termination, and spent this money wisely, whether or not there is an objection. We ask for this additional expense if the Court allows it.

- Joint Appendix Volume III: 15 copies of 15 of these volumes of 119 pages each (plus 5 pages table of contents), 1 binding each and two covers each.
- Reply brief: Only two of the fifteen volumes filed are billed: 27 pages, 1 covers; 2 bindings.

12. Plaintiff-Appellant asks for the entire amount expended at Cockle but waives the 13 printed by Kinko's. However, if the Fee Schedule is used, it should come to \$494 for the Brief and Special Appendix; \$2402 for the Joint Appendices (not including color); and \$199.80 for the reply brief. With the filing fee of \$505, plaintiff-appellant would be entitled to \$3,600.80, which is somewhat less than what was actually billed. We ask for the total amount of \$4,102.60, however, which is more than the fee schedule because of the color copies in the record.

13. For these reasons, plaintiff asks that the Court tax costs that the Court finds reasonable under the circumstances.

Dated: New York, New York

N.B.: *Date automatically updates to present, but this was filed in 2018*

*Greg S. Antollino*

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GREGORY ANTOLLINO, ESQ.

**UNITED STATES COURT OF APPEALS  
SECOND CIRCUIT**

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**ESTATE OF ZARDA,**

**Plaintiff-Appellant,**

**15-3775**

**-against-**

**ALTITUDE EXPRESS, Inc., et ano.**

**Defendants-Appellees**

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**DEFENDANTS-APPELLEES' OPPOSITION  
TO PLAINTIFF-APPELLANT'S BILL OF COSTS**

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**ZABELL & ASSOCIATES, P.C.**  
*Attorneys for Defendant-Appellee*

1 Corporate Drive, Suite 103  
Bohemia, New York 11716  
T: (631) 589-7242  
F: (631) 563-7475

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## **I. PRELIMINARY STATEMENT**

Defendants-Appellees, ALTITUDE EXPRESS, INC., doing business as Skydive Long Island, and RAY MAYNARD (collectively “Defendants-Appellees”), respectfully submit this Memorandum of Law in opposition to the application of Plaintiff-Appellant, Estate of Zarda (“Plaintiff-Appellant”), for a Bill of Costs, pursuant to Federal Rule of Appellate Procedure (“Fed .R. App. P.”) 39(d)(2).

For the reasons set forth below, Plaintiff-Appellant is not entitled to the costs that it asks to Court to tax upon Defendants-Appellees. As such, Plaintiff-Appellant’s instant application must be denied. However, should the Court find that Plaintiff-Appellant is entitled to certain costs, we ask that the amount awarded be reduced to conform with Fed. R. App. P. 39 and the fee schedule adopted by the Second Circuit, which does not allow for the additional sums that Plaintiff-Appellant now seeks.

## **II. PLAINTIFF-APPELLANT IS NOT ENTITLED TO COSTS**

Fed. R. App. P Rule 39(a), entitled “Costs”, reads in pertinent part:

The following rules apply unless the law provides or the court orders otherwise:

- (1) If an appeal is dismissed, costs are taxed against the appellant, unless the parties agree otherwise;
- (2) If a judgment is affirmed, costs are taxed against the appellant;

- (3) If a judgment is reversed, costs are taxed against the appellee;
- (4) If a judgment is affirmed in part, reversed in part, modified, or vacated, costs are taxed only as the court orders.

Fed. R. App. 39.

Thus, “[w]here a judgment is affirmed in part, reversed in part, modified, or vacated,’ costs must be ordered before a party filing a bill of costs under [F.R.A.P.] 39(d) is entitled to receive them.” *Lafaro v. New York Cardiothoracic Grp., PLLC*, 576 F.3d 128 (2d Cir. 2009) (quotations omitted). As a result, only the appellate court retains discretion to award or not award costs. *Essex Ins. Co. v. Zota*, No. 04-60619-CIV, 2008 WL 11333322, at \*2 (S.D. Fla. Dec. 3, 2008).

Said another way, “an appellate court operating under Rule 39(a)(4) may “tax the costs of [the] appeal as [it] see[s] fit ... That is, in a situation in which Rule 39(a)(4) applies, the appellate court may award all costs to one party, *see, e.g., Feingold v. New York*, 366 F.3d 138, 161 (2d Cir.2004) (‘Pursuant to Federal Rule of Appellate Procedure 39(a)(4), costs of this appeal are awarded to the plaintiff.’); may award costs to no party, *see, e.g., M.C. ex rel. Mrs. C. v. Voluntown Bd. of Educ.*, 226 F.3d 60, 69 (2d Cir.2000) (‘We decline to award costs of this appeal to either party. *See* Fed. R. App. P. 39(a)(4).’); or may award costs in whatever combination it sees fit.” *L-3 Commc’ns Corp. v. OSI Sys., Inc.*, 607 F.3d

24, 29 (2d Cir. 2010). Thus, “[w]here ‘a judgment is affirmed in part, reversed in part, modified, or vacated,’ Fed. R. App. P. 39(a)(4), costs must be ordered before a party filing a bill of costs under [Fed. R. App. P.] 39(d) is entitled to receive them.” *Lafaro v. New York Cardiothoracic Grp., PLLC*, 576 F.3d 128 (2d Cir. 2009).

To begin, we note that on February 26, 2018, this Court: (1) vacated the district court’s judgment on Plaintiff-Appellant’s Title VII claim; (2) remanded the matter back to the district court for further proceedings consistent with the February 26, 2018 decision; and (3) affirmed the judgment of the district court in all other respects. *Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018).

Importantly, this Court’s February 26, 2018 decision did not award costs to either party. *See id.*

Equally significant, the February 26, 2018 decision held that Plaintiff-Appellant is “entitled to bring a Title VII claim for discrimination based on sexual orientation.” *Id.* at 132. Thus, the applicable law in regard to Plaintiff-Appellant’s claim and appeal is Title VII of the Civil Rights Act of 1964 (“Title VII”), as amended, 42 U.S.C. 2000e *et seq.*

As stated above, Fed. R. App. P Rule 39(a) provides, in pertinent part, that its provisions on costs apply “unless the law provides ... otherwise.” Fed. R. App. P Rule 39; *see also id.* advisory committee’s note (“Subdivision (a) ... A few statutes contain specific provisions in derogation of these general provisions. ... These

statutes are controlling in cases to which they apply.”); *Ocean Conservancy, Inc. v. Nat’l Marine Fisheries Serv.*, 382 F.3d 1159, 1161 (9th Cir. 2004) (“When the federal statute forming the basis for the action has an express provision governing costs, however, that provision controls over the federal rules.”).

42 U.S.C.A. § 2000e-5(g)(2)(B) – the provision of Title VII entitled “Injunctions; appropriate affirmative action; equitable relief; accrual of back pay; reduction of back pay; limitations on judicial orders” (i.e., the provision pertinent to costs) – provides:

On a claim in which an individual proves a violation under section 2000e-2(m) of this title and a respondent demonstrates that the respondent would have taken the same action in the absence of the impermissible motivating factor, the court –

- (i) May grant declaratory relief, injunctive relief (except as provided in clause (ii)), and attorney’s fees and costs demonstrated to be directly attributable only to the pursuit of a claim under section 2000e-2(m) of this title.

42 U.S.C. § 2000e-5(g)(2)(B)(i).

42 U.S.C. § 2000e-2(m) provides: “Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national origin was a motivating factor for any employment practice, even though other factors also motivated the practice.” 42 U.S.C. § 2000e-2(m).

Thus, as per the provisions of Title VII, Plaintiff-Appellant's entitlement to costs occurs once he proves a violation pursuant to 42 U.S.C. § 2000e-2(m). Plaintiff-Appellant has not done so.

As such, we submit that Plaintiff-Appellant is not within the category of prevailing parties entitled to costs as enumerated under Fed. R. App. P. 39(a)(1)-(4). Indeed, the status of Plaintiff-Appellant is more akin to the taxing of fees, to which Judge Posner has opined:

A procedural victory that may be a way station to utter substantive defeat creates no right to fees. It makes no difference whether the procedural victory is the denial of a motion to dismiss, the denial of summary judgment, the denial of a motion for a directed verdict, appellate reversal of the grant of such a motion (as in *Hanrahan*), or, as in this case, appellate reversal of the grant of summary judgment – for that is the equivalent of a denial of summary judgment and leaves the plaintiff still having to prove his case at trial.

*Richardson v. Penfold*, 900 F.2d 116, 119 (7th Cir. 1990).

Here, Plaintiff-Appellant has not obtained a victory as regards the merits of its Title VII claim. We respectfully submit that Plaintiff-Appellant has merely obtained a procedural victory, and is thus far from proving a violation under section 2000e-2(m) to recover the costs it seeks.

Again, we note that the February 26, 2018 decision did not award costs to either party, but rather vacated the district court's judgment on Plaintiff-Appellant's Title VII claim; (2) remanded the matter back to the district court for further

proceedings consistent with the February 26, 2018 decision; and (3) affirmed the judgment of the district court in all other respects. *Zarda*, 883 F.3d at 108.

We also note that Defendant-Appellee will file a *writ of certiorari* with the United States Supreme Court to petition for the review of this Court's February 26, 2018 decision. This is further evidence that the matter has not been resolved, nor has Plaintiff-Appellant in any way prevailed on the merits of its Title VII claim.

Accordingly, Plaintiff-Appellant is not a prevailing party and not statutorily entitled to costs. Plaintiff-Appellant's instant application must be denied in its entirety.

### **III. IN THE ALTERNATIVE, PLAINTIFF-APPELLANT IS NOT ENTITLED TO THE SUMS IT SEEKS**

In the event this Court finds that Plaintiff-Appellant may recover costs, we request the amount taxed reflect a sum aligned with the costs enumerated under Fed. R. App. P. 39 and this Court's local Fee Schedule.

Fed. R. App. P. 39(c) provides that “[e]ach court of appeals must, by local rule, fix the maximum rate for taxing the cost of producing necessary copies of a brief or appendix.” Consistent with that requirement, this Court's Local Rule 39.1 provides that the “cost of reproducing necessary copies of briefs or appendices is taxable at the lesser of the actual cost or the maximum rate set by the court and posted on the court's website under Fee Schedule.” Rule 39 of the United States Circuit Court of Appeals for the Second Circuit. (emphasis added). The Fee

Schedule, in turn, provides for reproduction costs at the taxable rate of the lesser of the actual costs or twenty cents (.20¢) per page; one hundred twenty-five dollars (\$125.00) per cover; and five dollars (\$5.00) per binding.

Plaintiff-Appellant requests this Court grant costs amounting to the total amount specified in the “Cockle invoices”. ECF Doc 521-2 at ¶ 12. Although Plaintiff-Appellant fails to specify the actual amount it seeks, a review and calculation of the invoices [ECF Docs 521-3] shows that the amount to be three thousand five hundred ninety-seven dollars and sixty cents (\$3,597.60). However, the request does not incorporate the Court’s Fee Schedule and must therefore be summarily denied.

In the alternative, Plaintiff-Appellant requests costs in the amount of three thousand six hundred dollars and eighty cents (\$3,600.80). *Id.* Plaintiff-Appellant claims this amount incorporates the Court’s Fee Schedule for the costs of briefs and appendices, as well as the docketing fee of five hundred five dollars (\$505.00). *Id.* Despite Plaintiff-Appellant’s claim, this request, too, does not properly incorporate this Court’s Fee Schedule.

Fed. R. App. P. 39 enumerates four (4) costs which are taxable: (1) the preparation and transmission of the record; (2) the reporter's transcript, if needed to determine the appeal; (3) premiums paid for a supersedes bond or other bond to preserve rights pending appeal; and (4) the fee for filing the notice of appeal. And,

as stated above, this Court's Fee Schedule sets the specific maximum amount a party may be taxed for certain costs.

Simply put, Plaintiff-Appellant's alleged actual costs exceed the maximum costs allowable under this Court's Fee Schedule.

To begin, this Court's Fee Schedule grants reimbursement of reproduction costs up to twenty cents (\$.20) per page. It also grants reimbursement for binding up to five dollars (\$5.00) per copy. However, Local Rule 39 directs costs to be taxed at the lesser of these rates or the actual cost.

"Cockle" charged Plaintiff-Appellant approximately \$0.10 per page for the brief with special appendix and the joint appendix, and approximately \$0.15 per page for the reply brief. "Cockle" further charged \$1.00 per copy for each binding of the briefs and appendices. *See* ECF Doc. No. 521-3 at pages 4, 6, 8, and 10.

Therefore – and momentarily putting aside Plaintiff-Appellant’s request for addition sums for color copies – the actual taxable amounts for reproduction and bindings are as follows:

<u>Description of Cost</u>	<u>Quantity</u>	<u>Price per Unit</u>	<u>Total Amount</u>
Printing of Brief and Special Appendix (97 Pages)	15	\$9.80 (or approx. \$0.10 per page)	\$147.00
Printing of Volume I of Joint Appendix (305 pages, which includes the 5-page Table of Contents)	15	\$30.70 (or approx. \$0.10 per page)	\$460.50
Printing of Volume II of Joint Appendix (305 pages, which includes the 5-page Table of Contents)	15	\$30.70 (or approx. \$0.10 per page)	\$460.50
Printing of Volume III of Joint Appendix (124 pages, which includes the 5-page Table of Contents)	15	\$12.60 (or approx. \$0.10 per page)	\$189.00
Printing of Reply Brief (27 Pages)	2	\$4.00 (or approx. \$0.15 per page)	\$8.00
Binding for all Copies	62	\$1.00	\$62.00
		<b><u>TOTAL</u></b>	\$1,327.00

Thus, pursuant to Local Rule 39 and this Court’s Fee Schedule, the total taxable amount for reproduction and bindings is one thousand three hundred twenty-seven dollars (\$1,327.00).

As for color copies, Plaintiff-Appellant fails to posit why these specific reproductions were “necessary” as per Fed. R. App. P. 39(c). Indeed, in accordance with Fed. R. App. P. 39(c), costs are only accorded to “necessary copies” of briefs and appendices and at rates not higher than those generally charged for such work in the area where the Clerk’s office is located.... Reproduction costs for the appendix

are limited by Local Rule 39 to a maximum of \$.20 per page.” *Furman v. Cirrito*, 782 F.2d 353, 356 (2d Cir. 1986).

Apart from the self-serving description these copies as “important if not essential”, Plaintiff-Appellant offers no further justification as to why color copies were, in any way, necessary. *See generally* ECF Doc. 521-2 at ¶ 11. This Court made no mention of these color copies in its February 26, 2018 decision to justify Plaintiff-Appellant’s position. *See generally Zarda v. Altitude Express, Inc.*, 883 F.3d 100, 108 (2d Cir. 2018). We respectfully submit that these copies were not “necessary” and, accordingly, should be taxed – if at all – at the rates identified in the table, above, wherein they were incorporated in the “Total” cost.

Moreover, it remains uncertain from the content of Plaintiff-Appellant’s application how many “covers” they request to be taxed. In any event, the “Cockle invoices” do not delineate how much Plaintiff-Appellant was charged for covers or whether they were incorporated in another fee within the itemized charges. Given the impossibility in ascertaining this figure, the absence of proof submitted by Plaintiff-Appellant in its request for this specific cost, and the speculation required to even “ballpark” the amount expended, we submit said costs should not be taxed.

Further, Plaintiff-Appellant appears to have incurred fees identified as a “base cost” amounting to two hundred dollars (\$200.00) per transaction with “Cockle”. *See* ECF Doc. 521-3, pages 4, 6, 8, and 10. Plaintiff-Appellant blames

these costs on incorrect information obtained from the Clerk's office. *See* ECF Doc. No. 521-2 at ¶ 5.

Plaintiff-Appellant is not entitled to reimbursement of any amount associated with this "base cost" because neither Fed. R. App. P. 39 or Local Rule 39.1 specify this as a taxable cost. However, should this Court disagree with this position, we note that it would be prejudicial to tax Defendant-Appellee eight hundred dollars (\$800.00) – or two hundred dollars (\$200.00) per "Cockle" invoice – that arose from Plaintiff-Appellant use of "Cockle's" services on four (4) separate occasions, regardless of whether the need for this repeat patronage was due to Plaintiff-Appellant, the Clerk, or "Cockle".

Plaintiff-Appellant claims to have incurred other fees, associated with "Cockle," and identified as "Additional Proofs," "Alterations," "PDF File," "Typeset TOC," and "Proofs and Postage." *See* ECF Doc. No. 521-3, Pages 3 and 4. These additional fees amount to a total of four hundred fifteen dollars (\$415.00). Any request by Plaintiff-Appellant in regard to these amounts must also be denied, since Fed. R. App. P. 39 or Local Rule 39.1

Therefore, should this Court grant Plaintiff-Appellant's application for costs – sums that we submit it is not entitled – Defendant-Appellee must only be taxed those amount specifically allowed under Fed. R. App. P. 39 and Local Rule 39.1. Pursuant to that authority, the actual taxable costs related to Plaintiff-Appellant's

application total one thousand eight hundred thirty-two dollars (\$1,832.00), said amount being the costs associated with reproduction and binding the briefs and appendices (as reflected in the table above) and the docketing fee of five hundred five dollars (\$505.00).

#### **IV. CONCLUSION**

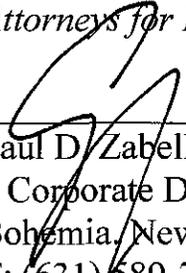
For the reasons set forth above, we submit that Plaintiff-Appellants application for costs must be denied. Pursuant to Fed. R. App. P Rule 39(a)(4), costs are taxed only as ordered by the court. In it February 26, 2018 decision, this Court did not order costs to either party. Moreover, Plaintiff-Appellant is not otherwise statutorily entitled to costs, but rather must succeed on the merits of its Title VII claim to become eligible for such sums.

In the alternative, we further submit that in the event this Court does award costs to Plaintiff-Appellant, the amount taxed upon Defendant-Appellee accord with Fed. R. App. P. 39 and the local rules and Fee Schedule adopted by this Court. Indeed, using the parameters therein, the amounts taxable are one thousand eight hundred thirty-two dollars (\$1,832.00).

Dated: March 22, 2018  
Bohemia, New York

Respectfully submitted,  
**ZABELL & ASSOCIATES, P.C.**  
*Attorneys for Defendant-Appellee*

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

  
Saul D. Zabell, Esq.  
1 Corporate Drive, Suite 103  
Bohemia, New York 11716  
T: (631) 589-7242  
F: (631) 563-7475  
[SZabell@laborlawsny.com](mailto:SZabell@laborlawsny.com)

**UNITED STATES COURT OF APPEALS  
FOR THE  
SECOND CIRCUIT**

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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 14<sup>th</sup> day of May, two thousand eighteen.

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

**STATEMENT OF COSTS**

Docket No. 15-3775

*Plaintiffs - Appellants,*

v.

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

*Defendants - Appellees.*

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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


**CERTIFIED COPY ISSUED ON 05/14/2018**

**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

*Scott S. Harris*

**GREGORY ANTOLLINO, ESQ.**

275 Seventh Avenue, 7th Floor  
New York, NY 10001  
gregory@antollino.com  
(212) 334-7397

March 9, 2021

Note RE Exhibits

To Whom It May Concern:

Exhibits E or F or both are not being accepted by ECF as “not well formed.” I shall try to devise a solution and file them as soon as possible.

Sincerely,

*/s/ Greg S. Antollino*

Gregory Antollino

Cc: Saul Zabell