SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:18-cv-22126-KMW

CARMEN ROMERO,
Plaintiff,
vs.

REGIONS FINANCIAL CORPORATION
Defendant.
_____/

PLAINTIFF'S REPLY TO: *DEFENDANT'S RESPONSE TO MOTION FOR APPROPRIATE SANCTIONS FOR SPOLIATION OF EVIDENCE*

COMES NOW THE PLAINTIFF, Carmen Romero, through counsel, and respectfully submits her Reply to Defendant's above-referenced Response [DE 116] and states:

INTRODUCTION

Rather than at least concede that it failed to preserve highly relevant portion of the day's recording (which would have given the bank some modicum of credibility that it did not do so in bad faith or intentionally), it instead ignores the arguments and facts stated in Plaintiff's Motion, as-well–as (fatally) ignoring the record and its **own** papers. Its arguments (aside in many instances simply being nothing more than its counsel's distracting and fanciful commentaries and labeling of Plaintiff's evidentiary points as alleged changes in theories[1]) also defy common sense and **logic**.

[1] In an attempt to distract from the issue, the Defendant includes extensive (although irrelevant) self-serving arguments by its counsel that the Plaintiff has allegedly changed her theory of the case. How that contention relates in any way to the spoliation issue is baffling. Moreover, as the docket reflects, the Plaintiff has from day one maintained the same theory – i.e., that she was discriminated and wrongfully fired due to her age. What the Defendant claims are allegedly different theories of Plaintiff's case, is nothing more than various forms of evidence (all showing "prextext") which the Plaintiff has pointed to from which an inference of discrimination can be gleaned. *Hamilton v. Geithner*, 666 F.3d 1344, 1351 (D.C. Cir. 2012) (Courts should consider discrimination issues "in light of the total circumstances of the case," asking "whether the jury could infer discrimination from the combination of (1) the plaintiff's prima facie case; (2) any evidence the plaintiff presents to attack the employer's proffered explanation for its actions; and (3) any further evidence of discrimination that may be available to the plaintiff . . ."). As the U.S Supreme Court repeatedly noted, to undermine an employer's arguments or establish intentional discrimination, a plaintiff is allowed to rely upon **any** evidence that the employer's reasons for its action were merely a "***coverup*** for a...discriminatory decision." *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973)(emphasis added). Proof of a coverup is powerful indirect evidence of discrimination because

Before addressing Defendant's distracting contentions, it bears noting that **none** of the factual recitations contained in Plaintiff's Motion regarding the events leading up to its general counsel's courtroom disclosure (i.e., that it had deleted the balance of the day's recording) were refuted or controverted by the Defendant. Accordingly, there is no factual dispute that literally during the Plaintiff's deposition testimony, Region's general counsel/ Ms. Turner (while on her lap-top– as she was during *each and every* deposition she attended in this case) was in *direct* contact with her paralegal via email communication about the video recording and was advised that the entire day's recording was available and with instructions given regarding its retrieval). Thus while the Defendant attempts (at Page 14 of its Response) to have the Court believe that Ms. Turner was ***allegedly*** left with "only one day in three (3) years period to effect a decision" while attending the deposition of Aimee Gonzalez (which the record reflects occurred on February 13, 1nd 14th– see Exhibit A & B to DE 114), the actual fact is that Ms. Turner was personally made aware of the availability of the video recordings on January 31st.[2] Unfortunately, Defendant's Response is *replete* with similar instances of complete disregard of the record and actual facts.

Moreover, while advising the Court that it has waived its attorney client and work product privilege on the matter, and despite claiming in a rather repetitive and lengthy fashion that it ***allegedly*** never directed anyone to pull or look at any other portion of the day's recording in that any part of the day's recording outside of the time frame overlapping with the account opening to customer leaving was allegedly irrelevant and not under consideration, it (conveniently and remarkably) both failed to bring to Shields' deposition or even provide as part of its Response a single one of the ***numerous*** email correspondence to and from Shields regarding the matter (to support its contentions), or even the January 31, 2019 email exchanges between Turner and her paralegal. The sum and substance of the benefit to the Court and the Plaintiff, instead, of Defendant's limited waiver of its attorney and work product privilege is merely its disclosure that

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"once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation." *Reeves v. Sanderson Plumbing Prods., Inc*., 530 U.S. 133, 147 (2000)."

[2] Moreover, even if Regions had only one day to preserve the video, that was more than ample time given that its representative had already located the day's videos and readily saved half of the morning's selected recordings.

on: "February 8, Regions received Plaintiff's expedited deposition transcript, reviewed the testimony referencing the "surveillance," and, in conjunction with the times provided by the computer data [3], framed the search for the surveillance." Id. @ 5. Its Response is thus replete and heavy on its counsel's self-serving speculations and arguments but surprisingly and exceedingly light and non-existent on actual evidence (which it possesses). [4] As cited in Plaintiff's Motion, a court can reach appropriate inferences (particularly from the failure to have provided **any** of these highly probative and relevant emails) and consider the issue in light of the overall circumstantial evidence.

Additionally, as the record reflects, once it was disclosed this year (notwithstanding counsel's prior representation in 2018 as to the non-availability of the video recordings) that Regions did in

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[3] As an aside, the Plaintiff notes that this disclosure (i.e., regarding when the computer data for the customer was actually available to the Defendant (i.e., on February 8th)), is contrary to Defendant's representations in its Reply [DE 49 @ 3] to Plaintiff's opposition to Region's Motion for leave to amend, wherein to justify the untimely nature of the document production and leave to amend, Defendant represented that it allegedly took it "six (6) weeks" to collect and analyze the customer data (which as the Court now knows is essentially nothing more than a single page worth of data– see D.E. 54-2 @15, Exhibit 2).

[4] As was conveyed to Judge Torres from the very outset of the case, Regions has had the luxury and benefit of having access to a vast amount of records and resources (which the Plaintiff does not possess)– it, however, only produces things which it believes benefit its defense and only at a time which it believes is beneficial (as exemplified by the belatedly produced customer account data and video recording– to support a motion for summary judgment).

Also, while maintaining on the one hand that video recordings come under the ambit of ESI, it now conveniently claims (without any supporting documents) that video recordings are not allegedly considered records under its litigation hold policy. Moreover, even if the Defendant did not have a litigation hold policy or (***very*** oddly) considered video evidence as not important to preserve, once it learned of the availability of the entire day's recording (and Plaintiff's claims), it should have issued a litigation hold on the recordings. *State Nat'l Ins. Co. v. County of Camden*, No. 08-cv-5128, 2012 U.S. Dist. LEXIS 38504 (D.N.J. Mar. 21, 2012) (sanctioning a party for failing to issue a litigation hold, suspend auto-deletion of email, or retain copies of any backup tapes after being notified about a lawsuit against it, even though there was no evidence of actual spoliation of evidence); *Carrillo v. Schneider Logistics, Inc.*, No. CV 11-8557-CAS (DTB), 2012U.S. Dist. LEXIS 146903 (D. Cal. Oct. 5, 2012) (concluding that defendant failed to take adequate steps to preserve relevant documents, in part because the litigation hold memorandum it issued failed to instruct employees to retain an entire category of relevant electronic documents).

fact have available the video recordings covering the morning portion of the day, Plaintiff's counsel sent numerous emails and *repeatedly* inquired of the Defendant why the rest of the day's recording was not also produced; as the record reflects, no answer was given (with both the Court and the Plaintiff finding out of the reason for the first time literally at the April 19, 2019 hearing). Query: if everything that the Defendant now argues in its Response is accurate and truthful, why did it repeatedly fail to simply advise that the video recording covering the end of the day was deleted? It obviously knew when it produced the video in March of this year that the other parts were deleted (it had to have known in light of Shields' deposition testimony); why ignore Plaintiff's request for information and fail to provide any explanation? Is this the conduct of a party who is acting in good faith and trying to be candid, open or forthright? Or is that conduct consistent with a party trying to evade/avoid in order to come up with excuses or engaging in delays? And why fail to even inform the Plaintiff of the availability of the video recordings before it was *allegedly* deleted?– Defendant's own Response reflects that both defense counsel and Ms. Turner were in the same room with Plaintiff's counsel for the deposition of Aimee Gonzalez taken on Feb 13th & 14th (when the video had still not been purportedly deleted), yet neither one mentioned anything (including Gonzalez- who was even asked about what the plaintiff had testified about (see DE 114@ 2-3).

REPLY

In a nutshell, Defendant's Response can be distilled to the following arguments: it had no reason to believe that the recording for the end of the day was in any way potentially relevant and even it was it cannot be sanctioned for its failure to preserve the recording because at most it would not have reflected what was said between the Plaintiff and management-Pumar as the video recordings lack audio etc. These arguments are disingenuous.

Defendant's first argument (i.e., that it did not have a duty to preserve because the end of the day recording is allegedly irrelevant) defies logic and also applicable law.[5] Defendant claims that it had no idea that the end of the day portion of the video recording was relevant because the Plaintiff somehow "concealed the relevancy of the surveillance from Regions for over two years." Response

[5] The duty to preserve is not limited to was is actually relevant but what may be "potentially" relevant. See, for e.g., *Leon v. IDX Sys. Corp*., 464 F.3d 951, 959 (9th Cir.2006)

@ 116. Astonishingly, it argues that it was the Plaintiff who withheld the "exculpatory surveillance" from the Defendant to "assure such surveillance would no longer exist." Id. @ 4, Fn. 2. None of these arguments hold any water or make any logical sense.

As the Court can discern from a review of the submissions (and with almost every filing), the Defendant continues to move away from and attempt to ignore the alleged facts Defendant itself provided in support of its decision to terminate the Plaintiff. As clearly noted in Plaintiff's Motion, and putting aside Pumar and Gonzalez's sworn deposition testimony (wherein they both referenced an end-of-the-day confrontation with the Plaintiff and Pumar learning of the fraud, etc.) Defendant's own termination papers (dated **July 8, 2016**– Please see D.E. 54-9 @ 14) specifically claimed that:

> "***During the Saturday debrief*** on May 28th, 2016, BTL, Leysi Pumar uncovered that Carmen Romero opened an account without the proper ID's, the account subsequently has been closed. *While completing the* ***day end debrief*** with Carmen Romero, Pumar noticed that copies of id's for the client were of a Cuban passport and a social security card which stated "not valid for employment". This prompted concerns and Pumar asked Carmen was the client a permanent resident or not? At which point Romero explained that customer told her he was a resident and had furnished his Resident Alien # on a piece of paper with an expiration date. However further review of the documents and debrief with Romero could not support that said documents were included in the file, nor the piece of paper Romero was referring to. ..." (Emphasis added)

Accordingly, Defendant's entire argument that the Plaintiff somehow concealed things particularly the importance of the events at the end of the day is simply disingenuous, frivolous and ***directly*** refuted by ***Defendant's*** own termination papers generated in July *2016* (i.e., before this suit was even filed and nearly three years prior to the video recording being allowed to be deleted literally during the course of this highly contested action). The relevancy of the day's end events is *glaringly* ***obvious*** based upon **Defendant's** *own* papers. Again, this is yet another example of the Defendant's arguments lacking good faith and candor, or any respect for the record or common sense.

Moreover, even if we buy into Defendant's fanciful argument that the Plaintiff (who did not have possession or access to the video recording and thus could not have possibly "withheld" the existence of such evidence from the Defendant– who is the *only* party who had both knowledge of and access to the recording) concealed everything from the Defendant or wanted to hide this alleged theory of her case, the Defendant took a very lengthy deposition of the Plaintiff on January 31st. As

noted in Plaintiff's Motion, while the Defendant did not have any problem taking advantage of some of Plaintiff's testimony (including filing motions for leave to amend its pleading, etc), and looked for any evidence to refute Plaintiff's claims (including pulling and saving portion of the day's recording that it believed somehow helped it defense), it had no qualms in **allowing** the balance of the day's recording to be deleted. As part of its pattern of making arguments in disregard of the record and duty of candor, it argues and represents (in all **bold** – see Response @ 11) that:

> **"Nothing Plaintiff said or did prior to filing her present Motion (ironically, three years to the day after the account opening at issue) put Regions on notice of the purported significance of Pumar's end-of-shift discovery."**

However, as the Plaintiff's summary judgment papers reflect, Plaintiff stated (contrary to the allegations contained in Defendant's termination papers referencing a day-end debrief with Pumar etc.) that no-one had ever confronted her about the matter and the "first time" she found about the accusations was the following month in the meeting with Gonzalez. (Please see D.E. 100 @ 7 ¶13) Thus, the Defendant did not have to be a "mind" reader but just a fair and honest litigant. To be sure, and for the Court's convenience, the Plaintiff was asked and provided the following testimony:

23 Q. Prior to that meeting with Amy, had you
24 told anyone about what Laysi did?
25 A. No. No, because *I didn't know.*
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1 Q. So the first time that you ever heard that
2 false information had been input into I-Connect to
3 open the account for Mr. [redacted] [customer] was during this
4 meeting with Amy Gonzales in mid June 201[6]?
5 MR. NEGAHBANI: Objection.
6 THE WITNESS: Correct. Before that, I
7 didn't know anything.
8 MS. RASSIF: I think I'm done.
9 You good?
10 MS. TURNER: We're good. (Please see DE 100 @ 50-1)

Accordingly, notwithstanding Defendant's lack of good faith arguments and candor, it (with general counsel in the room) was directly put on notice that there was no alleged end-of-the-day conference/discussion with Pumar whereat she was allegedly interrogated and confessed to fraud, wrongdoing and improper opening of the account. The Plaintiff thus testified that she only learned that Pumar had accused her of alleged wrongdoing during the meeting with H.R – which was over

two weeks after the event. *Any* litigant proceeding in ***good faith*** would have *easily* reasoned or concluded based upon Plaintiff's deposition testimony that the end of the day's recording would also be potentially (if not highly) relevant and should be preserved. Thus, even if we buy into Defendant's fanciful arguments [6] and regardless of whether it was the Plaintiff who allegedly concealed the existence of the video recording (which is an absurd argument given that the Defendant was the party who had both knowledge of and access to the recordings) or deliberately withheld her "'It-Wasn't-Me' Theory", once the Defendant took Plaintiff's deposition, all of Defendant's fanciful and disingenuous excuses went by the road side and reflect bad faith.

Using Defendant's logic, if the purpose of pulling the video recording was exclusively based upon and aimed to discredit Plaintiff's deposition testimony, this logically would have been the very place to start– Plaintiff's denial of an end of a day confrontation with Pumar etc. and her claims that the first time she ever heard of Pumar's accusations of having allegedly inputted false information into the system being in the meeting with HR in mid June 2016. **How much more potentially important can that portion of the day's recording possibly be to discrediting the Plaintiff?** (i.e, not only denying a *face-to-face* confrontation with management about the customer's account on the **very day** that it was opened but even having denied knowledge that she had been confronted about her alleged improper unauthorized conduct by Pumar on the very *same* day.)

Defendant's other passing arguments also lack any good faith or candor, and are similarly in disregard of the record. Defendant (while, ironically, itself trying to relying on the videos) contends that "any evidence regarding what, if anything, happened during the end-of-shift between Plaintiff and Pumar is purely testimonial,[7] and the video surveillance, even if it still existed, would

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[6] Defendant *incredibly* argues that it was the Plaintiff who withheld the "exculpatory surveillance" from the Defendant to "assure such surveillance would no longer exist"; this is rather spurious particularly given that all throughout this action the Plaintiff was proceeding under the belief that no video recording was available; not to mention that the Defendant easily had the ability and tools to readily dash such hope by the Plaintiff given that it clearly found out as soon as Plaintiff's testimony was taken that the *entire* day's recording was in fact still available (notwithstanding Plaintiff's alleged "machinations').

[7] Defendant's "testimonial" argument reflects Defendant's concession that the issues in this case must be resolved by a jury and undermines its summary judgment argument given that the

not reveal any relevant information" purportedly because: 1) the events would have occurred off camera at Plaintiff's cubical and 2) the video recordings lack audio. The Defendant conveniently ignores a few salient record- facts. Firstly, *regardless* of whether the meeting occurred off camera, it would have clearly shown (as the Court can *readily* see from the portion of the day's recording filed by the Defendant in support of its motion for summary judgment) whether Pumar ever walked towards and went to Plaintiff's desk/cubicle at the end of the day's shift. The portion of the day's recording *affirmatively allowed*[8] to be deleted by the Defendant would thus have easily refuted the

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events earlier in the morning (for which there is also no audio etc) would similarly also be "purely testimonial." *Moore v. Chesapeake & O. Ry. Co.*, 340 U.S. 573, 576 (1951)("[I]t is the jury's function to credit or discredit all or part of the testimony.")

Additionally, as the Court is well aware, regardless of whether the video recording was relevant to any of the facts alleged in this case, credibility of the litigants is ***always*** relevant — the fact that the Plaintiff is now unable to show to the jury that this alleged day-end confrontation/meeting never occurred, is wholly prejudicial to the Plaintiff. *Thaqi v. Wal-Mart Stores East, LP*, 2014 WL 1330925, at *6, 10 (E.D. N.Y Mar. 31, 2014) (mem.) (holding that "[b]ecause the record would allow a jury to draw an adverse inference against [defendant] concerning spoliation [of relevant video evidence], [defendant's] summary judgment motion must be denied"); *Pope v. Wal-Mart Stores East, LP*, 2013 WL 12086325, at *11 (N.D. Ga. Nov. 12, 2013) (finding that a disputed issue of material fact precluded summary judgment in light of the adverse inference supported by defendant's questionable disposal of relevant video surveillance).

[8] Defendant has cited some cases which reflect that where a recording is automatically deleted as part of a normal course of operation, no intent to deprive was found. The facts of this case are not, however, that the video recording was unwittingly automatically deleted before the party had an opportunity to review or preserve same, but that the party (while on notice of the potential relevance of the recording and ample opportunity to preserve same) affirmatively ***decided/allowed*** it to be deleted *without* making **any** attempt to preserve the end of the day recording. Whether the Defendant pressed a button to delete the video recording or decided to allow the recording to be deleted automatically is a distinction without a difference under the facts here– as the Defendant knew that it did not need to affirmatively delete anything as the passage of time would indirectly automatically accomplish what it directly "intended" to do (i.e., deprive Plaintiff of the rest of the day's recording). *Convolve, Inc. v. Compaq Computer Corp*., 223 F.R.D.162, 175–76 (S.D.N.Y. 2004)(Not only must documents and records be preserved, "in the world of electronic data, the preservation obligation is not limited simply to avoiding affirmative acts of destruction." "Since computer systems have automatic deletion features that periodically purge electronic documents", once the duty to preserve is triggered, a party **must also "take active steps** to halt that [automatic deletion] process."The party "must suspend its routine document retention/destruction policy and put in place a 'litigation hold" to ensure the preservation of relevant documents.")

claim that Pumar had this alleged end-of-the-day confrontation with the Plaintiff whereat she learned of Plaintiff's alleged unauthorized opening of the account and fraud. Secondly, and for the same logical reason, the fact that the video recording lacks audio is a misguided contention; a view of the video recording (completely lacking any sound) would have still shown whether Pumar went to Plaintiff's desk at the end of the shift (and allegedly also stayed there for about **10 minutes** (as claimed by Pumar (DE 100 @ 75)) confronting the Plaintiff over her misconduct). The video recording, without the need for any testimony, would have easily shown whether this alleged end-of the day meeting ever occurred, and from the lack of any such meeting, the jury would have been well entitled to not only consider same as undermining the credibility of Pumar/Regions but the reprehensibility of Region's management in making up completely fabricated events and facts.

Defendant's also claims that Plaintiff testified she would turn in the papers to Pumar– implying that the video recording would be irrelevant. This contention is also an attempt to misguide as it ignores the fact that Plaintiff testified that her practice was for her to turn them in (i.e., go to Pumar's office to hand them to her) and on that day she went and merely gave them to Pumar and did ***not*** get together to review the accounts that were opened that day (See Exh. A to Defendant's Response, Romero depo @ 127:22-128-10)); according to the Defendant and Pumar's contention,

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Defendant's cited cases in fact undermine its arguments. For example, in *Butzer ex rel. C.W. v. Corecivic, Inc*., No. 5:17-cv-360, 2018 WL 7144285, at *3 (M.D.Fla. Sept. 12, 2018) the court found no intent to deprive where defendant did not take any affirmative steps to destroy the video in question, but allowed it to be overwritten automatically in the normal course of operations ***given that four officials who had viewed the video testified they did not preserve it because it showed nothing to either substantiate or not substantiate plaintiff's claims***. Id. @ *3. Here, the Defendant claims that *no-one* was allegedly either instructed to look at the entire day's recording nor did *anyone* actually look at the rest of the day's recording to see whether it either substantiated or failed to substantiate Plaintiff's claim. While we have no doubt that the Defendant actually did view the rest of the day's recording in light of Plaintiff's deposition claims and found them to refute its own management's version of the events and was favorable to the Plaintiff (hence the reason why it failed to take ***any*** active steps to preserve it and allowed it to be deleted), Defendant's claim to the contrary is fatal to its arguments. *Day v. LSI Corp*., No. CIV11-186-TUC-CKJ, 2012 U.S. Dist. LEXIS 180319 (Dec. 20, 2012)(sanctioning defendant after determining in-house counsel's efforts to supervise preservation and production of relevant evidence so inadequate counsel acted "willfully")

however, on this occasion **Pumar** allegedly *went to* Plaintiff's desk to take the papers and look at them and spent up to **10 minutes** meeting with her while allegedly questioning/admonishing her.

Defendant's additional argument that the day-end meeting is not relevant as to when or how Pumar learned of the Plaintiff's alleged misconduct is an *extraordinary* argument. This baffling argument ignores Defendant's own termination papers and Pumar's sworn testimony– which all tie knowledge of the events to an end-of-the day meeting with the Plaintiff. In essence, the Defendant now contends that despite virtually everything in its termination papers and Pumar's testimony being a fabrication and bold faced lies, that is all somehow irrelevant. Well, we (and countless courts) find that facts matter and the truth even more. *Colbert v. Tapella*, 649 F.3d 756, 759 (D.C.Cir. 2011) ("The jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent."); *Aka v. Washington Hosp. Ctr.*, 156 F.3d 1284, 1293 (D.C. Cir. 1998) ("If the jury can infer that the employer's explanation is not only a mistaken one in terms of the facts, but a lie, that should provide even stronger evidence of discrimination. . . . This is so because, according to ordinary evidentiary principles . . . a lie is evidence of consciousness of guilt.").

As cited above, despite Defendant's self-serving arguments, courts find that proof of a coverup is powerful indirect evidence of discrimination because "once the employer's justification has been eliminated, discrimination may well be the most likely alternative explanation." *Reeves* @ 147. If the end-of-the day alleged confrontation with the Plaintiff never occurred, a jury can consider same *in conjunction* with the evidence which now clearly shows (despite Pumar's denials) that Pumar personally went to Plaintiff's desk earlier in the day (while the customer was at the bank) whereat she was made aware of the matter and even performed overrides so as to allow the account to be opened based upon the very documents that the Plaintiff was than accused by *Pumar* of improperly relying on, to infer/conclude that management not only knew of and fully **authorized/approved** Plaintiff's actions (which undermines an honest basis for the termination and refutes a claim of fraud or improper opening of the account) but that ***later on*** (i.e. two weeks after the event) it attempted to coverup the discrimination by ***fabricating*** a false story about a day-end meeting, etc. Thus, the spoliated video recording was not only highly relevant to confirm **approval** (hence the *lack* of any meeting) but also critical to showing a coverup (and subsequent fabrication).

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing was sent via CM/ECF to Allison.Folk@Jacksonlewis.com, Jenna Rassif, Esq., Jenna.Rassif@jacksonlewis.com, at Jackson Lewis P.C., One Biscayne Tower, Suite 3500, Two South Biscayne Boulevard, Miami, FL 33131, on June 17, 2019.

By: /s/ *Sina Negahbani*

Sina Negahbani,
F.B.N. 972673
Negahbanis@yahoo.com
Law Offices of Sina Negahbani
P.O. Box 566055
Miami, Florida 33256
Tel: (305) 595-9078
Fax: (305) 595-9079
Counsel for Plaintiff