

Foreperson
Juror #1

Thomas Micky
Thomas Micky
10/21/15 3:00 PM

FILED
IN CLERK'S OFFICE
U.S. DISTRICT COURT E.D.N.Y.

★ OCT 21 2015 ★

LONG ISLAND OFFICE

CD-10-4334 JFB

COURT EXHIBIT

we have unanimously
reached a verdict

Thomas Murphy

10/21/15 3:30 PM

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**Zarda v. Altitude Express. Inc., d/b/a Skydive Long Island
and Raymond Maynard
No. 10-CV-04334 (JFB)
October 13, 2015**

CIVIL JURY SELECTION

I. PRELIMINARY STATEMENT TO THE ENTIRE PANEL

[Before the opening statement to the panel, the court deputy shall call the case into the record and swear in the entire panel.]

Good morning, ladies and gentlemen. Welcome to the United States District Court for the Eastern District of New York. My name is Judge Joseph Bianco and I will be presiding over the trial which is about to begin. We are here this morning to select a jury in a civil case.

We are about to begin the actual process of selecting the jurors who will hear and decide this case. The trial is anticipated to take about two weeks. We will be sitting today, tomorrow, and Thursday this week, from 9:30 to 4:30, and Monday through Thursday next week. Each day next week will also be from 9:30 to 4:30. I thank you for being here. Your presence reflects your serious commitment to your civic responsibilities. I recognize that some of you are significantly inconvenienced by your service. Jury service, however, is one of the highest and most important duties of a citizen. Our system of justice depends on you. I, like all my fellow

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judges, am grateful to you for your service. In a few minutes, if you have an extraordinary personal hardship that prevents you from serving in this case, you will have an opportunity to bring that to the Court's attention. I emphasize extraordinary because, as I said, I know many of you have jobs or other places you would rather be. The hardship must be extraordinary for you to be excused. So I appreciate your full cooperation.

The purpose of this procedure is to select a panel of 8 fair and impartial jurors to try this case. So I am going to ask you certain questions with respect to your background. I apologize in advance for asking you personal questions, which I must, for the purpose of selecting a fair and impartial jury panel.

My questions – and your responses – enable me to determine if any prospective juror should be excused for cause. The questioning also enables the parties to exercise their judgment with respect to their peremptory challenges – that is, challenges for which no reason need be given. Each side has been allotted a certain number of peremptory challenges that they are free to exercise. If at any time you feel uncomfortable for any reason in answering a question in front of other jurors, just ask if you may come up here to the bench at sidebar and I will discuss it with you in the presence of the attorneys and the court reporter only.

If I decide that you should not sit as a juror here, please understand that it does not in any way reflect badly on you. Our system simply requires jurors who not only are totally impartial, but also who lack even the appearance of being partial or biased. Such an appearance may arise from a prospective juror's relationship to the case, the parties, or the subject matter of the case.

If for any reason I decide to excuse you, you may still be able to serve as a juror in a different case, so I will ask you to return to the central jury room.

So you can understand the reason for the questions I will be asking you shortly, I want to tell you briefly about the case.

II. SUMMARY OF THE CASE

As I explained, this is a civil case. It is entitled Zarda v. Altitude Express, Inc. d/b/a Skydive Long Island and Raymond Maynard.

I want you to understand that nothing I say today regarding the description of the case is evidence. The evidence that you will consider, if selected as a juror, will only come from the trial testimony of witnesses, and from exhibits that are admitted into evidence.

I will now briefly summarize the claims in this case. Again, my summary is only intended to assist you in considering whether you can sit as a fair and impartial juror in this case.

The plaintiff is the estate of Donald Zarda, represented by co-independent executors Melissa Zarda and William Allen Moore, Jr. Mr. Zarda worked as a skydive instructor for the defendants Skydive Long Island Inc. and Raymond Maynard. The plaintiff brought this action for damages against the defendants claiming that he was terminated based on his sexual orientation. Defendants deny the allegations of discrimination.

Do any of you know anything about the facts of this case, or have you heard or read anything about the facts of this case?

III. INTRODUCTION OF THE PARTIES AND COUNSEL

The plaintiff in this case is the estate of Donald Zarda, represented by Melissa Zarda and William Allen Moore, Jr. Please stand and face the jurors. The plaintiff is represented by Gregory S. Antollino and Richard J. Cardinale. Please stand and face the jurors.

The defendants in this case are Altitude Express, Inc. doing business as Skydive Long Island and Raymond Maynard. Mr. Maynard, please stand and face

the jurors. The defendants are represented by Saul D. Zabell and Laura Johnson of Zabell & Associates. Please stand and face the jurors.

Do any of you know, or have you had any personal or business dealings with any of the parties or their counsel?

Do any of you know, or have you had any personal or business dealings, directly or indirectly, with any relatives or associates of the parties or their attorneys?

Has a relative or close friend ever been employed by or had significant dealings with any of the parties or their attorneys?

Is there any member of the panel who is familiar with anyone else in the courtroom, including all Court personnel and myself?

IV. WITNESSES

The following individuals may, and I stress the word may, be called to testify as witnesses at trial, or their names may be mentioned during the course of the trial.

Donald Zarda

Richard M. Winstock

Raymond Maynard

Rosana Orelana

David Kengle

Lauren Callanan

Zachary Zuniga

Ira Helfand

Michael C. Gamble

Michael Gocke

Shaun Tierney

Tim Fayan

Ed Reiter

Robert Kozakiewicz

Kris Zito

John Campbell

Carmen Villamil

Duncan Shaw

Marko Markovich

Brandon Spadero

Orin Perry

Curt Kellinger

Ben Lowe

Aristotelo Dorizas

Wayne Burrell

Jason Lucas

John Sherman

Erik Tops

Jason Berger

Timothy Fagan

Joseph Fortune

James McQueen

Jordan Miles

Patrick Newman

Brett Nock

Brian Petretti

Daniel Santiago

Robert Swaine

Janeen Tierney

Douglas Alm

Meghan Ayers

Jared Fox

Gerard Hannon

Brian Kullmann

Dean Langen

Doug Licciardi

Paul Lichtarski

Allison Rodriguez

Christopher Spencer

Michael Thamarus

Casey Lacour

Miguel Arias

Matthew Kaufman

Graham Kozakiewicz

Jon Eric Lohwasser

Christina McCormick

Andrew Medina

Ryan Sargent

Jonathan Villa

William Allen Moore

Do any of you know or know about, or have any of you had any dealings with any of these individuals?

V. GENERAL QUESTIONS

Do any of you have any physical problems or an extraordinary personal hardship that would prevent you from serving in this case for the amount of time I have indicated?

Do any of you have any difficulty with your sight or hearing that could affect your perception of the proceedings?

Do any of you have any difficulty understanding or reading English?

Do any of you have any religious, moral or ethical beliefs that would prevent you from passing judgment on another person, or on a business?

Under our judicial system, the facts are for the jury to determine and the law is for the Court. The two areas are separate and distinct. At the end of the case, I will instruct you on the law, and you are required to accept the law as I explain it to you. It will be your job to determine the facts on the basis of the law as I have explained it to you. Do you feel that you would be able to apply the law as I explain it even if you disagree with it?

[CALL 14 NAMES – PLEASE REMEMBER THE JUROR # YOU ARE GIVEN. I WOULD LIKE TO EMPHASIZE TO THE REMAINING POTENTIAL JURORS IN THE AUDIENCE TO LISTEN TO THE QUESTIONS CAREFULLY BECAUSE YOU MAY ALSO BE UP HERE IN A MINUTE AND IF YOU ARE CALLED UP, I WILL ASK YOU WHETHER YOU HAVE HEARD THE QUESTIONS I ASK TO THE GROUP OF 14 AND WHETHER YOU HAVE AN AFFIRMATIVE RESPONSE TO ANY OF THEM. THIS WAY I WILL NOT HAVE TO REPEAT THE QUESTIONS WHEN YOU COME UP.]

VI. QUESTIONS SPECIFIC TO THE CASE

Is there anything about the nature of the case that would prevent you from rendering a fair and impartial verdict on the claims based solely on the evidence presented in court?

Have any of you, your family members or your close friends ever been unfairly demoted from a job, been denied a promotion you thought you should have received, or been unfairly terminated from a job?

Have you ever applied for a position and believed that you did not get the job due to discrimination?

Have any of you, your family members or your close friends ever witnessed, experienced, or been accused of discrimination in the workplace?

Have any of you, your family members or your close friends ever worked somewhere where a co-worker claimed he or she had been discriminated against?

Have any of you, your family members or your close friends ever filed a Charge of Discrimination with the Equal Employment Opportunity Commission, or any state agency charged with investigating complaints of discrimination or sexual harassment?

If yes: Who was it (you, family member, close friend)? What were the charges related to? Who were the charges against? What was the outcome?

Have you ever been responsible for supervising other workers? If so, please explain.

Have you ever been involved in making decisions to discipline, discharge, hire, train or promote other workers? If yes, please explain.

Have you, or a family member, or a close friend ever sued an employer?

This case involves allegations of discrimination based on sexual orientation. Is there anything about these types of allegations that would prevent you from sitting as a fair and impartial juror in this case?

Do any of you believe it is never appropriate to reveal one's sexual orientation in the workplace?

This case involves a claim of employment discrimination made by the plaintiff against his former employer. For reasons having nothing to do with the case, Mr. Zarda died before trial. However, his sworn testimony was recorded, and you may consider that testimony along with all the other evidence, even though he will not testify in the courtroom. In addition, our system allows his estate to be substituted for him after death, and to allow a jury to hear the evidence and make a decision. If there is an award, it will go to the estate. Is there is anyone who cannot treat the estate of a deceased person as fairly as you would a living person or a company?

During the course of this trial, you will hear testimony from witnesses with all sorts of backgrounds. They are all equal before the law, and you must judge the

credibility of each on the basis of his or her own testimony, not on any assumptions about them based on who they are or what they do. Is there anyone who would have any difficulty applying that rule?

VII. PRIOR EXPERIENCES WITH COURT SYSTEM

Have you or any member of your family or any close friends ever been a plaintiff or a defendant in a state or federal court case, whether criminal or civil? If so, what kind of case? And, what did it involve? Is there anything about that experience as a party in that case that would prevent you from acting as a fair and impartial juror in this case?

Have you or any member of your family or any close friend ever participated in a state or federal case, whether criminal or civil, as a witness or in any other capacity? If so, what was the case about? Is there anything about that experience that would prevent you from acting as a fair and impartial juror in this case?

VIII. CATCH-ALL QUESTION

Having heard the questions put to you by the Court, is there any other reason why you could not sit on this jury and render a fair and impartial verdict based on the evidence presented to you and in the context of the Court's instructions to you on the law?

Is there anything about your personal experiences which would prevent you from treating both the plaintiff and the defendants in this case fairly and impartially?

IX. QUESTIONS FOR INDIVIDUAL PROSPECTIVE JURORS

[Jurors answer from one-page handout.]

FINAL QUESTION TO EACH JUROR – If you are selected as a juror in this case, will you be able to keep an open mind until all of the evidence and arguments have been presented, and then decide the case fairly and impartially based only on the evidence presented at trial and the law as I explain it to you?

[CALL COUNSEL FOR FOLLOW-UP QUESTIONS, CAUSE CHALLENGES AND THEN PEREMPTORY STRIKES]

Please take a look at the following questionnaire. You do not need to fill it out. The *Italic response* is an example of how to respond to the questions. You do not have to follow this example. The Court may ask follow up questions in response to your answers.

When the Court asks you to answer these questions, you should not repeat the questions.

1. STATE YOUR PLACE OF RESIDENCE AND HOW LONG YOU HAVE LIVED THERE.

"I live in _____ and have been there for _____ years."

2. WHAT IS YOUR OCCUPATION? *"My occupation is _____."*

IF YOU ARE RETIRED OR CURRENTLY UNEMPLOYED, PLEASE STATE YOUR FORMER OCCUPATION AND THE NAME OF YOUR LAST EMPLOYER.

"My former occupation is _____."

3. ARE YOU MARRIED OR DO YOU HAVE A SIGNIFICANT OTHER? IF SO, PLEASE DESCRIBE HIS/HER OCCUPATION.

"I am married or have a significant other and his or her occupation is _____" OR "I am not married and don't have a significant other."

4. DO YOU HAVE ANY ADULT CHILDREN? *"I have _____ adult children" OR "I have no adult children."*

IF SO, WHAT IS EACH CHILD'S OCCUPATION? *"My children's occupation is/are _____."*

5. WHAT SCHOOLING HAVE YOU HAD? *"My schooling was/is _____."*

6. HAVE YOU EVER SAT ON A JURY BEFORE? *"I have not sat on a jury before" OR "I have sat on a jury before."*

IF SO, WAS IT A CIVIL OR CRIMINAL CASE? *"It was a civil jury" OR "It was a criminal jury." OR "I served on both."*

WITHOUT STATING WHAT IT WAS, DID THE CASE GO TO A VERDICT?

"The case went to a verdict" OR "The case did not go to a verdict."

7. HAVE YOU EVER BEEN A GRAND JUROR? *"I have never been a grand juror" OR "I have been a grand juror."*

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Zarda v. Altitude Express Inc., d/b/a Skydive Long Island and Raymond Maynard
No. 10-CV-4334 (JFB)
October 13, 2015

I. PRELIMINARY INSTRUCTIONS TO THE JURY

Members of the jury, now that you have been sworn, I will give you some preliminary instructions to guide you in your participation in the trial.

To begin with, you are here to administer justice in this case according to the law and the evidence. You are to perform this task with complete fairness and impartiality, and without bias, prejudice or sympathy for or against the plaintiff or the defendants.

It will be your duty to find from the evidence what the facts are. You and you alone will be the judges of the facts. You will then have to apply to those facts the law as the Court will give it to you. You must follow that law whether you agree with it or not.

Nothing the Court may say or do during the course of the trial is intended to indicate, or should be taken by you as indicating, what your verdict should be.

The evidence from which you will find the facts will consist of

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testimony of witnesses, documents, and other things received into the record as exhibits, and any facts that the parties agree to or stipulate to or that the court may instruct you to find.

Certain things are not evidence. I will list them for you now:

1. Statements, arguments, and questions by lawyers are not evidence.
2. Objections to questions are not evidence. Each side has the right to make objections when they believe evidence being offered is improper under the rules of evidence. You should not be influenced by the Court's ruling on an objection. If the objection is sustained, ignore the question. If it is overruled, treat the answer like any other. If you are instructed that some item of evidence is received for a limited purpose only, you must follow that instruction.
3. Testimony that the court excludes or tells you to disregard is not evidence and must not be considered.
4. Anything you may see or hear outside the courtroom is not evidence and must be disregarded. You are to decide the case solely on the evidence presented here in the courtroom.

There are two kinds of evidence: direct and circumstantial. Direct

evidence is direct proof of a fact, such as testimony of an eyewitness. Circumstantial evidence is proof of facts from which you may infer or conclude that other facts exist. I will give you further instructions on these as well as other matters at the end of the case, but keep in mind that you may consider both kinds of evidence.

One of your most important tasks as jurors is to evaluate the credibility of the witnesses who will testify before you. Listen carefully as each witness testifies both on direct and on cross and consider whether the witness is telling the truth. It will be up to you to decide which witnesses to believe, which witnesses not to believe, and how much of any witness's testimony to accept or reject. I will give you some instructions to help you evaluate the credibility of witnesses at the end of the case.

As you know, this is a civil case. The plaintiff has the burden of proving his claims by what is called a preponderance of the evidence. This means that the plaintiff has to produce evidence that, considered in light of all the facts, leads you to believe that what the plaintiff claims is more likely true than not. To put it differently, if you were to put the

plaintiff's evidence on one side of the scale, and the defendants' evidence on the other side of the scale, the plaintiff would have to make the scales tip somewhat in his favor to prove his claims by a preponderance of the evidence. If the plaintiff fails to do that, he has not met his burden and your verdict must be for the defendants.

Those of you who have sat as jurors on criminal cases or watched television have heard of the standard proof beyond a reasonable doubt. That standard does not apply to a civil case such as this and therefore you should put it out of your mind.

Now, a few words about your conduct as jurors. First, I instruct you that, during the trial, you are not to discuss this case among yourselves or with anyone else, including during any recesses or breaks. Even as among yourselves, it is important that each of you keep an open mind until you have heard all of the evidence, the summations and my instructions on the law. Only then will you begin to exchange views among yourselves and reach your verdict. But until I tell you to actually begin deliberating – which will be at the end of my instructions on the law at the end of the case – please do not discuss the case at all among

yourselves, with family members, or with anyone else. Of course, this includes not discussing the case with anyone through electronic communications.

Second, please do not, while you are serving as jurors in this case, have any conversations with the parties, the attorneys or any witnesses in this case, whether in the courtroom, in the hallways, in the elevator, outside or anywhere else. By this, I mean not only to avoid talking about the case; do not talk at all, even to say good morning or to acknowledge any of these people. Someone seeing a juror in conversation with a party, lawyer or witness might think that something improper was being discussed. To avoid even the appearance of impropriety then, avoid any such conversations. So I can tell you that, when the parties, lawyers, or witnesses pass you in the halls without even acknowledging your presence, they do not mean to be rude – they are simply following my instruction.

Third, do not read or listen to anything touching on this case in any way.

Fourth, do not try to do any research or make any investigation

about the case or the issues presented by this case. For example, do not go onto the internet tonight and research any matters relating to this case. Do not call up your lawyer friends to ask about the type of matters at issue in this case.

Finally, do not form any opinion until all the evidence is in. Keep an open mind until you start your deliberations at the end of the case. Sometimes jurors ask if they can take notes. If you wish, you may take notes. But if you do, leave them in the jury room when you leave at night. And remember that they are for your own personal use. Also, the notes are simply to help your memory. I don't want you to place too much emphasis on juror notes. As you know, a person's notes could be wrong.

At the conclusion of the case when you deliberate, notes which any juror may take may not be given any greater weight or influence in the determination of the case than the recollection or impression of other jurors, whether from notes or memory, with respect to the evidence presented or what conclusions, if any, should be drawn from such evidence. When you deliberate at the end of the case, any difference

between a juror's recollection and another juror's notes should be settled by asking to have the court reporter read back the transcript of that testimony, for it is the court record rather than any juror's notes upon which the jury must base its determination of the facts and its verdict.

In this trial, we will begin each day at 9:30 and go until 4:30.

Please be on time. If any of you are late, we will have to wait, for we cannot start until all of you are here, and all of us – me, the lawyers, the parties, the witnesses, your fellow jurors – will have to wait. And if we lose ten or twenty minutes every day, we may not be able to get the trial completed on time.

The trial will begin this morning. First, each side will give an opening statement. Again, I remind you that an opening statement is not evidence. It is not argument. It is simply an outline of what each party expects to prove, and it is given to help you follow the evidence as the evidence is presented. Next, the plaintiff will present his case. Each witness will testify on direct examination and the defendants' lawyer will then have an opportunity to cross-examine. There may be a little bit of re-direct and re-cross examination.

Once the plaintiff calls all of his witnesses and rests, the defendants will call their witnesses. After each defense witness testifies, the plaintiff will have the right to cross-examine. After the presentations of evidence have been completed, representatives for each side will give you their summations – their closing arguments. This will be their opportunity to summarize the evidence and make their arguments to you.

After you have heard the closing arguments, I will instruct you on the applicable law. You will then retire to the jury room to deliberate on your verdict.

You have a tremendously important task as jurors. It is to determine the facts. You, and not the court, are the sole judge of the facts.

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(Zarda)

March 28, 2015

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

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

Dear Judge Bianco:

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

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

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

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

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

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

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

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

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

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

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

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

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

Don's name F

Sworn to tell truth

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

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

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

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

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

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RESPONSE: We will add this line.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE: This line should have been added.

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

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

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

RESPONSE: The line should have been included.

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

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

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

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

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

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

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

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

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

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

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

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

RESPONSE: The Line should have been added.

3. The testimony of Lauren Callanan.

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

4. Don Zarda's Diploma.

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

5. Maynard's Cross Designations

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

Sincerely,

/s/

Gregory Antollino

Cc: Saul Zabell by ecf

COURT Exhibit
(parties shp.)

EXHIBIT V

COURT EXHIBIT

E

Def. Exh. V

1

Altitude Express Inc
DBA Skydive Long Island

Date 05-14-2010

Zarda J. Donald
Last Name MI First Name

PO Box 312
Street Address

Richmond MO 64085
City/Town State Zip Code

Same
Mailing Address

631-440-6124 901-569-5867 djzarda@gmail.com
Home Phone Mobile Phone E-Mail Address

05/27/1970 39 5'11 180 lbs. Would you like to be on our mailing list?
Birth Date Age Height Weight Yes / No (Please circle one)

H00227402 Student
Drivers License # Occupation

How Did You Hear About Us? _____

Emergency Contact Information

Fr. Mike Mulhearn Family Pastor/Friend
Name Relationship

2100 N. Noland Road
Street Address

816-254-9000
Home Phone Alternate Phone

Medical Certificate:

USPA recommends that all parachutists either receive an FAA Class III Medical Examination or be examined by a medical physician prior to making parachute jumps. In lieu of these qualifications, members must complete the following medical certificate if they are to participate in parachute jumps.

I hereby certify that I have no physical infirmity, am not under treatment for any physical infirmity or chronic ailment, or injury of any nature, and that I have never been treated for any of the following: cardiac or pulmonary condition or disease, diabetes, fainting spells or convulsions, nervous disorder, kidney or related disease, high or low blood pressure.

I certify that all statements in this application are true and correct to the best of my knowledge, and that the medical facts are correct as stated.

[Signature] 5-14-2010
Signature Date

Experienced Skydivers Only

90990 06/30/10 All D-16190
USPA # Exp. Date License Number & Current Ratings

05/01/2010 MRVS 05-01-2010 25175
Reserve Pack Date Date of Last Jump & Location Total Number of Jumps

Information we can release: Phone Number / Address / E-mail / None

Last Name
Zarda

First Name
Donald

Def. Exh. V
2

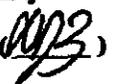
AGREEMENT, RELEASE OF LIABILITY & ASSUMPTION OF RISK

IN CONSIDERATION of being permitted to utilize the facilities and equipment of ALTITUDE EXPRESS INC., D.B.A. SKYDIVE LONG ISLAND (and its associated entities) to engage in parachute activities, ground instruction, flying and related activities, skydiving, freefall and Tandem jumping, hereinafter collectively referred to as "parachuting/skydiving activities", as defined in paragraph 6 in this contract, I HEREBY AGREE AS FOLLOWS:

1. I understand that this document is a binding contract between myself and the entities described herein as SKYDIVE LONG ISLAND, and certify that I am of legal age and under no legal disability which would prevent me from entering into a binding contract. 

2. I am aware that "parachuting/skydiving activities" are inherently dangerous and may result in injury or death and agree that the unforeseen may happen and no one can delineate all risks or possibilities of error. Therefore, I specifically include in this Release, any injury resulting from any occurrence, whether foreseen or unforeseen, and whether contemplated or not contemplated which is in any way connected with my "parachuting/skydiving activities" and/or on presence of the premises commonly known as CALVERTON ENTERPRISE PARK, the former GRUMMAN FACILITY, The Town of RIVERHEAD, or any other place or entity connected with SKYDIVE LONG ISLAND. 

3. PARTIES INCLUDED: I understand that this Agreement, Release of Liability and Assumption of Risk includes but is not limited to, Ray Maynard, SKYDIVE LONG ISLAND, and any of its officers, board members, and shareholders, its or their agents, customers, associated entities, employees, volunteers, pilots, instructors, jumpmasters, the owners of the aircraft, (which shall also include but not be limited to airfoils and balloons), SKYDIVE LONG ISLAND, CALVERTON ENTERPRISE PARK, the former GRUMMAN FACILITY The TOWN of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY, and GRUBB & ELLIS MANAGEMENT SERVICES, INC., the owners of any land utilized for "skydiving activities" adjacent property owners, the United States Parachute Association and its members, anyone working with or for SKYDIVE LONG ISLAND, any manufacturer of any piece of equipment or gear which I may use or am using at the time of my INJURY or DEATH and anyone involved in any way, shape, form or manner in my "skydiving/parachuting activities", and specifically including but not limited to tandem or experimental test parachute jumping to include tandem parachute jumping, hereinafter collectively referred to in this Agreement Release of Liability and Assumption of Risk as SKYDIVE LONG ISLAND. 

4. This entire Contract, Release of Liability and Assumption of Risk is expanded to include all parties mentioned anywhere in the body of the document by name or by category, all vendors or suppliers of materials or equipment for "skydiving/parachuting activities", including but not limited to the manufacturer of the equipment, its employees, directors, officers and shareholders, and all associated entities, shareholders, partners, employees and all other persons in any way associated with any entity mentioned, either specifically or by implication, in the body of this document. 

5. RISKS CONTEMPLATED: This Agreement is made in contemplation of all "skydiving/parachuting activities", which for purposes of this agreement shall include but not be limited to all occurrences contemplated or not contemplated, foreseen and unforeseen, instruction, parachute jumping, tandem or experimental test parachute jumping, ground instruction, flying and related activities, the exit from the aircraft, skydiving, freefall, time under the canopy, the landing, any rescue operations or attempts by SKYDIVE LONG ISLAND, whether on or off the designated landing area, or facilities used by SKYDIVE LONG ISLAND, ground transportation provided to me by any entity in any way associated with SKYDIVE LONG ISLAND, and any activity whatsoever in any way, shape, form or manner connected with my "skydiving/parachuting activities" or my presence on or near the facility and grounds of

SKYDIVE LONG ISLAND, and/or the airport which is used for my "skydiving/parachuting activities". These risks shall be referred to for the purposes of this agreement as "skydiving/parachuting activities".

6. **PARTIES BOUND BY THIS AGREEMENT:** It is my understanding and intention that this Agreement, Release of Liability and Assumption of Risk be binding not only on myself, but on anyone or any entity, including my estate and my heirs, that may be able to or do sue because of my injury or death. It is further my understanding and agreement that this Release is intended to and does in fact release SKYDIVE LONG ISLAND as defined in paragraph 3 from any and all claims or obligations whatsoever, foreseen and unforeseen, contemplated or not contemplated, arising in any way from my participation in "skydiving/parachuting activities", even if caused by the negligence or other fault of SKYDIVE LONG ISLAND.

7. **RELEASE OF LIABILITY:** I hereby release and discharge SKYDIVE LONG ISLAND from any and all liability, claims, demands or causes of action that I may hereafter have for injuries or damages arising out of my participation in "skydiving/parachuting activities" even if caused by negligence or other fault of SKYDIVE LONG ISLAND.

8. **COVENANT NOT TO SUE:** I further agree that I WILL NOT SUE OR MAKE CLAIM AGAINST SKYDIVE LONG ISLAND, CALVERTON ENTERPRISE PARK, or The TOWN of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY and GRUBB & ELLIS MANAGEMENT SERVICES, INC. for damages or other losses sustained as a result of my "skydiving/parachuting activities" even if caused by negligence or other fault of "SKYDIVE LONG ISLAND".

9. **INDEMNIFICATION AND HOLD HARMLESS:** I also agree to INDEMNIFY AND HOLD "SKYDIVE LONG ISLAND", CALVERTON ENTERPRISE PARK, The TOWN of RIVERHEAD COMMUNITY DEVELOPMENT AGENCY and GRUBB & ELLIS MANAGEMENT SERVICES, INC. HARMLESS from all claims, judgments and costs, including but not limited to actual attorney's fees, and to reimburse them for any expenses whatsoever incurred in connection with any action brought as a result of my participation in "skydiving/parachuting activities", including but not limited to actions brought by myself or on behalf of myself or my estate and further acknowledge that in the event of any lawsuit, this Release can and will be used against me by SKYDIVE LONG ISLAND.

10. **ASSUMPTION OF RISK:** I understand and acknowledge that "skydiving/parachuting activities" are inherently dangerous and I EXPRESSLY AND VOLUNTARILY ASSUME ALL RISK OF DEATH OR PERSONAL INJURY SUSTAINED WHILE PARTICIPATING IN "SKYDIVING/PARACHUTING ACTIVITIES" WHETHER SUCH RISK IS FORSEEN OR UNFORSEEN, CONTEMPLATED OR NOT CONTEMPLATED, AND WHETHER OR NOT CAUSED BY THE NEGLIGENCE OR OTHER FAULT OF SKYDIVE LONG ISLAND including but not limited to equipment malfunction from whatever cause, inadequate training, any deficiencies in the landing area, rescue attempts, bad landings or any other cause whatsoever, including but not limited to those set forth in paragraph 5, even if those injuries are caused by the negligence or any other fault of SKYDIVE LONG ISLAND.

11. **LIMITATION OF WARRANTY:** SKYDIVE LONG ISLAND hereby warrants that the equipment provided by SKYDIVE LONG ISLAND has been previously used for "skydiving/parachuting activities". This warranty is the only warranty made and is made in lieu of any other warranties, express or implied, including but not limited to warranty of merchantability or fitness for a particular purpose.

I have read the above paragraph, acknowledge that I understand it and accept the limitation of warranty.

12. In the event any agent of SKYDIVE LONG ISLAND is guilty of willful and wanton, or any conduct outside the scope of this contract, I agree that that agent's action shall be beyond the scope of his/her employment and not attributable to anyone on any agency theory, or any other theory. *WJ*

13. 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. *WJ*

14. DURATION OF RELEASE: It is my understanding and intention that this Release and Agreement be effective not only for my first jump but for any subsequent jumps or "skydiving/parachuting activities" and shall be in full force and effect from the signing of this Agreement until such time it is cancelled by SKYDIVE LONG ISLAND. *WJ*

15. I hereby agree to waive any and all duty of care, whether by omission or commission, or any other duty which may be owed to me by SKYDIVE LONG ISLAND. *WJ*

16. ENFORCEABILITY: I agree that if any portions of this Agreement, Release of Liability and Assumption of Risk are found to be unenforceable or against public policy, that only that portion shall fall, but I specifically waive any unenforceability or any public policy argument that I may make or that may be made on behalf of my estate or by anyone who would sue because of my injury or death. *WJ*

17. I am, by reading this paragraph, being made aware that the general rule is that the type of document is to be narrowly construed and ambiguities are to be decided against the person or entity preparing the document. By initialing this paragraph, I expressly waive that rule and specifically agree that this document be broadly construed in favor of SKYDIVE LONG ISLAND and against me and that all ambiguities be resolved in favor of SKYDIVE LONG ISLAND. *WJ*

18. It is further agreed between the parties that no matter where venue lies, any lawsuits shall be filed in State Court of Suffolk County, New York. It is further agreed that in the event any lawsuit is filed other than in State Court of Suffolk County, New York or such other locations as SKYDIVE LONG ISLAND shall specify, on Motion and at the option of SKYDIVE LONG ISLAND. *WJ*

19. I hereby agree to reimburse SKYDIVE LONG ISLAND for loss or damage to any equipment of any kind whatsoever caused by my personal negligence or other wrongdoing. *WJ*

20. I hereby authorize SKYDIVE LONG ISLAND or its assignees to take any photographs and videos as they may deem appropriate of myself or my party and to use those photographs in such a manner as they may deem appropriate and specifically waive any interest, proprietary or otherwise, I may have in such photographs. *WJ*

21. I further acknowledge that I have been shown a videotape featuring an attorney who in general terms has explained the terms and conditions of this Release. I further acknowledge that I have been told that I do not have to go forward at this time and that any monies that I have tendered prior to this date, will be refunded in the event I chose not to continue. *WJ*

22. I GIVE UP LEGAL RIGHTS: I understand, that by signing this document I am giving up important legal rights and it is my intention to do so.

[Handwritten signature]

23. Even though I may have failed to initial some or all of the paragraphs of this document, I still intend to be bound by all paragraphs. I further understand that this document can only be amended in writing, with the amendment signed by the attorney for the drop zone and myself.

[Handwritten signature]

24. UNDERSTANDING OF AGREEMENT: I HEREBY CERTIFY THAT I HAVE READ AND UNDERSTAND THE CONTENTS OF THIS DOCUMENT AND I WISH TO BE BOUND BY ITS TERMS AND I UNDERSTAND THAT BY SIGNING THIS, I HAVE FOREVER GIVEN UP IMPORTANT LEGAL RIGHTS.

[Handwritten signature]

I UNDERSTAND THAT WHEN I SIGN THIS DOCUMENT, I WILL BE GIVING UP ANY AND ALL RIGHTS WHICH I OR MY HEIRS MAY HAVE TO SUE ANYONE IN ANYWAY, SHAPE OR FORM ASSOCIATED WITH MY SKYDIVE, EVEN IF THE ENTITY I INTEND TO SUE HAS CAUSED MY INJURY OR DEATH BY THEIR NEGLIGENCE.

I HAVE BEEN GIVEN AN OPPORTUNITY TO READ THIS DOCUMENT. I HAVE DONE SO. I UNDERSTAND ITS CONTENT. I INTEND THAT NOT ONLY I, BUT ALSO MY HEIRS, MY FAMILY AND ANYONE WHO MIGHT ACT ON MY BEHALF IN ANY CAPACITY WHATSOEVER BE BOUND BY ITS TERMS.

READ BEFORE YOU SIGN. YOU ARE GIVING UP IMPORTANT LEGAL RIGHTS.

DATED THE 14th DAY OF May, 2010

[Handwritten signature] (signature)

Donald J. Zarda (print your name)

____ (witness signature)

____ (print witness name)

____ (print witness address)

____ (witness signature)

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

-----X
 :
 ESTATE OF DONALD ZARDA, :
 :
 Plaintiff, :
 :
 - against - :
 :
 ALTITUDE EXPRESS INC., d/b/a SKYDIVE :
 LONG ISLAND AND RAYMOND MAYNARD. :
 :
 Defendants. :
 :
 -----X

10-CV-04334 (JFB) (ARL)

JURY CHARGE

Members of the jury, you have now heard all of the evidence in the case as well as the final arguments of the parties. We have reached the point where you are about to undertake your final functions as jurors. You have paid careful attention to the evidence, and I am confident that you will act together with fairness and impartiality to reach a just verdict in the case.

At this point, it is my responsibility to instruct you as to the law that governs this case. My instructions will be in three parts.

First: I will give you instructions regarding the general rules that define and govern the duties of a jury in a civil case;

Second: I will instruct you as to the legal elements of the causes of action relevant to this case; and

Third: I will give you some general rules regarding your deliberations.

COURT EXHIBIT
 F

PART I: GENERAL RULES

1. **Sole Judges of the Facts**

It is your responsibility and duty to find the facts from all the evidence in this case. You are the sole judges of the facts – not the parties and not I. I want to impress upon you the importance of that role. It is for you and you alone to pass upon the weight of the evidence – to resolve such conflicts as may have appeared in the evidence and to draw such inferences as you deem to be reasonable and warranted from the evidence or lack of evidence.

2. Juror's Use of Professional Expertise

Although as jurors you are encouraged to use all of your life experiences in analyzing testimony and reaching a fair verdict, you may not communicate any personal or professional expertise you might have or other facts not in evidence to the other jurors during deliberations. You must base your discussions and decisions solely on the evidence presented to you during the trial and that evidence alone. You may not consider or speculate on matters not in evidence or matters outside the case.

3. Juror's Recollection Governs

With respect to any question concerning the facts, it is your recollection of the evidence and yours alone that controls.

You must apply the law, in accordance with my instructions, to the facts as you find them.

While the parties may have commented on some of these rules, you must be guided only by what I say about them. You must follow all the rules as I explain them to you. You may not follow some and ignore others. Even if you disagree or do not understand the reason for some of the rules, you are bound to follow them. You must not substitute your own notions or opinions of what the law is or ought to be.

4. Parties are Equal Before the Court

This case should be considered and decided by you as an action between parties of equal standing in the community. You are to evaluate the evidence calmly and objectively, without prejudice or sympathy. You are to be completely fair and impartial. Your verdict must be based solely on the evidence developed at this trial, or the lack of evidence.

The parties in this case are entitled to a trial free from prejudice and bias. The parties here are entitled to your equal consideration and none are entitled to sympathy or favor.

5. Sympathy

Under your oath as jurors, you are not to be swayed by sympathy. You should be guided solely by the evidence presented during the trial, without regard to the consequences of your decision.

You have been chosen to try the issues of fact and reach a verdict on the basis of the evidence or lack of evidence. If you let sympathy interfere with your clear thinking there is a risk that you will not arrive at a just verdict. All parties to a civil lawsuit are entitled to a fair trial. You must make a fair and impartial decision so that you will arrive at the just verdict.

6. Conduct of Counsel

It is the duty of the representatives for each side to object when the other side offers testimony or other evidence that they believe is not properly admissible. Therefore, you should draw no inference from the fact that a party objected to any evidence. Nor should you draw any inference from the fact that I might have sustained or overruled an objection.

From time to time, the parties and I had sidebar conferences and other conferences out of your hearing. These conferences involved procedural and other matters, and none of the events relating to these conferences should enter into your deliberations at all.

7. Evidence to Be Considered

You will look to the evidence in order to decide what the facts are. Evidence comes in several forms:

- a. Sworn testimony of witnesses, both on direct and cross examination, and regardless of who called them;
- b. Exhibits that the court received in evidence;

On the other hand, certain things are not evidence. Let me list them for you:

- a. Argument or statements by lawyers are not evidence. In this regard, what they said to you in their opening statements and in their summations is intended to help you understand the evidence to reach your verdict. If your recollection of the facts differs from the parties' statements, however, it is your recollection that controls;
- b. The questions put to the witnesses are not evidence;
- c. Objections to questions are not evidence. In this regard, the parties have a duty to object when they believe evidence should not be received. You should not be influenced by the objection or by the court's ruling on it. If the objection was sustained, ignore the question. If the objection was overruled, treat the answer like any other answer;
- d. Anything the court may have said, including these instructions is not evidence;
- e. Testimony that has been excluded, stricken, or that you have been instructed to disregard is not evidence;
- f. Anything you may have seen or heard outside the courtroom is not evidence.

8. Direct and Circumstantial Evidence

I told you that evidence comes in various forms such as the sworn testimony of witnesses and exhibits.

There are, in addition, different kinds of evidence - direct and circumstantial.

(a) Direct evidence is the communication of a fact by a witness who testifies to the knowledge of that fact as having been obtained through one of the five senses. So, for example, a witness who testifies to knowledge of a fact because he saw it, heard it, smelled it, tasted it, or touched it is giving evidence which is direct. What remains is your responsibility to pass upon the credibility of that witness.

(b) Circumstantial evidence is evidence which tends to prove a fact in issue by proof of other facts from which the fact in issue may be inferred.

The word "infer" - or the expression "to draw an inference" - means to find that a fact exists from proof of another fact. For example, if a fact in issue is whether it is raining at the moment, neither of us can testify directly to that fact sitting as we are in this windowless courtroom. Assume, however, that as we are sitting here, a person walks into the courtroom wearing a raincoat that is soaking wet and carrying an umbrella dripping water. We may infer that it is raining outside. In other words, the fact of rain is an inference that could be drawn from the wet raincoat and the dripping umbrella. An inference is to be drawn only if it is logical and reasonable to do so. In deciding whether to draw an inference, you must look at and consider all the facts in the light of reason, common sense, and experience. Whether a given inference is or is not to be drawn is entirely a matter for you, the jury, to decide. Please bear in mind, however, that an inference is not to be drawn by guesswork or speculation.

Circumstantial evidence does not necessarily prove less than direct evidence, nor does it necessarily prove more. You are to consider all the evidence in the case, direct and circumstantial, in determining what the facts are and in arriving at your verdict.

9. Burden of Proof

The burden of proof rests on the plaintiff. That means that it must be established by a fair preponderance of the credible evidence that the claim plaintiff makes is true. The credible evidence means the testimony or exhibits that you find to be worthy to be believed. A preponderance of the evidence means the greater part of such evidence. That does not mean the greater number of witnesses or the greater length of time taken by either side. The phrase refers to the quality of the evidence, that is, its convincing quality, the weight and the effect that it has on your minds. The law requires that for the plaintiff to prevail on a claim, the evidence that supports plaintiff's claim must appeal to you as more nearly representing what took place than the evidence opposed to plaintiff's claim. If it does not, or if it weighs so evenly that you are unable to say that there is a preponderance on either side, then you must decide the question in favor of the defendant. It is only if the evidence favoring the plaintiff's claim outweighs the evidence opposed to it that you can find in favor of plaintiff.

10. Witness Credibility

You have had the opportunity to observe the witnesses. It is now your job to decide how believable each witness was in his or her testimony. You are the sole judges of the credibility of each witness and of the importance of his or her testimony.

You should carefully scrutinize all of the testimony of each witness, the circumstances under which each witness testified, the impression the witness made when testifying, and any other matter in evidence that may help you decide the truth and the importance of each witness's testimony.

In other words, what you must try to do in deciding credibility is to size a witness up in light of his or her demeanor, the explanations given, and all of the other evidence in the case. Always remember that you should use your common sense, your good judgment, and your everyday experiences in life to make your credibility determinations.

11. Prior Inconsistent Statements

You have heard evidence that, at some earlier time, witnesses have said or done something that one party argues is inconsistent with their trial testimony.

Evidence of a prior inconsistent statement was placed before you for the purpose of helping you decide whether to believe the trial testimony of a witness who may have contradicted a prior statement. If you find that the witness made an earlier statement that conflicts with the witness's trial testimony, you may consider that fact in deciding how much of the witness's trial testimony, if any, to believe.

In making this determination, you may consider whether the witness purposely made a false statement or whether it was an innocent mistake; whether the inconsistency concerns an important fact, or whether it had to do with a small detail; and whether the witness had an explanation for the inconsistency and, if so, whether that explanation appealed to your common sense.

It is exclusively your duty, based upon all the evidence and your own good judgment, to determine whether the prior statement was inconsistent, and if so, how much, if any, weight to give to the inconsistent statement in determining whether to believe all, or part, or none, of the witness's testimony.

12. Bias of Witnesses

In deciding whether to believe a witness, you should specifically note any evidence of hostility or affection that the witness may have towards one of the parties. Likewise, you should consider evidence of any other interest or motive that the witness may have in cooperating with a particular party. You should also take into account any evidence that a witness may benefit in some way from the outcome of the case.

It is your duty to consider whether the witness has permitted any such bias or interest to color his or her testimony. In short, if you find that a witness is biased, you should view his or her testimony with caution, weigh it with care, and subject it to close and searching scrutiny.

Of course, the mere fact that a witness is interested in the outcome of the case does not mean he or she has not told the truth. It is for you to decide from your observations and applying your common sense and experience and all the other considerations mentioned, whether the possible interest of any witness, or of any party, has intentionally or otherwise colored or distorted his or her testimony. You are not required to disbelieve an interested witness; you may accept as much of his or her testimony as you deem reliable and reject as much as you deem unworthy of acceptance.

13. Corporate Parties and the Estate of the Deceased

In this case, one of the defendants is a corporation and one is an estate. The mere fact that a party is not a live person does not mean it is entitled to any lesser consideration by you. All litigants are equal before the law, and corporations or estates, big or small, are entitled to the same fair consideration as you would give any other individual party. In addition, since a corporation is not a natural person, it can act only through its officers, employees, or other agents. Thus, any act by any of Altitude Express Inc. d/b/a Skydive Long Island's officers or employees that is undertaken in the scope of employment is an act by defendant Altitude Express Inc. d/b/a Skydive Long Island. Conduct is undertaken within the scope of employment if it is reasonably foreseeable in light of the employer's business or the employee's responsibilities. In this case, the plaintiff has not claimed that anyone other than Raymond Maynard committed any act in violation of the statute that I will describe to you, and it is undisputed that Mr. Maynard was the sole owner of Altitude Express Inc. d/b/a Skydive Long Island.

A claim for money damages to be won at trial is like any asset, and can be handed down from a plaintiff to his estate, just like an inheritance that is in the bank, or any other personal property owned by the deceased at the time of his death. You may not sympathize with the estate because of Mr. Zarda's death, but if the estate has proved Mr. Zarda's claim by a preponderance of the evidence, you must find for his estate. Conversely, and again, if the estate has not proved Mr. Zarda's claim by a preponderance of the evidence, you must find for the defendants.

14. Depositions

Some of the testimony before you is in the form of depositions which have been received in evidence. A deposition is simply a procedure where prior to trial the attorneys for one side may question a witness or an adversary party under oath before a court stenographer. This is part of the pretrial discovery, and each side is entitled to take depositions. You may consider the testimony of a witness given at a deposition according to the same standards you would use to evaluate the testimony of a witness given at trial.

PART II: PRINCIPLES OF LAW

I will now discuss the second part of these instructions; the principles of law that you must apply to the facts as you determine them to be.

The plaintiff, the estate of Donald Zarda represented by executors Melissa Zarda and William Allen Moore, Jr., is asserting a legal claim under the New York State Human Rights Law, which makes it an unlawful discriminatory practice for an employer to discriminate based on sexual orientation.

I will now proceed to explain the elements of plaintiff's claim. Let me remind you that to find for the plaintiff, you must find that plaintiff met its burden to prove each of the elements by a preponderance of the evidence.

A. EMPLOYMENT DISCRIMINATION UNDER NEW YORK STATE HUMAN RIGHTS LAW SECTION 296

As you have heard, this is an action to recover damages for employment discrimination. The law prohibits employment discrimination based on sexual orientation, whether that discrimination is intentional or not. In this case, plaintiff claims that defendants terminated Mr. Zarda because he was gay or because he identified as gay.

The New York State Human Rights Law (Executive Law § 296) defines and prohibits unlawful discriminatory practices by private and public employers. Executive Law § 296(1)(a) provides in pertinent part that it is

... an unlawful discriminatory practice ... (f)or an employer ... because of an individual's ... sexual orientation ... , to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms, conditions or privileges of employment.

Sexual orientation was added to the statute as a protected class in 2003.

An employer must follow non-discrimination laws that protect his or her employees even if the employer's customers might hold biases against the protected class at issue, which in this case is sexual orientation. An employer cannot take adverse action against an employee on the grounds that one or more customers might not prefer to associate with or are offended by the employee's protected class, whatever that might be. However, an employer can take adverse action against an employee if the customer complaint is not based upon the employer's protected class.

In order for plaintiff to recover on his claim, Mr. Zarda's estate must prove by a preponderance of the evidence that Mr. Zarda's sexual orientation was a determining factor in Mr. Maynard's decision to terminate him. There can be more than one determining factor in any decision. Therefore, Mr. Zarda's estate need not prove that his sexual orientation was the only reason for Mr. Maynard's decision. Mr. Zarda's sexual orientation is a determining factor if he would have continued to work for Altitude Express d/b/a Skydive Long Island and Mr. Maynard, except for the fact that he was gay. In other words, sexual orientation is a determining factor if it made a difference in whether or not Mr. Zarda would have continued working for defendants.

Mr. Zarda's estate is not required to produce direct evidence that Mr. Maynard discriminated against him on the basis of his sexual orientation. Discrimination is rarely admitted and may be inferred from the existence of other facts.

In deciding whether the fact that Mr. Zarda was gay was a determining factor in Mr. Maynard's decision, you must first consider whether Mr. Zarda's estate has established the following facts by a preponderance of the evidence. First, Mr. Zarda's estate must prove that

Mr. Zarda was qualified for the tandem skydive instructor position. Second, the estate must prove that Mr. Zarda was terminated. Third, the estate must prove that the termination occurred under circumstances giving rise to an inference of discrimination.

If you find that the estate of Mr. Zarda failed to prove any one of these facts, you will find for the defendants. If you find that the estate proved all of these facts, then you must proceed to consider the reason defendants have given for terminating Mr. Zarda.

Defendants have produced evidence that Mr. Zarda was terminated based upon a customer complaint. Although plaintiff agrees there was a customer complaint, plaintiff claims that this is not the real reason for Mr. Zarda's termination. Mr. Zarda's estate has the burden of establishing by a preponderance of the evidence that the reason offered by the defendants was not really the reason Mr. Zarda was terminated and that Mr. Zarda's sexual orientation was a determining factor in the decision. An employer may take adverse decisions against an employee for any reason, good or bad, as long as it is not discriminatory. However, you should scrutinize the reasons proffered by the defendants, just as you would any other evidence.

If you find that Mr. Zarda's estate has failed to prove that the reason offered by the defendants was not really the reason Mr. Zarda was terminated, you will find for the defendants. If you find that the estate of Mr. Zarda has proved that the reason offered by defendants was an excuse for discrimination, then you will find for Mr. Zarda's estate and you should proceed to determine the amount of damages.

I am going to provide you with a written verdict form.

B. DAMAGES

If you find that the plaintiff has proven its claim, then you must consider the issue of damages. I will now give you instructions regarding computing the amount of damages. The fact that I am giving you instructions on damages, however, should not be considered as an indication of any view of mine on what your verdict should be. Rather, instructions on damages are given only so that you will have them in the event that you should find in favor of the plaintiff on the question of liability.

In computing damages, should you award damages, you may not engage in speculation or arbitrary guess-work. On the other hand, the law does not require a plaintiff to prove the amount of his or her losses with mathematical precision, but only with as much definiteness and accuracy as the circumstances permit.

I instruct you that the plaintiff's attorney's statements, if any, to you of the amount of damages you should award the plaintiff are not binding upon you. It is not evidence; it is only the statement of the plaintiff's attorney. It is the sole and exclusive function of the jury to determine the amount of money, if any, that will justly and fairly compensate the plaintiff for any injuries and damages she has sustained. You are to make that determination solely on the basis of the evidence in this case, and on the law I will give you, and not on the basis of an attorney's or party's statement, claim or argument.

I will discuss each category of damages in turn.

1. Damages for Lost Wages

With respect to the issue of lost wages, you may award as actual damages an amount that reasonably compensates the plaintiff for any lost wages and benefits, taking into consideration any increases in salary and benefits that Mr. Zarda would have received from the defendants had

he not been subject to the intentional discrimination. The plaintiff has the burden of proving these lost wages and benefits by a preponderance of the evidence. If you choose to award the plaintiff damages for lost wages, damages would apply from the date the Mr. Zarda's employment ended until the date of his death. Therefore, any award of damages for lost wages to the plaintiff must be determined only for the period between June 21, 2010 and October 4, 2014. In addition, if you award damages for lost wages to plaintiff, you must deduct from that amount whatever wages Mr. Zarda obtained from other employment during this period. You are not required to deduct from the award of lost wages social security benefits, unemployment compensation and pension benefits. You must also reduce any damages for lost wages you award to the plaintiff by the amount of expenses Mr. Zarda would have incurred in making those earnings. You are further instructed that Mr. Zarda was required to make every reasonable effort to minimize or reduce his damages for loss of compensation by seeking employment. This is referred to as "mitigation of damages." On this particular issue, if you find that plaintiff has proven lost wages by a preponderance of the evidence, defendants must then prove by a preponderance of the evidence that Mr. Zarda failed to mitigate his damages for loss of compensation. If you determine plaintiff is entitled to damages, you must reduce these damages by: (1) what Mr. Zarda earned, and (2) what Mr. Zarda could have earned by reasonable effort during the period from his discharge until the date of his death. Mr. Zarda must have accepted employment that was "of a like nature." In determining whether employment is "of a like nature," you may consider: (1) the type of work, (2) the hours worked, (3) the compensation, (4) the job security, (5) the working conditions, and (6) other conditions of employment.

You must decide whether Mr. Zarda acted reasonably in not seeking or accepting a

particular job. If you determine Mr. Zarda did not make reasonable efforts to obtain a similar job, you must decide whether any damages resulted from his failure to do so.

You must not compensate plaintiff for any portion of plaintiff's damages resulting from Mr. Zarda's failure to make reasonable efforts to reduce his damages.

2. Emotional Damages

With respect to emotional damages, you must award plaintiff such sum of money as you believe will fairly and justly compensate plaintiff for the damages you believe Mr. Zarda actually sustained as a direct consequence of the allegedly discriminatory conduct of the defendants.

You should award compensatory damages only for those injuries that you find plaintiff has proven by a preponderance of the evidence. Moreover, you shall award compensatory damages only for those injuries that you find plaintiff has proven by a preponderance of the evidence to have been proximately caused by defendants' unlawful conduct. In other words, to recover compensatory damages, plaintiff must prove by a preponderance of the evidence that the defendants' actions were a proximate cause of Mr. Zarda's injuries. "Proximate cause" means that there must be a sufficient causal connection between the act of the defendants and any injury or damage sustained by the Mr. Zarda. An act is a proximate cause if it was a substantial factor in bringing about or actually causing the injury, that is, if the injury or damage was a reasonably foreseeable consequence of the defendants' acts. If an injury was a direct result, or a reasonably probable consequence of the defendants' acts, it was proximately caused by such act. In other words, if defendants' acts had such an effect in producing an injury that reasonable persons would regard as being a cause of the injury, then the acts are a proximate cause. A proximate cause need not always be the nearest cause either in time or space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or

more people may operate at the same time, either independently or together, to cause an injury. Defendants are not liable if the Mr. Zarda's injury was caused by a new or independent source of an injury that intervened between the defendants' act and the his injury and that produced a result that was not reasonably foreseeable by the defendants. Likewise, defendants are not liable for an injury that they did not cause, such as, for example, an injury that existed before the defendants' conduct in question.

With respect to proximately caused injuries, compensatory damages in this case can include any suffering, inconvenience, loss of enjoyment of life, and other non-monetary losses that plaintiff proves were experienced as a consequence of the actions of a defendant. There is no requirement that evidence of the monetary value of such intangible things as injury, pain, and suffering be introduced into evidence. There is no exact standard for fixing the compensation to be awarded for these types of damages and no expert testimony need be introduced. Any award you make should be fair in light of the evidence presented at the trial.

Compensatory damages must not be based on speculation or sympathy, however. They must be based on the evidence presented at trial, and only on that evidence.

Plaintiff can only recover for damages, if any, that plaintiff proves by a preponderance of the evidence were caused by the unlawful conduct of the defendants. If you find that plaintiff has proven that Mr. Zarda suffered an injury and that these injuries were caused by the defendants' conduct, you must fix the amount of damages that will, as much as money can, fairly compensate the plaintiff for such injuries. The purpose of such an award of damages is not to punish the defendants, nor is plaintiff entitled to be compensated for any injury not caused by unlawful conduct.

In determining the amount of any damages that you decide to award, you should be guided by dispassionate common sense. You must use sound discretion in fixing an award of damages, drawing reasonable inferences from the facts in evidence.

PART III: CLOSING REMARKS

Before I allow you to retire to the jury room to deliberate, I would like to offer you some closing remarks. By way of reminder, I charge you once again that it is your responsibility to judge the facts in this case only from the evidence presented during the trial and to apply the law as I have given it to you to the facts as you find them from the evidence.

Keep in mind that nothing I have said in these instructions is intended to suggest to you in any way what I think your verdict should be. That is entirely for you to decide.

Your deliberation should include a rational discussion of the evidence in the case by all of you.

In your deliberations, you are entitled to your own opinion, but you should exchange views with your fellow jurors and listen carefully to each other.

You should not hesitate to reconsider your opinions from time to time and to change them if you are convinced that they are wrong. However, do not surrender an honest conviction as to weight and effect of the evidence simply to arrive at a verdict.

If the plaintiff has carried its burden of proof by establishing every essential element of the claim by a preponderance of the evidence, your sworn duty is to find for plaintiff. If the plaintiff has failed to establish any essential element of a claim, your sworn duty is to find for the defendants.

I instruct you that the decision you reach must be unanimous. I instruct you to consider each question on the verdict sheet separately, and your decision on each question must be unanimous.

Remember also that your verdict must be based solely on the evidence in the case and the law as the court has given it to you, not on anything else. Opening statements, closing

arguments, or other statements or arguments of the parties are not evidence. If your recollection of the facts differs from the way the parties have stated the facts to be, then your recollection controls.

When you get into the jury room, before you begin your deliberations, your first act will be to select one of you to be the foreperson. The foreperson will be responsible for signing all communications to the court and for handing them to my deputy, Michele, during your deliberations, but of course the foreperson's vote is entitled to no greater weight than any other juror.

During the trial, I permitted the taking of notes by those of you who wished to do so. At that time I pointed out that while you could take notes, there is no need for your doing so, because the court reporter takes down everything that is said in the courtroom and during your deliberations the court reporter will read back to you any portion of the transcript you may ask for.

For those of you who did take notes during the trial, I point out to you and your fellow jurors that your notes are simply an aid to memory for the particular juror who takes the notes. You are instructed that your notes are only a tool to aid your own individual memory and you should not compare your notes with other jurors in your deliberations. Jurors who did not take notes should not be influenced by the fact that other jurors have taken notes. Your notes are not evidence, may be inaccurate, and are by no means a complete recording of the trial testimony. Any difference between a juror's recollection and another juror's notes should be settled by asking to have the court reporter read back the transcript, for it is the court record rather than any juror's notes upon which the jury must base its determination of the facts and its verdict.

It is very important that you not communicate with anyone outside the jury room about your deliberations or about anything touching this case. There is only one exception to this rule. If it becomes necessary during your deliberations to communicate with me, you may send a note, through my deputy, Michele, signed by your foreperson or by one or more members of the jury. No member of the jury should ever attempt to communicate with me except by a signed writing, and I will never communicate with any member of the jury on any subject touching on the merits of the case other than in writing, or orally here in open court. If you send any notes to the court, do not disclose anything about your deliberations. Specifically, do not disclose to anyone - not even to me - how the jury stands, numerically or otherwise, until after you have reached a unanimous verdict or have been discharged.

If during your deliberations you want to see any of the exhibits, they will be sent to you in the jury room upon written request. If you want any of the testimony read, that can also be done. But, please remember that it is not always easy to locate what you might want, so be as specific as you possibly can in requesting exhibits or portions of testimony which you may want. If you request a readback of testimony, please be patient, as it may take some time to locate and agree upon the specific testimony required. Your request for a readback may be as narrow or extensive as you decide it to be.

I have prepared a verdict sheet, which will be given to you. The verdict sheet is given to you to record your verdict after you have reached a verdict in this case.

When you have reached a decision, have the foreperson sign the verdict form and put the date on it - and notify my deputy, Michele, by note, that you have reached a verdict.

I reiterate that any verdict you reach must be unanimous.

Your oath sums up your duty - and that is - without fear or favor to any person, you will well and truly try the issues in this case according to the evidence given to you in court and the laws of the United States.

This concludes my instructions. Thank you for your close and careful attention. Members of the jury, you will now retire to deliberate after I swear in my deputy. I do ask that, as your first order of business, you elect a foreperson and send me a note, dated and timed, identifying that foreperson.