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October 16, 2015

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

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

Dear Judge Bianco:

Sorry to pop up on your day off from this case, but I need to move *in limine* to establish why *portions* of plaintiff's sworn declaration is admissible. Additionally, plaintiff moves to preclude either 3, or at least one, of the defendant's witnesses.[1]

1. Portions of Plaintiff's Declaration Are Then-Existing (i.e. "Present") Mental and or Emotional, or Physical Conditions admissible as Exceptions to the Hearsay Rule

Plaintiff's sworn declaration under penalty of perjury in opposition to summary judgment is attached as "Exhibit A." Plaintiff offers the following paragraphs (or portions thereof) in support of his case:

A. ¶¶ 1-4 (or such portions that logically take one to the statement of present emotion at the end of ¶ 4 "I fear that my fear of being accused of 'inappropriately touching' might have compromised my expertise."

B. The last two sentences of ¶ 8 (which are also lay opinion)

C. The underlined portions of ¶ 10

D. Paragraph 18 in whole or in part as both a present sense impression and/or admission of a party opponent under 801-2

E. The marked portion of ¶ 47 which refers to plaintiffs then present sense

[1] The motion to preclude is denominated as a "motion for sanctions" (presumably under Rule 37), as it is the closest ecf entry insofar as precluding the witness would be the sanction for failing to notice the witnesses in the amended disclosures, failing to provide the address of at least one, and failing to provide a reasonable list of witnesses in the JPTO in contemplation of what that document is actually for – to narrow the issues for trial.

impression.

All of these portions of the declaration are admissible as present sense impressions that Mr. Zarda expressed at the time he wrote and signed the deposition. Notably, I am not offering expressions of descriptions of past emotions, only present ones that he had at precisely the time he offered the declaration. The Second Circuit's most extensive analysis, upholding the conviction based on the introduction of present sense impressions, is United States v. Zito, 467 F.2d 1401, 1404 (2d Cir. 1972). Here, the declarant's state of mind is at issue, and it was made at the time he had it (at least those portions offered).

2. Additionally, and in the Alternative, Some or All of These Statements Are Offered Under the Residual Exception, Rule 807

When the pre-trial order was entered on the docket, plaintiff was alive, so we did not invoke this rule – and we did not designate the declaration as an exhibit. However, after his death, we did give notice before trial that we had added Plaintiff's declaration (Exhibit 49) as an exhibit and if necessary move to amend the pretrial order to include this exhibit. The rule under 807 requires as follows:

(1) the statement has equivalent circumstantial guarantees of trustworthiness;

Here the declaration is sworn under penalty of perjury.

(2) it is offered as evidence of a material fact;

Plaintiff's state of mind has been offered by both sides for multiple reasons.

(3) it is more probative on the point for which it is offered than any other evidence that the proponent can obtain through reasonable efforts; and

There is no other way I can get this information now that Don is dead.

(4) admitting it will best serve the purposes of these rules and the interests of justice.

Don died just as this case was to go to trial, and its admission is, of course, subject to dispute by the defense. The defense can attack it as to weight but that does not mean it is not admissible and that to serve the interests of justice in a case involving a novel and important issue, and the damages related thereto, that these statements cannot be admitted.

(b) Notice. The statement is admissible only if, before the trial or hearing, the proponent gives an adverse party reasonable notice of the intent to offer the

statement and its particulars, including the declarant's name and address, so that the party has a fair opportunity to meet it.

Plaintiff made this part of his exhibit list, and so did the defense. Notice was given by both sides, so there is no unfair surprise. Don is dead, therefore the name and address portion of this rule is irrelevant.

3. Additionally, or in the Alternative, some or all of these Statements Are Admissible under Rule 804(d)(1)(b).

Rule 804 (d)(1)(b) states:

That a statement of an unavailable witness "is now offered against a party who had--or, in a civil case, whose predecessor in interest had--an opportunity and similar motive to develop it by direct, cross-, or redirect examination."

Not only did defendants have the motive to do what is described above, but they did, if to a lesser extent than I would have wanted had I known Don was going to die. Had I had any such notice, I would have asked further questions on cross at the deposition (or redirect as you might refer to it), or notice my own deposition on the subject. The defense went into lengths to tell the jury stories about Don's cruises and trips to Norway. We should be given the chance to explain what he was feeling inside while he was doing these things.

4. Defense Witnesses Duncan Shaw, Wayne Burrell and Kurt Kellinger Must be Precluded because they were not listed as Witnesses on the Amended Initial Disclosure Statement. In the alternative, and additionally, defendants never produced the address of Kurt Kellinger, so he, at a minimum must be precluded.

I should not have been surprised, but I was that Mr. Zabell listed 60 witnesses in their pre-trial order. The defense refused to sign my proposed pretrial order on the grounds that I put in the order words to the effect that these proposed were not noted in the defendant's initial disclosure statement. See Exhibit 2. Additionally, I did not have all

of their addresses. Both sides. Therefore, with your permission, filed their own Pre-trial orders. At the next tele-conference, I brought up the issue of *60 witnesses* - ! - at the next conference. Your response was simply, "I can tell you right now Mr. Zabell, you're not calling 60 witnesses."

The point is not that I had any fear whatsoever that you would allow the defense to call 60 witnesses. The point is that listing 60 witnesses in the pre-trial order is flat-out trial by ambush. The Federal Rules are designed to present this. The parties notice the availability of witnesses with discoverable information; the parties are then on notice as to what depositions to take. In this case, defendants amended initial disclosures did not include Shaw, Burrell, or Kellinger. Exhibit 2. For that reason alone they must be precluded. Mr. Zabell's provision of 60 names in the pre-trial order was sheer trial by ambush – naming people who might have had some inkling of Don's work or the workplace (although I'm still not sure), but without any indication as to what they would testify about. The middle of trial on the eve of the defense case is not the time for the opposing party to be on notice as to whom the defense intends to call. Raymond Maynard and David Kengle are fair game. Although Mr. Zabell made repeated misrepresentations about not knowing his address during discovery, at least, after he had won him over and taken him out to lunch, we got to depose him. With regard to the other three, it was a sheer guessing game for me to know how many witnesses the defense would call, or what they would testify to. It's just plain gamesmanship, contrary to the purpose and intent of the federal rules and not fair for you to allow the defense to list sixty witnesses and then pick a few at the last minute for trial.

Additionally, while the defense did provid plaintiff with addresses for Shaw and

Burrell during discovery, see Exhibit 3, it did not provide Kellinger's. We have no idea who Kellinger is, and we are not in a position to be taking depositions during trial. To allow him to testify under these circumstances would reward trial by ambush and Mr. Zabell's grotesque manipulation of the process and would be entirely unfair under any reasonable interpretations of the federal rules and their intentions. For these reasons we move the preclusion for these three witnesses, or at a minimum Kellinger.

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell (via ecf)

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

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DONALD ZARDA,

Plaintiff,

ALTITUDE EXPRESS, INC., et ano.

Defendants.

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PLAINTIFF'S DECLARATION

10 Civ 4334 (JFB)

Donald Zarda, plaintiff herein, does hereby declare under penalty of perjury as follows:

1. I am an experienced skydiver, having over 20 years' experience and having made over 5,800 jumps to date, although I have now been phasing my jumping career into wingsuit base-jumping – jumping from cliffs, the top of fjords, and when permissible, tall buildings. I am also studying to receive a Bachelor's of Science in Aviation Management specializing in Logistics at Embry – Riddle Aeronautical University where I am just one class (3 credits) from obtaining a Bachelor's Degree.

2. Although I did apply for some tandem – instructing jobs since my termination, and did perform one day of tandem jumps, I felt uncomfortable doing it, and my heart was not in it like before I was fired from Skydive Long Island ("SDLI"). After that horrible event, I soon resolved I could not do another tandem jump until I was vindicated from a false charge that I "inappropriately" touched a woman during a jump.

3. This is not just out of principal, but also out of fear. A jump involves touching at many parts of the passenger's body for the passenger's safety and as necessary to perform the

Def. Exh. N 2

job. As Rich Winstock put it at his deposition, a skydive instructor is out of necessity "invading [the passenger's] space." If a Skydive owner could fire me, in part, for doing my job, without any semblance of investigation, then I was without protection from any employer, and would not want to expose myself to further injury to my character.

4. It was chiefly Raymond Maynard who injured my character because, as I stated at my deposition at pages 237-40, he is a man of his significant experience who knew I had to touch the passenger at the hips, and who knew I was a homosexual, and who did no investigation whatsoever. He would not even let me see the video of the jump in question so that I could defend myself. If he would even slightly credit a frivolous allegation, by a man made on behalf of a woman, the latter whom he didn't even speak to, at any time, ever, then I have no protection at all as a tandem instructor, and I fear that my fear of being accused of "inappropriate touching" might have compromised my expertise.

5. I make this affidavit in furtherance of my motion for summary judgment and in opposition to the defendants'. I stand by my deposition, but make this statement for the purposes of narrative clarity.

6. I worked at SDLI first in 2001. During that time, admitting one was gay was not something that might help someone from getting a job – except perhaps at a gay establishment – and I am certain I did not tell Ray Maynard I was gay before he hired me. Further, I never told any passenger my sexual orientation. I probably told one or two tandem instructors, or they figured it out when I told them I went to the Fire Island Pines for the weekend, and word eventually got to Ray.

Def. Exh. N

3

7. Perhaps when Ray learned I was gay, he fired me. I personally believe that the reason I was fired – based on the chief instructor's brief statement to me after Ray gave me the news – was that a customer complained that I would not perform flips from the airplane, a maneuver which at that time was deemed unsafe and forbidden by manufacturers of tandem equipment. Instructors were made aware of this manufacturer's policy by a joint bulletin issued by the three main tandem gear manufacturers. As it was at the time, the very most senior and well known industry expert and licensing examiner for the gear manufacturer of the equipment I was using (Bill Morrissey), happened to be also working at SDLI. Had he seen me do a flip, I could have lost my license. The customer complained because he saw another tandem instructor perform the unsafe maneuver; that instructor was willing to risk his license, but I was not, and I recall that even Maynard admitted at his deposition, that the maneuver was unsafe. I left SDLI knowing I had been treated unfairly, but knowing that I had made the right decision. For the next several years, I worked as a tandem instructor at several other dropzones and skydiving centers.

8. I heard at my deposition that one or two women came to Ray "in tears" that I had told them my sexual orientation. In my informed opinion as a gay person, not so. Tears? Really? I have told some women friends in my personal life that I am gay, and not one of them cried. In fact, I have found that as a gay man, women are more sensitive and more attuned with the interests and feelings of gay men. In my opinion as a lifelong gay man, for a stranger to cry in response to having been told someone is gay is not just incredible, it is nonsensical. While a few people close to me initially weren't so happy about learning I am gay, no one cried, when they perhaps, at a different time, had a motive to. In my opinion as a gay person, it seems not only unusual, but absurd that someone I didn't even know would cry if I told her I am gay. In my opinion as a male, the suggestion that a woman would cry when told that someone is gay is a

Def. Exh. N

4

sexist remark that reduces a woman to a delicate object, unable to handle the "horrific" idea that a man could love another man.

9. In any case, I said no such thing to any passenger – again, 12 years ago was a different era concerning gay rights, and I had just come out of the closet and was very discrete. Furthermore, there were few job protections for gay people, including New York. Additionally, Ray did not tell me that this is why I was fired; he just told me to get out, and the chief instructor told me about the other customer complaint concerning the flip. If I had satisfied that customer, however, that too could have been a reason to fire me, or for me to lose my license, so I was apparently in a Catch 22.

10. I am 100% gay. I have no physical attraction to women, have never been with a woman, and have never had a romantic relationship with a woman. I have had many female friends, and, before I came out, might have played a role in "pretend dating" as a cover due to my being a closeted homosexual, but I was never once physically attracted to any of the women. Further, I would say that the idea of sex with a woman physically, repulses me. I fantasize about and enjoy romance and sex with men exclusively. There are many other things that I could say to prove my proclivities, but for the sake of decorum I will say emphatically that I am gay and reading the defendants' 56.1 statement where they try to portray me as homosexual with a liking to grope women, is bigoted and offensive. I doubt in the history of time there have been few straight men who have attempted to cover as being gay, and to imply, as Maynard and his attorney do – that homosexuality is something that can be turned on and off suggests – as Maynard did when he terminated me – that being gay is an "escapade." That word, is defined as an adventure, an antic, or an exploit. My being gay is none of those things. My being gay is part of who I am and I have always been gay, even while I was closeted.

11. While people normally assume I am straight, again, I never once told Ray Maynard I was gay. I eventually told at least one staff member that I am gay, then most if not all of the staff knew, and it is logical that word got to Ray as well. I flatly deny that Maynard knew that I am gay until I let other staff people know and word must have gotten to him. I have never in my life experienced someone cry when I told them I am gay, as Ray testified two women did in 2001.

12. The skydiving community is mostly composed of a collection of very unique types of people and my co-workers were constantly joking around. In 2001, many of the jokes revolved around my homosexuality. I do not think that any of my co-workers were malicious about it, but at times it got to be a bit too much to shake off, and I found it distracting and embarrassing. I was named "Gay Don" by someone and the name stuck. I grew used to it, but I would not have chosen it nor did I choose it myself.

13. I worked at SDLI again starting in 2009. At the beginning of that season I had a conversation with the staff to tone down the amount of gay jokes from 2001, as I was concerned about it being overboard in a professional work setting. Though I knew no one was being malicious, I had grown out of the novelty of accepting it. The jokes were fewer, but they did not stop.

14. I worked for a couple of months in the 2009 season until, unfortunately, at the beginning of July, I did a tandem with an overweight passenger (over 225 pounds). Nothing went wrong on the jump, and the landing was normal. Nevertheless, I broke my right ankle, and could

not work for the rest of the summer. My doctors were not sure when I would be recovered enough to jump, so I stayed in Long Island, but could never go back and eventually went home.[1]

15. I told Ray that I was ready and willing to return to the drop zone as soon as I could, and remained in New York, ready to start jumping again as soon as possible. My leg was in a cast, for which color I chose pink, which is, by virtue of the Pink Triangle, the symbol that represents gay people. Straights wear pink, but it is not often that one sees a straight man wearing pink. I chose pink specifically to identify with my sexuality, that is why when I wear my pink cap, no one asks if I am gay, but when I do not, they assume I am straight. A picture of me in my pink cast and painted pink toenails is attached as "Exhibit A."

16. While I was in Long Island waiting to get back to work, there were emails calling for staff meetings, some "mandatory." See Exhibit A, which was marked as "Callanan 3" at the deposition of Lauren Callanan. At the "mandatory staff meeting" announced at Exhibit B, which was marked as Exhibit 22 at the Maynard Deposition, I showed up with my pink cast, and as it was summer, my foot in the cast was bare. See Exhibit A.

17. Ray saw the cast, demanded that I paint the cast black if I were to stay at the dropzone that day. But the allegation, made by defendants, that the reason they didn't want me hanging around the drop zone with a cast because it would scare other customers away is demonstrably untrue. I was on crutches, see Exhibit A, and to cover a cast with black paint would fool no one. Imagine from the picture attached as "A" I am still on crutches where the only difference is that the cast is painted black. No one would be fooled that I was not injured. Additionally, the suggestion that he asked me to cover the cast is belied not only by the fact that to paint it black or would fool no one, but there is a woman at the hospital at the same time I was

[1] I started this lawsuit as a citizen of Missouri, but had to leave because the land upon which my residence was standing on was sold and I am for the duration in Texas.

Def. Exh. N

7

– Tara, the girlfriend of a co-worker by the name of Ed Reiter – who came to the drop zone on crutches after her jump accident where she broke her back on a landing, which happened the within days of my accident. She was not asked to leave by Ray because of not wanting broken jumpers around customers.

18. Additionally, at one time in 2009, after I broke my ankle, but while the pink cast was off and I was still healing, I was at the dropzone and encountered Ray near a coke machine. I took off a boot that covered my entire foot and Ray said about my pink toenails and said "That's gay!" in a derogatory tone. Since the boot covered my foot, he did not demand I paint them black, but the fact that I was allowed to remain at the dropzone with a recovery boot – clearly evidence of an injury – demonstrates that Ray's objection was the color, not any worry that a customer would be afraid to go on a tandem jump. Ray's safety video, as well as the waiver all passengers sign, mentions death as a possible outcome, and dissuading anyone who has any fear of jumping. This further demonstrates the falsehood of Ray's explanation for objecting to my pink cast and pink toenails.

19. My doctors would not clear my return to work in the summer of 2009 but before I left in or about late August/early September was rehired for the following summer.

20. I returned in May 2010. Nothing of incident occurred for about a month. On Friday, June 18th, 2010, however, I was in attendance at work performing my routine duties taking primarily first-time passenger jumpers on their first skydives. It was a typical day for me at work and the start of a fairly busy weekend of jumping. At some point that day, a couple came to Skydive Long Island to make their scheduled jumps. It was a heterosexual couple making a jump, which, I later learned, was to be a birthday present for the female from the boyfriend.

Def. Exh. N
8

21. I was randomly assigned to take the female jumper (Rosana Orelana) and a co-worker was assigned to take the male (David Kengle). The couple was manifested aboard the same aircraft so that they could jump at the same time. Both passengers ordered videographer services provided by the drop zone, which involves a third jumper to document the event taking video and/or still photography. At some point during the ride in the aircraft to the designated jump altitude, another employee of the drop zone had asked Mr. Kengle what he thought about his girlfriend being strapped to another guy in presence of myself, Rosana, and other passengers and staff in the aircraft.

22. This is a common joke or statement made before an opposite sex couple does a jump to loosen the tension, though it has long lost its humor to me and is not funny to every customer, particularly Rosana and Kengle, and her discomfort embarrassed me; I wanted her to know that despite our being so physically close to each other, I got no gratification from it.

23. I sensed Rosana felt awkward by that comment, and I did too; I did not want to be presumed to be heterosexually attracted to her, so I in front of Rosana (and others in the aircraft if they should have happened to hear) stated that she should not to worry about me because I am gay. She testified that I said I told her I had just broken up with my boyfriend; I don't think I said that because it is not true - my ex and I broke up years ago. What I believe I said was that "and I have an ex-husband to prove it."

24. While I was in the aircraft that day, as on any jump, if you are sitting on a bench, straddled, and a passenger is sitting between your legs, the instructor's legs are forced to spread apart. In that position, your arms naturally end up resting on your legs and your hands naturally rest near the hips are of the passenger; the passenger is strapped to you, sitting between your legs in very close proximity. This is normal. In the cramped aircraft, there is no other place to put

them. I have never had a passenger injury, so why should I do things differently for Rosana – who said nothing about being uncomfortable; I also had no idea that she was claustrophobic and didn't even read the waiver about touching. To have strapped her more loosely might have resulted in her injury or fatality. See Exhibit C, Notice from United Parachute Technologies ("If you think you are doing your student a favor outside of your normal or recommended procedures, you could be making a fatal error in judgment.")

25. Furthermore, speaking into someone's ear is normal. The passenger's head is right in the instructor's face when strapped together and more particularly giving final instructions in a noisy environment right into the ear of the passenger so as not to be shouting, but rather calmly giving instructions as we go through all the processes towards the jump and landing. Due to the surrounding noise, this calm delivery might be interpreted as a whisper.

26. There was nothing more said about anything at that time about me and the jump operation went forward and was performed in the normal manner expected. I took her up on the jump, she saw the scenery that is to be seen, and iterated "awesome!" at the end of the jump.

27. The couple landed within seconds of each other and happily took pictures together in the landing field and together with the other instructor and myself. That was the last interaction I had with either of these two customers until their deposition where Kengle, now knowing I was gay - or fearing as he testified that gay men like to flirt with women - wanted to be in the deposition room to protect Rosana from me. I also witnessed Rosana back away from my attorney when he inoffensively moved closer to her to show her a video on a laptop.

28. The next three days were busy and I performed numerous jumps each day – Saturday, Sunday, and all day Monday, June 21st, 2010 – until sunset at which time I was called aside by the owner of Skydive Long Island, Ray Maynard, into an unplanned, private meeting in

his office area just after sunset located in the passenger video briefing room adjacent his office. Ray proceeded to question me about a jump I performed on the previous Friday. It was now Monday. He was asking me to recall a specific jump I had done with Rosana. I could not recall any details about any specific jump after so many jumps and days had passed.

29. I said that to Ray, yet he proceeded to press me to recall and acknowledge specific knowledge of this one jump. I told him that I did not know anything specific about the jump he was referring to. He told me that I had taken Rosana on a jump on Friday, June 18th and that there was a complaint about my sexuality coming up in front of the customers. I did not either confirm or deny that it came up because I did not have specific recollection of that jump, which is very common after a busy few days and after about 30 jumps.

30. I also stated to him that, as he knew, it was quite common that my sexuality was raised by numerous staff, friends, and visitors at the drop zone everyday and that it comes up all the time and in front of customers, and that I did not know if I had said something or if someone else did about it.

31. Ray proceeded to inform me that the customers were offended by it and that it was inappropriate for my sexuality to come up and that he was suspending me for one week, without pay, and as well was going to dock my pay for the full cost of two tandem jumps and two video/picture packages while claiming he was forced to refund the customer's money and I was going to pay for it. This he did.

32. I said to Ray that if attention to my sexuality is a problem that he was going to need to have a meeting with everyone to tell them not to joke about it anymore in front of customers. He replied that there was going to be a meeting about it in my absence. I asked him if that was it or if there was anything else and he said yes there was something more. I asked him

Def. Exh. N
11

what and he replied stating that I had inappropriately touched Rosana during the jump. I was surprised to hear such a thing and asked him to verify my understanding of which passenger, the male or female, that I took on the skydive.

33. He said it was the girl, referring to Rosana. Not believing what I had just heard, I asked Ray to specifically state where she had been inappropriately touched at which time Ray stuttered and pointed at his hips and said it was at the hips. To be sure I understood what Ray was saying, I asked him, summarizing, that what was happening is that me, the gay guy, was being suspended for my sexuality being mentioned in front of Rosana and her boyfriend and I am also being accused of touching my female passenger at the hips in an act of heterosexual misconduct. I asked Ray if that was seriously what he was proceeding on and he just looked at me.

34. Rosana testified at her deposition that she wanted for me to do what was necessary to safeguard her on the jump. If I had not attached the required hip attachments, and adjusted them as necessary, she easily could have fallen out of the harness, died, and I would have lost my license (or worse) for that, since it would result in a fatality.

35. I then pointed out that since he was taking money from me for two video packages that there must be video and still camera footage of both jumps and that I would like to see it. He refused to allow me to see the videos stating to me that it was irrelevant. I responded that I thought it was relevant and that I would like to see it and suggested to him that we pull the manifest log from that Friday and see which videographer filmed the jumps and we look at the raw footage and see if there was a problem. He refused again and stomped outside.

36. After he left the office, I composed myself and proceeded outside at which time I came across Rich Winstock who was at the time the chief instructor at the drop zone. I asked to

Def. Exh. N
12

speak with him urgently at which time we went to the drop zone classroom where I informed him about everything that just transpired. During the conversation, Ray barged open the door and in disgust shouted at us talking about what Ray and I had just spoken about, and left, slamming the door back closed.

37. Rich calmed me and assured me that he would try to talk some sense into Ray and that I should go on home and we would be in contact during the week. We did exchange email that week about the progress with the situation. He ensured me that he would advocate on my behalf with Ray stating also that the decision to continue my employment would be left with Ray the Sunday night before my scheduled return to work from suspension.

38. I returned to work on time on Monday, June 28, 2010 at 9:00AM. Ray was nowhere on the drop zone. I waited for several hours until Ray returned at which time he called me into the same room he had the suspension meeting with me a week prior, this time with Lauren Callanan in attendance. I had an iPhone voice recorder to document the meeting.

39. The tape of the meeting is attached as "Exhibit D." In sum, Ray told me in extremely angry terms that I was terminated.

40. I pressed further for answers or a reason for my termination. Ray got further agitated refusing to offer a reason again, then attempted to claim it was not a "gay issue" but that I had ruined a man's fiancé's birthday by talking about my personal life with the customer, and stating that if Rich Winstock had done the same, he would be fired too. In fact we know this to be a lie because Rich later quit to Ray's dismay[2]; he also testified in his deposition that he did, on occasion, referencing his sexuality by referring to his wife and children, and Ray did not fire him.

[2] See Exhibit E, email from Rich Winstock from me.

Def. Exh. N
13

41. I pressed further for an acceptable explanation for him not investigating the allegations and suggested that perhaps they were simply trying to get a refund for a bogus claim. Ray lied and said they refused a refund, but the record now shows he gave one. And Kengle accepted it. He refused to answer my questions as to whether he investigated.

42. Rather, he re-iterated that this was the action that is being taken, told me to get my things out and left the room much in the same angry manner as the week prior. I asked Lauren, who was the office manager, to provide me with final jump logs and I also attempted to get from her the information Ray refused to give me about the video footage of the two tandem jumps. She refused, stating that it was on Ray's orders.

43. I proceeded to the staff video room area to collect my equipment. There was confusion among my colleagues. I had little time to say anything to them about what had happened. I asked the room if anyone knew why I had been gone and they did not. I asked a closer colleague videographer to check his records for the name of my passenger I took, he did and showed me that it was not he. I was unable to determine who filmed either jump and at that time I did not know David Kengle's name either or Rosana's last name, although Rosana's first name was on my manifest. I asked my colleagues to come forward with any information they might have later, and also stated that this was not over as I was very upset.

44. During the month of July 2010, I sought employment at two drop zones. One was Ray's competitor. I had a meeting with the owner of Long Island Skydiving and discussed what transpired with SDLI. He regrettably informed me that this was not surprising behavior by Ray and apologized that I had experienced that treatment but did not have any openings at the time. There were no other possible employment opportunities within over 100 miles from the condo I had leased for the summer to work at SDLI.

45. I also answered an ad for employment at a large commercial Midwest drop zone in the third week of July by email exchange with that owner (Doug Smith, Chicagoland Skydiving Center). He was prepared to offer me employment based upon the positive feedback and recommendations he received about me up until he was told that I was suing SDLI – which, at that time, had not happened or been discussed with anyone. I asked the Mr. Smith to tell me who told him that and he refused and stated in an email that I would be hard-pressed to ever find work again if I pursued a lawsuit against Ray.

46. Before this event happened in my skydiving career, I had always enjoyed the sport and made it a life-long pursuit of 20 years through most all of my adult life to date. I made thousands of customers happy. I began working as an instructor just two years after my inception into the sport. Customers typically praised my performance – as did even Ray in his deposition – and I did received one email, attached as "Exhibit F" from Lauren Callanan and marked as "Callanan 2" at her deposition. She cannot explain why it was not turned over to us in discovery. I have seen the affidavit of Ray attached as "Exhibit G," indicating that no electronic information had been destroyed. That would appear to be impossible, and at a minimum unexplained, if I have electronic information from 2009 that defendants attest that they search for but have not turned over. A search as outlined by Ray's affidavit, Exhibit G, would have turned up the customer compliment attached as "Exhibit F." However, it was I who produced it to the defendants, not the other way around.

47. The customer who wrote in Exhibit F that "[e]mployees like Don will be the reason for the continued success" of SDLI was like many of the thousands of passengers whom I took into the air and provided a safe, exhilarating experience that they will never forget. But this matter has ruined my relationship with skydiving both professionally and as the passionate

Def. Exh. N
15

activity I partook in for personal enjoyment, social interaction and comradery among a diverse collection of people. As if having my sexuality illegitimately used against me in such a way wasn't terrible enough, falsely accusing me of the misconduct Ray Maynard cited in addition to trying to use that to cover up discriminating against me and lying and stealing from me; has damaged me severely. I know longer feel like I can be myself working jumping, especially tandem jumping having to strap people to me and touch in so many places to perform the job. Because of what Ray Maynard did terminating me for such reasons, regardless of the bogus customer complaint, I can no longer work in this industry without fear of having been branded as some kind of gay pervert. I cannot even enjoy non-work skydiving because there are tandem jumps taking place at every skydiving center and it is a stark and vivid reminder about what happened to me, which takes away the enjoyment I get from jumping and keeps me from interacting with friends and social circles developed over two decades. No amount of personal loss, injury, or death in the sport has ever pushed me away, until now.

Dated: Dallas, Texas

April 7, 2013

DONALD ZARDA

Def. Exh. N
16

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UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

DONALD ZARDA,

Plaintiff,

– against –

ALTITUDE EXPRESS, INC., d/b/a SKYDIVE LONG ISLAND, and RAY MAYNARD,

Defendants.

Case No.: CV-10-4334 (JFB)(ARL)

DEFENDANTS' AMENDED RULE 26 DISCLOSURE STATEMENT

Pursuant to Local Civil Rules, the Civil Justice Expense and Delay Reduction Plan and the Federal Rules of Civil Procedure, Defendants, **ALTITUDE EXPRESS, INC., dba SKYDIVE LONG ISLAND, and RAY MAYNARD**, by and through their attorneys, **ZABELL & ASSOCIATES, P.C.**, hereby provides automatic disclosure as follows:

A. PERSONS WITH PERTINENT INFORMATION RESPECTING CLAIMS, DEFENSES, AND DAMAGES:

Name/Title	Present or Last Known Employer or Address
Plaintiff	c/o Plaintiff's Counsel
Raymond Maynard	Employee of Defendants c/o Defendants' Counsel
Lauren Callanan	Employee of Defendants c/o Defendants' Counsel

Richard Winstock	Director of Business Development Encore Nationwide, Inc. Unknown
Michael C. Gamble	Member of Rainbow Skydivers Unknown
David Kengle	Customer of Defendants Unknown
Rosana Drellana	Customer of Defendants Unknown

B. GENERAL DESCRIPTION OF ALL DOCUMENTS IN THE CUSTODY AND CONTROL OF DEFENDANTS BEARING SIGNIFICANTLY ON CLAIMS AND DEFENSES:

1. Plaintiff's Summons & Complaint filed with the Clerk of the Court for the Eastern District of New York, dated September 23, 2010;

2. Defendants' Rule 7.1 Statement;

3. Altitude Express, Inc.'s tax return for an S corporation, form 1120S, from 2009;

4. Altitude Express, Inc.'s tax return for an S corporation, form 1120S, from 2008;

5. Altitude Express, Inc.'s tax return for an S corporation, form 1120S, from 2007;

6. Altitude Express, Inc.'s tax return for an S corporation, form 1120S, from 2006;

7. Altitude Express, Inc.'s tax return for an S corporation, form 1120S, from 2005;

8. Altitude Express, Inc.'s tax return for an S corporation, form 1120S, from 2004;

9. IRS Depreciation and Amortization form 4562, from 2008;

10. IRS Depreciation and Amortization form 4562, from 2007;

11. IRS Application for Automatic 6-month Extension of Time to File, form 7004, for 2007

12. IRS Depreciation and Amortization form 4562, from 2006;

13. IRS Depreciation and Amortization form 4562, from 2005;

14. IRS Depreciation and Amortization form 4562, from 2004;

15. Altitude Express, Inc.'s Suffolk Federal Credit Union Statement of Accounts from January 2009 through September 2010;

16. New York Post article "Gay Skydive Teach Axed for 'gal grope,'" dated October 4, 2010;

17. Printout of homepage of www.DonZarda.com;

18. Printout of Plaintiff's Facebook homepage;

19. Printout of Skydive MRVS's Staff webpage;

20. Printout of History of Skydive St. Louis webpage;

21. Printout of City of Harrisonville, Board of Aldermen, meeting minutes from February 21, 2006;

22. Plaintiff's contact information, emergency contact information, medical certificate, and experienced skydiver's information, dated 5/14/2010;

23. Plaintiff's signed Agreement, Release of Liability & Assumption of Risk, dated 5/14/2010;

24. Altitude Express Jump Log January 1, 2010 though December 31, 2010;

25. Altitude Express Plane Loads cross-tab by day for November 1, 2009 - March 1, 2010, November 1, 2008 - March 1, 2009, and November 1, 2007 – March 1, 2008;

26. Altitude Express, Inc.'s June18, 2010 manifest;

27. Altitude Express, Inc.'s employee list with phone numbers;

28. Plaintiff's earning record from January 1, 2010 – December 31, 2010;

29. October 21, 2010 request for waiver of service of a summons pursuant to Rule 4;

30. October 21, 2010 waiver of service of a summons pursuant to Rule 4

31. Plaintiff's Notice of Charge of Discrimination to the EEOC with attachments, dated August 6, 2010;

32. Letter from EEOC to Plaintiff, dated August 20, 2010;

33. Altitude Express, Inc.'s Transaction Detail by Account, from January 2009 through October 2010;

34. New York State Department of State, Division of Corporations, database information on Altitude Express, Inc., dated December 15, 2010;

35. Proposed Scheduling Order in connection with this action, Docket No. 9;

36. Defendants' Notice of Appearance, dated November 1, 2010, Docket No. 4;

37. August 22, 2010 email from Michael C. Gamble to Rich Winstock;

38. August 23, 2010 email from Rich Winstock to Michael C. Gamble;

39. August 23, 2010 email from Michael C. Gamble to Rich Winstock;

40. August 23, 2010 email from Rich Winstock to Lauren Callanan;

41. August 24, 2010 Mediation Invitation Response Form to the EEOC;

42. December 16, 2010 Spoliation letter from Defendants' to Plaintiff's counsel.

C. COMPUTATIONS OF DAMAGES CLAIMED BY PLAINTIFF:

Not applicable.

D. CONTENTS OF ANY LIABILITY INSURANCE POLICIES:

Plaintiffs' claims are not covered by an insurance policy.

Defendants reserve the right to change or supplement any automatic disclosure, which may subsequently appear to be incomplete or incorrect. Defendants further reserve the right to object at such later time that any response given hereunder is protected by the attorney/client privilege, is attorney work product or trial preparation material, or the disclosure of such information was inadvertent.

Dated: Bohemia, New York
December 22, 2010

ZABELL & ASSOCIATES, P.C.
Attorneys for Defendants

By: _____

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AFFIDAVIT OF SERVICE

STATE OF NEW YORK)
) **ss:**
COUNTY OF SUFFOLK)

ROBERT GARAFOLA, being duly sworn, deposes and says:

1. That I am over eighteen years of age and am not a party to this action.

2. That on the 22nd day of December, 2010, I served a copy of Defendants' Altitude Express, Inc., d/b/a Skydive Long Island, and Ray Maynard's Amended Rule 26 Disclosure Statement, annexed hereto, upon:

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

3. *via* First Class Mail at the address listed above, same being the address designated for that purpose, by depositing a true copy of the same enclosed in a properly addressed wrapper in a depository under the exclusive care and custody of the United States Postal Service.

Robert Garafola

Sworn to before me
this 22nd day of December, 2010.

NOTARY PUBLIC

TIMOTHY J. DOMANICK
Notary Public, State of New York
No. 02DO6182370
Qualified in Suffolk County
Commission Expires February 25, 2012

Skydive Long Island Employee Addresses for 2009-2010:

ARISTOTELI DORIZAS
1027 WOOL AVENUE
FRANKLIN SQUARE NY 11010

DUNCAN SHAW
275 EAST MAIN STREET
YAPHANK NY 11980

JOHN W CAMPBELL
150 MAPES ROAD
PERRIS CA 92570

WAYNE BURRELL
57A SEA BREEVE AVE
WESTHAMPTON NY 11977

JASON LUCAS
149 SOUTH WEST EVANS AVE
PORT SAINT LUCIE FL 34984

JOHN SHERMAN
42 MEAGHER PLACE
WILLISTON PARK NY 11596

ERIK TOPS
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SUSSEX NJ 07461

CARMEN VILLAMIL
150 MAPES ROAD
PERRIS CA 92570

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HACKETTSTOWN NJ 07840

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EAST MEADOW NY 11554

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YAPHANK NY 11980

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14 WARDS PATH
HAMPTON BAYS NY 11946

JOSEPH FORTUNE
4 PICKWICK HILL DRIVE
HUNTINGTON STATION NY 11746

ROBERT KOZAKIEWICZ
788 REEVES AVE
RIVERHEAD NY 11901

MARKO MARKOVICH
205 HOLBROOK ROAD
LAKE RONKONKOMA NY 11779

JAMES D MCQUEEN
84 HEROD POINT ROAD
WADING RIVER NY 11792

JORDAN MILES
82 ROBINWOOD DR
MASTIC BEACH NY 11951

PATRICK NEWMAN
27540
CANTURBURY ST
LAKE ELSINORE CA 92585

BRETT NOCK
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NEWTON NJ 07860

BRIAN PETRETTI
40 PARK HILL DRIVE
SELDEN NY 11784

EDWARD REITER
15 OLD STONE ROAD
CALVERTON NY 11933

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ROCKVILLE CENTRE NY 11570

ROBERT J SWAINE
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CENTRAL ISLIP NY 11722

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YAPHANK NY 11980

SHAUN TIERNEY
6 CALENDAR ROAD
MANORVILLE NY 11949

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142 PINENECK AVE
EAST PATCHOGUE NY 11772

FREEFLYALEX INC
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YAPHANK NY 11980

DOUGLAS ALM
440 SOUTH AIRPORT ROAD
LAKE WALES FL 33859

MEGHAN AYERS
39 JOHN STREET
SAYVILLE NY 11782

JARED FOX
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WADING RIVER NY 11792

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107 ORIOLE RD
LEVITTOWN NY 11756

GERARD J HANNON
238 FARHAN LANE
NORTH BABYLON NY 11703

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GLENDALE NY 11385

DEAN J LANGEN
2164 POND ROAD
RONKONKOMA NY 11779

DOUG LICCIARDI
68 LAKESIDE TRAIL
RIDGE NY 11961

PAUL LICHTARSKI
801 CENTER BAY DR
WEST ISLIP NY 11795

BENJAMIN LOWE
1509 LAUREL AVENUE
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