UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 18-CV-20957-ALTONAGA/GOODMAN

RUBY SOSA,

Plaintiff,

vs.

CARNIVAL CORPORATION, a
Foreign Corporation,

Defendant.
_____/

DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFF'S MOTION FOR SPOLIATION SANCTIONS [DE 38]

Defendant, CARNIVAL CORPORATION ("Carnival"), by and through undersigned counsel, hereby submits its Response in Opposition to Plaintiff's Motion for Sanctions Due to Spoliation of Evidence [DE 38] as follows:

I. Introduction

In this slip and fall case, Plaintiff seeks draconian sanctions including adverse jury instructions and striking of defenses over the unintentional loss of CCTV footage that did not even capture the surface on which Plaintiff slipped. Plaintiff's motion is unsupported by the law cited therein or the facts in the record. *See, e.g., Long v. Celebrity Cruises, Inc.*, 2013 WL 12092088, n.4 (S.D. Fla. July 7, 2013) ("The reckless conduct here does not warrant a draconian sanction like an adverse inference instruction") (emphasis supplied) (citing *Zubulake v. UBS Warburg LLC*, 220 F.R.D. 212, 216 (S.D.N.Y. 2003)) (an "adverse inference instruction is an extreme sanction and should not be given lightly.").

As more fully set forth below, Plaintiff fails to meet her burden to demonstrate an entitlement to spoliation sanctions because (1) the CCTV footage is not crucial to Plaintiff's claim; (2) there is no evidence that Carnival acted in bad faith; and (3) Carnival took reasonable steps to save the CCTV of the incident.

II. Factual background

Plaintiff claims she slipped and fell on a tiled floor in the buffet area of the cruise ship Carnival *Freedom*. [DE 1, ¶ 9]. The tiled buffet floor is walled off from the carpeted dining area by long, couch-style seating topped with decorative ironwork, as shown below:

CCTV footage from the dining room was reviewed by the ship's security after Plaintiff's fall. Security noted that the floor where Plaintiff "apparently" slipped **was not visible** in the footage because the view was **"blocked by couch walls."** [DE 38-4, p. 6-7 (emphasis supplied)]. Nevertheless security preserved the CCTV for future reference, noting: "CCTV footage is saved in F drive under Exacq vision files." *Id.* at p. 7.[1] Carnival's corporate representative, Monica Petisco, testified that the F drive is one of the drives on the ship's computer. [DE 38-1, 45:3-10]. Petisco testified that generally CCTV is saved on board by pulling footage, putting it into a drop box, and then saving it to a drive or a flash drive. [DE 38-1, 15:25-16:4; 17:13-21]. She explained that the drop box is a temporary place to store a big file, with a fourteen-day retention cycle. [DE 38-1, 20:13-21:14]. Files can be copied from the drop box and saved onto another drive on the same computer or an external drive, or a flash drive. *Id.*

Carnival's June 22, 2018 discovery response indicating that the CCTV footage was preserved and would be produced was reasonably based on the security notation that the CCTV

[1] While CCTV footage did not depict the floor where Plaintiff fell, a photograph depicting Plaintiff, her footwear, and the tiled floor was taken at the time by Drusic. That photograph was included in security's watch report and has been produced to Plaintiff. [DE 38-4, p. 8].

had been preserved.[2] However, when the CCTV could not be readily located by shipboard security, Carnival enlisted the *Freedom*'s IT Officer, Tian Peng, to search the onboard computers for the footage, to no avail. [DE 38-1, 25:2-2]. After exhausting all efforts to locate and retrieve the subject footage, Carnival supplemented its discovery on July 31, 2018, to reflect that the CCTV could not be found. [DE 38-3]. Petisco surmised that because the CCTV could not be located on the onboard computer, it was likely viewed by security in a drop box, but not saved to a drive on the onboard computer. [38-1, 33:3-11]. Petisco did not know whether the F drive noted by security was a drop box or a flash drive or other drive on the ship board computer. [DE 38-1, 45:3-10 "Q: Okay. What is the F drive? A: It's one of the drives on the computer on board. Q: Is it the external drive that you were referencing earlier? A: I'm not sure. Q: Is the F drive the drop box? A: I don't know."].

Assistant Chief Security Officer James Desouza was one of the security officers responsible for preserving CCTV footage in connection with shipboard incidents. [DE 38-1, 29:6-12]. Carnival disclosed Desouza in its initial Rule 26 disclosures served May 23, 2018, indicating his ship assignment on the *Pride*, sailing out of Maryland. [*See* Carnival's Rule 26 Disclosures attached as Exhibit A]. Desouza was again identified in Carnival's answers to interrogatories served June 22, 2018, with his ship assignment. [*See,* Carnival's answers to interrogatories of June 22, 2018 attached as Exhibit B]. For a third time, Carnival identified Desouza and his ship assignment on Friday, September 7, 2018 in response to Plaintiff's spoliation discovery. [DE 38-10].

Plaintiff first requested Desouza's deposition on September 10, 2018. [DE 38-15]. Upon inquiry, defense counsel learned Desouza signed off for his end of contract vacation on Sunday, September 9, 2018. [DE 38-1, 67:7-24]. He is scheduled to return to work on January 13, 2019. *Id.* To accommodate Plaintiff's request for Desouza's deposition, Carnival reached out to Desouza in India, who advised he could not do a video deposition from where he resides. On October 8, 2018, Carnival advised Plaintiff that Desouza offered to be deposed by telephone, which Plaintiff rejected at that time, indicating "Carnival should continue efforts to find accommodations for a video depo." [*See* email chain regarding efforts to coordinate deposition attached as Exhibit C"]. Therefore, Carnival is working with legal counsel in India to determine whether there is any

[2] Monica Petisco testified she had never had an issue of missing CCTV footage come up in a case before. [DE 38-1, at 17:9-11]. Ms. Petisco has worked for Carnival Corporation for twelve years, three as a litigation representative. [DE 38-1, at 5:13-18; 6:2-4].

feasible method of conducting a video deposition. *Id.* Carnival's efforts were communicated to Plaintiff in compliance with the Court's Order. *Id.*

Furthermore, although it was unable to produce CCTV footage, Carnival produced the security watch report summarizing the CCTV footage, the photograph of Plaintiff on the subject tiled floor, and the security watch summary of crew and passenger interviews, among other things. [DE 38-4]. Plaintiff thereafter deposed six witnesses regarding the alleged water, complaints made to Carnival employees regarding the water prior to the incident, and Plaintiff's injuries.

III. Legal Standard

The Eleventh Circuit defines spoliation as "the destruction of evidence or the significant and meaningful alteration of a document or instrument. *Green Leaf Nursery v. E.I. DuPont De Nemours and Co.*, 341 F.3d 1292, 1308 (11th Cir. 2003), *cert. denied*, 541 U.S. 1037, 124 S.Ct. 2094, 158 L.Ed.2d 723 (2004) *see also Calixto v. Watson Bowman Acme Corp.*, No. 07-6077-CIV, 2009 WL 3823390, at *13 (S.D. Fla. Nov. 16, 2009) (spoliation is the "intentional destruction, mutilation, alteration, or concealment of evidence."). A party seeking sanctions based on the spoliation of evidence must first establish: (1) the missing evidence existed at one time; (2) the party having control over the evidence had an obligation to preserve it at the time it was destroyed; and (3) the evidence was **crucial** to the movant being able to prove its *prima facie* case. *In Matter of Compl. Of Boston Boat III, L.L.C.*, 310 F.R.D. 510, 515 (S.D.Fla. 2015).

In addition to establishing the first three elements of spoliation, a party seeking sanctions must present evidence of "bad faith such as where a party **purposefully** "tamper[s] with the evidence." *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997) (emphasis supplied); *see also Rutledge v. NCL (Bahamas) Ltd.*, 464 Fed.Appx. 825, 829 (11th Cir. 2012) (plaintiff failed to present evidence of bad faith regarding cruise line's destruction of alcohol breath test where test results were witnessed and recorded). Bad faith is "not merely a factor, but an essential element in a spoliation sanction decision." *Gardner*, at *1. Mere negligence in losing or destroying records or evidence is insufficient to justify an adverse inference instruction for spoliation. *Bashir*, 119 F.3d at 931; *see also Mann v. Taser Intern., Inc.*, 533 F.3d 1291, 1310 (11th Cir. 2009) (negligence insufficient to warrant adverse instruction); *Eli Lilly and Co. v. Air Exp. Intern. USA, Inc.*, 602 F.Supp.2d 1260, 1280 (S.D. Fla. 2009) (denying spoliation sanctions where no showing of culpable state of mind), *aff'd*, 615 F.3d 1305, 1318 (11th Cir. 2010). Thus, an adverse inference instruction is only proper if "the absence of the evidence is predicated on bad faith." *ML*

Healthcare Services, LLC v. Publix Supermarkets, Inc., 881 F.3d 1293, 1308 (11th Cir. 2018) (*citing S.E.C. v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012)) (emphasis supplied).

Although the Eleventh Circuit has not set forth factors to evaluate *circumstantial* evidence of bad faith, courts in this District have ruled that circumstantial evidence of bad faith may be shown where Plaintiff establishes all of the following: (1) evidence once existed that was material to the proof or defense of a claim; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while aware of its duty to preserve the evidence; and (4) the affirmative act causing the loss cannot be credibly explained as not involving bad faith. *Calixto*, 2009 WL 3823390, at *16; *see also Managed Care Sols.*, 736 F.Suppl.2d at 1331-32. Most recently, the Eleventh Circuit did not utilize the four factors or make a distinction between direct and "circumstantial" evidence of bad faith in a spoliation analysis. *See generally, ML Healthcare, supra.*

The Eleventh Circuit has also considered factors enumerated in *Flury v. Daimler Chrysler Corporation*, 427 F.3d 939 (11th Cir. 2005) to determine whether spoliation of evidence (once established) is sanctionable, including whether the movant was prejudiced and whether any prejudice can be cured, the practical importance of the evidence, whether the spoliating party acted in bad faith, and the potential for abuse if sanctions are not imposed. *ML Healthcare*, at 1307.

Plaintiff's motion fails to mention Federal Rule of Civil Procedure 37(e), which was amended in 2015 to address the failure to preserve electronically stored information. Rule 37(e) codifies the requirement of bad faith as a precondition to an adverse instruction or other sanctions, stating "**only upon finding that the party acted with the intent** to deprive another party of the information's use in the litigation may [the court] (A) presume that the lost information was unfavorable to the party; (B) instruct the jury that it may or must presume the information was unfavorable to the party; or (C) dismiss the action or enter a default judgment.

In *ML Healthcare Services, supra*, the Eleventh Circuit affirmed the District Court's denial of spoliation sanctions for failure to preserve extended video of a slip and fall. The Court stated that both under its prior precedent and under Rule 37(e) the plaintiff failed to demonstrate bad faith where the defendant had immediately saved video of the incident, there was no evidence the defendant had "destroyed" the extended video evidence apart from its normal video-retention policies, and the unpreserved evidence was not essential to resolve a crucial issue in the case. *ML Healthcare Services, LLC*, at 1308. The Court affirmed the District Court's decision to allow

defendant's witnesses to testify that the location of the fall had been cleaned, noting that "any additional benefit from the undisclosed video was 'pure speculation and conjecture,' and that the resolution of the video was not clear enough to see any liquids on the floor, even if the videos were available." *Id.* at 1309.

The Eleventh Circuit declined to make a determination regarding whether the multifactorial spoliation analysis utilized prior to the amendment (and relied upon by Plaintiff) still applies to Electronically Stored Information (ESI) after the Amendment of Rule 37, finding that the alleged spoliation was not sanctionable under either standard. *Id.* at 1308-09. Courts in this district have continued to apply the multi-factorial analysis in cases dealing with preservation of surveillance videos. *See, e.g., Henkle v. Cumberland Farms, Inc.,* 2017 WL 5635400, No. 16-14248 (S.D. Fla. June 15, 2017) (denying spoliation sanctions for failure to preserve video surveillance footage of Plaintiff's trip and fall); *Gardner v. Target Corporation,* 2017 WL 3601810 No. 16-80743-CIV-ZLOCH (S.D. Fla. July 19, 2017) (denying spoliation where no bad faith found). A Rule 37(e) spoliation analysis has been utilized in this District regarding the loss of ESI such as text messages. *Living Color Enterprises, Inc. v. New Era Aquaculture, Ltd.,* 2016 WL 1105297 No. 14-cv-62216-MARRA-MATTHEWMAN (S.D. Fla. Mar. 22, 2016) (where neither party had initially addressed Rule 37(e) the court required supplemental briefing and applied a Rule 37(e) analysis).

Rule 37(e)(1) or 37(e)(2) does not apply at all where a party takes "reasonable steps" to preserve ESI. The Comments caution that the rule "does not call for perfection" and notes that information a party may have preserved electronically can be destroyed for many reasons such as failure of a "cloud" service, a computer virus, or other glitches outside the control of the party preserving evidence. [see comments to the rule]. Rule 37(e) maintains that adverse jury instructions and striking of pleadings are available only after a finding of "intent" to deprive a litigant of evidence. The comments specifically reject that adverse instructions can be given where negligence or gross negligence results in the loss of evidence. *Id*. The requirement of "intent" has been found to be akin to the bad faith standard previously established by the Eleventh Circuit. *See, Living Color Enterprises, Inc.,* at n.6.

Under either the common law analysis utilized by the Eleventh Circuit, or under Rule 37(e) analysis, bad faith must be found prior to the imposition of draconian sanctions such as adverse instructions and striking of pleadings. As set forth below, there is no evidence of bad faith to

support spoliation sanctions. Moreover, Plaintiff cannot establish that the subject footage is crucial to the Plaintiff's ability to prove her case.

IV. Plaintiff's Motion should be denied

A. The Plaintiff cannot establish spoliation because the CCTV footage is not crucial to prove Plaintiff's case

In this Circuit, a movant must show that spoliated evidence is crucial to the movant being able to prove its *prima facie* case. *Managed Care Sols., Inc. v. Essent Healthcare, Inc.*, 736 F.Supp. 2d 1317, 1327 (S.D. Fla. 2010); *Walter*, 2010 WL 2927962, at *2. It is not enough that the spoliated evidence would have been relevant to a claim or defense. *See Floeter v. City of Orlando*, 2007 WL 486633, *6 (M.D. Fla. Feb. 9, 2007) (finding that although relevant, spoliated evidence was not crucial); *Managed Care Solutions*, at 1327-28 (allegedly spoliated evidence not crucial to plaintiff's claims because it could prove its case through evidence obtained elsewhere). "Generally, only outcome determinative evidence constitutes 'crucial' evidence." *Long*, at *5, (citing *United States v. McCray*, 2009 WL 2989775, *2-3 (11th Cir. 2009)); *see also, e.g., Oil Equipment Company, Inc. v. Modern Welding Company Inc.*, 661 Fed. Appx. 646 (11th Cir. 2016) (spoliator destroyed truck bedding and tank in product liability action alleging defective tank); *Flury, supra* (truck with allegedly defective airbags was destroyed).

In a similar case, this Court analyzed whether previously requested and overwritten video footage of an incident was evidence "crucial" to the movant's case. *See Wandner v. American Airlines*, 79 F. Supp. 3d 1285 (S.D. Fla. 2015). There, the Plaintiff was arrested at the airport for disorderly conduct. The plaintiff sought sanctions for spoliation after the county failed to preserve video surveillance of the area despite Plaintiff's request. *Id.* In finding that the video surveillance was not "crucial" to the plaintiff's case, this Court noted:

> There are several witnesses to Wandner's exchange with the ticket agents and Officer Diaz. The mere fact that they happen to be employees of American Airlines . . . does not mean that alternative evidence is not available. Wandner may not like their testimony, but this does not equate to a situation where a party destroyed the **only** evidence concerning an issue.

Id. at 1304 (emphasis supplied).

Plaintiff fell by the ship's main buffet at dinner time. Like in Wandner, there are multiple witnesses to the incident, including six witnesses already deposed by Plaintiff. Indeed, Plaintiff

has already conceded to having this testimony, which offers more than the CCTV footage that could not even observe the ground:

> There were several passengers who witnessed the incident. This is at dinner time, there's a bunch of people in line, in the buffet line.
>
> So Carnival interviewed people, they got them to give written statements in this case. They have disclosed them as having information and we have taken their depositions. They've testified that there was water on the floor before Miss Sosa fell. Several of them testified that they told Carnival employees to clean it up before she fell and a few of that said that she - - she fell in a really awkward position.

[*See*, Transcript of September 21, 2018 Discovery Hearing, attached as Exhibit D at 7:15-24]. Moreover, there is a photograph of Plaintiff on the floor after the incident. Also, Plaintiff claims the floor became unreasonably slippery when wet, and has retained an expert to testify regarding slip resistance. [*See*, Plaintiff's Renotice of Vessel Inspection, attached as Exhibit E]. Alternative evidence concerning the incident, the events leading up to it, and the events after it, exists and has been elicited by Plaintiff. Just as in *Wandner*, this case does not equate to a situation where a party destroyed the only evidence concerning an issue.

Furthermore, the security watch report notes that the subject CCTV footage did not depict the floor because it was blocked by "couch walls." So, although Plaintiff could be identified in the video as someone who "apparently" slipped with her right foot and fell, as part of her body could be seen through the decorative ironwork, the video did not depict the flooring on which she slipped. [DE 38-4]. Plaintiff's motion discounts the security watch report as "self-serving" and claims that Carnival testified "its notes are not conclusive." [DE 38, p. 10]. A review of the cited deposition testimony of Petisco contradicts Plaintiff, as it reflects Petisco was answering questions about shipboard medical records, not the security watch report, and that since she did not see the CCTV footage, she did not know whether anything other than what was noted was on the security report was in the footage. [38-1, pp. 62-63; 136-137]. Furthermore, Plaintiff's argument that "the security officer remains in India, so no one can verify his report," ignores the fact that Plaintiff did not take the opportunity to depose Desouza by telephone, during which she could have questioned him regarding his report. [Exhibit C]. Assuming that the notation that footage of the floor was blocked by couch walls is true, the footage would have shown Plaintiff slipping and falling, a fact not in dispute.

With the multitude of witnesses, including passengers, the plaintiff and her daughter, and Carnival crewmembers, Plaintiff cannot establish that CCTV footage, which did not depict the surface on which she slipped, is crucial to her case. Plaintiff's motion acknowledges that evidence regarding alleged drips from the ceiling, complaints about water, and Carnival's response time has been elicited from witnesses. Therefore, like in *Wandner,* there is alternative evidence to establish the issues Plaintiff identified as necessary to prove her case. Because Plaintiff cannot establish that the CCTV footage was "crucial" to her case, Plaintiff's motion for sanctions must be denied.

B. There is no direct or circumstantial evidence that Carnival acted in bad faith

1. The CCTV footage would not be material to the proof of Plaintiff's claim where it depicted Plaintiff slipped and fell, a fact not in dispute

Plaintiff does not present any direct evidence of bad faith on the part of Carnival. Rather, she cites alleged "circumstantial evidence" of bad faith. Under the factorial approach utilized by this District to analyze whether circumstantial evidence of bad faith exists, Plaintiff first must establish that evidence once existed that was material, or crucial, to the proof of her claim. *See, Calixto, supra.* While footage of the Plaintiff slipping and falling would be *relevant* to this case, the test is whether it would have been material to the proof of Plaintiff's negligence claim. The security officer who viewed the CCTV reported it depicted that the Plaintiff slipped and fell, a fact not in dispute. Plaintiff questions how the security officer could note Plaintiff's right foot "apparently" slipped and she fell on the floor without being able to visualize the floor. [DE 38, p. 10]. However, depending on the height of the Plaintiff, one can visualize her body through the decorative ironwork sufficiently to conclude she slipped with one leg and fell, which is supported by the security officer's use of the word "apparently," meaning although he could not see her foot due to the wall, it appeared from her body position that she slipped with her right foot and fell.

2. Carnival did not engage in "an affirmative act" which caused the CCTV to be lost or destroyed despite a known duty to preserve

Plaintiff fails to establish the second and third requirements to find circumstantial evidence of bad faith: that Carnival engaged in an affirmative act which caused the CCTV to be lost or destroyed when it was aware of the duty to preserve it. Plaintiff does not point to an affirmative act on the part of anyone at Carnival that caused the CCTV to be lost or destroyed. [DE 38, p. 11]. The evidence is that the security officer saved the footage to the F drive. In other words, he

recorded his affirmative act, which demonstrated his intent to *save* the footage, not to lose or destroy it.

Accordingly, Plaintiff's "theory" that the security officer intentionally destroyed the footage because the incident was deemed "non-reportable" does not hold water. First, Petisco repeatedly testified that the medical staff, not the security officer, determines whether an incident is non-reportable. [DE 38-1, 18:22-19:1; 50:10-22 ("As I stated earlier today, it's the medical staff that would determine if something is reportable or not.")]. Indeed, Petisco even identified the doctor on board who would have decided that the incident was "non-reportable." [DE 38-1, 54:5-15]. Nevertheless, Plaintiff's motion states that "Desouza arguably did not like the way the inchoate investigation was going and decides that Ms. Sosa's incident is suddenly "not reportable." Plaintiff misleadingly states that it was "Desouza's decision" that the incident was not reportable. However, nothing in the record or citations included by Plaintiff supports that contention.

Next, Plaintiff contends that CCTV footage was not preserved for the fourteen days set forth in Carnival's preservation policy. However, there is no evidence that the footage saved on drive F was lost or deleted before the expiration of the 14 days. Petisco did testify that security generally puts footage they are investigating in a drop box and then saves it to another drive. [38-1, 16:1-4]. Any footage in the drop box is automatically deleted after 14 days. [38-1, 21:2-8]. Petisco testified her "understanding" was security took a clip to the temporary drop box, and from there it was not saved to another drive or to a flash drive, so it became would have been automatically deleted from the drop box after 14 days. [38-1, 23:5-19]. Petisco testified she did not know if the "F drive" is the drop box. [38-1, 45:9-10]. Plaintiff has not deposed persons with knowledge about the F drive or what Desouza did to save the footage to the F drive.

Plaintiff relies on *Long* to suggest that simply because footage "no longer exists" it is sanctionable spoliation, repeating her unsupported argument that Carnival "sent" the security officer to India "in the middle of discovery." [DE 38, p. 14-15]. However, the court in *Long* noted that "[g]enerally, destruction of evidence under routine procedures does not indicate bad faith. *Long*, at *6 (emphasis supplied). Also, unlike here, in *Long*, the Plaintiff had deposed the security officer, who testified that he had unsuccessfully attempted to save the footage in question to his laptop, and ultimately without follow up, delegated the saving of the footage to a colleague. *Long*, at *7. Here, there is no indication or evidence that security officer Desouza had difficulty saving the footage nor was there any indication that the footage was not successfully saved to the F drive.

In fact, there is no evidence that the footage was not successfully saved and became lost due to some glitch outside the control of the security officer. The *Long* court found the security guard who knew he had not saved the incident footage was reckless enough to support a finding of bad faith. *Id.* Even in view of its finding, the *Long* court denied the plaintiff's request for an adverse inference instruction, noting "the reckless conduct here does not warrant a draconian sanction like an adverse inference instruction." *Id.* at n. 4. Accordingly, Plaintiff's reliance on *Long* is misplaced as under *Long*, here, Plaintiff is not entitled to an adverse instruction.

3. The loss of CCTV footage can be credibly explained as not involving bad faith

Plaintiff fails to establish the last prong necessary for a finding of circumstantial evidence of bad faith, because the loss of CCTV footage can be explained as not involving bad faith, based on the facts in the record. The security officer noted he saved footage at the time of the incident to the F drive "for further reference." [DE 38-4]. His notes do not reveal any difficulty saving the file or any deletion of the file. Petisco testified there has not been another case she is aware of in which CCTV has been lost. *Id.* Yet, when it was requested in discovery a year later and Carnival searched for it, it could not be found.

There are several credible possibilities to explain the loss of the footage that do not involve bad faith. First, as Petisco testified, the officer could have saved it to the drop box and neglected to save it to another drive. This explanation is based on the assumption that had it been saved from the drop box to another drive on the ship's computer, the IT officer would have found it when it was to be retrieved in the course of discovery. Under this scenario, the footage was automatically deleted after 14 days, despite the officer's recorded belief that the footage was saved. [DE 38-4]. Like in *ML Healthcare Services, LLC, supra*, here there is no evidence Carnival "destroyed" video evidence apart from its normal video-retention practices. *ML Healthcare Services, LLC, supra* at 1308 (finding no bad faith). Furthermore, destruction of evidence under routine procedures does not generally indicate bad faith. *Long, supra*, citing *Vick v. Texas Employment Comm'n*, 514 F.2d 734, 737 (5th Cir. 1975). This scenario differs from the facts of *Long*, where the security officer testified he was aware that he had been unsuccessful in saving the video and asked someone else to try, without confirming if the second try was successful. Even in *Long*, where the Court found circumstantial evidence of bad faith, the Court refused to grant Plaintiff's requested sanction of an

adverse inference jury instruction. *Long*, at *9 ("the reckless conduct here does not warrant a draconian sanction like an adverse inference instruction").

Five years after *Long* was decided, the Eleventh Circuit reiterated that an adverse inference instruction is only proper if "the absence of the evidence is predicated on bad faith." *ML Healthcare Services, LLC v. Publix Supermarkets, Inc.*, 881 F.3d 1293, 1308 (11th Cir. 2018) *citing S.E.C. v. Goble*, 682 F.3d 934, 947 (11th Cir. 2012) (emphasis supplied). In its analysis of whether bad faith existed, the court explained that it was not a case "where the unpreserved evidence clearly would have resolved a crucial issue in the case," noting that *Flury (supra)* suggested the court should "weigh the degree of the spoliator's culpability against the prejudice to the opposing party." Plaintiff has an abundance of evidence apart from the CCTV (that does not show on what Plaintiff slipped), such as eyewitness testimony, so that Plaintiff is not prejudiced by its unavailability.

Another scenario is that the footage was saved to the F drive as recorded by the security officer, but that some time in the year that passed from the incident to the discovery request, a technical issue resulted in the loss of the video, such as malfunction of the server at sea or a computer virus. A third scenario is that the footage could have been innocently deleted by someone with access to the F drive. Or, if the F drive was a flash drive, the actual drive may have simply been misplaced. In short, despite Plaintiff's unsupported innuendo, there is no evidence that someone intentionally or purposefully tampered with the footage of the incident. Furthermore, there is no evidence that the security officer acted recklessly to fail to save the footage.

Plaintiff attempts to establish circumstantial bad faith by recounting a timeline of discovery which omits that Plaintiff was aware that Desouza had knowledge of the incident, for four months prior to his end of contract vacation, and over a month after Plaintiff became aware that the CCTV could not be located. Plaintiff has insisted on an unsupported narrative that Carnival "conveniently" sent him home and thwarted his deposition. Nothing could be further from the truth. Carnival disclosed Desouza four months before the end of his contract, and, when Plaintiff sought Desouza's deposition the day after he went home for vacation, and offered a telephonic deposition given Desouza's locale in India, which Plaintiff rejected. [Exhibit C]. Carnival also has coordinated with legal counsel in India to investigate if a video deposition is feasible. *Id.* In any event, the discovery timeline put forth by Plaintiff does not support a finding that Carnival acted in bad faith such as to cause the loss of the subject footage.

Plaintiff has not put forth evidence to support a finding of bad faith based on direct or circumstantial evidence. Absent a finding of bad faith, spoliation sanctions are not awardable. *See*, *Bashir*, *ML Healthcare*, *supra.*

C. Carnival took reasonable steps to preserve the CCTV footage

The security watch report produced to Plaintiff, in which the ship's security team logged its actions relative to the investigation of the incident, plainly reports that "CCTV footage is saved in F drive under Exacq vision files." [DE 38-4 at p. 7]. This indicates that security took "reasonable steps" to save the subject footage, even noting where in the F drive one could find it "for further reference." *Id.* Plaintiff has presented no evidence to support her contention that Desouza either intentionally failed to save the CCTV footage or deleted the CCTV footage. Plaintiff cannot blame her failure to present evidence supporting her spoliation claim on her alleged inability to depose Desouza, and her suggestion that Carnival "sent" Desouza to India to prevent him from being deposed is ludicrous. Plaintiff's counsel routinely sues cruise lines and is well aware of the discovery challenges of deposing crewmembers, all of whom work on a contract basis for a matter of months. Carnival disclosed Desouza and his ship assignment in May 2018, and he remained on Carnival ships for over four months until his contract ended. Nevertheless, Plaintiff declined the opportunity to take a telephonic deposition. [Exhibit C].

Rule 37(e) does not apply here because Carnival took reasonable steps to preserve the CCTV footage. Petisco surmised that the CCTV was viewed in a drop box and then not saved, but she does not have first-hand knowledge and did not even know what the F drive was. [DE 38-1, 45:3-10]. In fact, testified she had never encountered a missing CCTV situation coming up in Carnival litigation previously. [DE 38-1, 17:9-11]. The fact that CCTV could not be located and retrieved a year after it was saved does not establish that Carnival did not take reasonable steps to preserve it at the time. As the comments to Rule 37(e) note, loss of electronically stored information can be a result of many causes. Therefore, Plaintiff cannot use Rule 37 as a basis for spoliation sanctions.

IV. Conclusion

Ultimately, Plaintiff has failed to show intentional destruction of CCTV footage or any other ground to impose an adverse inference jury instruction. Nevertheless, Plaintiff specifically rejects the remedy the *Long* court imposed, i.e., prohibiting either party from referencing the CCTV footage. Indeed, without any basis, Plaintiff claims Desouza believed the

CCTV was "the lynchpin in this case" when in fact, he noted it did not even show the surface on which Plaintiff slipped and fell. [DE 38-4]. Accordingly, there are no grounds for the imposition of sanctions for spoliation of evidence under the facts of this case.

WHEREFORE, Defendant respectfully requests the Court deny Plaintiff's Motion for Sanctions Due to Spoliation of Evidence [DE 38].

Dated: October 19, 2018
Miami, Florida

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on October 19, 2018, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to electronically receive Notices of Electronic Filing.

By: ***/s/ Noah D. Silverman***
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