



1 ***I. Plaintiff's Request for an Extension of Time***

2 On January 22, 2013, Defendants filed a Motion for Sanctions against Plaintiff  
3 pursuant to Rule 11 of the Federal Rules of Civil Procedure. (Doc. No. 189.) Thereafter,  
4 the Court set a briefing schedule and hearing date for Defendant's motion. (Doc. No.  
5 190.) The Court instructed the parties to file opposition briefs by February 19, 2013 and  
6 reply briefs by March 12, 2013. (*Id.*) The Court set the hearing for April 18, 2013 at  
7 2:00 p.m. (*Id.*) On February 19, 2013, Plaintiff filed the instant request for a thirty day  
8 extension of time in which to file her opposition. (Doc. No. 191.)

9 Considered in light of the current schedule, Plaintiff's requested extension does not  
10 require a continuance of the April 18, 2013 hearing date or cause unnecessary delay in  
11 the resolution of Defendants' motion. Therefore, the Court grants Plaintiff's request for a  
12 thirty day extension of time in which to oppose Defendants' motion. Accordingly,  
13 Plaintiff's opposition brief must be filed by March 21, 2013, and Defendants' reply brief  
14 must be filed by April 5, 2013. The hearing date will remain as set previously.

15 The Court notes, however, that any arguments pertaining to the merits of  
16 Defendants' Rule 11 motion made by Plaintiff in her motion for an extension of time will  
17 not be considered by the Court when ruling upon Defendants' motion. All of Plaintiff's  
18 substantive arguments in this regard must be set forth fully within her opposition brief.

19 ***II. Plaintiff's Request to File a Cross-Motion Under Rule 11 and 37***

20 As an initial matter, the Court notes that Plaintiff does not require permission from  
21 the Court to file motions in this action. Should Plaintiff wish to file a motion, she may do  
22 so in accordance with the Federal Rules of Civil Procedure, the Southern District's Civil  
23 Local Rules, and this Court's Chamber Rules.

24 While it is unclear what discovery related issues Plaintiff wants to raise under Rule  
25 37, those should be raised before Magistrate Judge Skomal who has supervised discovery  
26 in this case. Motions relating to discovery violations, like discovery matters in  
27 general, are referred to a magistrate judge for handling in this district. The issue of  
28 discovery sanctions, other than claim or affirmative defense preclusion and the striking of

1 evidence and/or witnesses, is within the purview of the magistrate judge, and must be  
2 filed in accordance with the magistrate judge’s chambers rules as well as the scheduling  
3 orders in the case.

4 Finally, to the extent that Plaintiff requests leave to file a Cross-Motion under Rule  
5 11 in order to avoid the procedural requirements of Rule 11's safe harbor provision,  
6 Plaintiff’s request is denied. Plaintiff must proceed appropriately under Rule 11 in this  
7 regard.

### 8 ***III. Plaintiff’s Motion to Reconstruct the Record***

9 Under Rule 10(c) of the Federal Rules of Appellate Procedure, it is possible to  
10 reconstruct the record for purposes of appeal when a transcript of a hearing or trial is  
11 unavailable and the proceeding was not recorded. In this instance, the “appellant may  
12 prepare a statement of the evidence or proceedings from the best available means,  
13 including the appellant’s recollection.” Fed. R. App. P. 10(c). The appellant must serve  
14 the statement on the appellee, “who may serve objections or proposed amendments  
15 within 14 days” after being served with the statement. *Id.* “The statement and any  
16 objections or proposed amendments must then be submitted to the district court for  
17 settlement and approval.” *Id.* “As settled and approved, the statement must be included  
18 by the district clerk in the record on appeal.” *Id.*

19 Here, Plaintiff seeks to reconstruct the record with regard to a “missing essential  
20 recording” of the June 13, 2011 proceeding before Magistrate Judge Skomal. (Doc. No.  
21 192 at 1.) The Court finds Plaintiff’s motion deficient for two reasons. First, Plaintiff  
22 has not complied with the procedure set forth within Rule 10(c) for reconstructing the  
23 record. Plaintiff has not prepared a statement of the proceedings and served it upon  
24 Defendants in order for them to provide objections and proposed amendments. Without  
25 this statement, the Court has nothing to consider adding into the record. The role of the  
26 Court is to review the provided statement along with any objections and proposed  
27 amendments. Only then can the Court settle and approve the final statement to be  
28 included by the district clerk in the record on appeal. Here, Plaintiff has not provided her

1 statement reflecting the proceedings or provided any indication that she has served such a  
2 statement upon Defendants. As such, Plaintiff has not complied with the proper  
3 procedure for reconstructing the record provided by Rule 10(c) and, thus, the Court  
4 cannot reconstruct the record under the current circumstances.

5 Second, Plaintiff seeks reconstruction of a proceeding that is not typically held on  
6 the record. Plaintiff states that the “subject of the June 13[,] 2011 hearing was to  
7 determine if there was sufficient justification not to sanction Plaintiff who contended she  
8 could not fly and physically appear in Magistrate’s Courtroom for a personal hearing.”  
9 (*Id.* at 3.) However, the Court’s docket does not reflect her description of the proceeding.  
10 Per several docket entries, the June 13, 2011 proceeding was, in fact, a mandatory  
11 settlement conference rather than a hearing regarding sanctions based upon Plaintiff’s  
12 failure to appear. (Doc. No. 69 (case management order setting mandatory settlement  
13 conference on June 13, 2011); Doc. No. 88 (minute entry stating “Mandatory Settlement  
14 Conference held on June 13, 2011”); and Doc. No. 87 (order to show cause why sanctions  
15 should not be imposed for Plaintiff’s failure to appear at the mandatory scheduling  
16 conference held on June 13, 2011).)<sup>1</sup> Pursuant to Civil Local Rule 16.3, settlement  
17 conferences, mandatory or otherwise, are “off the record, privileged and confidential,  
18 unless otherwise ordered by the court.” Generally, settlement communications between  
19 the parties are privileged under Rule 408 of the Federal Rules of Evidence. As such, the  
20 parties’ discussions at mandatory settlement conference are not routinely recorded or  
21 transcribed as they are held “off the record.” For this reason, the mandatory settlement  
22 conference would not typically be part of the record on appeal, and Plaintiff has not  
23 provided any evidence why the Court should find otherwise.

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26 <sup>1</sup> Further, the Court notes that despite Plaintiff’s contention that Magistrate Judge  
27 Skomal assured her the June 13, 2011 proceeding was being recorded, it appears that  
28 Plaintiff did not actually attend the proceeding. In fact, her failure to appear ultimately  
led to the subsequent order to show cause and the possibility of sanctions being imposed  
against her. This is one of many seeming inaccuracies within Plaintiff’s Motion to  
Reconstruct the Record.

1 To the extent that matters of settlement were adjudicated during the settlement  
2 conference, plaintiff has failed to give any meaningful information for the Court to  
3 consider.

4 Under these circumstances, the Court cannot reconstruct the record of the June 13,  
5 2011 proceeding as Plaintiff has not complied with the procedural requirements set forth  
6 in Rule 10(c) or established that the June 13, 2011 proceeding should properly be  
7 included in the record for appeal. Accordingly, Plaintiff's Motion for Reconstruction of  
8 the Record is denied.


9 **IV. Conclusion**

10 For the reasons set forth above, the Court ORDERS as follows:

- 11 1. Plaintiff's request for an extension of time to oppose Defendant's Rule 11  
12 motion is GRANTED, (Doc. No. 191);
- 13 2. Accordingly, Plaintiff must file her opposition brief on or before March 21,  
14 2013, Defendants' must file their reply brief on or before April 5, 2013, and  
15 the hearing will be held on April 18, 2013 as previously set;
- 16 3. Plaintiff's request to file Cross-Motions under Rules 11 and 37 is DENIED,  
17 (Doc. No. 191);
- 18 4. Should Plaintiff wish to file motions under Rules 11 and 37 in the future, she  
19 may do so in accordance with the Federal Rules of Civil Procedure, the Civil  
20 Local Rules, and the appropriate chambers rules;
- 21 5. Plaintiff's Motion to Reconstruct the Record is DENIED, (Doc. No. 192).

22 IT IS SO ORDERED.

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24 DATED: February 27, 2013

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27 Hon. Anthony J. Battaglia  
28 U.S. District Judge