IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

| | | |
|---|---|---|
| UNITED STATES EQUAL EMPLOYMENT OPPORTUNITY COMMISSION,<br><br>Plaintiff,<br>v.<br><br>GMRI, INC.,<br>Defendant. | ) | Case No. 15-cv-20561-JAL/JG |

**EEOC'S MOTION FOR SPOLIATION AND RULE 37(e) SANCTIONS RELEVANT TO SUMMARY JUDGMENT AND TRIAL**

**Exhibit List**

1. Exhibit 1: Charge of Discrimination (Scornavacca)
2. Exhibit 2: Charge of Discrimination (Alfaro)
3. Exhibit 3: Notice of Charge(Scornavacca)
4. Exhibit 4 Notice of Charge (Alfaro)
5. Exhibit 5 EEOC Expansion Letter
6. Exhibit 6: EEOC National Request for Information
7. Exhibit 7: EEOC request for Applications and Interview Booklets
8. Exhibit 8: Letter from Defendant Confirming National Investigation
9. Exhibit 9: EEOC Letters of Determination
10. Exhibit 10: Declaration of Katherine Gonzalez
11. Exhibit 11: Declaration of Terry Carter
12. Exhibit 12: GMRI 2013 Document Retention Policy
13. Exhibit 13: GMRI 2010 Document Retention Policy
14. Exhibit 14: Deposition of Terry Carter
15. Exhibit 15: Valentine Deposition
16. Exhibit 16: Tampa E-mail Confirming Number of Interviews
17. Exhibit 17: Expert Report of David Neumark
18. Exhibit 18: Kansas City Opening
19. Exhibit 19: Appendix A, List of Locations and Opening Dates
20. Exhibit 20: Defendant's Interrogatory Answers
21. Exhibit 21: Expert Report of Ali Saad
22. Exhibit 22: Marcoe Deposition
23. Exhibit 23: Hiring Tracker Spreadsheet

**24.** Exhibit 24: Dethloff Deposition

**25.** Exhibit 25: Debarril Deposition

**26.** Exhibit 26: Declaration of David Neumark

**27.** Exhibit 27: Interview Booklets

**28.** Exhibit 28: Interview Guides

**29.** Exhibit 29: Conferral E-mails regarding Paper Application Data

**30.** Exhibit 30: Chart of E-mail Retention

**31.** Exhibit 31: Defendant's Interrogatory Answers

**32.** Exhibit 32: Munden Deposition

**33.** Exhibit 33: E-mail from Michael Jong

**34.** Exhibit 34: E-mail from David Culley

**35.** Exhibit 35: Morton II Deposition

**36.** Exhibit 36: Saad Deposition

**37.** Exhibit 37: Jaie O'Banner LinkedIn Page

**38.** Exhibit 38: E-mail Providing dates of ESI

**39.** Exhibit 39: Tokes Deposition

**40.** Exhibit 40: Cavanaugh Deposition

**41.** Exhibit 41: Hopkins Deposition

**42.** Exhibit 42: Raasch Deposition

**43.** Exhibit 43: Willen Deposition

**44.** Exhibit 44: Dunavan Deposition

**45.** Exhibit 45: Drafts Deposition

**46.** Exhibit 46: Pham Deposition

**47.** Exhibit 47: Abayasinghe Deposition

**48.** Exhibit 48: Exhibit A to EEOC's Interrogatory Answers (Disclosing Claimants)

**49.** Exhibit 49: Net Deposition

**50.** Exhibit 50: Cestare Deposition

**51.** Exhibit 51: Siegmund Deposition.

**52.** Exhibit 52: Lullo Deposition

**53.** Exhibit 53: E-mail re Applicant ("a little big")

**54.** Exhibit 54: E-mail re Applicant ("young guy")

**55.** Exhibit 55: E-mail re College Recruiting

**56.** Exhibit 56: Demonstrative Exhibit.

**57.** Exhibit 57: Hearing Transcript

**58.** Exhibit 58: Neumark Deposition

Defendant GMRI, Inc. ("GMRI" or "Seasons 52") failed to preserve—and intentionally destroyed—**paper applications** and **interview booklets** used at Seasons 52 new restaurant openings ("NRO") in bad faith, and in violation of federal regulation. GMRI's destruction prejudices EEOC by opening the door for GMRI to attack EEOC's statistical and anecdotal evidence, and to rely upon otherwise impermissible Seasons 52-favorable proxy data. Further, GMRI failed take *any* steps to preserve **emails** sent by or to the managers involved in the very hiring decisions challenged by this lawsuit. EEOC thus seeks spoliation sanctions against GMRI.

## I. Factual Background

**A. GMRI Was on Notice of EEOC's Nationwide Investigation**. Anthony Scornavacca and Hugo Alfaro filed charges of discrimination against Seasons 52 (Coral Gables) under the Age Discrimination in Employment Act ("ADEA") in October and December 2010, respectively. Exs. 1, 2. EEOC notified GMRI of the Charges, and explained EEOC's recordkeeping regulations. Exs. 3, 4. On August 31, 2011, EEOC issued an Expansion Letter and notified GMRI that it was expanding the investigation to include GMRI's hiring practices *throughout the nation* as they affect a class of individuals, applicants for employment, because of their ages. Ex. 5. EEOC then requested nationwide information including, *inter alia*, an employment roster for all Seasons 52 locations, Ex. 6, as well as applications and interview booklets for 10 locations, Ex. 7. On January 10, 2012, *Seasons 52 acknowledged that EEOC's investigation was nationwide*. Ex. 8. On July 16, 2013, EEOC issued Letters of Determination finding that GMRI "engaged in a pattern or practice of not hiring individuals who are over the age of forty at its Seasons 52 restaurants throughout the United States." Ex. 9. During conciliation, EEOC advised GMRI that it was conciliating on behalf of a nationwide class of applicants. Ex. 10. EEOC filed its Complaint on February 12, 2015. DE #1.

**B. GMRI's Document Retention Policies Require Preservation**. Seasons 52's document-retention policies in effect since 2010 require the preservation of all applications and

interview booklets for non-hired applicants for at least three years and, for hired applicants, for a minimum of six years. Ex. 11 ¶¶ 8-9. Business related e-mail is also subject to retention. Ex. 11 ¶ 11. Further, in the event of an investigation: "*[A]n in-house Company attorney will issue a notice of Record Hold to inform Employees of the Records that must be retained* . . . [IT] collects all emails available in the custodian's email box. . . ." Ex. 12 at 5 (italics added); *see also* Ex. 13 at 2.

**C. GMRI Failed to Issue an Appropriate Litigation Hold.** When GMRI initially received the charges of discrimination, it issued a Litigation Hold to Gary Marcoe, Managing Partner ("MP") in Coral Gables, and Christine Wilson, the Director of Employee Relations. Ex. 11 ¶ 21. Thereafter, GMRI did not issue a litigation hold covering application, booklets, or e-mails at the remaining 34 locations until May 27, 2015, 3 years and 8 months after the Expansion Letter, Ex. 5, and 3 months after EEOC's lawsuit was filed. Ex. 11 ¶ 20; Ex. 14 at 48:18- 49, 60:5-61:3.

**D. Paper Applications: Tampa, King of Prussia ("KOP"), and Costa Mesa.** GMRI received paper applications in Tampa, KOP, and Costa Mesa. Ex. 17 at 69 (Table 1, Columns 4, 5). In 2011, the "litigation team" collected materials from these locations merely by asking managers to send them to a central office to be scanned. Ex. 14 at 30:14-21, 52:5-52:11, 57:25-58:21. No one issued a litigation hold or went to the restaurants to oversee the collection. Ex. 14 at 58:7-20. Not surprisingly, GMRI failed to produce a large number of applications to EEOC:

| | | |
|---|---|---|
| Tampa | 1800 applications received[1] per Manager testimony | 205 produced[2] |
| KOP | 1000 applications received per Manager testimony | 325 produced |
| Costa Mesa | 1000 applications received per Manager testimony | 322 produced |

Because the limited application data produced for these stores is not representative, EEOC's statistical analysis for Tampa, KOP, and Costa Mesa by necessity is based upon proxy Census data.

[1] Manager testimony confirms applications received. **Tampa**: Ex. 15 at 56:19-24; Ex. 16 at 1(e-mail confirming 1800). **KOP**. Ex. 24 at 47:22-48:1. **Costa Mesa.** Ex. 25 at 81:2-20. *See also* Hiring Tracker. Ex. 22 at 148:1-158:10; Ex. 23 at 9 (Tampa 1890), at 8 (KOP 1152), at 6 (Costa Mesa 1846).

[2] Ex. 20 (Interrogatory No. 3) (number of applications produced)

Ex. 17 ¶ 92. As Dr. Saad's (GMRI's expert) analysis demonstrates, this prejudices EEOC, as Census data reflects less under-hiring of older applicants than actual applicant data at each of the remaining 8 locations that accepted paper applications. Ex. 21, *Compare* pg. 81 (Exhibit 12) *with* pg. 142 (Exhibit 73). Using application data, Saad found a statistically significant failure to hire older workers for 7 of 8 locations, and under-hiring of older workers at the 8th location. *Id.* at 81 (Table 12). Conversely, using Census data, Saad reported statistical significance at only 2 of the same 8 locations, with 2 restaurants slightly *over-hiring* older applicants. *Id.* at 142 (Exhibit 73). Thus, the forced use of Census data understates GMRI's discriminatory hiring at these three locations, and impacts the relief EEOC can recover for victims of discrimination.[3]

**E. Seasons 52 Has No Knowledge.** GMRI does not say that the missing applications were lost or destroyed (either before or after any preservation obligation); instead, it has steadfastly maintained that it has "no knowledge." GMRI claims it is "unaware" of the number of applications received, notwithstanding the testimony of its managers. *See* Ex. 14 at 47:14-18, 56:21-57:5; 58:21-58:24, 59:13:60:3. GMRI claims it has no "knowledge of the destruction of applications, interview booklets or other related documents from . . . Tampa, King of Prussia, [and] Costa Mesa." Ex. 11 ¶ 15. GMRI is "unaware" of data being lost at any time. Ex. 14 at 41:14-24, 46:7-15, 52:8-14, 59:9-12.

**F. Paper Applications: Jacksonville and Kansas City.** GMRI destroyed a significant number of paper applications from Jacksonville and Kansas City:

| **Location** | **Min. # Paper Apps received at restaurant** | **Paper Apps Produced by GMRI** (Ex. 17, pg. 69-70, Table 1, Column 5) |
|---|---|---|
| Jacksonville | 1,000 (Ex. 45 at 56:20-57:9) | 126 |
| Kansas City | unknown | 8 |

Here, GMRI's preservation efforts were particularly tardy and lackadaisical. Although EEOC set discovery hearings, DE # 48 & 80, and repeatedly requested a timeline for the production of

[3] Phase 2 damages will be calculated based on the "shortfall" –the number of additional older applicants that would have been hired by GMRI if hiring was neutral with respect to age.

paper applications, Ex. 29 at 1, 3, GMRI made no effort to collect paper documents for these 2 locations, and 23 others, until January 2016, 11 months *after* EEOC filed this lawsuit. *See* Ex. 11 ¶ 17; Ex. 14 at 67:16-68:16. All the while, GMRI represented to EEOC that efforts to collect paper data were underway. Ex. 29 at 1, 3, 6 ("first priority has been the collection . . . of paper applications.")[4] Ex. 14 at 76:15-25. Regrettably, GMRI waited too long. In Jacksonville, managers testified that paper applications and booklets were shredded.[5] *See* Ex. 45 at 56:20-60:13, 79; Ex. 49 at 113:24-117:17 (Net states applications shredded).[6] Despite this, GMRI remains willfully clueless, asserting that it has "no knowledge" of any destruction of documents from Jacksonville. Ex. 14 at 72:25-73:16.[7] As to Kansas City, a December 31, 2015 fire—10 months after EEOC's Complaint—destroyed the application materials. Ex. 14 at 64:22-65:9, 67:3-67:20. Thus, EEOC is left with limited electronic data for these two locations because the paper applicants were destroyed.[8]

Because GMRI failed to produce virtually all of the paper applications, EEOC analyzed only electronic data at these two stores. Limited electronic application data alone, however, can hide gross under-hiring of older applicants evident in paper application data, as evidenced by examining the Coral Gables data. In Coral Gables, while the electronic data (392 electronic applicants) suggests

---

[4] GMRI likewise told the Court: "[T]he notice of hearing was set back in December [2015], and at that time we told the EEOC that we were diligently collecting documents and readying them for production. . . . I told her we are proceeding with all deliberate speed." Ex. 57 at 6.

[5] Defendant is "unaware" of the number of paper applications submitted in Jacksonville and Kansas City. Ex. 14 at 67:11-20, 68:9-22. However, both locations hired for the NRO using paper applications. Ex. 18 at 1 (hiring begins 9/26); Ex. 45 at 56:20-57:9.

[6] Paper applications may also have been shredded in Princeton, Ex. 51 at 84:3-8.

[7] **Q:** Does Seasons 52 have any knowledge that any [Jacksonville] applications were shredded? **A:** We do not have knowledge that any applications were shredded. Q:… [W]hat steps did Seasons 52 take to look into the issue of whether applications were shredded at Jacksonville? **A:** I personally do not know what steps were taken. **Q:** Do you know if any steps were taken? **A:** I do not know. *See* Ex. 45 at 56:20-60:13

[8] Although GMRI did produce electronic application data for these two locations, the number of applicants age 40 or older that received interviews is extremely small (14 and 16), providing a very small pool of potential claimants with anecdotal evidence. Ex. 26 ¶ 15.

that older workers are *favored*, Ex. 21 at 72 (Saad Exhibit 3), the paper data tells a different story. During litigation, GMRI produced 256 paper applications from Coral Gables. Ex. 26 ¶ 14. GMRI, however, had produced approximately 900 more Coral Gables applications during EEOC's investigation—applications that it failed to produce in litigation. With the complete paper data (1179 applications), Saad acknowledges that Coral Gables shows a statistically significant failure to hire older applicants. Ex. 21 at 81 (Saad Exhibit 12). Thus, when the analysis includes all available data, we see dramatically different hiring results, and a higher shortfall for purposes of damages.[9]

**G. GMRI Failed to Produce Interview Booklets.** During 2010-2011, GMRI provided restaurants a standard interview booklet ("Booklet") to, among other things, provide an interview scoring system for evaluating applicants. Ex. 27. When stores switched to electronic applications, GMRI switched to using an interview guide ("Guide"), which closely resembled the Booklet and served the same general purposes. Ex. 28. In total, GMRI produced approximately 2202 Booklets and 786 Guides from 32 of the 35 restaurants. Ex. 26 ¶ 16. Of the Booklets produced, Dr. Saad confirmed that they were heavily skewed towards hires, Ex. 36, 58:18-58:23, thereby indicating GMRI destroyed thousands of Booklets for unsuccessful applicants.

Hiring managers testified that Booklets/Guides were required, or generally used, in Tampa, KOP, Plano, Phoenix, Indianapolis, North Bethesda, McLean, Naples, Jacksonville, Memphis, and Columbia,[10] but even from these locations, EEOC received significantly less Booklets/Guides than

[9] The 256 paper applications produced by GMRI in litigation were heavily skewed towards hires (41.8%). Neumark would not have used them because the data was not representative. Ex. 26 ¶ 14.

[10] Hiring Manager testimony requiring Booklets/Guides: (1) Tampa, Ex. 39 at 101:17-20; (2) King of Prussia, Ex. 24 at 64:19-21 (3) Plano, Ex. 24 at 74:9-75:13, 86:25-87:6, 87:22-88:3 (4) Phoenix, Ex. 41 at 92:1-21; (5) Indianapolis, Ex. 42 at 88:1-89:14; (6) North Bethesda, Ex. 43 at 59:1-60:19; (7) McLean, Ex. 40 at 72:14-75:3, 137:19-138:11; (8) Naples, Ex. 44 at 85:8-19, 120:15-121:18; (9) Jacksonville, Ex. 45 at 79:1-3, (10) Memphis, Ex. 46 at 75:8-76:1, 80:24-81:2; (11) Columbia, *see* Abayasinghe 88:21-89:13, 103:11-106:5.

the number of applications.[11] In fact, there is evidence that, *after EEOC's Expansion Letter,* some of these Booklets/Guides were intentionally destroyed. *See* Ex. 46 at 76:2-5 (after interview, Guides thrown away at Memphis); Ex. 49 at 113:24-117:17(policy to shred at each location where Net is Director of Operations (DO), and applications/booklets kept together); Ex. 31 at 8 (Net is DO over Jacksonville, Memphis, Birmingham, Sarasota, Tampa); Ex. 50 at 64:4-22 (immediate shredding of booklets at Cherry Hill); Ex. 32 at 245:6-247:12 (TAS paperwork and prescreen notes destroyed in Chicago). As for GMRI, it has no "knowledge." Ex. 11 ¶ 15.

The absence of GMRI's Booklets/Guides is highly prejudicial to EEOC because the analysis performed by Dr. Saad is only possible due to the spoilation. Saad's Report *repeatedly* states that there is no information regarding what transpired during the interview. Ex. 21, ¶ 10, 11, 26, 93. Seizing upon this void in the data, Saad argues that older workers seeking entry-level and mid-level restaurant service jobs possess, on average, less ability than younger workers seeking the same jobs, *and that this was evident in interview performance of older workers.* Ex. 21, ¶ 11 (rejecting presumption that interview performance is *not* related to age), 79; Ex. 36, 137:8-139:7, 144:12-17. He then turns to an external, unrelated data source—the National Longitudinal Study of Youth (NLSY)—to discount the value of applications from older applicants by an amount up to 0.36, which Saad says is the measure of older applicants' lesser ability that would have been evident at interview. Ex. 21, App'A, ¶¶ 96-101; Ex. 36, 177:24-181:4. Saad supposes that the longer unemployment duration of older workers is proxy for the abilities possessed by applicants to GMRI. Ex. 21 ¶¶ 20, 21, 97; Ex. 36,148:15-22, 173:6-15, 174:17-175:2. Saad acknowledges, however, that were scores from Booklets/Guides available, he would have had to consider them. Ex.36, 61:11-65:7. Having

[11]Examples of lost Booklets/Guides: (1) Tampa: 205 applications/39 booklets; (2) Phoenix: 2516 applications/259 booklets; (3) North Bethesda: 1330 applications/ 48 Booklets; (4) Indy: 934 applications/223 booklets/1 guide; (5) Columbia: 933 Electronic Interviews/133 Guides; and (6) Memphis: 579 Electronic Interviews/2 Guides *See* Ex. 20 (Rog 3); Ex. 26, ¶ 16.

admitted that objective characteristics we do know about applicants (e.g., experience, availability) shows 40+ workers possessed desirable traits, Ex. 36, 27:18-28:15; it is suspiciously convenient to argue that spoliated evidence would have shown 40+ workers actually do not possess desirable characteristics.

Because GMRI destroyed the very booklets that it used to score applicants, EEOC cannot present statistical evidence as to what actually happened at the interviews. Indeed, EEOC does not have access to the very information that, according to Saad, explains the disparities in hiring. Likewise, EEOC cannot use the interview booklets to test Saad's theory, or to otherwise shed light on claimants' interview performance or what happened at the interviews at all.

**D. GMRI Failed to Preserve and Produce Highly Relevant E-mail.**

For each of the 35 restaurants at issue, GMRI issued two email accounts: one for the restaurant itself ("Restaurant Email") and one for the Managing Partner ("MP Email"). Ex. 35, 19:14-16; 19:20-24. These email accounts were used for internal and external communications about, *inter alia*, hiring, recruiting, and specific applicants.[12] From February 2010 until February 2014, emails were preserved for 90 days on GMRI's Mimosa archiving system, and then automatically deleted. Ex. 14 at 22:19-21; Ex. 35 at 10-11. Emails were preserved beyond that 90-day period only if a litigation hold was issued. Ex. 35 at 10-11. In February 2014, GMRI switched to a ProofPoint archiving system that featured an automatic three-year preservation for all emails. Ex. 35 at 16, 18.

As set forth above, it is undisputed that GMRI issued two relevant litigation holds, one for Coral Gables in 2010, Ex. 35 at 21-27, and a second in May 2015 for the Restaurant and MP emails for all 35 restaurants, Ex. 35 at 26. No other efforts were made to preserve emails. Incredibly, it appears GMRI did not even take the basic step of preserving any hard drives. *See* Ex. 35, 47:13-13-

[12] *See e.g.* Ex. 52 at 65:12-15 (email offering position), at 83:7-11 (e-mail sending hiring tracker); Ex. 53 (applicant a "little big,"); Ex. 16; Ex. 33; Ex. 34; Ex. 54 ("young guy"), Ex. 55 (college recruiting).

15 (30(b)(6) has no "personal knowledge" of that).[13]

In discovery, EEOC requested e-mail for all 35 restaurants from when the restaurant began hiring through one year of the NRO. The degree of spoliated e-mail varies depending upon the location's opening date in relationship to the date of the Expansion Letter (which would begin GMRI's duty to preserve), and when GMRI began archiving e-mail in ProofPoint (Feb. 2014):

- Plano, Phoenix, Indianapolis, North Bethesda, and McClean opened *before* the Expansion Letter. Had GMRI issued a Litigation Hold upon receipt of the Expansion Letter, it would have preserved at least some e-mails exchanged during the first year of the NRO.[14]
- Jacksonville; Kansas City; Garden City; Oak Brook; Dallas; and Los Angeles lost *all* email from pre-NRO through one year after restaurant opening.
- Naples lost all Restaurant Email; MP Dunavan's e-mail goes back to 2012. Ex. 38 at 2.
- Norwood, Santa Monica, Birmingham, Burlington, Houston, Chicago, Chestnut Hill, San Diego, and Houston opened in 2013, after the Expansion Letter. EEOC has some e-mails during the one year period, but no e-mails from the NRO hiring time frame.[15]
- Edison and Memphis opened in January 2014, after the Expansion Letter, and immediately before GMRI switched e-mail systems. At these locations, EEOC has some e-mails from the Managing Partner/Restaurant, but not from the pre-opening, NRO hiring time frame.

---

[13] For example, MP Jaie O'Banner opened Birmingham in March 2013, Ex. 31, and left GMRI in July 2014. Ex. 37. His hard drive may have contained e-mail prior to February 2014.

[14] By way of example: the Expansion Letter is dated 8/31/2011. Ex. 5. On that date GMRI had e-mail dating back 90 days, or until 5/31/2011. Thus, with respect to North Bethesda (that opened 4/11/11), Ex. 19, had GMRI issued a litigation hold, EEOC could have received nearly 1 year of e-mail, from 5/31/2011 through 5/11/12, one year after the North Bethesda NRO.

[15] By way of example, Birmingham opened on 8/26/13, Ex. 19, after both the Expansion Letter and LODs, Ex. 5, Ex. 9. Because GMRI failed to issue a Litigation Hold, e-mail from the pre-opening hiring (or before 8/2013) through February 2014 was destroyed.

*See* Ex. 19; Ex. 30; Ex. 31 (Interrogatory No. 3); and Ex. 56 (Demonstrative Exhibit).

GMRI's summary judgment arguments highlight the crucial nature of lost e-mail in this proceeding. Significantly, GMRI argues that EEOC must establish a "top down message at Seasons 52 to discriminate against 40+ applicants." DE #241 at 2. Yet, the available evidence from Gary Marcoe—the only MP that received a litigation hold (for this case) prior to 2015—includes an email from the corporate Manager of Field Training, copying the President of Seasons 52, that suggested the hiring of "young/hungry future prep team member" and indicated that hires "without the resume" but with "intangible qualities that we cannot train" usually became "the best hires" because they had a "clean slate . . . and no bad habits." Ex. 33. Likewise, a 2013 e-mail from corporate DO David Culley suggests that a Managing Partner hire food runners, and describes potential food runners as "younger with less experience." Ex. 34. *See also* Ex. 54 (MP writes about second interview with a "young guy."). Although GMRI understood that a litigation hold was required (as evidenced by its own Retention Policy and the litigation hold issued to Gary Marcoe), GMRI failed to issue a litigation hold and failed to stop the destruction of e-mail. Remarkably, GMRI's Motion for Summary Judgment then seeks to benefit from its own preservation failures.

**II. Legal Analysis:**

"Spoliation refers to the destruction or significant alteration of evidence, or the failure to preserve property for another's use as evidence in pending or reasonably foreseeable litigation." *Oil Equip. Co. Inc. v. Modern Welding Co. Inc.*, No. 16-11326, 2016 WL 5417736, at *5 (11th Cir. Sept. 29, 2016). "A district court has broad discretion to impose sanctions as part of its inherent power to manage its own affairs and to achieve the orderly and expeditious disposition of cases." *Id.* In determining whether spoliation sanctions are appropriate, courts in the Eleventh Circuit "consider the extent of prejudice caused by the spoliation (based on the importance of the evidence to the case), whether that prejudice can be cured, and the culpability of the spoliator." *Id.*; *see also Flury v.*

*Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005); *Kraft Reinsurance Ireland, Ltd. v. Pallets Acquisitions*, LLC, 843 F. Supp. 2d 1318, 1325 (N.D. Ga. 2011). The first two factors (prejudice and curability of prejudice) are often analyzed together because both turn on the importance of the spoliated evidence. *Pallets Acquisitions,* 843 F.2d at 1325.

The third factor generally turns on whether the spoliating party had the requisite bad faith. *Oil Equip*, 2016 WL 5417736, at *5; *Flury,* 427 F.3d 939. "[B]ad faith may be found where the [party's] actions are responsible for the spoliation of evidence and the [party] fully appreciated the significance of the evidence to the anticipated litigation." *Oil Equip*, 2016 WL 5417736, at *6. A party can demonstrate bad faith through direct or circumstantial evidence. *In Matter of Complaint of Boston Boat III, L.L.C. ("Boston Boat")*, 310 F.R.D. 510, 520 (S.D. Fla. Sept. 2, 2015). Where circumstantial evidence is used, the party must demonstrate: (1) material evidence existed; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the evidence was lost when spoliating party knew or should have known of its duty to preserve the evidence; and (4) the affirmative act cannot be credibly explained as not involving bad faith. *Id.* at 520. Malice is *not* required to show bad faith, but mere negligence does not suffice. *Flury,* 427 F.3d at 945-56; *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

Notably, the element of bad faith is satisfied where the destruction of documents violates generally applicable EEOC regulations. *See Austrum v. Fed. Cleaning Contractors, Inc.*, 149 F.Supp. 3d 1343, 1348 (S.D. Fla. 2016) (finding bad faith where application was destroyed in violation of EEOC regulations"); *Wood v. Pittsford Cent. Sch. Dist.*, No. 07-0892-cv, 2008 WL 5120494, at *2 (2d Cir. 2008) (destruction of records in violation of regulations satisfies *mens rea* requirement); *Waters v. Genesis Health Ventures, Inc.*, 400 F. Supp. 2d 814, 820-21 (E.D. Pa. 2005) ("We will allow Plaintiff to offer evidence of Defendant's failure to retain job applications for the [EEOC-regulation-] required period."); *Hicks v. Gates Rubber Co.*, 833 F.2d 1406, 1418-19 (10th Cir. 1987) (plaintiff was "entitled

to the benefit of a presumption that the destroyed documents would have bolstered her case"). Likewise, a party's failure to issue a litigation hold weighs in favor of a finding of bad faith, as do haphazard efforts to ensure the litigation hold is followed or to otherwise preserve evidence. *See O'Berry v. Turner,* No. 7:15-CV-00064-HL, 2016 WL 1700403, at *2 (M.D. Ga. Apr. 27, 2016) (party's "minimal" efforts to preserve important evidence—printing out a copy and storing it in a cabinet—deemed insufficient); *Zubulake v. UBS Warbug LLC*, 220 F.R.D. 212, 218 (S.D.N.Y.2003) ("Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents.").

Where a court finds spoliation of evidence, sanctions may include, *inter alia*, dismissal of the case, an adverse inference or rebuttal presumption, exclusion of expert testimony, striking pleadings, or an award of fees and costs. *Boston Boat*, 310 F.R.D. at 523. Courts in the Eleventh Circuit exclude expert testimony by the spoliating party that relates to the same subject matter as spoliated evidence. *Id.* at 946 (excluding as sanction plaintiff's car accident reconstruction expert's testimony based solely upon a post-incident evaluation—specifically, review of post-accident photographs and consideration of the accident report); *Graff v. Baja Marine Corp.*, 310 F. App'x 298, 301 (11th Cir. 2009) (excluding expert testimony); *Pallets Acquisitions, LLC*, 843 F. Supp. 2d at 1327 (excluding expert testimony where spoliating party destroyed containers in a lawsuit over mold growth on containers); *see also Fry's Elecs.*, 874 F. Supp. at 1047(directing jury to draw an adverse inference where employer destroyed data that may have refuted its assertion that employee performed poorly).

**A. Destruction of Paper Applications.**

EEOC was Prejudiced by Loss of Statistical & Anecdotal Data. GMRI's destruction of application data has caused significant uncurable prejudice to EEOC. EEOC will prove its case through the use of statistical and anecdotal evidence, and thus, application data is undoubtedly crucial. *Oil Equip.*, 2016 WL 5417736, at *8 (finding prejudice where party prevented from

"gathering critical evidence relevant to its theory."); *EEOC v. Joe's Stone Crab*, 220 F.3d 1263, 1274 (11th Cir. 2000) (plaintiff proves its case through statistics). Indeed, the use of actual applicant data is the most reliable evidence EEOC can present of discrimination. *See Pollocks v. Sunland Training Ctr.*, 85 F. Supp. 2d 1236, 1242 (N.D. Fla. 2000) ("[A]ctual applicant flow data (if available), not census data, provide the appropriate benchmark"); *Payne v. Travenol Lab., Inc.*, 673 F.2d 798, 823–24 (5th Cir.1982) (applicant flow data).

In addition, every lost application represents an applicant whom EEOC cannot contact—EEOC cannot contact people whose very existence is unknown. As a result, EEOC has far fewer witnesses from the locations with limited applicant data. Ex. 48 (showing 1 witness from Costa Mesa, 0 from Tampa, 1 from Kansas City). *See Victor Stanley, Inc. v. Creative Pipe, Inc.*, 269 F.R.D. 497, 533 (D.Md. 2010) (finding prejudice because a "[p]laintiff's case against [d]efendants is weaker when it cannot present the overwhelming quantity of evidence it otherwise would have").

The Prejudice Cannot Be Cured. The prejudice to EEOC cannot be cured through the use of other data. As set forth above, EEOC was forced to use less favorable Census data in Tampa, KOP, and Costa Mesa, and less favorable electronic data in Jacksonville and Kansas City. *Oil Equip.*, 2016 WL 5417736, at *8 (prejudice found where replacement evidence is unfavorable to the non-spoliating party); *Flury*, 427 F.3d at 946 (finding prejudice was not cured where the spoliation of the truck "forced experts to use much less reliable means of examining the product's condition"). The evidence strongly suggests that the paper applications are the most reliable source of evidence for those stores that used paper application data. In turn, because damages will be based upon the shortfall, using less accurate proxy data necessarily means less relief for victims of discrimination.

Turning to the anecdotal evidence, GMRI seeks to capitalize upon its own spoliation by challenging the absence of Stage 1 claimants from locations where the applications were destroyed. Indeed, although GMRI's applications literally went up in flames at Kansas City, and having offered

no explanation for thousands of missing applications from other locations, GMRI argues in Summary Judgment: "EEOC has no Stage One claimants for restaurants in Costa Mesa, Kansas City, and Tampa." DE #241, pg. 19, n.9. GMRI further argues that "EEOC's evidence is quantitatively deficient to demonstrate a nationwide pattern and practice of intentional discrimination." *Id.* at19- 20. Again, EEOC would have more Stage 1 claimants if GMRI had not shredded, burnt, and mysteriously destroyed data.

GMRI Acted in Bad Faith. First, a finding of bad faith is warranted here based upon GMRI's failure to comply with federal regulations, which require all personnel records to be maintained for one year, 29 C.F.R. § 1627.3(b)(1), and through final disposition after a charge is filed, *id.* § 1627.3(b)(3). Where GMRI has denied that applications were destroyed before the Expansion Letter, GMRI's failure to preserve application data *after* the Expansion Letter constitutes bad faith. *Austrum*, 149 F. Supp. 3d at 1348 (finding bad faith where party violated EEOC regulations).

Even if violation of EEOC regulations alone were not sufficient, in Jacksonville, GMRI's intentional shredding of application data, after GMRI acknowledged the nationwide scope of EEOC's investigation, is further direct evidence of bad faith. Likewise, in Tampa, KOP, Costa Mesa, and Kansas City, there is circumstantial evidence of bad faith. First, it is undisputed that the applications existed, as confirmed by testimony from managers at the locations and contemporaneous e-mails. Second, the August 31, 2011 Expansion Letter and concomitant RFI put GMRI on notice that EEOC was investigating age-based discriminatory hiring at all restaurants opened after February 1, 2010, and that applications should therefore be preserved. *See EEOC v. Fry's Elecs., Inc.*, 874 F. Supp. 2d 1042, 1044 (W.D. Wash. 2012) (mere mention of the EEOC to "sophisticated corporate employer" enough to put employer on notice to preserve documents). Third, the destruction of the data indisputably took place after the August 31, 2011 Expansion

Letter. Both Jacksonville and Kansas City opened after that date, and thus, the documents could not have been destroyed earlier. Further, despite many opportunities to say so, GMRI has adamantly denied that paper applications at Tampa, Costa Mesa, and KOP were lost or destroyed before EEOC's Expansion Letter (and indeed denies any knowledge of destruction at all), and GMRI's own policy required that they be kept for a minimum of three years.

Finally, the disappearance of application data cannot credibly be explained except by finding an affirmative act by GMRI in bad faith. GMRI has repeatedly alleged it has "no knowledge" of the documents being lost or destroyed, but the documents existed and were not produced. There is direct evidence of shredding in Jacksonville, as well as the unexplained failure to produce 900 Coral Gables applications. GMRI issued no litigation hold, failed to oversee the initial document collection, and failed to even begin collecting documents at 25 locations despite assurances to EEOC and the Court that such collection was proceeding with due diligence. In these circumstances, *Woodard v. Wal-Mart Stores E., LP*, 801 F. Supp. 2d 1363, 1372-75 (M.D. Ga. 2011) is instructive. There, where a video of a slip-and-fall mysteriously disappeared, the Court held:

> [T]he circumstances of the disappearance of the videotape are sufficient to support an inference of bad faith and to justify putting the issue to the jury. By its own admission, Wal–Mart's policies comprehend the need to evaluate and retain any videotape evidence of a trip-and-fall incident . . . In that process, the videotape disappeared, and Wal–Mart has offered only speculation as to how that occurred. . . . Given that a question of fact remains as to whether Wal–Mart lost or destroyed the videotape in bad faith, the appropriate sanction in this case is a jury instruction on spoliation.

*Id.* at 1376. Here too, GMRI's willful lack of knowledge, in the face of abundant testimony from managers/former managers GMRI represents, is simply not credible and the mysterious disappearance of application data can be explained only by an affirmative act in bad faith.

**B. Destruction of Interview Booklets/Interview Guides**

EEOC is Prejudiced. GMRI cannot reasonably dispute the significance of interview evidence, as its expert testified at length that "the real action is in these interviews." *See* Ex. 36 at 101

("What you need is information for ·every single person who was interviewed regarding what happened in those interviews . . . . [T]he hiring process really is in the interview scenario."). Saad's report repeatedly highlights the absence of interview evidence, and in turn, the loss of this candidate scoring contained in Booklets/Guides allowed Dr. Saad to adjust actual applicant data, negatively impacting older workers, with proxy data using his self-created "employment path theory." At the same time, the loss of candidate-interview evidence and scoring prevents EEOC from presenting statistical evidence, or otherwise shedding light on, what *actually happened* at interviews. *See Oil Equip. Co. Inc.*, 2016 WL 5417736, at *8 (prejudice may be found where replacement evidence is unfavorable to the non-spoliating party).

There is No Substitute Evidence. Regrettably, EEOC's and GMRI's respective statistical experts agree that the small number of preserved Booklets or Guides is too insufficient in number and disproportionately skewed towards hires to perform a meaningful statistical analysis of the relationship between interview score and age. *See* Ex. 36 at 58:18-58:23; Ex. 58 at 96:22-97:18. Had GMRI maintained the booklets, the parties would have had information as to what occurred at the interviews. Regrettably, no analysis is possible because of GMRI's destruction. *See Matthew Enter., Inc. v. Chrysler Grp.* LLC, No. 13-CV-04236-BLF, 2016 WL 2957133, at *4 (N.D. Cal. May 23, 2016) (finding spoliation and noting "neither party can say with any certainty what the deleted communications would have shown").

Because of GMRI's document destruction, EEOC is left with Saad's spoliation-enabled "employment path theory"—which is based purely on unrelated proxy data about unemployment durations of older v. younger workers in entry-level and mid-level jobs. This scenario is the exact opposite of when Court's allow use of proxy data, and should not be permitted here. *See Brown v. Nucor Corp.*, 785 F.3d 895, 904 (4th Cir. 2015) ("It is also clear, however, that *plaintiffs* may rely on other reliable data sources and estimates when a *company* has destroyed or discarded the primary

evidence in a discrimination case. More than two decades of this Court's precedent affirm as much.") (emphasis added).

Bad Faith. The Expansion Letter, along with EEOC's request for Interview Booklets, necessarily put GMRI on notice that Booklets/Guides used to make the very applicant-selection decisions under investigation should be preserved. Nonetheless, GMRI destroyed booklets in violation of federal regulations. As with applications, GMRI has not suggested that booklets were destroyed prior to EEOC's Expansion Letter, there is affirmative evidence of shredding in several locations, GMRI failed to issue a litigation hold, allowed managers to self-collect documents from 10 locations, and waited until 2016 to begin any collection from the remaining locations. And of course, GMRI professes to have "no knowledge" of what happened to the booklets, and has allowed their mysterious disappearance to remain unexplained. These factors weigh in favor of a finding of bad faith. *See, e.g., Muhammad v. Mathena*, No. 7:14CV00529, 2016 WL 8116155, at *6 (W.D. Va. Dec. 12, 2016) (finding spoliation where party had failed to check whether evidence still existed upon receiving notice or take steps to preserve it); *O'Berry v. Turner,* 2016 WL 1700403, at *2 ("minimal" efforts to preserve important evidence deemed insufficient); *U.S. ex rel. Baker v. Cmty. Health Sys., Inc.,* No. CIV. 05-279 WJ/ACT, 2012 WL 12294413, at *2 (D.N.M. Aug. 31, 2012), (finding spoliation where party failed to promptly issue litigation hold).

### C. Sanctions for the Destruction of Applications and Booklets

In light of GMRI's destruction of applications and booklets, EEOC seeks the following: (1) an order permitting EEOC to introduce evidence of, and arguments about, GMRI's destruction of paper applications and booklets; what such data would have shown; and possible motives for the destruction; (2) a permissive inference, both at summary judgment and trial, that had applications been preserved at Tampa, Costa Mesa, and KOP, Jacksonville, and Kansas City, they would have shown more significant under-hiring of older applicants than Census proxies and electronic data; (3)

a permissive inference, both at summary judgment and trial, that had applications at Tampa, Costa Mesa, KOP, Jacksonville, and Kansas City been preserved, additional applicants from those locations would have provided anecdotal age discrimination testimony; (4) a permissive inference, both at summary judgment and trial, that had Booklets/Guides been preserved, they could have contemporaneously recorded the interviewer's observations, age bias and other indicia of what took place at the interviews, which could be used to rebut the assertion that older applicants performed poorly at interviews as compared with younger applicants; (5) the exclusion of Dr. Saad's Census Data analysis at Tampa, Costa Mesa, and KOP; and (6) the exclusion of Dr. Saad's employment path theory and NLSY adjustments. *See Waters*, 400 F. Supp. 2d at 820–21; *Fry's Elecs., Inc.*, 874 F. Supp. 2d at 1046 (directing to jury to draw an adverse inference; allowing plaintiff "considerable leeway" as to what information might have been gleaned from destroyed hard drives and the defendant's motive in destroying them); *Flury,* 427 F.3d at 946 (excluding expert testimony).

**D. GMRI Failed to Preserve E-mail.**

Rule 37(e) applies where the alleged spoliation involves ESI. *Keim v. ADF Midatlantic, LLC*, No. 12-CV-80577, 2016 WL 7048835, at *3 (S.D. Fla. Dec. 5, 2016); *see also Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.*, No. 14-CV-62216, 2016 WL 1105297, at *3 (S.D. Fla. Mar. 22, 2016). Under Rule 37, Courts ask three preliminary questions in analyzing alleged spoliation of ESI: (1) Should the allegedly spoliated ESI evidence been preserved?; (2) Was the allegedly spoliated ESI lost because a party failed to take reasonable steps to preserve it?; and (3) Is the allegedly spoliated ESI evidence that cannot be restored or replaced through additional discovery? *Living Color Enterprises, Inc*, 2016 WL 1105297, at *5. Only if the answer to all three question is "yes" do courts proceed to determine if sanctions are appropriate under either 37(e)(1) or (2). *Id.*

Here, ESI should have been preserved because litigation was "reasonably foreseeable." *Living Color Enterprises, Inc. Id.* at *4 (citing *Graff v. Baja Marine Corp.*, 310 Fed. Appx. at 301). As noted *supra*,

GMRI—a sophisticated corporate entity—was on notice by September 2011 that EEOC was pursuing a nationwide investigation into age discrimination, and thus, e-mail should have been preserved. *EEOC v. Fry's Elecs., Inc.*, 874 F. Supp. 2d at 1044. In fact, GMRI's own policies require preservation of e-mail, and GMRI knew it, as it preserved e-mail from Coral Gables.

Next, GMRI took no steps to preserve e-mail at 34 of the 35 locations until after the lawsuit was filed.[16] Although GMRI had in place a process by which emails could be preserved (i.e. litigation hold), no steps were taken for 34 of the 35 locations. This does not suffice. *See Virtual Studios, Inc. v. Stanton Carpet Corp.*, No. 4:15-CV-0070-HLM, 2016 WL 5339601, at *10 (N.D. Ga. June 23, 2016) (finding spoliation where party "failed to take reasonable steps to preserve the e-mails at issue . . . [and] did little, if anything, to prevent the loss of the e-mails."); *O'Berry v. Turner*, No. 7:15-CV-00064-HL, 2016 WL 1700403, at *3 (M.D. Ga. Apr. 27, 2016) (finding spoliation where party took only "minimal" steps to preserve ESI) *Matthew Enter., Inc.*, 2016 WL 2957133, at *4 (finding insufficient steps taken where party evinced a "lackadaisical attitude towards document preservation").

Third, spoliated e-mails cannot be restored or replaced through additional discovery. This prong of the analysis looks not to whether similar evidence can be obtained, but whether the specific ESI that was lost can be restored or replaced. *See Living Color Enterprises, Inc.*, 2016 WL 1105297, at *4. Here, the lost emails cannot be restored or replaced, as GMRI has admitted that they were deleted and cannot be recovered. Ex. 35 at 13:7-24. While a few of the lost emails may have been preserved if sent to or from an account whose emails were preserved, overall preservation is unlikely given that GMRI does not have e-mail from the time of NRO hiring from Managing Partners and Restaurant E-mails in 30 of the 35 locations. *See e.g.* Ex. 56 .

[16] GMRI implemented ProofPoint in 2014 because it learned Mimosa was no longer going to be supported. Ex. 35 at 14:22-15:3. EEOC thus has e-mails post February 2014.

Rule 37(e)(1). Turning to Rule 37(e)(1), EEOC is prejudiced by the loss of e-mail: indeed, available evidence from the few custodians where e-mail is available demonstrates that managers were instructed to hire "young." As such, the Court should consider evidence of spoliation in ruling on summary judgment, particularly GMRI's arguments regarding a lack of "top-down" evidence. In addition, the Court should: (1) permit EEOC to introduce evidence of, and arguments about, GMRI's destruction of e-mail; what such data would have shown; and possible motives for doing so, and to consider this evidence at both summary judgment and trial; (2) prohibit GMRI from introducing evidence about what the e-mail might have shown; and (3) prohibit GMRI from affirmatively making arguments about the lack of e-mail evidence at summary judgment and at trial.

Rule 37(e)(2). The application of Rule 37(e)(2) requires a finding that the non-preserving "party acted with the intent to deprive another party of the information's use in the litigation." Fed. R.Civ. P. 37(e)(2). Rule 37(e)(2) "does not require a finding that the opposing party was prejudiced by the failure to preserve the electronically stored data." *O'Berry v. Turner*, 2016 WL 1700403, at *4 (citing Fed. R. Civ. P. 37(e) advisory committee's note to 2015 Amendment). Rather, intent to deprive may be found, as in *O'Berry*, from extremely faulty preservation efforts. *Id.* (finding intent to deprive found where party printed out a single copy of ESI put in a filing cabinet, did not inform additional persons with access to ESI about its need to be preserved, and party and its law firm did not attempt to actually collect the ESI for litigation until three years after a pre-litigation preservation letter had been sent). As the *O'Berry* court stated, "Such irresponsible and shiftless behavior can only lead to one conclusion—[defendants] acted with the intent to deprive Plaintiff of the use of this information at trial." *Id.*

GMRI—a sophisticated corporate entity—is required to issue a Litigation Hold under its own document retention policies in the event of an "investigation." Moreover, upon receipt of the Coral Gables charges, GMRI issued a litigation hold covering e-mail from Coral Gables. Yet, after

receipt of the Expansion Letter, and after GMRI's own acknowledgement of a nationwide investigation, GMRI took no steps to preserve the Restaurant and MP Emails at any of the 35 remaining locations. Where a party's own policies require a litigation hold, and where the party clearly understands its preservation obligations (as evidenced by the litigation hold in Coral Gables), the deliberate failure to take any further measures constitutes an "intent to deprive." *See O'Berry* 2016 WL 1700403, at *4; *Ala. Aircraft Industries, Inc. v. Boeing Co.*, 319 F.R.D. 730, 746 (N.D. Ala. 2017) (finding intent to deprive where firewall plan was followed as to two ESI custodians, but not followed with respect to third custodian).

Here, the Court should: (1) not allow GMRI to introduce evidence about the content of lost emails; (2) allow EEOC to introduce evidence of the email destruction and to argue what the lost emails likely would have contained (and to consider such arguments for purposes of summary judgment and trial); and (3) institute a permissive inference, both at summary judgment and trial, that had e-mail been preserved, the e-mail would reflect additional emails expressing a preference for younger applicants. *Seen Muhammad v. Mathena*, No. 7:14CV00529, 2016 WL 8116155, at *9 (W.D. Va. Dec. 12, 2016) (ordering similar relief where video was destroyed).

## II. Conclusion

Based on the foregoing, EEOC respectfully requests the Court to enter spoliation sanctions for purposes of summary judgment and trial as described herein.

Dated: August 2, 2017

Respectfully submitted,

s/Kristen Foslid
Kristen Foslid
Trial Attorney
Bar ID No. 0688681
Kristen.Foslid@eeoc.gov

Beatriz Biscardi André
Trial Attorney
New York Bar No. 4394599

Beatriz.Andre@eeoc.gov

Ana Consuelo Martinez
Trial Attorney
Government Bar No. A5501912
New York Bar No. 4935607
Ana.Martinez@eeoc.gov

U.S. Equal Employment Opportunity Commission
Miami District Office
Miami Tower
100 S.E. 2nd Street, Suite 1500
Miami, Florida 33131
Tel: (305) 808-1803
Fax: (305) 808-1835

Daniel Seltzer
Trial Attorney
Equal Employment Opportunity Commission
New York District Office
33 Whitehall Street, 5th Floor, Room 521
New York, NY 10004
Tel: 212-336-3701
Fax: 212-336-3623
daniel.seltzer@eeoc.gov

**CERTIFICATE OF SERVICE**

I hereby certify that on August 2, 2017, I filed this document through the CM/ECF system, which will send a notice of electronic filing to all parties.

s/ Kristen Foslid
Kristen Foslid

**SERVICE LIST**

Kristen Foslid
Beatriz Biscardi Andre
Daniel Seltzer
Ana Martinez
Trial Attorneys

Kimberly Cruz
Supervisory Trial Attorney

Robert Weisberg
Regional Attorney

EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION
100 SE 2nd St., Suite 1500
Miami, FL 33131
T: 305/808-1803
F: 305/808-1835
*kristen.foslid@eeoc.gov*
*beatriz.andre@eeoc.gov*
*ana.martinez@eeoc.gov*
*daniel.seltzer@eeoc.gov*
*kimberly.cruz@eeoc.gov*
*robert.weisberg@eeoc.gov*

***Attorneys for EEOC***

Alex S. Drummond
SEYFARTH SHAW LLP
1075 Peachtree Street, NE, Suite 2500
Atlanta, GA 30309
Telephone: (404) 885-1500
Facsimile: (404) 885-7056
*adrummond@seyfarth.com*

Gerald L. Maatman, Jr.
Andrew Scroggins
Christina M. Janice
Jay Carle
Jennifer A. Riley
Matthew Gagnon
Alexis P. Robertson
SEYFARTH SHAW LLP
131 South Dearborn Street, Suite 2400
Chicago, Illinois 60603

Telephone: (312) 460-5000
Facsimile: (312) 460-7000
*gmaatman@seyfarth.com*
*jriley@seyfarth.com*
*mgagnon@seyfarth.com*
*arobertson@seyfarth.com*

Michael C. Marsh
AKERMAN LLP
One Southeast Third Avenue, 25th Floor
Miami, FL 33131
Telephone: (305) 982-5507
Facsimile: (305) 374-5095
*michael.marsh@akerman.com*

Arlene K. Kline
AKERMAN LLP
One Southeast Third Avenue, 25th Floor
Miami, FL 33131
Telephone: (305) 982-5507
Facsimile: (305) 374-5095
*arlene.kline@akerman.com*

***Attorneys for Defendants***