UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 1:18-cv-22126-KMW

CARMEN ROMERO,

Plaintiff,

v.

REGIONS FINANCIAL CORPORATION
REGIONS BANK, d.b.a. REGIONS,

Defendant.
_____/

DEFENDANT'S OPPOSITION TO PLAINTIFF'S
MOTION FOR APPROPRIATE SANCTIONS FOR SPOLIATION OF EVIDENCE

Dated: June 11, 2019

Respectfully submitted,

s/ Jenna Rinehart Rassif

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Defendant Regions Bank ("Regions"), pursuant to Southern District of Florida Local Rule 7.1(c), submits this Memorandum of Law in Opposition to Plaintiff's Motion for Appropriate Sanctions for Spoliation of Evidence ("Motion"). Plaintiff Carmen Romero cannot establish spoliation or entitlement to the sanctions she seeks.

PRELIMINARY STATEMENT

Plaintiff is now on her third theory in this one-count age discrimination case. Initially, Plaintiff sought to identify a similarly-situated, younger employee who engaged in misconduct like Plaintiff's, but whom Regions treated more favorably. Unable to establish such proof, Plaintiff next debuted at her deposition on January 31, 2019 (a ***full year into the lawsuit***), a new theory that branch surveillance would reveal it was not Plaintiff but Leysi Pumar who engaged in the misconduct at issue (the "'It-Wasn't-Me' Theory"). While Plaintiff failed to take advantage of numerous opportunities to have earlier disclosed the It-Wasn't-Me Theory (and the exculpatory role Plaintiff claimed branch surveillance would purportedly play), Plaintiff also failed to give further insight regarding her new theory *via* supplementing disclosures or discovery responses or requesting video footage Plaintiff believed exculpatory or incriminatory. Instead, Plaintiff went silent, as she had for the prior thirty months. Conversely, Regions leapt into action, exceeding any duty it owed to preserve the surveillance in this matter, and promptly locating, reviewing, securing, and producing the surveillance referenced by Plaintiff in her deposition.

Yet the very surveillance to which Plaintiff alerted Regions shows not only that Pumar spent only thirteen seconds on the customer's account, but also, when viewed in conjunction with the computer data, confirms that: (1) only Plaintiff was in her cubicle at the times the false data was entered and the account was opened; and (2) from the time the customer entered the branch through the account opening, Pumar was in Plaintiff's cubicle during only the thirteen second period corresponding to the override. Because the surveillance wholly discredits Plaintiff's "It-Wasn't-Me deposition testimony and shows the ***exact opposite*** of what Plaintiff claimed it would, Plaintiff now pitches (also for the first time) an entirely new theory that the "***most*** crucial part" of the day's events was not the conduct for which Regions terminated Plaintiff (accepting improper identification, entering false data, and opening the account), but instead, was whether Pumar ***really*** discovered Plaintiff's misconduct at the end of shift. The ministerial detail of when or how Pumar ascertained Plaintiff's misconduct, however, is not only wholly irrelevant, but also is a red herring. Indeed, Plaintiff's sudden ascription of critical importance to the timing and manner of Pumar's

unearthing results solely from Regions' disclosure that the surveillance corresponding to the time of any such discovery (end of business day) was written over in Regions' normal course of operations. To be sure, were this meeting actually "crucial," Plaintiff would have identified this fact well before now. Instead, on May 28, 2019, armed with fresh knowledge that Regions did not preserve that portion of the surveillance, Plaintiff has invented this latest theory to exploit the purported criticality of Pumar's end-of-day discovery in a last-gasp effort to exclude the highly-inculpating surveillance.

Plaintiff knows the surveillance proves she entered the false data based on improper identification, opened the account, and was not truthful in her deposition; hence, Plaintiff must seek exclusion of the surveillance to have any chance of surviving summary judgment under U.S. Supreme Court precedent. *Scott v. Harris*, 550 U.S. 372, 380 (2007) (holding that "[w]hen opposing parties tell two different stories, one of which is blatantly contradicted by the record, so that no reasonable jury could believe it, a court should not adopt that version of the facts for purposes of ruling on a motion for summary judgment"); *Pratt v. Amtrak*, 709 Fed. App'x 33, 34 (2d Cir. 2017), *cert. denied*, 138 S. Ct. 749 (2018) (holding that "objective video and data evidence was sufficient to overcome all contrary eyewitness testimony and preclude any genuine dispute of material fact as to the train's speed and horn blasts"). Plaintiff fails, however, to establish even a basic violation of either Rule 37 or the Court's inherent authority, much less the type of conduct or state of mind necessary to impose sanctions. Plaintiff cannot establish that Regions had a duty to preserve any surveillance, much less footage of the 1.5 hours ***after*** the account opening. Notwithstanding, even if Regions had a duty to preserve the surveillance, Plaintiff cannot show that Regions failed to take reasonable steps to preserve it. Further, Plaintiff is not prejudiced by the loss of the surveillance of Pumar's end-of-day "discovery," nor can Plaintiff establish that Regions acted with intent to deprive Plaintiff of that footage. Finally, Plaintiff cannot show that the end-of-day surveillance was crucial to proof of her *prima facie* case or that Regions acted in bad faith, as required to award sanctions under the Court's inherent authority. Accordingly, the Court should deny Plaintiff's Motion in its entirety and award fees and costs to Regions.

RELEVANT BACKGROUND

I. Plaintiff's Improper Account Opening and Subsequent Termination.

On May 28, 2016, when Plaintiff was working at Regions' Miami Lakes branch, a father and son asked her to open an account for the son. [Ex. A, Pl. Dep. 101:23-102:2-11]. Plaintiff

logged into Regions' System to initiate the account opening process. [Ex. B, Street Decl. ¶ 35, Exs. 2-4]. When prompted to enter a primary form of identification, Plaintiff selected a Florida "Temporary Non-Driver's ID" as the "ID Type," but falsely coded the number, date of issuance, and expiration date of the customer's Cuban passport[1] into the System. [Ex. B, Street Decl. ¶ 37, Ex. 2 (rows 7-8, Columns U, V, W, X, and Y), Ex. 3 (DEF 2119), Ex. 4 (DEF 2123)]. Based upon the data entered, Regions' third-party verification solution generated warning prompts and an override pop-up. [Ex. B, Street Decl. ¶¶ 24-25, 29-30, 40-42]. Plaintiff's supervisor, Pumar, entered her User ID and password to effect the override. [Ex. B, Street Decl. ¶ 42, Ex. 2 (rows 77-78, Column H), Ex. 4 (DEF 2124, "Resolutions")].

When the Miami Lakes branch closed that day around noon, Plaintiff gave Pumar documents regarding the accounts Plaintiff had opened that day, including the customer-at-issue's account, as was Plaintiff's practice. [Ex. A, Pl. Dep. 127:24-128:8]. Upon reviewing the customer's file, Pumar saw that Plaintiff had accepted a Cuban passport and, upon further research, determined that Plaintiff had entered the Cuban passport number as a purported Florida "Temporary Non-Driver's ID" to circumvent Regions' proper identification requirements and open the account despite the customer's lack of proper identification. [Ex. C, Pumar Dep. 87:7-15; Ex. D, Gonzalez Dep. (2/13/19), Ex. 2 (CRF, DEF 239-40), Ex. 3 (Termination Summary, DEF 152)]. The improper account opening was reported to Regions' HR Generalist Aimee Gonzalez, who investigated and concluded that Plaintiff failed to follow Regions' policies and procedures by fraudulently entering information in Regions' System knowing that she was circumventing the System. [Ex. D, Gonzalez Dep. (2/13/19) 46:3-15, Ex. 2 (CRF, DEF 239-40)]. Based on the investigation, Regions terminated Plaintiff's employment on July 8, 2016. [Ex. D, Gonzalez Dep. (2/13/19) 78:14-18].

II. Plaintiff Disclosed Her "It Wasn't Me" Theory and Implicated Surveillance Evidence for the First Time at Her January 2019 Deposition.

From her termination on July 8, 2016, until her deposition on January 31, 2019, Plaintiff provided no factual basis for what she claimed made Regions' termination of her employment a "sham." As this Court previously observed, Plaintiff initially pursued comparator evidence in a presumed effort to show that Regions treated a similarly-situated younger employee more

[1] Regions does not accept Cuban passports as valid forms of primary identification. [Ex. C, Pumar Dep. 87:1-6, 118:20-21].

favorably. [Ex. E, 4/19/19 Hr'g Tr. 29:10-16]. In response to Plaintiff's extensive discovery requests, however, on January 22, 2019, Regions produced substantial discovery demonstrating that Plaintiff had no chance of identifying such a comparator. [Confidential Employee Lists (DEF 615-624)]. Unable to identify a comparator, less than ten (10) days later at her deposition, Plaintiff shifted her theory and, for the ***first time*** **(as confirmed by this Court)**, claimed that *she* had not entered the false data and opened the account in question, but instead, *Pumar* had done so. [Ex. A, Pl. Dep. 130:15-133:25]. *See* DE 86 (concluding that Plaintiff did not disclose to Regions prior to her deposition on January 31, 2019, that she claimed that Pumar had been the actual wrongdoer even though Plaintiff had "presumably . . . been aware of" these alleged facts "from the inception of this lawsuit"); DE 87 (stating "Plaintiff had not previously disclosed the information . . . that another employee entered the information leading to her termination, and not Plaintiff herself. Our review of the record also shows that Plaintiff had been provided numerous opportunities to disclose this *specific information* to Defendant (and not the broad, general "sham" argument raised by Plaintiff in its Response, which we reject) at several points during the course of the litigation. She chose not to do so until her deposition . . . .").

Also for the first time at her deposition, Plaintiff implicated surveillance as relevant evidence (to support her new contention). In this regard, Plaintiff testified that she told Gonzalez: "That I had not opened that account. That I had not – nor had I approved it. **That if [Gonzalez] wanted to verify it, she could go to the surveillance cameras and verify who did it**." [Ex. A, Pl. Dep. 130:15-20 (emphasis added)]. Before her deposition, Plaintiff had never claimed that anyone other than herself entered the false data or opened the account; therefore, prior to her deposition, Regions had no reason to review surveillance to see who might have been entering the false data or opening the account. This Court has already determined that Plaintiff served "no request that relates to the video issue."[2] [Ex. E, 4/19/19 Hr'g Tr. 34:6-7, 35:13-18 (stating that the Court "looked at [Plaintiff's] complaint . . . looked at [Plaintiff's] responses to [Regions'] requests

[2] Perhaps Plaintiff assumed that by withholding for nearly three years her claim of exculpatory surveillance, Plaintiff would ensure any such surveillance would no longer exist. She could then argue that: (1) Gonzalez failed to review the surveillance, and hence, Gonzalez's investigation was a "sham"; (2) had the surveillance not been "lost," it would have exculpated her; or (3) Regions destroyed the surveillance because it proved Pumar's misconduct. Likely to Plaintiff's great surprise, however, the surveillance still existed, and it did ***not*** exculpate her in any way.

for production . . . looked at [Plaintiff's] disclosures. [And, Regions'] representation is, and the record supports it, is that there is nowhere a factual dispute as to this particular issue.")].

III. Guided Only by Plaintiff's Deposition Testimony, Regions Located Surveillance Corresponding to the Entry of the False Data and Opening of the Account.

While Plaintiff failed to take advantage of numerous opportunities to have earlier disclosed her It-Wasn't-Me Theory (and the exculpatory role Plaintiff claimed branch surveillance would purportedly play), Plaintiff also failed to expound further upon her theory once professed. In this regard, after deposition, Plaintiff made no supplements or amendments to her Rule 26 initial disclosures (i.e., explaining Pumar's newly-disclosed role in the case); made no supplements or amendments to her interrogatory answers (i.e., swearing to Pumar's newly-claimed misconduct); and served no discovery requests for surveillance (i.e., delimiting what footage Plaintiff sought to exculpate herself or incriminate Pumar). Instead, Plaintiff left it to Regions to glean the relevancy of any surveillance *solely* from Plaintiff's deposition testimony.

In stark contrast to Plaintiff's indolence, Regions promptly acted to investigate Plaintiff's new claims and secure surveillance. To this end, after Plaintiff's deposition, Regions extracted computer data identifying the User IDs involved in and the times attendant to the processing, override ("approval," as Plaintiff refers to it), and opening of the customer account at issue. On or about 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, framed the search for the surveillance.[3] On Monday, February 11, Regions requested that Randall Shields, Corporate Security Field Investigator, advise whether video of the Miami Lakes branch for May 28, 2016, was available. [Ex. F, Shields Dep. 11:16-12:19]. Shields advised the surveillance was available; observed that the surveillance was among the oldest on the hard drive for the branch; and determined that the surveillance was soon likely to be overwritten

[3] With regard to the portion of the video that is no longer available, Regions is making a limited waiver of the attorney-client privilege and/or work-product protection only for the limited purpose and the limited topic of Regions' actions related to the preservation of the video recording. Regions does not waive or agree to waive the attorney-client privilege or work-product protection as to any other topic. *See Williams v. Crown Liquors of Broward, Inc.*, No. 11-61341, 2011 WL 13096632, at **1-2 (S.D. Fla. Dec. 16, 2011) (finding valid and enforceable limited waiver by in-house counsel); *McPartland v. GEICO Gen. Ins. Co.*, No. 6:09-cv-268, 2010 WL 11507535, at *6 (M.D. Fla. Mar. 5, 2010) (recognizing a limited waiver on a specific subject matter).

in the regular course.[4] [Ex. E, 4/19/19 Hr'g Tr. 66:25-67:12; Ex. F, Shields Dep. 39:17-20, 41:14-42:11].

On the afternoon of February 13, armed with the computer data and the customer's photo, Shields and Ben Faucett (Regions' ediscovery and Forensic Operations) located the portion of the surveillance corresponding to the time of the override and expanded their review to the customer's entrance and departure to and from the branch, which surveillance corresponded to that referenced by Plaintiff during her deposition. [Ex. A, Pl. Dep. 130:15-133:25; Ex. F, Shields Dep. 19:8-20:11]. Ultimately, Shields and Faucett secured video from six cameras[5] for May 28, 2016, from 9:00-10:45 a.m., confident they had secured what was requested. [Ex. F, Shields Dep. 20:1-9, 46:23-47:25]. As such, the surveillance that Regions preserved covered well beyond the discrete times that the false data was entered (9:56:14-10:10:43 a.m.); the override was effected (10:13:34 a.m.); and the account was opened (10:14:31 a.m.), the events Plaintiff testified she discussed with Gonzalez when purportedly directing Gonzalez to the surveillance. [Ex. A, Pl. Dep. 91:9-20, 107:15-22, 109:22-111:25, 112:20, 113:7-11, 118:19-119:7, 130:17-20-133:25].

Because Regions had no parameters for identifying the pertinent portions of the surveillance other than Plaintiff's deposition testimony, Shields and Faucett did not preserve any surveillance footage past 10:45 a.m., the time the customer left the branch and well after the account had been opened. [Ex. F, Shields Dep. 19:8-20:11, 23:7-12]. Given the scope of their search, moreover, Shields and Faucett saw no need to review the recordings for the entire day and terminated their review of the videos after the customer exited the branch.[6] Thus, no one reviewed

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[4] Regions stores its video recordings on hard drives and as the hard drives become full, older recordings loop off and are overwritten. [Ex. E, 4/19/19 Hr'g Tr. 66:25-67:2]. How long a recording for a particular branch remains on a hard drive depends on how much memory that branch's video hard drive has; the number of cameras; and the amount of traffic in the branch, as the cameras are stop-motion. [Ex. E, 4/19/19 Hr'g Tr. 67:4-6]. Depending on these factors, recordings can be overwritten in as little as 30 days or at most, years.[4] [Ex. E, 4/19/19 Hr'g Tr. 67:3-12]. Although Shields had never pulled a recording as old as this, "[t]here are branches that will retain a very lengthy amount of video" [Ex. F, Shields Dep. 26:16-27:2], and the Miami Lakes branch "is a fairly small-traffic branch." [Ex. E, 4/19/19 Hr'g Tr. 67:6-7].

[5] The Miami Lakes branch has about 20 surveillance cameras. Shields and Faucett selected the six cameras they believed provided the best view of the customer in relation to the account processing, override, and opening. The remaining branch cameras covered areas not assistive to the issues (i.e., ATMs, drive-thru teller lanes, and cash vault). [Ex. F, Shields Dep. 60:1-61:10].

[6] Indeed, downloading the entire day's video recordings would have been quite burdensome. It took two and a half hours to sift through the footage retained and then transmit it over the network,

the May 28, 2016 surveillance past 10:45 a.m. [Ex. F, Shields Dep. 19:8-10, 23:7-12, 26:9-15, 62:24-64:6]. In March or April 2019, Shields checked again and, as he had anticipated, the day's recordings had been overwritten and were no longer available.[7] [Ex. F, Shields Dep. 39:6-14; Ex. E, 4/19/19 Hr'g Tr. 67:13-20].

Nevertheless, Faucett advised Shields he would check with Angela Henderson in the Legal Department to ensure they had secured the times they had been requested to pull. [Ex. F, Shields Dep. 40:8-13]. Faucett and Henderson determined that sufficient video had been pulled based upon Plaintiff's deposition testimony. [Ex. E, 4/19/19 Hr'g Tr. 66:23-25]. Regions produced the surveillance to Plaintiff on March 13.

IV. The Surveillance Confirms Plaintiff – Not Pumar -- Entered the False Data and Opened the Customer's Account in Direct Opposition to Plaintiff's Sworn Testimony.

Plaintiff testified she was *unable* to enter the customer's primary identification and corresponding data into Regions' System before a warning prompt requiring an override stopped her. [Ex. A, Pl. Dep. 110:3-9, 118:9-20, 119:2-11, 120:20-121:25]. Thus, according to Plaintiff's sworn testimony, the surveillance would show that Pumar came over to Plaintiff's desk, met with the customer to do the override, sat at Plaintiff's desk, and entered the customer's primary identification data (among much other data) into Regions' System while Plaintiff walked to the lobby and stood outside the cubicle. [Ex. A, Pl. Dep. 108:19-109:2, 118:4-119:4]. Contrary to Plaintiff's sworn testimony, and as proved by Regions' computer data, Regions' System was not programmed to and did not operate in the manner to which Plaintiff testified because the override pop-up could not and did not occur until *after* the customer's primary identification data had been entered. [Ex. B, Street Decl. ¶¶ 19-21, 26, 35-43, Exs. 2-4].

The surveillance further confirms the falsity of Plaintiff's testimony and directly contradicts what Plaintiff testified it would show. For instance, the surveillance confirms that

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and it would have taken exponentially longer to transfer the entire day's recordings, which likely would have had a deleterious effect on the branch's network capabilities. [Ex. F, Shields Dep. 47:20-48:1].

[7] Plaintiff erroneously contended that the surveillance was subject to Regions' litigation hold policy. [DE 110 at 2]. However, videos are not considered records for purposes of Regions' litigation hold policy and the video recordings in question were not accessed as part of Regions' investigation, so they are not subject to the litigation hold policy. This would have been made clear to Plaintiff had she asked Regions' corporate representative, Carrie Fowler, about video at her deposition; Plaintiff did not.

Pumar was in Plaintiff's cubicle for only 13 seconds (corresponding to the time the override was conducted), [Ex. B, Street Decl. ¶ 42, Ex. 2, Ex. 4; Ex. G, Street Dep. 61:21-25; Ex. H, Shields Decl. ¶¶ 16, 19], and confirms that only Plaintiff was in her cubicle at the time of the account processing (data entry) and opening. [Ex. B, Street Decl. ¶¶ 35- 42, Exs. 2&4; Ex. G, Street Dep. 61:21-25; Ex. H, Shields Decl. ¶¶ 11, 14 (Ex. B)].

V. Plaintiff's Newest Theory that Pumar's End-of-the Day "Discovery" is "Crucial".

Because the surveillance directly rebuts her testimony, Plaintiff reinvents her theory once again. Notwithstanding ***months*** of litigation during which Plaintiff pursued copious discovery seeking a comparator followed by weeks of highly-contentious litigation during which Plaintiff impugned Pumar as the purported wrongdoer, Plaintiff now contends that the misconduct is of seemingly minor consequence, and the key issue is whether Pumar ***really*** discovered Plaintiff's misconduct at the end of the shift. Specifically, Plaintiff contends that the "crucial" fact is whether, at the end of the day on May 28, 2016, Pumar "found out for the first time about the customer, saw the customer records and interrogated the Plaintiff about her fraudulent conduct whereat the Plaintiff admitted to all of Pumar's allegations." [Motion at 4]. Notably, however, Plaintiff admits she provided the customer's file to Pumar, [Ex. A, Pl. Dep. 127:22-128:19], and Plaintiff admits the file contained the customer's Cuban passport, [Ex. A, Pl. Dep. 107:23-108:6], an improper identification for account opening, [Ex. C, Pumar Dep. 87:1-6, 118:20-21]. Insofar as Plaintiff gave Pumar the customer's file with an improper form of identification, the ministerial details of how Pumar discovered additional details of Plaintiff's misconduct are immaterial.

Moreover, as is readily discernible from even a cursory review of the surveillance, it shows nothing of what happens behind the walls of Plaintiff's cubicle; also, it contains no audio. As such, the surveillance could not show whether Pumar "found out for the first time about the customer, saw the customer records and interrogated the Plaintiff about her fraudulent conduct whereat the Plaintiff admitted to all of Pumar's allegations," the purportedly "crucial" part of the day according to Plaintiff. [Motion at 4]. *See* Video (request to file conventionally under seal submitted simultaneously herewith), at 9:56:14-9:58:39 (DEF 2128); 10:12:18-10:12:41 (DEF 2129); 10:13:17-10:13:30 (DEF 2129). Instead, any evidence regarding what, if anything, happened between Plaintiff and Pumar at the end of the shift is purely testimonial, and the video surveillance, even if it still existed, would not reveal any relevant information.

So, why does Plaintiff contend this wholly irrelevant portion is so "crucial"? Because it is the only portion of the day's surveillance no longer available; it was overwritten in the normal course of operations. [Ex. E, 4/19/19 Hrg. Tr. 67:13-20; Ex. F, Shields Dep. 38:25-39:10]. Desperate to exclude the relevant surveillance that so damages her case and credibility, Plaintiff files this motion for "appropriate sanctions" claiming that the loss of the last approximately 1.5 hours of irrelevant video[8] justifies exclusion of the very surveillance to which Plaintiff alerted Region in her deposition and which confirms the falsity of her claims in this case. [Pl.'s Mot. at 18, 20]. Plaintiff cannot remotely satisfy her burden of establishing spoliation: Regions had no duty to preserve the surveillance in the first instance; once it had to scramble after Plaintiff's grossly late It-Wasn't-Me deposition disclosure, Regions took reasonable steps to preserve the surveillance; and the surveillance overwritten would prove nothing, and therefore, its loss effects no prejudice to Plaintiff. Even if spoliation occurred, Plaintiff has failed to establish the requisite intent to support the sanctions she seeks. For the reasons set forth below, Plaintiff's Motion should be denied.

MEMORANDUM OF LAW

Spoliation is the "intentional destruction of evidence or the significant and meaningful alteration of a document or instrument" and "the intentional concealment of evidence." *Brown Jordan Int'l, Inc. v. Carmicle*, No. 0:14-CV-60629, 2016 WL 815827, at *34 (S.D. Fla. Mar. 2, 2016), *aff'd*, 846 F.3d 1167 (11th Cir. 2017).[9] Historically, a federal court's power to issue sanctions for spoliation derived from both the court's inherent power and Federal Rule of Civil Procedure 37. *Sosa v. Carnival Corp.*, No. 18-20957, 2018 WL 6335178, at *8 (S.D. Fla. Dec. 4, 2018); *Wooden v. Barringer*, No. 3:16-cv-446, 2017 WL 5140518, at *3 (N.D. Fla. Nov. 6, 2017). After the December 1, 2015, amendments to Rule 37(e) addressing the spoliation of electronically stored information (ESI), most courts now conclude that Rule 37(e) exclusively governs spoliation sanctions for loss of ESI. *Sosa*, 2018 WL 6335178, at *9; *see also* Fed. R. Civ. P. 37(e) Adv.

[8] The branch closed at noon that day, and surveillance shows the customer leaving the branch at 10:39:16 ET. [Ex. H, Shields Decl., Ex. B]. Thus, while Plaintiff claims Regions lost the "entire day," in reality, she refers to, at most, 1.5 hours of surveillance video.

[9] Sanctions for spoliation are an evidentiary matter. *Long v. Celebrity Cruises, Inc.*, No. 12-22807, 2013 WL 12092088, at *2 (S.D. Fla. July 31, 2013). Thus, even in a diversity case, federal law applies because the Federal Rules of Evidence govern the admissibility of evidence in federal courts. *Id.*; *Wandner v. Am. Airlines*, 79 F. Supp. 3d 1285, 1296 (S.D. Fla. 2015).

Comm. Note to 2015 Amendment (stating new Rule 37(e) "forecloses reliance on inherent authority or state law to determine when certain measures should be used")).

The Federal Rules do not expressly define ESI. The Eleventh Circuit, however, recognizes that video recordings like those at issue here constitute ESI. *See ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1307 (11th Cir. 2018) (recognizing a video to be ESI); *see also Butzer ex rel. C.W. v. Corecivic, Inc.*, No. 5:17-cv-360, 2018 WL 7144285, at *2 (M.D. Fla. Sept. 12, 2018) (same); *Sosa*, 2018 WL 6335178, at *15 (same); *Wooden*, 2017 WL 5140518, at *4 (same). Because the videos in question likely constitute ESI, this Court should apply the Rule 37(e) framework.

I. PLAINTIFF CANNOT PROVE A RULE 37(e) VIOLATION BECAUSE REGIONS HAD NO DUTY, YET TOOK REASONABLE STEPS, TO PRESERVE.

Rule 37(e) provides, in relevant part, that "[i]If [ESI] that **should have been preserved** in the . . . conduct of litigation is lost **because a party failed to take reasonable steps to preserve it**," the court may: (1) upon finding prejudice to another party from loss of the information, "order measures no greater than necessary to cure the prejudice"; or (2) upon finding **the party acted with intent to deprive another party,** presume the lost information was unfavorable to the party or give an adverse jury instruction. Fed. R. Civ. P. 37(e) (emphasis added).

A. Plaintiff Cannot Establish that Regions Had a Duty to Preserve.

As the moving party, Plaintiff bears the burden of establishing that Regions had a duty to preserve the surveillance video of May 28, 2016, from 9:00 a.m. through approximately noon. *See Sosa*, 2018 WL 6335178, at *16 (using the approach adopted by the Eleventh Circuit for analyzing spoliation issues under the inherent authority doctrine, pursuant to which the burden is on the party seeking sanctions). "The duty to preserve relevant evidence must be viewed from the perspective of the party with control of the evidence and is triggered not only when litigation is pending but also when it is reasonably foreseeable to that party." *Wooden*, 2017 WL 5140518, at *5 (citing *Ala. Aircraft Indus. v. Boeing Co.*, 319 F.R.D. 730, 740-41 (N.D. Ala. Mar. 9, 2017)). Rule 37(e) "does not call for perfection" and recognizes that "[u]sing hindsight to determine that the ESI 'should have been preserved' is far too easy. Accordingly, the better interpretation of this provision is that the determination of what ESI 'should have been preserved' is viewed at the time litigation is anticipated or ongoing, not when it is discovered that the ESI was lost." *Snider v. Danfoss, LLC*, No. 15 CV 4748, 2017 WL 2973464, at *4 (N.D. Ill. July 12, 2017).

Plaintiff cannot meet her burden to show that Regions had a duty to preserve surveillance corresponding to the time of the account opening (though Regions nonetheless did so), much less that Regions had a duty to preserve 1.5 hours of branch activity after the account was opened and the customer had left. When viewed from Regions' perspective (as the Court must do), it was not apparent to Regions prior to Plaintiff's deposition that surveillance was or could become relevant. Unlike Plaintiff's ever-changing story, Regions has consistently maintained since Plaintiff's termination, and Plaintiff has known since her termination, that Regions terminated her after it concluded she admitted to accepting improper identification, entering false data, and fraudulently opening the customer's account. Regions did not review surveillance footage in connection with deciding to terminate Plaintiff's employment and had no reason to do so.

As discussed *supra*, Point I. (Relevant Background), Plaintiff had multiple opportunities before and after her deposition to disclose the supposed significance of the surveillance (including her recent claim that the "most important part" happened not when the account was opened from false data based on improper identification, but instead when Plaintiff handed off the customer's file to Pumar at or about noon) or serve discovery requests seeking surveillance.[10] Yet, Plaintiff took no action whatsoever to alert Regions that she denied the misconduct; that she denied the admission; or that she believed surveillance would clear her. Moreover, even after Plaintiff finally disclosed her It-Wasn't-Me Theory and implicated surveillance as potentially relevant, based on her testimony, the window of potentially relevant surveillance was limited to *at most* the time of the account opening: *i.e.*, 9:56:14 ET (when the customer entered Plaintiff's cubicle) to 10:14:31 ET (when the account was recorded as opened). **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.** Regions

[10] Plaintiff argues that because Regions produced the video in response to Plaintiff's Request for Production No. 7, surveillance must necessarily have been responsive even prior to Plaintiff's deposition. As a preliminary matter, this Court has already heard and rejected Plaintiff's argument on this issue, concluding that she had not served any document requests for surveillance. *See supra* Point II (Relevant Background). Moreover, Plaintiff's argument is peculiar to say the least. In this regard, Request No. 7 seeks documents supporting Regions' legitimate, non-discriminatory reasons for Plaintiff's termination. Having been alerted to the surveillance by Plaintiff in her deposition, and having discerned that the surveillance confirmed the computer data and Regions' legitimate, non-discriminatory reason for terminating Plaintiff, Regions disclosed the surveillance properly under Request No. 7 in support of its defense.

cannot be expected to read Plaintiff's mind and predict her ever-changing theory of the case. Nor should Regions be punished in hindsight because Plaintiff has invented yet another iteration of her claim. As Plaintiff did ***nothing*** to alert Regions that she believed the last approximately 1.5 hours of surveillance video on May 28, 2016 might be relevant, she cannot meet her burden to show that it is ESI that "should have been preserved."

In any event, whether Pumar "found out for the first time about the customer, saw the customer records and interrogated the Plaintiff about her fraudulent conduct whereat the Plaintiff admitted to all of Pumar's allegations" is not relevant. [Motion at 4]. The computer data and surveillance to which Plaintiff alerted Regions debunked Plaintiff's myth that Pumar was the actual wrongdoer and undisputedly proved that Plaintiff entered the false data based on improper identification and opened the account. This undisputed evidence combined with the agreed facts that Plaintiff gave the customer file to Pumar at the end of the day and that the file contained a copy of the customer's Cuban passport, an improper form of primary identification, puts it beyond the realm of disagreement that Pumar discovered Plaintiff's misconduct. The machinations as to how Pumar researched the additional details of Plaintiff's misconduct are irrelevant. The end-of-day discovery proves nothing about Regions' legitimate, non-discriminatory reason for terminating Plaintiff; Plaintiff had already completed the terminable misconduct.

Even if Pumar's end-of-day discovery were tangentially relevant, the surveillance lacks audio and the cubicle wall blocks the camera from recording activities inside the cubicle. As such, the surveillance would not show any of the allegedly "crucial" interactions between Plaintiff and Pumar. To this end, the surveillance would not show whether Pumar "found out for the first time about the customer"; whether Pumar looked at the customer records; whether Pumar interrogated Plaintiff about her misconduct; or whether Plaintiff admitted Pumar's allegations. [*See* Plaintiff's Motion at 4 (delineating what Plaintiff considers the "crucial" evidence)]. Instead, any evidence regarding what, if anything, happened during the end-of-shift between Plaintiff and Pumar is purely testimonial, and the video surveillance, even if it still existed, would not reveal any relevant information.

B. Plaintiff Cannot Establish that Regions Failed to Take Reasonable Steps to Preserve Surveillance After the Customer's Departure.

Even assuming, *arguendo*, that the 1.5 hours of surveillance after the customer left the branch "should have been preserved," Plaintiff still must show that Regions failed to take

reasonable steps to preserve it. *Sosa*, 2018 WL 6335178, at *16. "Rule 37(e) does not define the 'reasonable steps' necessary to preserve ESI, nor does it explain what a party must show to meet its burden that a party failed to take those reasonable steps." *Sosa*, No. 18-20957, at *5. Moreover, "the routine, good-faith operation of an electronic information system would be a relevant factor for the court to consider in evaluating whether a party failed to take reasonable steps to preserve lost information." *See* Fed. R. Civ. P. 37(e), Adv. Comm. Note to 2015 Amendment. In sum, "ESI preservation is difficult and . . . the mere loss of ESI does not by itself mean that curative measures are warranted." *Sosa*, 2018 WL 6335178, at *15.

Abundant evidence discussed *supra* Point III (Relevant Background) shows that Regions took reasonable steps to preserve the surveillance. After Plaintiff's deposition, Regions promptly began to discern the parameters of the surveillance referenced by Plaintiff; identify the branch cameras containing prospectively pertinent footage; search the footage to pinpoint the time of the account opening; obtain the photo of the customer to locate footage on the applicable cameras at the specific times pertaining to the events at issue; retrieve and secure the video footage from those cameras; confirm the sufficiency of the footage obtained as the video seemed likely to be written over the following day; and disclose the surveillance to Plaintiff. The decision as to which portions of the video from May 28, 2016 to preserve was inherently reasonable because none of Plaintiff's testimony warranted looking past the account opening, yet Shields and Faucett preserved well prior to and after the time of the account opening.

In light of the above, Regions' steps taken to preserve the data were abundantly reasonable. Regions did not rely on the surveillance video in conducting its investigation and Plaintiff never referenced it in any of her discovery responses or requests. Rather, Plaintiff concealed the relevancy of the surveillance from Regions for over two years. Even if the surveillance could be construed as relevant, this is only because Plaintiff made it so by testifying about it for the first time at her January 31 deposition. By that point, Regions had roughly two weeks to scramble to pull the video before the May 28, 2016 recordings would roll off the Miami Lakes branch hard drive and be written over. Plaintiff never supplemented her discovery responses or requests to clarify the role she *now* claimed Pumar played in the case; the effect of Pumar's role on the need for surveillance; or any significance of Pumar's end-of-the-day discovery — which Plaintiff now claims is the crucial piece of evidence in this case.

Thus, Regions had to make its decision on what to preserve based exclusively on Plaintiff's deposition testimony secured by its own counsel's questioning and, in the end, Regions had ***one day*** to decide what to do before the video expired. At the time, the only reference to surveillance by Plaintiff concerned who entered the false data, approved, and opened the account, so Regions reasonably relied on Plaintiff's deposition testimony on this issue. There was simply no reason to preserve any portion of the video recordings beyond the creation of the account and departure of the customer in question. Unfortunately, Plaintiff's ***inexplicable*** failure to disclose the issue earlier, frame the issue more robustly, or request specific discovery left Regions only one day in a three (3) year period to effect a decision – all without the benefit of Ms. Turner, who was attending in-person that day Regions' Corporate Representative (Aimee Gonzalez's) deposition in Miami being taken by Plaintiff's Counsel.

Regardless, as discussed *supra* Point II.A., the portion of the day's surveillance preserved by Regions remains the only relevant portion of the recordings. Regions terminated Plaintiff for entering false data after accepting improper identification from a customer; Regions did not terminate Plaintiff because Pumar did or did not subject Plaintiff to the proverbial third degree at the end-of-her shift. Plaintiff's entry of the false data is verified by the relevant computer data separate and apart from the surveillance video. The surveillance video to which Plaintiff alerted Regions simply confirms what the computer data already proved. In sum, Plaintiff cannot satisfy her burden of showing that Regions failed to take reasonable steps to preserve the data.

III. EVEN IF SPOLIATION OCCURRED, PLAINTIFF IS NOT PREJUDICED AND IS NOT ENTITLED TO SANCTIONS.

A. Plaintiff Is Not Prejudiced from the Loss of the Surveillance.

If Plaintiff meets her burden as to the first two factors,[11] the analysis turns to whether Plaintiff was "prejudiced by the loss of the data," enabling the Court to "order measures no greater than necessary to cure the prejudice."[12] *Sosa*, 2018 WL 6335178, at *15; Fed. R. Civ. P. 37(e)(1).

[11] As to the third factor, it appears that the lost surveillance cannot "be restored or replaced through additional discovery." Fed. R. Civ. P. 37(e). Regions hired an independent outside vendor to conduct a forensic analysis of the branch hard drives. This analysis confirmed the May 28, 2016 recordings were overwritten and cannot be retrieved. Additionally, while Plaintiff complains about Shields not being able to testify to the status of the forensic analysis [DE 110 at 8], such was not a corporate representative deposition topic.

[12] Plaintiff requests that the Court "bar Regions from contesting Plaintiff's recollection of the day's event for which no video recording was saved, deny attempt to use any portion it decided to save,

Rule 37 "does not place a burden of proving or disproving prejudice on one party or the other." *Sosa*, 2018 WL 6335178, at *15. "An evaluation of prejudice from the loss of information necessarily includes an evaluation of the information's importance in the litigation." Fed. R. Civ. P. 37(e) Advisory Committee's Note to 2015 Amendment. The loss of inconsequential information or information detrimental to the moving party's claim does not establish prejudice. *Freidig v. Target Corp.*, 329 F.R.D. 199, 209 (W.D. Wis. 2018).

The loss of the recording for the 1.5 hours after the account opening (i.e., after Plaintiff had already definitively engaged in the misconduct at issue) is not prejudicial to Plaintiff because, even if the surveillance still existed, any assistance it may provide to Plaintiff would be pure speculation. *See ML Healthcare*, 881 F.3d at 1308 (finding plaintiff had failed to show prejudice where any additional benefit plaintiff might have derived from the undisclosed video was "purely speculation and conjecture"). In actuality, no one knows what the video would have shown because no one viewed the recording past 10:45 a.m. when the customer left the branch. Therefore, Plaintiff's bald assertion that "the recordings would have unquestionably refuted Regions'/Pumar's claim about a day-end meeting" [DE 110 at 17-18] lacks merit. Indeed, Regions could just as easily speculate, and likely more convincingly so given Plaintiff's historical lack of reliability in predicting what the surveillance would show, that the video would support Regions' version of events. Given that the video *flatly contradicted* Plaintiff's prior testimony, it would not be surprising if that were also the case with respect to the lost portion of the surveillance.

The speculative nature of Plaintiff's contention is reinforced by the fact that, as discussed *supra* Point II.A. (Memorandum of Law), even if the end-of-day surveillance were preserved, **what Plaintiff contends the surveillance would show would not, in fact, have been reflected on the video**. The evidence regarding what happened at the end-of-the-day debriefing is purely testimonial and can be attested to by the two witnesses who were present (*i.e.*, Plaintiff and Pumar). Thus, Plaintiff is not prejudiced by the loss of the video, and the Court should deny Plaintiff's request to "bar Regions from contesting Plaintiff's recollection of the day's event for which no video recording was saved, deny attempt to use any portion [Regions] decided to save, and/or

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and/or consider Defendant's conduct as additional circumstantial convincing mosaic of fact in evaluating Defendant's pending motion for summary judgment." [DE 110 at 20]. It is somewhat difficult to parse this request, but it appears to be seeking sanctions pursuant to Rule 37(e)(1).

consider Defendant's conduct as additional circumstantial convincing mosaic of fact in evaluating Defendant's pending motion for summary judgment." [DE 110 at 20].

B. Plaintiff Cannot Establish an Intent to Deprive.

To obtain an adverse jury instruction under Rule 37(e), Plaintiff must show that Regions "acted with the intent to deprive [Plaintiff] of the information's use in the litigation." Fed. R. Civ. P. 37(e)(2).[13] Negligent or grossly negligent behavior is insufficient to satisfy this standard. *Sosa*, 2018 WL 6335178, at *15. Indeed, "a party can fail to take reasonable steps to preserve ESI and not act with an intent to deceive" justifying sanctions under Rule 37(e)(2). *See Sosa*, 2019 WL 330865, at *4.

In *ML Healthcare*, the plaintiff slipped and fell at the defendant's supermarket. 881 F.3d at 1296-97. Notwithstanding the plaintiff's request for all videos from all store cameras for a period of over one month, the defendant only preserved the one hour of video immediately surrounding plaintiff's accident, while the rest had been erased in the normal course of business. *Id.* at 1307. The trial court rejected the plaintiff's motion for spoliation sanctions, finding that the defendant had no duty to preserve any more video than what was provided and had not destroyed the remainder with the necessary state of mind to warrant sanctions. *Id.* The Eleventh Circuit affirmed on appeal, ruling that the district court had properly found no evidence of intent to deprive the plaintiff of the information. *Id.* at 1308. In reaching this decision, the court concluded that the defendant had immediately saved the most relevant portion of the video and might reasonably have concluded that it need not comply with plaintiff's overbroad and far-reaching request for all video from every camera in the store for a period of over 30 days. *Id.* Other courts have reached similar conclusions. *See, e.g.*, *Butzer*, 2018 WL 7144285, at *3 (finding 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 and four officials who viewed video testified they did not preserve it because it showed nothing to either substantiate or not substantiate plaintiff's claims); *Wooden*, 2017 WL 5140518, at *9-10 (finding no intent to deprive where defendant did not engage in affirmative act to destroy the videos and video system automatically overwrote recordings after 30 days; failure to take affirmative steps to preserve evidence at most

[13] This standard has been compared to the bad faith standard of the inherent authority approach. *See ML Healthcare*, 881 F.3d at 1308. Thus, "[t]he sanctions available in subsection (2) require bad faith (i.e., the 'intent to deprive')." *Sosa*, 2018 WL 6335178, at *15.

constituted negligence and negligence is insufficient to establish an intent to deprive).

Plaintiff has fallen ***woefully*** short of establishing an intent to deceive. As in *ML Healthcare*, Regions preserved the relevant portion of the video (i.e., the portion surrounding the entry of the false data and opening of the account), which is the *only* portion of the surveillance Plaintiff referenced prior to the regular-course overwrite. Indeed, the facts here are even stronger in Regions' favor than in *ML Healthcare* because *ML Healthcare* involved a ***formal discovery request from the plaintiff*** for specific surveillance video, albeit an overbroad one. Here, in contrast, Plaintiff ***never*** served a written discovery request for surveillance. Nor did Regions engage in any affirmative action to destroy the video in question; it simply rolled off the branch hard drive in the normal course of operations. As in *Wooden*, failure to take affirmative steps to preserve evidence is at most negligence (which Regions denies is the case here), and negligence is insufficient to establish an intent to deprive. As she cannot establish an intent to deprive, Plaintiff is not entitled to a presumption the surveillance would have favored Plaintiff or an adverse jury instruction.

C. Regions, Not Plaintiff, is Entitled to Attorneys' Fees and Costs.

As Plaintiff cannot demonstrate either prejudice or an intent to deprive, Plaintiff is not entitled to attorneys' fees and costs. Given that Plaintiff's Motion is not only patently unsupported, but also has unreasonably and vexatiously multiplied the proceedings in this action, Regions requests that the Court require Plaintiff to pay its attorneys' fees and costs pursuant to 28 U.S.C. § 1927.

IV. PLAINTIFF IS NOT ENTITLED TO THE RELIEF SHE SEEKS PURSUANT TO THE COURT'S INHERENT AUTHORITY.

As discussed *supra*, the prevailing wisdom is that the adoption of the 2015 amendments to Rule 37(e) forecloses reliance on a court's inherent authority to award sanctions based on spoliation of ESI. Nevertheless, Plaintiff devotes a significant portion of her brief to the inherent authority standard. Even if the Court's inherent authority were relevant to this Motion, however, Plaintiff cannot satisfy the standard. Federal law has not set forth any "specific guidelines" to determine when spoliation sanctions are warranted pursuant to a court's inherent authority. *ML Healthcare*, 881 F.3d at 1307. Accordingly, federal courts in Florida exercising their inherent powers may be "informed" by the Florida state spoliation standard. *Noftz v. Holiday CVS LLC*, No. 6:17-cv-1638, 2018 WL 3997983, at *2 (M.D. Fla. Aug. 21, 2018). Under Florida law,

"spoliation is established when the party seeking sanctions proves that: (1) the missing evidence existed at one time; (2) the alleged spoliator had a duty to preserve the evidence; and (3) the evidence was crucial to the movant being able to prove its prima facie case or defense." *U.S. E.E.O.C. v. SunTrust Bank*, No. 8:12-cv-1325, 2014 WL 1364982, at *5 (M.D. Fla. Apr. 7, 2014); *Wandner*, 79 F. Supp. 3d at 1297. Even if these elements are met, courts in the Eleventh Circuit will not impose sanctions for spoliation in the absence of bad faith. *Wandner*, 79 F. Supp. 3d at 1297.

Here, the Court need not even reach the issue of bad faith as Plaintiff cannot establish the second and third prongs. As discussed *supra* Point II.A., Plaintiff cannot show that Regions had a duty to preserve any surveillance, much less the footage of the 1.5 hours after the account had been opened and the customer had left. Regardless, Plaintiff has proffered no argument that surveillance of whether Pumar interrogated Plaintiff at the end of the shift is relevant—much less *crucial*—to her *prima facie* case.[14] Thus, Plaintiff cannot establish these factors.

Even if Plaintiff could establish the above factors, she cannot prove bad faith. "[M]ere negligence in losing or destroying records or evidence is insufficient to justify an adverse inference instruction for spoliation." *Wandner*, 79 F. Supp. 3d at 1298. Indeed, "even grossly negligent discovery conduct does not justify that type of jury instruction." *Id.* Further, the "systematic and routine elimination of electronic data in the ordinary course does not constitute bad faith"). *Long*, 2013 WL 12092088, at *6; *see also Wandner*, 79 F. Supp. 3d at 1299 (recognizing that "district courts in our Circuit regularly deny adverse inference requests even when there is an indisputable destruction of evidence."). Instead, to establish bad faith destruction of evidence through circumstantial evidence, Plaintiff must establish *all* of the following:

> (1) evidence once existed that could fairly be supposed to have been material to the proof or defense of a claim at issue in the case; (2) the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) the spoliating party did so while it knew or should have known of its duty to preserve the evidence; and (4) the

[14] To establish a *prima facie* case, Plaintiff must show that she: (1) was a member of a protected group; (2) suffered an adverse employment action; (3) was qualified for her job; and (4) was treated less favorably than a similarly-situated, younger individual or, alternatively, a substantially younger person filled the position from which she was discharged. *Damon v. Fleming Supermarkets of Fla., Inc.*, 196 F.3d 1354, 1359 (11th Cir. 1999); *East v. Clayton County*, 436 Fed. App'x 904, 911 (11th Cir. 2011). Whether Plaintiff met with Pumar at the end of the day has no bearing on any of these factors.

> affirmative act causing the loss cannot be credibly explained as not involving bad faith by the reason proffered by the spoliator.

Wandner, 79 F. Supp. 3d at 1300 (citation omitted). Plaintiff does not come remotely close to satisfying this burden. *See Wandner*, 79 F. Supp. 3d at 1288 (finding that a county whose employee reviewed but failed to retain ***any*** surveillance despite a letter from the plaintiff requesting preservation, which failure resulted in spoliation of the evidence, was merely negligent, or, at worst, grossly negligent, but not bad faith); *ML Healthcare*, 881 F.3d at 1308 (finding no evidence of bad faith in the absence of any indication the defendant had destroyed the information in a manner inconsistent with its normal video retention policies).[15]

Regions' lack of duty to preserve, yet reasonable actions undertaken in preserving, the surveillance at issue stand in stark contrast to the actions of the defendants in *Wandner* and many of the other cases here cited. Yet still, the courts refused to find bad faith in any of them. **Here, Regions preserved the only relevant portions of the video surveillance and did despite having less than two weeks from first (and only) the time Plaintiff raised the issue -- despite Plaintiff having known of the issue for at least two-and-one-half years and her Counsel having known of the issue for at least one year.** Regions took no affirmative actions to destroy the subsequent 1.5 hours of footage; instead, the footage was simply overwritten in the normal course of operations. In light of the case law cited herein, Regions' actions were appropriate and do not even rise to the level of negligence, let alone the heightened standard of culpability required to establish bad faith. Accordingly, even if the Court's inherent authority were somehow invoked by

[15] *Accord Noftz*, 2018 WL 3997983 (denying motion for sanctions after finding that defendant did not act with culpable state of mind in only preserving video from five minutes before to 28 minutes after plaintiff's slip-and-fall accident, rather than all available video from three hours before accident); *Caron v. NCL (Bahamas) Ltd.*, No. 16-23065, 2017 WL 7803866 (S.D. Fla. Oct. 5, 2017) (denying motion for sanctions based on defendant's failure to produce additional video beyond what it had already provided where such footage was not crucial to plaintiff's negligence claim); *Henkle*, 2017 WL 5635400 (denying spoliation sanctions where failure to preserve video subsequently recorded over pursuant to company policy at most amounted to gross negligence rather than bad faith); *SunTrust*, 2014 WL 1364982, at *10 (declining to find bad faith where defendant bank allowed video surveillance to be taped over in direct contravention of its own preservation policies); *Carter v. Hi Nabor Super Mkt., LLC*, 168 So. 3d 698 (La. Ct. App. 2014) (finding no spoliation where defendant preserved as much of video as it felt it needed to preserve, based on knowledge it had at the time); *Brookshire Bros., Ltd. v. Aldridge*, 438 S.W.3d 9 (Tex. 2014) (finding lack of requisite intent where defendant did not believe any additional video footage would be relevant at time he made decision as to which portion of footage to save).

Plaintiff's Motion, she still cannot prevail.

CONCLUSION

For the foregoing reasons, the Court should deny Plaintiff's Motion for Appropriate Sanctions for Spoliation of Evidence in its entirety. Moreover, given that Plaintiff's affirmative failure to disclose timely her It-Wasn't-Me Theory or her current "crucial end-of-shift" theory yielded the loss of surveillance about which she now complains, this Court should award Regions its fees and costs incurred in responding to this and Plaintiff's prior Motion for Sanctions.

CERTIFICATE OF SERVICE

I hereby certify that on June 11, 2019, 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 identified on the below Service List via transmission of Notices of Electronic Filing generated by CM/ECF.

s/ Allison Gluvna Folk
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CASE NO: 1:18-cv-22126-KMW

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