(Emphasis added). This violation of the local rule is grounds for sanctions. Defendant attempts to distinguish CA-POW! v. Town of Greece, 2012 U.S. Dist. LEXIS 36099 (W.D.N.Y. Mar. 9, 2012) on the grounds that that case involved a failure of counsel to provide a memorandum of law in his filings. If anything, what Zabell did was worse than failing to file a memorandum. What he did was coach his witness and pervert the truth in a dirty, unethical and illegal manner. He should surely be sanctioned for that.

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

Local Rule 37.3(a) does not require me to submit a memorandum to my opponent. Rather, it requires my opponent to *talk* to me. It doesn't matter that Zabell's "case load is voluminous." Br. at 13. The rule, however, does not allow for a voluminosity exception. Rather, Zabell frustrates the salutary purpose of the rule by making his opponents do more work than is necessary and make You do more work as well. When You ordered Mr. Zabell to confer with me in 2011, we resolved several items that were taken off your plate. My guess is that there could have been *something* we could have resolved had Mr. Zabell complied with the rule. Here's a suggested sanction for this failure to comply with 37.3(a) – overrule all of Mr. Zabell's objections to plaintiff's second combined demand. If not that, something else is called for. The rules are there for a reason. Mr. Zabell needs to be reminded of this. The previous sanctions levied against him in state court have not yet done the trick.

CONCLUSION

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

Dated: New York, New York
May 7, 2012

/s/
GREGORY ANTOLLINO
Attorney for Plaintiff

lunch and to spin their story. Such perjury and gamesmanship should not be overlooked; it may even call for a referral to the U.S. Attorney. Surely if Mr. Zabell believed that these witnesses had been "mistaken" in their deposition testimony, he would have stated so under oath, or perhaps gotten an explanatory affidavit from one or both of the witnesses. Instead, he believes you will overlook it simply when he states that these witnesses' sworn depositions were "mistaken." That is not an acceptable response, and certainly not disproof of perjury.

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

The record speaks for itself. After I asked a question of Maynard about plaintiff's future employability, Zabell made a speaking objection, qualifying my question with "just yes or no," twice. Then the record shows after I asked a simple question, "Why not?" he pulled his client out of the room. This is on videotape, mind you. Zabell states that this was merely a bathroom break is belied by the fact that (1) the transcript shows no evidence whatsoever that Zabell had intended a bathroom break; and (2) 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. Maynard dep. at 304-05. And even if Zabell *had* intended a break, it could have waited an answer to that one simple, potentially crucial question.

What Zabell did was take his client out into the hallway, and coach him not to say that my client was not eligible for rehire because of the lawsuit. That would have been evidence of retaliation and Zabell had not anticipated the question. His taking his client outside of the room to coach him was a plain violation of Local Civil Rule 30.4. ("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."

in September, I called him several times before he gave me a single day for deposition in November, and then three in December, one of which he kept changing, requiring my client additional expense and inconvenience because he had to keep changing his flight. The reality is that I cannot choose my adversary and I cannot control his calendar. Plaintiff needs more time for discovery and Mr. Zabell resists it. These two facts are undeniable and therefore I think that for this case, a November deadline is reasonable. If the Court disagrees I would ask for such extra time as you deem reasonable under the circumstances. I do know that I have been diligent and tried mightily to push things along more quickly. I would ask for the courtesy of more time that will allow me reasonably to conclude to get the information I need for a case that is more complex than meets the eye.

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

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

Mr. Zabell makes an ipse dixit assertion – without an affidavit – that both Orellana and Kengle "mistakenly indicated" that they did not authorize Zabell to accept a subpoena on their behalf. Both of them – outside of each other's earshot were asked specific questions on this and both gave a negative answer *under oath*. Orellana was pinned down precisely on what permissions she had given Zabell. Then, given the opportunity to correct any "mistake," each witness signed their deposition transcript and returned it to me unchanged. Mr. Zabell committed perjury in a filing in court by stating that he had been authorized to accept subpoenas on behalf of these witnesses. In fact, this was a lie, and that is why it took so long for discovery even to start – because Zabell wanted first crack at these witnesses, to take them out to an expensive

to defendants' attempt to distinguish Rivera, the facts are extremely similar. Defendant in this case did not tender a list of names and addresses of employees until September 2011, after this Court had ordered it, and almost a year after I had asked that list. Mr. Zabell then lied to this court and me and stated that the witnesses Orellana and Kengle had authorized him to accept a subpoena on their behalf, and yet when I sent one, Zabell did not tender it, because he knew his pronouncements were all fiction. He has steadfastly stonewalled plaintiff's access to witnesses and he will improperly solicit any employee whom I might subpoena. Winstock and Callanan don't need an attorney; disqualification will not impede justice. None of the other employees of SDLI need an attorney to represent them at a deposition. That is a device, rather, for Mr. Zabell to attempt to monopolize access to the witnesses and impede the speedy resolution of this case. Mr. Zabell should be informed that he is not allowed to do this.[6]

V. Discovery Should Be Extended Until November.

I could easily ask for an earlier date, but this is a different case – not just because of the subject matter, but chiefly because I know in experience that Mr. Zabell's schedule is impossibly full for months on end. If this Court would be willing to support me in my attempt to complete discovery on a timely manner, September would work, but again, Mr. Zabell has to cooperate. Time and again he shows that he will not. He even invokes his "voluminous" (br. at 13) caseload as an excuse not to confer with me before a discovery motion and to require me to write him a memorandum. After our oral argument

[6] Defendants cite Carter v. Cornell Univ. 173 FRD 92 (SDNY 1997). In addition to being so much older than Rivera, I happened to know a little bit about Carter, since I was on the losing side on that case in which I was seeking notes of attorney interviews of employees. When these employees were eventually deposed, they were not, however, represented by counsel; nor were they at trial. Judge Motley's decision pertained solely to the work product notes of conversations of witnesses, something that I am not asking for in this motion.

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

Zabell now admits that it has been his intention all along to represent witnesses, and that he has solicited them. Although Zabell did not represent Winstock at his deposition, Zabell now states that he does, br. at 10. I don't know which is true, since Zabell often takes liberties with the truth, as well as the rules (see Point V). These witnesses were not, as defendant contends, deposed in their "corporate capacity." I subpoenaed them as fact witnesses. They have no reason to be represented by Zabell; they are at no risk of being sued, and Zabell must be disqualified from representing current employees who are fact witnesses, and ordered to stop soliciting other employees. Zabell's representation of fact witnesses who are not the target of the lawsuit is nothing more than Zabell attempting to confer upon himself an advantage and is improper under the rules.

Defendants in their brief cite numerous very old cases none of which comport with the rule cited in 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). There is one instance where the Appellate Division Second Department can overrule federal courts in this district – and that is in their interpretation of disciplinary rules that apply in this district. EDNY Local Rule 1.3(a), for example, requires those who wish admission to the bar to this Court to affirm to, among other things, compliance with, "the New York State Rules of Professional Conduct as adopted from time to time by the Appellate Divisions of the State of New York." There are no federal disciplinary rules. The Appellate Divisions decide the interpretations of the rules of professional conduct, so none of the cases defendant has cited apply, and all predate Rivera. And, indeed, contrary

defendant company, and just several months prior to the complaint made in this action. One of the complaints in the Ripoff report concerns an allegation strikingly similar – an improper touching -- to one of the complaints made against plaintiff. Therefore, plaintiff is entitled to know what the complaint was, what Maynard's response to it was in order so to make a comparison between what he did in this instance – whether anyone was fired, what the investigation entailed – and what Maynard did in this instance, which was to go to his lawyer and fire my client. The Ripoff Report complainer is a comparator to Orellana, who made her complaint less than a year later. Therefore, this meets all of the requirements of the order of production in Muñoz v. Manhattan Club Time Share, 2012 U.S. Dist LEXIS 17284 at p*6-7. The objections should be overruled and either admissions made or the actual complaints tendered.

3. Dates in Which Plaintiff worked and did Not Get Paid

Defendant makes the ipse dixit contention that plaintiff "was not eligible for payment" for days in which he remained on the campus of the Long Island Sky Dive and did not get paid. No citation to the record is given, and there is none. In fact, the defendants are incorrect. The defendants run an operation in which one only gets paid if there are customers. However, the flaw in this plan is that employees are entitled to minimum wage. Any day on which there was only one jump or none, the plaintiff was not paid minimum wage. We are in discovery and Maynard acknowledged he could ascertain on which days there were no jumps. They should be tendered so plaintiff can make his case that he worked without pay.

length chute you could possibly put on the machine"). See also Harrison v. Sears, Roebuck & Co., 981 F.2d 25, 31 (1st Cir. 1992) ("A more direct impeachment use of subsequent remedial measure evidence would exist if Appellees' witness stated that he did not change the product after the alleged accident was brought to his employer's attention."). Again, we are in discovery and admissibility arguments await trial. But assume Maynard were to testify (or defendant were to argue) that it is so obvious that an employee should not reveal his or her sexual orientation to a customer, and plaintiff should have known better. And what if the new employee manual contains a warning that one should not reveal one's sexual orientation to a customer. Then the impeachment argument would go like this: "So it's so obvious but you felt you had to put it in the employee manual?" Or what if, conversely, the defendant puts nothing about revealing "personal information," sexual orientation or marital status in the manual. That is impeachment going to the question as to why they would not make that remedial measure considering the consternation it caused in this instance.

All told this is an employment discrimination case and we are in discovery. An employee manual near in time is standard fodder for discovery in cases such as these and the manual should be turned over.

2. *Request for Admission as to Ripoff Report, etc.*

The plaintiff was employed in 2001- and from 2009-10.[4] The Ripoff report concerns a complaint made in 2009,[5] when plaintiff was intending to return to work at the

[4] Plaintiff went out on workers comp. in 2009, but hoped he would return to work that summer if possible, but he wasn't cleared. He did come back in 2010 as soon as he was cleared. See Zarda dep, 75-76 (plaintiff stopped jumping in 2009 after injury, was unable to get cleared to return to work in that year, but came back in 2010). Attached as "Exhibit A."

[5] At the bottom of Exhibit H, the report indicates that the complaint was made in October 2009.

C. Maynard Must Tender the Address of Santine Megneco.

Defendant first argues that plaintiff is not entitled to this because "Title VII does not prohibit harassment or discrimination on the basis of sexual orientation." Br. at 4, citing case. This is true and again irrelevant. This is a double-jurisdiction case - diversity and federal question. Plaintiff has alleged a cause of action for discrimination on the basis of sexual orientation. He has also make a claim based on sex stereotypes under Title VII. Mengeco's testimony could lead to discoverable information as to the state claim. Defendant then makes an argument that what Ms. Mengeco says is inadmissible. But this is not trial. Plaintiff is entitled to enquire and admissibility arguments are decided at a later time, depending on what the evidence is.

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

For most of these points, I will rely on my opening brief and contend that defendant has not shown that the information requested is not discoverable. I do, however reply to some arguments.

1. Employee Manual.

Defendants' only defense is that any employee manual would be a subsequent remedial measure. Once again, that is a trial issue, not one for discovery. Furthermore, there are exceptions to the subsequent remedial measure doctrine, including impeachment. See Wood v. Morbark Indus., 70 F.3d 1201 (11th Cir. 1995) (post-accident change to the design of a woodchipper was admissible for impeachment where the president of the corporate defendant testified that the woodchipper contained "the safest

include an audio tape and a few videotapes, those tapes are short in time – the longest video being three minutes and five seconds. Insofar as I have not used my seven hours, Maynard should be ordered back to return.

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.

Defendant remarks first, "mere acknowledgement of a conversation does not constitute a waiver if the substance of the conversation is not disclosed." Def. Br. at 2, citing cases. This is true, but inapplicable. Here, Maynard told plaintiff about the *substance* of the conversation:

> 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, Maynard stated that "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.

Maynard has waived this discussion, clearly and fully. Defendant may have a point that Maynard hasn't fully waived subject matter going back in time, as to undisclosed conversations with his lawyer. Br. at 3, citing In re Von Bulow, 828 F.2d 94 (2d Cir. 1987). But even the mandamus decision in Von Bulow holds that "the district court correctly found a waiver by von Bulow as to the particular matters *actually disclosed* in the book." Id. at 102 (underline added; italics in original). At this point, plaintiff is entitled to enquire as to the conversation with Harvey Arnoff that Maynard disclosed to plaintiff at his termination – not only the existence of the conversation, but its subject matter and content.

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

DONALD ZARDA,

Plaintiff,

-against-

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

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

REPLY MEMORANDUM IN SUPPORT OF DISCOVERY AND SANCTIONS

10-cv-04334-JFB

REPLY ARGUMENT

I. Ray Maynard Must Be Returned to Complete his Deposition as well as Answer Certain Questions.

A. Viewing short videos and review of documents did not exceed the time limit; nor could such a thing could ever fairly count toward the seven-hour limit.

The case law cited in plaintiff's opening brief requires that a court extend a seven-hour deposition -- excluding colloquy and breaks -- in the demonstration of good cause. Defendant doesn't even attempt to address that, yet maintains that, despite a generous lunch break, numerous other breaks and extensive colloquy, that time given to the witness to review documents should be included in the seven hours limit. This proposition should be rejected. First, does not show that the review of documents took up an hour and a half. Second, not a single case stands for the proposition that review of documents would count toward the seven-hour limit. Witnesses are always instructed to take their time with documents, by both deposing and defending counsel. The idea that giving the witness the time to look over a document so that he can give his best and truthful testimony is beyond ridiculous. Furthermore, while this case does

various people about that from six weeks up.

Q How long were you --

A I was being optimistic.

Q Is it safe to say that July 2 landing injury took you out of jumping for the remainder of 2009?

A It took me out of -- yeah, it did.

Q You didn't work at Skydive Long Island after --

A Let me --

Q -- you have to let me finish my question, sir.

A Fine.

Q You didn't work at Skydive Long Island in 2009 after July 2; is that correct?

A That is correct. The injury -- what I was going to say was that it took me out of work jumping for the remainder of the season, completely.

Q You came back in 2010?

A I did.

Q With a vengeance?

MR. ANTOLLINO: Objection to form.

A No.

Q You came back in 2010 looking forward to jump again; correct?

A I did. I came back with a positive, high-spirited attitude ready to go to work.

Q When were you cleared to begin jumping in 2010?

A By my doctor, I was cleared to begin work jumping on -- now, this may be off a couple of days -- on or around January 22 or 24. It was in that range right there.

That was -- let me continue so that I make sure I get this straight.

Q Please, go ahead.

A That was on my doctor's initial orders that I begin work jumping six months following my surgery. That was six months. We had been in contact on the phone, but when I returned to Long Island, because I knew I was coming back to work for Ray because we had already established that, he still wanted