

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

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**DONALD ZARDA,**

Plaintiff,  
-against-

10-cv-04334-JFB

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

Defendants.

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**PLAINTIFF'S BRIEF IN SUPPORT OF HIS MOTION TO COMPEL DISCOVERY AND  
FOR EVIDENTIARY AND MONETARY SANCTIONS**

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March 21, 2012

## TABLE OF CONTENTS

<b>TABLE OF AUTHORITIES</b>	<b>II</b>
<b>FACTS &amp; PROCEDURAL HISTORY</b>	<b>1</b>
<b>ARGUMENT</b>	<b>4</b>
I. Ray Maynard Must Be Returned to Complete his Deposition as well as Answer Certain Questions which his Counsel Directed Him not to Answer.	4
A. Plaintiff Had Not Completed Maynard’s Deposition nor Used Up His Seven Hours at the Time Zabell Walked out of the Deposition Room with his Client. Plaintiff Is Entitled to More Deposition Time.	4
B. Maynard Waived His Right to Maintain the Attorney-Client Privilege between Himself and Harvey Arnoff, and Must Answer Questions about his Discussions with Arnoff about Plaintiff, or the Propriety of Terminating Someone for Revealing his Sexual Orientation or “Personal Information” to a Customer.	6
C. Maynard Must Tender the Address of Santine Megneco.	8
II. Defendants’ Objections to Plaintiff’s Second Combined Demand Must Be Overruled, and the Discovery Sought Must Be Tendered and Verified by Ray Maynard.	9
III. <u>Saul Zabell Must Be Disqualified from Representing Lauren Callanan and Prohibited from Further Soliciting Witnesses.</u>	15
A. It Has Always Been Zabell's Intention to Solicit Witnesses.	165
B. Zabell Solicited a Witness Richard Winstock on the Record.	16
C. Callanan, a Clerical Employee Showed up to her Deposition with Zabell as her Counsel.	16
V. Discovery Should Be Extended Until November.	19
VI. <u>Saul Zabell and/or Defendant Should be Sanctioned for His Improper Conduct.</u>	19
A. <u>Zabell Should be Sanctioned for Making Sworn Misrepresentations to Me and to the Court about the Non-Party Witnesses.</u>	20
B. <u>Coaching His Client in the Middle of a Question</u>	22
C. <u>Refusing to Confer with Me under Local Rule 37.3(a).</u>	25
<b>CONCLUSION</b>	<b>25</b>

**TABLE OF AUTHORITIES**

**Cases**

Arista Records LLC v. Lime Group LLC, 2008 U.S. Dist. LEXIS 31269 (S.D.N.Y. Apr. 16, 2008) ..... 5

CA-POW! v. Town of Greece, 2012 U.S. Dist. LEXIS 36099 (W.D.N.Y. Mar. 9, 2012), ..... 25

Cioffi v Habberstad, 22 Misc 3d 839 (Sup.N.Y. 2008). ..... 20

Condit v. Dunne, 225 F.R.D. 100 (S.D.N.Y. 2004) ..... 5

Ferguson v. Lion Holding, Inc., 2005 U.S. Dist. LEXIS 9789 (S.D.N.Y. Mar. 23, 2005) ..... 8

In re Horowitz, 482 F.2d 72, 81 (2d Cir.), Cert. denied, 414 U.S. 867 (1973) ..... 7

Munoz v. The Manhattan Club Timeshare Association, Inc., 2012 U.S. Dist. LEXIS 17284 (S.D.N.Y.,  
February 8, 2012) ..... 10, 12

Rivera v Lutheran Med. Ctr., 73 A.D.3d 891 (2d Dep't 2010) ..... 15, 19

Rivera v. Lutheran Med. Ctr., 22 Misc. 3d 178 (Kings Sup. 2008). ..... 16

von Bulow v. von Bulow, 114 F.R.D. 71, 76 (S.D.N.Y.), aff'd, 811 F.2d 136 (2d Cir.), Cert. denied, 481  
U.S. 1015 (1987) ..... 7

Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). ..... 11

**Statutes and Rules**

28 U.S.C. § 1927 ..... 25

Fed. R. Civ. P. 26(b)(1) ..... 8

Fed. R. Civ. P. 30(d)(1) ..... 4

Local Civil Rule 30.4 ..... 24

Local Rule 37.3(a) ..... 25

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**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFF’S MOTION TO  
COMPEL DISCOVERY AND FOR SANCTIONS**

**FACTS & PROCEDURAL HISTORY**

This is an employment discrimination action in which plaintiff alleges that he was improperly discharged because he told a customer of the defendant Skydiving Company that he is gay. He alleges causes of action under the New York State Human Rights Law and Title VII. Also, because of the unusual nature in which plaintiff was paid – in which plaintiff could be sitting around all day and get no compensation depending on business – plaintiff has brought a minimum wage claim.

Discovery has revealed, essentially, the following: Plaintiff worked portions of 2001, 2009 and 2010 summer seasons. Defendant alleges that in 2001, when discrimination against persons because of their sexual orientation was legal in New York State, plaintiff was fired because he told two women, who came running to Ray Maynard “in tears,” that he, plaintiff, is gay. Plaintiff denies this and alleges that he was fired for not violating safety guidelines as requested by a passenger. In any case, the 2001 termination is not a subject of this lawsuit.

In 2009, plaintiff was rehired, now with the full protection of the New York State Human Rights Law that had been amended to protect gay people from discrimination. In 2009, plaintiff's tenure was cut short because of an accident that put him in a case for the remainder of the season. Defendant Maynard has admitted seeing the videotape of the landing in which the injury occurred, and admits that there was nothing negligent that plaintiff did to cause the injury, the landing looked good, and the passenger in this particular landing was uninjured. All persons who have testified so far who worked at Skydive Long Island – Maynard, Winstock, and Callanan – regarded plaintiff as an excellent skydive instructor who was well-liked by his co-workers with an excellent safety record.

In June 2010, plaintiff had fully recovered from the landing injury and returned to SDLI for the summer season. On or about June 10, 2010, he took a passenger by the name of Rosanna Kengle on a Skydive. Orellana was given a waiver that explained that she would need to be touched and strapped closely to plaintiff on a tandem skydive; however, as she testified, she did not read the waiver; rather, she read parts of it while simultaneously watching a safety video.

After the waiver and the video, Orellana and her boyfriend, David Kengle, went up in the same plane. He testified that he saw plaintiff with his hands on Orellana's hips and wondered why he was doing that. Maynard admitted at his deposition, however, that one of the points of attachment was at the hips, and that they had to be adjusted and that the safety of the customer was more important than her comfort.

As Orellana was being strapped to Don Zarda, a skydiver from New Zealand was strapping to Kengle. New Zealand – his name escapes me – commented to Kengle and Orellana words to the effect that, "I bet you didn't think your girlfriend was going to get strapped so closely to another guy!" The point of the comment was to loosen the tension, but Plaintiff sensed

that this made Orellana uncomfortable. Because he did not want to be presumed to be heterosexual, or interested in Orellana, he told Orellana that she did not have to be worried about being strapped so closely to him because he is gay. The dive ended uneventfully; the video of the dive, which can be seen on YouTube<sup>1</sup> shows that it ended happily.

Later the same day, Orellana told Kengle that she felt uncomfortable when plaintiff told her he is gay and also when he adjusted her hip straps. Orellana did not want to complain, but Kengle did; he called Maynard and told him what Orellana had stated. Maynard never spoke to Orellana, but immediately suspended plaintiff, and docked his pay by some \$600, the amount that he refunded to Kengle. During the period of the suspension, Richard Winstock, plaintiff's chief instructor, testified that he advocated strongly to Maynard that plaintiff should not be fired. Maynard nevertheless called plaintiff into work and fired plaintiff a week later. Sensing his rights were about to be violated, plaintiff recorded the meeting in which he was fired. In that meeting, which is transcribed on Maynard's deposition transcript, starting at page 224, Maynard tells plaintiff why he is being fired. The discussion is also available on YouTube.<sup>2</sup>

In that recording, Maynard repeatedly references a conversation he had with his attorney who was revealed at his deposition to be one Harvey Arnoff. During the conversation, the "gay issue" came up repeatedly, but the touching at the hips did not come up until plaintiff mentioned it; except in response to Zarda, Maynard did not mention it at all.

Plaintiff left the premises and attempted to get work but decided to mitigate his damages in part by buckling down on his studies. He applied for unemployment, which a student is allowed to do in certain circumstances. In opposition to his unemployment application, Maynard

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<sup>1</sup> <http://www.youtube.com/watch?v=6hWMF-hL5G0&feature=g-upl&context=G2208647AUAAAAAADAA>

<sup>2</sup> <http://www.youtube.com/watch?v=APQs-0d9TkE&feature=g-upl&context=G2e320d3AUAAAAABAA>

attempted to get plaintiff disqualified as having been fired for misconduct. Specifically Maynard, through his assistant, Lauren Callanan, stated that plaintiff was fired for “revealing personal information” to his customers. There is no mention of an improper touching at the hips.

This case was filed in or about late September 2010. A pre-answer motion was proposed by defendant, then abandoned. Paper discovery took place in the beginning of 2011, and depositions did begin until November 2011 because, as was the subject of a prior motion (a) defense counsel refused to provide names and addresses of witnesses until the court ordered him to; and (b) defendant was unwilling to waive priority – he had served his notice of deposition on plaintiff before me – but he was also unwilling to take plaintiff’s deposition pending a motion to compel discovery that he made in or about the spring of 2011. Several depositions took place in the fall of 2011; plaintiff also made additional paper demands.

Now comes plaintiff’s motion to compel discovery. Plaintiff also seeks sanctions on several items based on Saul Zabell’s improper behavior in this litigation. Because the reasons plaintiff seeks relief vary in each instance, the facts pertaining to each argument will be laid out in the points below.

## ARGUMENT

### **I. Ray Maynard Must Be Returned to Complete his Deposition as well as Answer Certain Questions which his Counsel Directed Him not to Answer.**

- A. Plaintiff Had Not Completed Maynard’s Deposition nor Used Up His Seven Hours at the Time Zabell Walked out of the Deposition Room with his Client. Plaintiff Is Entitled to More Deposition Time.

According to the FRCP, “[u]nless otherwise stipulated or ordered by the court, a deposition is limited to one day of 7 hours. Fed. R. Civ. P. 30(d)(1). Notwithstanding the 7 hour limit, Rule 30 continues, “[t]he court **must** allow additional time consistent with Rule 26(b)(2) if

needed to fairly examine the deponent or if the deponent, another person, or any other circumstance impeded or delays the examination.” Id. (emphasis added); see also Arista Records LLC v. Lime Group LLC, 2008 U.S. Dist. LEXIS 31269 (S.D.N.Y. Apr. 16, 2008) (stating that Rule 30 “simply provides a default rule”) (Lynch, J.). Courts have determined that “only the time taken for the actual deposition, not breaks, counts toward the 7 hours, and . . . for good cause shown, the court should enlarge the time limit.” Condit v. Dunne, 225 F.R.D. 100, 112-13 (S.D.N.Y. 2004) (Leisure, J.).

In this case, plaintiff had not even used up his seven hours of deposition time, not including breaks. The deposition started on or about 10:15 AM because of a train delay. See Sanchez Dec., Exhibit R. At 5:30 PM, the following exchange occurred:

MR. ZABELL: Counsel, it is now 5:30. If you represent that you can finish within the next ten minutes, I will gladly allow my client to sit for another ten minutes. If you cannot, then we are done for the day.

MR. ANTOLLINO: All right. If you're leaving, and I'm not going to represent that I'm done. I get seven hours. If you insist on leaving then we'll just have to continue the deposition another time.

MR. ZABELL: Okay. I believe you've used your seven hours. I say good day, sir.

MR. ANTOLLINO: I haven't, but that's okay. What time do you have for the video?

THE VIDEOGRAPHER: We've gone on the record testimony five hours, 30 minutes and 16 seconds.

MR. ANTOLLINO: Does that sound like seven hours to you, Counsel?

MR. ZABELL: You've used your seven hours. We were invited to be here at 10 o'clock. You did not start on time. We were here at 10 o'clock. This deposition, from our position, started at 10 o'clock.

MR. ANTOLLINO: Well, even if you count that 15 minutes of lateness, I'm still well within my seven hours and I get another hour, but we'll just have to take it up to the judge like everything else.

Maynard Dep., Exhibit C at 312-13. (The reference to 10:15 is at page 1). The clock reading of the video is attached as “Exhibit B.”

So, even if the Court were to penalize me for being ten minutes late to the deposition, I still have not used up my seven hours. I had at least an hour to go and am entitled to have the witness to return. I would have gladly allowed the witness to come in another day if requested, but Mr. Zabell unilaterally decided not only that I had ten minutes notice to finish the deposition at 5:30, but also that I had used my seven hours. Since the seven hours did not include breaks – which were substantial – and presumably should not include colloquy, which was not insubstantial, I am entitled to more questioning. For good cause shown, the court should enlarge the time limit, Condit; in this case, I only want what I am entitled to.

B. Maynard Waived His Right to Maintain the Attorney-Client Privilege between Himself and Harvey Arnoff, and Must Answer Questions about his Discussions with Arnoff about Plaintiff, or the Propriety of Terminating Someone for Revealing his Sexual Orientation or “Personal Information” to a Customer.

In the tape of the meeting in which Maynard fired plaintiff, he repeatedly justifies his actions on the grounds that he received attorney’s advice:

I went and spoke to my attorney. I explained everything to him exactly the history of everything and that and he said that, you know, I have to let you go. It's not working for me for you to be here anymore and that's -- there's no more explanation. There's nothing else I'm going to say. That's all on my attorney's advice.

Maynard Dep. 224-26

Later in the conversation, Maynard would continue to invoke his attorney’s advice:

I thought about this for a very long time. I went to my lawyer. I got legal advice of what I should do here and I'm doing what I feel I have to do.

Id. 228.

Having revealed the substance of a conversation with an attorney, it is black letter law that the substance of the conversation, as well as the subject matter discussed, is waived. As then District Judge Walker held

The theoretical predicate underlying all recognized privileges is that secrecy and confidentiality are necessary to promote the relationship fostered by the privilege. Once the secrecy or confidentiality is destroyed by a voluntary disclosure to a third party, the rationale for granting the privilege in the first instance no longer applies. Accordingly, where a client has published an account of his previously confidential conversations with an attorney, courts have held that these clients have waived the protection of the attorney-client privilege.

von Bulow v. von Bulow, 114 F.R.D. 71, 76 (S.D.N.Y.), aff'd, 811 F.2d 136 (2d Cir.), Cert. denied, 481 U.S. 1015 (1987) (citations and internal quotations omitted). Judge Walker summed up how simple this issue is: "it has been established law for a hundred years that when the client waives the privilege by testifying about what transpired between her and her attorney, she cannot thereafter insist that the mouth of the attorney be shut[.]" Id. at 101. See also In re Horowitz, 482 F.2d 72, 81 (2d Cir.), Cert. denied, 414 U.S. 867 (1973) (client's disclosure to a third party of a communication made during a confidential consultation with his attorney "eliminates whatever privilege the communication may have originally possessed, whether because disclosure is viewed as an indication that confidentiality is no longer intended or as a waiver of the privilege.")

Ultimately, for whatever reason, Maynard decided to spill the beans repeatedly about what he did – assuming he actually did it, of course – in between the time he suspended plaintiff and fired him. He long longer has a

right to keep those conversations confidential, and plaintiff has the right to full inquiry into the details of the conversation.

C. Maynard Must Tender the Address of Santine Megneco.

Maynard's deposition revealed something I had not expected to learn, namely that, although he had no gay friends and had been to no gay establishments, he did have a sister, now deceased, who was not only gay, but had been out since the 1960's, and had had a partner by the name of Santine Megneco. Maynard dep. 111-12. While asking for Megneco's address, Zabell improperly stated:

You're under no obligation to provide it and, in fact, I'm going to advise you not to provide it. If counsel wants it, he'll have to make an application to the court to get it.

Id. at 112.

There was no basis for Zabell to make such a direction for his client not to answer that question, and a conversation with Megneco could "reasonably calculated to lead to the discovery of admissible evidence." Federal Rule of Civil Procedure 26(b) authorizes discovery on this basis. Fed. R. Civ. P. 26(b)(1). "[R]elevant information need not be admissible at trial"; it need only be "reasonably calculated to lead to the discovery of admissible evidence." Ferguson v. Lion Holding, Inc., 2005 U.S. Dist. LEXIS 9789 \*2 (S.D.N.Y. Mar. 23, 2005). Megneco's address, and perhaps an interview or deposition of her would lead to relevant information that such as Maynard's attitudes towards gay people. We were trying to get that from Mrs. Maynard, but her testimony is on hold because – although the marital privilege is not absolute – it is sticky to deal with. It strikes me as reasonable for plaintiff to inquire of a gay person with whom Maynard did not have any privilege to inquire of his attitude toward gay people, about which Megneco might have an opinion, as well as his relationship with a lesbian. Manifestly, why

would Maynard – who had an out gay family member since the 1960's – go ballistic<sup>3</sup> when he found out that plaintiff revealed to a customer that he is gay. Megneco might answer that question and shed light on his animus toward the mere mention of homosexuality.

**II. Defendants' Objections to Plaintiff's Second Combined Demand Must Be Overruled, and the Discovery Sought Must Be Tendered and Verified by Ray Maynard.**

The defendant denied all but one and a half of plaintiff's second combined demand. The answer, which contains the demands, is attached as Exhibit G. (There are several pages of objections and definitions that precede the meat of the document.) As I noted in my accompanying declaration, I tried mightily to confer verbally with Mr. Zabell in advance of this motion to narrow down his objections and make compromises. See Exhibit K, emails between Antollino and Zabell about verbal conference. We had able to do that with plaintiff's objections to defendants' demands in 2011, thereby enabling less attorney and court time be spent on issues that could be disposed of without court intervention. Before that conversation, though, the Court had to order Mr. Zabell to confer verbally and denied Zabell's first discovery motion, without prejudice.

For this motion, however, Zabell refused to talk to me. I will go through each demand for which defendant gave a boilerplate objection and explain, for the reasons set forth in the case law in Part IC why the information requested could lead to admissible evidence. Again, the demands, combined with defendant's responses, are attached as Exhibit G.

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<sup>3</sup> One needs to listen to the YouTube tape to get a full sense of the rage Maynard expressed when he fired plaintiff, though it does come out somewhat in the transcript.

1. *Produce all copies of the employee manual that both Lauren Callanan and Raymond Maynard testified to at their depositions.*

Both Callanan (Exhibit F, dep. 61-62) and Maynard (Exhibit A dep. at 310) testified that there is now an employee manual/handbook that has been put into place since plaintiff left the company. Defendants have offered only boilerplate objections, but manifestly the employee manual is calculated to lead to admissible evidence for multiple reasons. It would likely, for example, show what standards the defendants consider appropriate when dealing with customers to the extent of (a) touching; (b) adjustment of straps at the hips; and (c) revelation of “personal information” to customers. There are many other things that one can think it would reveal. It should be produced.

2. *Produce all electronic documents pertaining to Donald Zarda, or the facts underlying his complaint, that have not yet been produced.*

Defendant indicates in response to this that it is not in possession of this information. If that is the case, then I need to know why, and need certainly need a response to 3, 4 and 5:

3. *INTERROGATORY: Please state all electronic devices, including but not limited to cell phones, blackberries & personal computers in the position of the defendant since January 1, 2009.*
4. *INTERROGATORY: Please identify which person(s) searched for discoverable information about Donald Zarda, his complaint or other information demanded by plaintiff in December 2010, or in response to demand number 2, supra.*
5. *INTERROGATORY: Please set forth in detail how the person set forth in ¶ 4 searched for such electronic information.*

Manifestly, plaintiff is entitled to have all electronic information available about him. Munoz v. The Manhattan Club Timeshare Association, Inc., 2012 U.S. Dist. LEXIS 17284 (S.D.N.Y., February 8, 2012) (electronic documents about plaintiff are

“reasonably calculated to lead to admissible evidence and will therefore be granted). If the defendants don’t have these electronic documents, as set forth in the response to demand 2, then plaintiff is entitled to find out how they searched for them, and whether spoliation sanctions should apply. See Zubulake v. UBS Warburg LLC, 220 F.R.D. 212 (S.D.N.Y. 2003). At her deposition, Callanan was vague about the search for electronic documents at the defendant company and what search she did for the. See Exhibit E, Dep. at 13-15. Plaintiff himself was able to produce an electronic document that defendant did not have, or produce to us, (see Antollino Dec., Exhibit P), therefore, this calls into question (a) the adequacy of the defendants’ search for electronic documents; (b) whether electronic documents have been negligently spoiled; and (c) why the defendants are not in possession of electronic documents pertaining to plaintiff, as represented in their response to ¶ 2. These interrogatories should therefore be answered and, better yet, the documents found.

6. *Please produce any documents outlining “appropriate” or “inappropriate” topics for discussion in the workplace, including any documents concerning “appropriate” or “inappropriate” topics for discussion with customers.*

This could lead to admissible evidence for the same reason production of the employee handbook, see ¶ 1, could lead to admissible evidence. Therefore the objection should be overruled and the documents produced.

7. *REQUEST FOR ADMISSION: The document attached as “Exhibit A” is the complaint from the “Rip-off Report” that Lauren Callanan referred to in her deposition starting at page 41.*
8. *REQUEST FOR ADMISSION: The document attached as “Exhibit A” is the complaint that Raymond Maynard referred to in his deposition starting at page 55.*

9. *REQUEST FOR ADMISSION: The document attached as “Exhibit B” is Raymond Maynard’s response to the complaint attached as “Exhibit A.”*
10. *CONDITIONAL INTERROGATORY: If the answers to 7, 8 & 9 were not unqualified admissions, please produce the complaint(s) referred to in the depositions, and Ray Maynard’s responses referred to in the deposition.*

These demands all concern the documents attached as Exhibits H (which was Exhibit A to the demand) and I (which was Exhibit B to the demand) to the Antollino Declaration. These are extremely significant, in my opinion. Early on in this litigation – through Mrs. Maynard – plaintiff learned that there had been other customer complaints about Sky Dive Long Island, and he asked for production of same in December 2010. Defendant falsely denied there were any. See Antollino Dec. Exhibit M. As it turns out, Maynard (Exhibit A, dep. at 57-56) and Callanan (Exhibit E, dep. at 40) readily admitted to the existence of a complaint on the “Ripoff Report,” which I subsequently looked up on the internet and found, along with what purported to be Maynard’s written response. I asked defendant to admit the authenticity of these documents – which should have been produced in the original round of discovery. The defendants have tendered a bad faith answer, and *notably, a witness has not even verified the request for admission.* The defendant will recognize the complaint he testified to at his deposition, as well as his response; the fact that he has not verified the request for admission suggests that he hasn’t even looked at my demand. I ask that (a) Maynard be compelled to verify his admission or his inability to admit; or (b) produce the complaint that I asked for in 2010, and that Maynard and Callanan testified to at their depositions. This is very simple and defendants are obviously giving me a run around.

Plaintiff was fired for a customer complaint. As Judge Oetken held in Muñoz, in which the plaintiff was allegedly fired for a customer complaint, “Plaintiff’s demand for

discovery into customer complaints at [his former employer] is reasonably calculated to lead to admissible evidence to the extent it covers customer complaints comparable to those against Plaintiff. Therefore, the request to compel discovery into customer complaints is granted as to all customer complaints relating to any employee's conduct for the time period of Plaintiffs employment by Defendant.” 2012 U.S. Dist. LEXIS 17284 at p\*6-7.

The complaint and response attached as Exhibits H & I are particularly significant because the complainers make one similar allegation that Orellana made against plaintiff – improper touching. While some evidence already available suggests that Maynard never thought the touching allegation had any merit, his response to the touching allegation in the Ripoff report (Exhibit I) is relevant because it would suggest he doesn't believe it and that would go to prove the contention that plaintiff was fired solely for telling Orellana that he is gay and the touching had nothing to do with it whatsoever.

The bottom line is that these documents are clearly the complaints that Callanan and Maynard were testifying about. They should have been produced in response to plaintiff's first combined demand, and defendant's failure to investigate and have Maynard verify the response to the demand for admissions is made in bad faith. The objections should therefore be stricken and Maynard forced to look at the complaint and its response, compare it to the one he knows is available on the internet, and admit or deny under oath that this is the complaint they were testifying about. If not, produce the real complaint.

11. *INTERROGATORY: Please state in detail, what, if anything, Mr. Maynard did to investigate the complaint attached as “Exhibit A,” including but not limited to finding out who the author of the complaint was, when it happened, or whether anything in the complaint actually occurred.*

12. *INTERROGATORY: Were any employees disciplined, i.e., fired, counseled, reprimanded, suspended or warned as a result of the complaint attached as "Exhibit A?"*
13. *CONDITIONAL INTERROGATORY: If the answer to the previous interrogatory is in the affirmative, please state the name of the employee and level of discipline imposed.*

If defendant verifies the authenticity of plaintiff of Antollino Dec. H & I, and plaintiff has additional time to depose Maynard, plaintiff can ask these interrogatories at the deposition. However, the questions are obviously relevant as they underscore what Maynard did in response to the complaint in Exhibit H as it did in response to the complaint against plaintiff.

14. *DEMAND FOR INSPECTION OF PREMISES and/or DEMAND FOR DISCOVERY AND INSPECTION: Please offer an agreeable date upon which the plaintiff and/or his counsel may inspect the premises of the Altitude Express, Inc. and review each tandem video made in the summers of 2009 and 2010. Please note that plaintiff does not wish to review every tandem videotaped, but merely to take a sampling. Plaintiff also wishes to photograph the workplace.*

Defendants have agreed to an inspection of the premises but not the tandem videotapes. Plaintiff wants access to a random sampling of the videotapes so that defendant cannot pick the best of them. Plaintiff is making this request because Maynard testified that plaintiff's behavior on the Orellana's videotape was "creepy." Dep. 281-82. In fact, plaintiff's contention is that the workers at SDLI were required to act goofy and make faces for the enjoyment of the passengers and that is how all skydivers act – they pantomime and goof around extravagantly. Plaintiff should have random access to videotapes so that plaintiff can show that he wasn't doing anything different than any other worker.

15. *DEMAND FOR DISCOVERY AND INSPECTION: Please produce the videotapes that Altitude Express requires/required customers to view before engaging in a tandem jump. In his deposition, Maynard referred to two different videotapes used at different times.*

Defendants have agreed to make these available for inspection, but not copying. Plaintiff is entitled to copy, at his own expense. Plaintiff will gladly locate a video-reproduction facility to send the tapes, though it is likely the defendants have additional copies on hand. Manifestly, these videotapes are shown to tandem passengers before they board an airplane and therefore are relevant to the question of what Orellana and Kengle should have reasonably have expected from their experience.

16. *INTERROGATORY: Please set forth every day that plaintiff worked during the seasons 2009 and 2010 in which he was paid for (a) no tandems; (b) one tandem; or (c) three tandems.*

Defendant objects to this on the ground that plaintiff has equal access to this information. In fact, we do not. We do have his jump logs, but not the days in which he appeared at work and did no jumps at all, which would lead to evidence relevant to his minimum wage claim. We will withdraw any other request with respect to this demand.

**III. Saul Zabell Must Be Disqualified from Representing Lauren Callanan and Prohibited from Further Soliciting Witnesses.**

- A. It Has Always Been Zabell's Intention To Represent The Defendants' Employees And To Prevent Plaintiff From Obtaining Easy Access To Witnesses.

Early on in this litigation, Zabell refused to tender names of witnesses to me on the grounds that counsel represented them. He stated as much in a letter to me on April 7, 2011, that "inasmuch as these individuals are represented by counsel, you would be precluded from contacting them directly." Exhibit N, page 2. I later moved to have him disqualified from representing these witnesses based on Rivera v Lutheran Med. Ctr., 73

A.D.3d 891 (N.Y. App. Div. 2d Dep't 2010), affirming Rivera v. Lutheran Med. Ctr., 22 Misc. 3d 178 (Kings Sup. 2008). Zabell the offered that his office has not “actively solicited” any employee, Exhibit Q, page 2, but then assured that he would if the employee requested it. Id. It is very clear to the undersigned that, although these employees should have no interest whatsoever in having Zabell represent them, Zabell would do his utmost to get them to represent him and thus manipulate their testimony.

B. Zabell Solicited a Witness Richard Winstock on the Record.

At the deposition of Richard Winstock, Zabell had the audacity to solicit the representation of the witness. After I confirmed that Zabell did not represent Winstock, Zabell chimed in, “[u]nless you want to be. I've been authorized by Mr. Maynard that if you feel the need for representation at this deposition, I am available to represent you, but only if you feel the need.” Winstock Dep., Exhibit C, p.7. This was blatant solicitation, whether or not Zabell couched it in terms of whether Winstock felt the need. If Winstock had felt the need he'd have hired counsel beforehand. Zabell's statement was grossly improper and a bald solicitation that also makes me look bad to a witness whom I have not offered to represent. This was grossly improper, and demonstrates Zabell's intentions

C. Callanan, a Clerical Employee Showed up to her Deposition with Zabell as her Counsel.

The Winstock deposition happened to go very well for plaintiff. He testified not only that Don was an “outstanding instructor,” Exhibit C, Dep. at 84, and but that there were instances where he would reveal his heterosexuality to a passenger. Id. at 109-110. Zabell clearly didn't want Callanan to come in and testify so well for Don. Therefore, at

Callanan's deposition, she showed up to Mr. Zabell's office and learned, on the spot that she would be represented by Zabell. After Zabell informed the Court reporter that he represented her, the following questioning occurred:

Q When did you retain Mr. Zabell?

A Earlier today.

Q Was it a suggestion made by him that he would represent you?

MR. ZABELL: Objection. I'm going to advise you that if answering that question requires you to reveal the contents of conversations that you had between yourself and myself, you may simply say, I can't answer that question. If you can answer the question without revealing the content of conversations between yourself and myself, you may do so.

A I apologize. The question is?

\* Q Did Mr. Zabell tell you that he was going to represent you or did you ask him to represent you?

A I apologize, I can't answer the question.

MR. ANTOLLINO: Mark it for a ruling.

\*\*\*

Q Did you speak to Mr. Zabell before today?

A Before today I spoke with him regarding --

MR. ZABELL: You can only confirm that you spoke to me. You cannot disclose the contents of our conversation.

Q You can answer.

A Yes.

Q How many times?

A Once.

Q When was that?

\*\*\*

Q The time that you spoke to him last Friday or Monday, whenever it was, was before you retained Mr. Zabell this morning, correct? I note you're looking at your lawyer.

A I apologize. Can you repeat the question.

MR. ANTOLLINO: Can you read it back.

(Whereupon, the above referred to question was read back.)

A When I spoke to him within the past week, yes, that was before I retained him this morning.

\*\*\*

Q When you called the office, did you speak to Mr. Zabell?

A I did.

\* Q What did you say to him?

MR. ZABELL: Objection. The same direction I gave you before regarding communications between yourself and myself.

A I cannot answer the question.

Exh. F, Callanan Dep. at 8-11. It is apparently obvious that Zabell manipulated the witness by making speaking objections and improperly directed her not to answer a question not only about how she came to be represented by him but at a time *before* she even allegedly retained him. If she asked him to retain him, then that is not something that is covered by the attorney-client privilege until such time as Zabell accepted the representation. What really happened here was that Zabell told Callanan on the date of the deposition that he would representing her, which is a solicitation. After he represented her, any discussion would be covered by the attorney client privilege, but not the mere fact of who solicited whom. If the Court is unwilling to find this to be a solicitation on this record, then Callanan must be compelled to answer how she came to be represented by Zabell. Such question is not covered by the attorney client privilege. If it were, then no plaintiff in a circumstance such as this can ascertain whether witnesses are being improperly solicited to manipulate their testimony in favor of the employer in violation of the disciplinary rule cited in Rivera.

Ultimately, Zabell should be precluded from further representing employee witnesses, and disqualified from representing Callanan. None of these employee witnesses has any basis to need representation at all, let alone representation by Zabell whose interest is in helping Maynard, not the witnesses. He anticipated to represent the employees, solicited to represent Winstock and compelled Callanan to be his client solely to limit the flow of information and skew the testimony toward the defendant. This is improper and it must stop. I am reluctant to take the deposition of any further employee witnesses because I expect that at such deposition, Zabell will show up as the employee's attorney, or solicit, as he did with Winstock.

**V. Discovery Should Be Extended Until November.**

This is an important case that will make law in New York as to whether a gay person has the right to identify himself as a gay person without reprisal in the employment context. There are significant discovery disputes that are unresolved. Additionally, in summer, vacation schedules make witness and lawyer availability difficult. Mr. Zabell has a particularly tight schedule - as is my experience with him. He represented to the Court in September at oral argument on the last motion that his entire month of October was taken, and by the time he returned my phone calls to schedule depositions for November, he had *a single day* available, November 9, which we used. In December, plaintiff was here for three weeks. Although Zabell promised certain days to me, he subsequently took them away and changed the schedule, and plaintiff had to change his flight schedule at significant cost to him, which the Court was unwilling to make defendant pay for. Bully for Zabell that he is so busy, but it is clear that we need several more months to finish this case.

We did not get to depositions until November because Zabell withheld of the names and addresses of witnesses, and was unwilling either to schedule plaintiff's deposition or waive priority. I think, all told, November is a reasonable time in which to extend discovery.

**VI. Saul Zabell and/or Defendant Should be Sanctioned for His Improper Conduct.**

Mr. Zabell's advocacy of his representation to for his clients exceeds the bounds of propriety and civility. I had earlier informed that Court that he has already been sanctioned once for telling an adversary at a deposition that he was "in over his head."

Cioffi v Habberstad, 22 Misc 3d 839 (Sup.N.Y. 2008). He has made disparaging statements towards me as well, insulting my attire, and derisively referred to my mentee, Jhon Sanchez's supposed unpreparedness to take Mr. Maynard's deposition when I was ten minutes late. See Exhibit R, declaration of Jhon Sanchez. When I made an objection at my client's deposition that this Court later *sustained* on the basis of medical privilege, he smugly offered to show me a copy of the federal rules to "familiarize myself" with them. Exhibit S, portions of the deposition of Donald Zarda, p.7. He referred to my client as looking like a "muscle head." Id. at 369. He also made repeated coaching objections at the depositions of Orellana and Kengle. See Exh. D., Orellana dep at 61 ("I'm going to ask Ms. Orellana to slow down. It's okay. It's not conversation, it's a formal deposition, and I just want to make sure that the record is accurate and complete.") Kengle dep Exh. E ("Don't answer his questions like you're having a conversation.")

These things I wouldn't make a motion for sanctions for – although I have advised Mr. Zabell to stop insulting me and will bring it to the Court's attention again when he does – but the following matters clearly deserve sanctions, whether they be monetary or evidentiary or both:

A. Zabell Should be Sanctioned for Making Sworn Misrepresentations to Me and to the Court about the Non-Party Witnesses.

Defendant repeatedly misrepresented to me and to the Court that the non-party witnesses in this case, Orellana and Kengle, had authorized them to accept a subpoena on their behalf. See Exhibit O (Letter from Zabell to the undersigned indicating "Regarding your repeated requests for the contact information for Rosanna and her boyfriend, our client has located the relevant documents. However, upon discussing the situation with

Rosanna and her boyfriend, they do not wish us to disclose this information to you. Rather, they have authorized us to accept service of a subpoena on their behalf.”). See also Exhibit J (Saul Zabell declaring under penalty of perjury that “Upon obtaining the contact information of Ms. "Orellana" and Mr. Kengle, I advised their contact information was being sought in connection with this lawsuit. In response, they informed me they did not want their personal contact information disclosed, and in exchange, authorized us to accept service of a subpoena on their behalf.”)

As a result of Zabell’s representation, I subpoenaed them to appear for a deposition, through Zabell, in June 2011, and moved for contempt, after they did not appear. In fact, Zabell never got such permission to accept subpoenas from Kengle and Orellana because he was holding that information back until he got first crack at them as witnesses, visited their home, and take them out to an expensive lunch of steak and scallops. See Orellana Dep., Exhibit D, at 24. Ultimately, though Zabell did get early access to Orellana and Kengle, he lied to the Court about their willingness to allow his acceptance of subpoenas on their behalf.<sup>4</sup> Kengle testified about the first of two meetings he had with Zabell:

Q Did he tell you anything about a subpoena?

A I believe I asked him if we would be subpoenaed, or I asked him if we would have to go to court for any of this, and he said, yeah, you might, there might come a point.

Q Did you tell him to accept subpoenas on your behalf?

A No.

Kengle Dep., Exhibit E at 11. Kengle had the opportunity to amend his deposition, and did not. See id., signed errata sheet.

For her part, Orellana was more emphatic about never having agreed to allow Zabell to accept a subpoena:

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<sup>4</sup> As indicated in the Sanchez declaration, Exhibit R, Zabell attempted to get the authority to accept a subpoena for Kengle at his deposition, but that was long after he made the misrepresentations to me and to the Court.

Q When did you learn about a subpoena in this lawsuit?

A When did I learn about it?

Q Yes.

A I guess whenever my boyfriend received the phone call, he let me know -- I mean, everything went through my boyfriend, I didn't really do too much of the -- I didn't really get a phone call. So that was a couple of months ago, like three months ago, two months ago.

Q It was a couple of months ago that you heard about the subpoena?

A I mean, he said there was a possibility that there would be a subpoena, so I was kind of expecting it, but I didn't know about the exact date until a couple of -- maybe a week or two ago when he gave us the letter. Somebody sent us a letter.

Q I think that was me who sent you a letter.

A Yes. So that was the first time.

Q So that was the first time you learned about a subpoena?

A Yes.

Q Did you ever tell Mr. Zabell that you would allow him to accept a subpoena for you?

A Did I ever tell him?

Q Yes.

A I didn't think I had a choice. I think when you're subpoenaed, it's a mandatory thing.

Q Well, that's true, but what I'm asking is this. Did you sell Mr. Zabell, I want you to accept subpoenas for me in this case?

A No, I didn't want to -- I didn't want the subpoena.

Q I know you didn't want the subpoena. Most people don't. Did you ever say to Mr. Zabell, if there is going to be a subpoena, they can send it to you?

A No, I never said that.

Orellana Dep, Exhibit D at p.20-21. Like Kengle, Orellana signed her deposition and changed nothing. See id., errata sheet.

If lying to the Court under penalty of perjury on top of misleading counsel about service of a subpoena is not sanctionable under Rule 37 and the Court's inherent power, then surely nothing is. Kengle and Orellana have exposed Zabell as a liar and he should be sanctioned.

B. Zabell Took His Client out of the Deposition and Coaching Him in the Middle of an Important Question

In Maynard's deposition, we learned that the defendant is looking for several employees this summer:

Q. All right. So you're looking for between five and nine people who are experienced jumpers; correct?

A. About that.

Q. Because the video guys also have to go out in the parachute; correct?

A. Correct.

Q. Don is qualified for all of those jobs; correct?

A. Correct.

Maynard Dep, Exh A at 302. The questioning continued:

Q. All right. Is Don eligible for rehire this summer?

MR. ZABELL: Objection to the form of the question.

Q. You can answer.

MR. ZABELL: Just yes or no.

THE WITNESS: Excuse me?

MR. ZABELL: Just answer yes or no.

A. No.

Q. Why not?

MR. ZABELL: Let's take a break.

MR. ANTOLLINO: No, no, no, hold on. We are going to --

MR. ZABELL: Step outside.

MR. ANTOLLINO: You have interrupted the questioning. You're coaching the witness and that's unfair.

THE VIDEOGRAPHER: Do you want me to go off the record now?

MR. ANTOLLINO: Well, I have no choice.

THE VIDEOGRAPHER: We are now off the record at 5:16 p.m.

(Recess taken.)

THE VIDEOGRAPHER: We are now on the record at 5:17 p.m.

MR. ANTOLLINO: Counsel, that was completely inappropriate and I'm going to ask for evidentiary sanctions because of that.

MR. ZABELL: Counselor, look at me when you speak to me, please. I am telling you you are absolutely incorrect. I started to get up to take a quick break before you started asking your question.

MR. ANTOLLINO: Nonsense.

MR. ZABELL: You saw that I stood up and then you jammed out a question while I had already was attempting to take a break.

MR. ANTOLLINO: Nonsense. You went out and coached your witness.

Q. Why is Don not eligible for rehire?

MR. ZABELL: Objection to the form. You may answer.

A. He was let go for a customer complaint and this was the second time it happened. I believe in giving people a second chance and he's had a second chance.

Q. Are there any other reasons?

A. No.

Maynard Dep., Exhibit A, pp. 302-05.

Zabell's misconduct here is (a) Qualifying my question with "just yes or no," twice; (b) interrupting the deposition with a break while a question was pending and taking his witness outside to discuss his answer. (Later in the deposition, Zabell refused to allow Maynard to say even whether he had a discussion with Zabell during the break— not the substance thereof, but any discussion. *Id.* at 304-05). The former was not only a speaking objection, but a plain violation of Local Civil Rule 30.4. "Conferences Between Deponent and Defending Attorney," which reads that "An attorney for a deponent shall not initiate a private conference with the deponent while a deposition question is pending, except for the purpose of determining whether a privilege should be asserted." The Committee Note on this rule states that "The Committee believes that there is a broad consensus that it is **improper** for the deponent's attorney to initiate a private conference with the deponent while a question is pending." (Emphasis added). My purpose in asking that question was to elicit what I expected Maynard to say, i.e., that he would not hire plaintiff after having filed this lawsuit. I've elicited that response before. See, Exhibit L, portion of deposition in a confidentially settled case. As a result of having elicited that answer, I was able to settle the case because it gave my client a clear cause of action for retaliation. Zabell had obviously not prepared his client how to answer that question. We'll never know what Maynard's answer would have been had Zabell followed the rules and not coached his witness, as he obviously did. Likely, Maynard would have said that plaintiff was not eligible for rehire because he filed this lawsuit. As a result of the same – had it happened - plaintiff would have had a clear claim for retaliation, as well as a chance for this case to settle. Zabell took that away in a dirty manner - by violating the rules. He should be sanctioned for such obvious misbehavior, as much as perhaps the striking of the answer.

Incidentally, a violation of the local rules is grounds for sanctions. CA-POW! v. Town of Greece, 2012 U.S. Dist. LEXIS 36099 (W.D.N.Y. Mar. 9, 2012), as an upstate judge ruled just this week (monetary sanctions granted under 28 U.S.C. § 1927).

C. Refusing to Confer with Me under Local Rule 37.3(a).

Local Rule 37.3(a) serves the salutary purpose of requiring the parties to give it one last shot to resolve discovery disputes that must otherwise be put before the Court. Zabell, as set forth in the emails attached as Exhibit K refuses to abide by Rule 37.3(a) unless I *first* write to him to discuss my objections to his objections and cite case law. Nothing requires me to do that and I think it is a colossal waste of time, especially since, in the past, I have not succeeded in getting anything out of Zabell by letters. On the other hand, before he moved against plaintiff, we were able to resolve several items that the Court did not have to, demonstrating how well this rule works. Zabell should be sanctioned for this improper conduct, which required me to make a lengthier motion and required the court to delve into more than perhaps You would have been required to delve into. CA-POW! v. Town of Greece, 2012 U.S. Dist. LEXIS 36099 (W.D.N.Y. Mar. 9, 2012). Manifestly, that you should work more than you have to because an attorney like Mr. Zabell insists on playing hardball on every point is grounds for sanctions.

**CONCLUSION**

For the above-stated reasons, the motion should be granted in its entirety.

Dated: New York, New York  
March 21, 2012

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/s/  
GREGORY ANTOLLINO  
Attorney for Plaintiff