

UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA  
MIAMI DIVISION

CASE NO.: 18-20957-CIV-CMA/Goodman

RUBY SOSA,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

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**PLAINTIFF’S MOTION FOR SANCTIONS DUE TO SPOILIATION OF EVIDENCE**

Plaintiff, RUBY SOSA, by and through her undersigned counsel and pursuant to Federal law, Southern District Local Rule 7.1, and this Court’s inherent authority, hereby files her Motion for Sanctions against Defendant, CARNIVAL CORPORATION (“Carnival”), due to its Spoliation of Evidence in this case, and in support thereof states as follows:

**I. BACKGROUND**

While on a Carnival cruise, Plaintiff slipped and fell in a puddle of water while walking through the buffet area of the *Carnival Freedom* near dinnertime. [See Compl. D.E. 1]. As a result of the fall, Plaintiff suffered serious and permanent injuries. [Id.]. The incident was captured on closed-circuit television (“CCTV”) videotape; however, during the course of its own accident investigation or sometime thereafter, Carnival caused the destruction and/or loss of said footage. [See Exhibit “A,” Petisco depo. at 32:21-24].

In *Long v. Celebrity Cruises, Inc.*, 2013 WL 12092088 (S.D. Fla. July 31, 2013), Magistrate Judge Torres issued sanctions to a cruise line after ruling on a spoliation issue *strikingly similar* to the issue presented here. In *Long*, the security officer charged with the duty to preserve CCTV

footage of the incident in that case “permanently lost” the footage when it was overwritten in the normal course. The Southern District held that “[f]or a security officer tasked with investigating a possible claim *in anticipation of litigation* and preserving evidence for that claim to allow the evidence to be lost in this manner is undeniably reckless.” *Id.* at \*7. As a result, the *Long* court found that Plaintiff “amply” satisfied the burden of showing bad faith sufficient to impose sanctions. *Id.* at \*8.

Plaintiff submits that the circumstantial evidence of bad faith in this case goes above and beyond that which was presented to the court in *Long v. Celebrity*. As a result, Plaintiff seeks an adverse inference jury instruction as a result of Defendant’s spoliation of evidence. In the alternative, Plaintiff asks this Court to strike certain affirmative defenses raised by Carnival, of which the CCTV footage would have been dispositive, had it been properly preserved.

## II. LEGAL STANDARD

Spoliation of evidence is established when the prejudiced party demonstrates, first, that the missing evidence existed at one time; second, that the spoliator had a duty to preserve the evidence; and third, that said evidence was crucial to proving the movant’s *prima facie* case. *Walter v. Carnival Corp.*, 2010 WL 2927962, \*2 (S.D. Fla. July 23, 2010). The burden on the party seeking to demonstrate that the evidence was crucial to proving its case is light; as “courts must not hold the prejudiced party to too strict a standard of proof regarding the likely contents of the destroyed evidence because doing so allows the spoliators to profit from the destruction of the evidence.” *In re Boston Boat III*, 310 F.R.D. 510, 521 (S.D. Fla. 2015) (citing *Southeastern Mech. Servcs., Inc. v. Brody*, 657 F. Supp. 2d 1293, 1300 (M.D. Fla. 2009)).

The spoliation of evidence rises to the level of a *sanctionable* offense when the party seeking sanctions can show bad faith on the part of the spoliator, “such as where a party purposely

*loses or destroys* relevant evidence.” *Walter*, 2010 WL 2927962, \*2 (citing *Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997)) (emphasis added). Bad faith can be demonstrated through circumstantial evidence if direct evidence of bad faith is unavailable. *Id.*; see *Long*, 2013 WL 12092088, \*6 (“Courts recognize that because a movant often faces a difficult burden in proving bad faith, and as direct evidence of bad faith is rarely available, circumstantial evidence can be used.” (citations omitted)). Further, bad faith sufficient for sanctions “is not limited to acts of malice or willful intent.” *Id.* at \*7.

To show bad faith through circumstantial evidence, a party must demonstrate: (1) that evidence once existed “that could fairly be supposed to have been material” to proving a claim in the case; (2) that the spoliating party engaged in an affirmative act causing the evidence to be lost; (3) that the spoliating party did so when it knew of its duty to preserve the evidence; and (4) the spoliating party cannot credibly explain the affirmative act as not involving bad faith for the reason offered by the spoliator. *Walter*, 2010 WL 2927962, \*2 (citing *Calixto v. Watson Bowman Acme Corp.*, 2009 WL 3823390, \*16 (S.D. Fla. Nov. 16, 2009)).

Upon finding bad faith, a court has broad discretion to impose sanctions, which can include but are not limited to: dismissal of the case, entering a default judgment against a defendant, excluding expert testimony, or issuing an adverse jury instruction that raises a presumption against the spoliator. *Boston Boat*, 310 F.R.D. at 514. Jury instructions can vary with regard to harshness, and may include “imposition of a mandatory, albeit rebuttable, presumption,” or a less harsh adverse inference allowing “a jury to presume that the lost evidence is relevant and favorable to the innocent party,” where the jury considers rebuttal evidence and then considers whether to draw the adverse inference. *Id.* at 514-15.

### III. MEMORANDUM OF LAW

Plaintiff is entitled to sanctions in this case because she can show Carnival's bad faith in the loss or destruction of the CCTV footage, through mounting circumstantial evidence. Carnival knew it had a duty to preserve the CCTV footage of the incident. The only security officer with knowledge of exactly what happened to the CCTV footage in this case was sent to India in the midst of this dispute, conveniently out of reach of being deposed. That same security officer failed to complete an internal investigation—in fact, made a unilateral decision to stop the investigation halfway through, for reasons unknown and never explained. Finally, Carnival had notice of Plaintiff's claim within the timeframe outlined by its own evidence preservation procedures, yet failed to take immediate steps to preserve the evidence in this case, effectively violating its own evidence preservation policies. *Cf. Mitchell v. Royal Caribbean Cruises, Ltd.*, 2013 WL 12066018, \*2 (S.D. Fla. May 7, 2013).

Below, Plaintiff outlines each element in the spoliation analysis, then analyzes each element showing circumstantial evidence of bad faith on the part of Carnival. Because the circumstances in this case rise above those presented in an almost identical factual scenario in *Long v. Celebrity*, Plaintiff is entitled to an adverse jury instruction regarding Carnival's spoliation of the CCTV footage in this case. *See Long v. Celebrity Cruises, Inc.*, 2013 WL 12092088.

#### **A. Spoliation Element #1: The CCTV footage existed at one time.**

In this case, it is undisputed that CCTV footage depicting the incident alleged in the Complaint existed at one time. Carnival represented in its first response to Plaintiff's First Request for Production that "CCTV footage reflecting the occurrence of the subject incident was preserved in this matter. A copy of the footage will be produced by this Defendant in a supplemental response." [*See* Exhibit "B," Def's Resp. dtd. 6/22/18, at 2].

Subsequently, Carnival admitted that it no longer had possession of the CCTV footage. In its first supplemental response to Plaintiff's First Set of Interrogatories, Carnival represents that "the subject footage could not be located. As a result, the subject CCTV footage is unavailable for production by this Defendant." [See Exhibit "C," Def's Resp. dtd. 7/31/18, at 1]. Thus, the first element of spoliation is met, as the CCTV footage did exist at one time. *Walter*, 2010 WL 2927962, \*2; *Long*, 2013 WL 12092088, \*4.

**B. Spoliation Element #2: Carnival had a duty to preserve the CCTV footage.**

Carnival had a duty to preserve the CCTV footage in this case. Aside from admitting that it undertook to preserve said footage in its written discovery responses (*see* Exhibits "B" and "C"), Carnival's corporate representative further testified that Carnival has internal policies and procedures governing the preservation of evidence related to incidents such as this. [See Exhibit "A," at 17-20].

And Carnival's security officer took similar preliminary steps as Celebrity's security officer in *Long*, such as taking written statements in anticipation of litigation and determining to save the CCTV footage in the first place. Carnival's security officer notated that the CCTV footage was "saved to the F: Drive" in his internal notes. [See Exhibit "D," Def's 3d Supp. Resp. dtd. 9/10/18]. He also followed other passengers around the ship to obtain their written statements, even if it inconvenienced these eyewitnesses—Carnival's own customers. [See Exhibit "E," Plant depo. at 21:6-11]. Carnival further withheld these written statements in discovery on the basis of work product; evidence of its knowledge that they were obtained in anticipation of litigation. [See Exhibit "F," Def's Privilege Log]. This demonstrates that Carnival knew of its duty to preserve evidence. *See Long*, 2013 WL 12092088, \*5 ("Why else would he have tried to save the video in

the first place but for its possible use in future litigation? [The security officer]’s actions show that Defendant recognized it had a duty to preserve evidence.”).

Therefore, the second element of spoliation of evidence is met in this case. *Walter*, 2010 WL 2927962, \*2; *Long*, 2013 WL 12092088, \*5.<sup>1</sup>

**C. Spoliation Element #3 / Circumstantial Bad Faith Element #1: The CCTV footage could fairly be supposed to have been material to the proof of Plaintiff’s negligence claim at issue here.<sup>2</sup>**

Plaintiff believes the CCTV footage here depicted not only the incident, but also important events that go to Carnival’s actual notice of the wet floor, the existence of a dangerous condition, Carnival’s failure to warn, and causation of Plaintiff’s injuries—all elements of Plaintiff’s *prima facie* negligence claim that Defendant disputes in its Answer and Affirmative Defenses. *Boston Boat*, 310 F.R.D. at 520 (“In the Eleventh Circuit, the maritime standard of reasonable care ‘usually requires that the cruise ship operator have actual or constructive knowledge of the risk-creating condition.’” (quoting *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275 (11th Cir. 2015))).

Carnival predictably takes the position that the CCTV footage did not depict anything crucial to Plaintiff’s negligence claim in this case, but Plaintiff’s burden is light on this issue. *Boston Boat III*, 310 F.R.D. at 521. Six of the deposed eyewitnesses gave varying accounts of the events that occurred immediately before and after the incident causing Plaintiff’s injuries, and

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<sup>1</sup> Further, as pointed out by the Southern District in *Long*, “Federal law recognizes a litigant’s duty to preserve evidence once it knows, or should know, that such evidence may be relevant to any potential litigation, even before litigation commences.” *Long*, 2013 WL 12092088, \*5 (citation omitted).

<sup>2</sup> In *Walter v. Carnival*, the court held that in order to prove bad faith with circumstantial evidence, the party seeking sanctions must show that “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.” *Walter v. Carnival*, 2010 WL 2927962, \*2. This is similar to the last element required to establish spoliation, proving that “the evidence was crucial to the movant being able to prove its *prima facie* case or defense.” *Id.* The Southern District has noted that this burden is light, otherwise “the spoliators [would] profit from the destruction of the evidence.” *In re Boston Boat III*, 310 F.R.D. at 521.

Plaintiff believes Defendant will attempt to discredit the testimony of these eyewitnesses. Further, Defendant's purported "notes" allegedly describing what occurred on the videotape are admitted to be incomplete. [Ex. "A," at 62-63; 136-137].

Three of the approximately eight eyewitnesses to the incident testified that they told or overheard other passengers tell Carnival crewmembers to clean up the water on the floor before the time that Mrs. Sosa slipped and fell. [Exhibit "G," Lee depo. at 10:15-25; 31-32; Exhibit "H," Henry depo. at 29:7-18; Exhibit "E," Plant depo. at 11:11-14; 13:13-15; 31:12-21]. As a result, the CCTV footage likely shows passengers pointing to the floor, talking or gesturing to Carnival crewmembers, or gesturing towards the floor in an effort to get Carnival staff to clean up the water.

This goes directly to Defendant's **actual notice** of a dangerous condition, an element of the "failure to warn" claim of negligence that Plaintiff must prove in this case. *Perry v. Oceania Cruises, Inc.*, 2017 WL 2901327, \*2 (S.D. Fla. May 30, 2017) ("Therefore, in order to impose liability, a plaintiff must show that the shipowner 'had actual or constructive notice of the risk-creating condition ....'"); *Cosmo v. Carnival Corp.*, 272 F. Supp. 3d 1336, 1341 (S.D. Fla. 2017) ("In the Eleventh Circuit, 'the maritime standard of reasonable care usually requires that [a] cruise ship operator have actual or constructive knowledge of the risk-creating condition.'" (citing *Sorrels v. NCL (Bahamas) Ltd.*, 796 F.3d 1275, 1286 (11th Cir. 2015); *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989))).

Additionally, Carnival, in its Answer and Affirmative Defenses, has disputed that it had notice of any dangerous condition. [See D.E. 15; D.E. 22]. For an eighth affirmative defense (later deemed a specific denial by agreement), Carnival alleges "that it had no notice, actual, constructive or otherwise of any condition which the Plaintiff alleges was the proximate cause of [her] damage

....” [Ans. at 6, D.E. 15; Order on Aff. Def., D.E. 22]. As such, notice is a crucial and disputed element of negligence in this case.

Next, two of the eyewitnesses testified that they observed water leaking from the ceiling above the area where Mrs. Sosa fell, prior to the incident. [Exhibit “G,” Lee depo. at 10:14-25; 33:17-19; Exhibit “H,” Henry depo. at 11:4-13; 28:4-9]. Other eyewitnesses testified they did not see water leaking from the ceiling, so the CCTV footage is crucial to this issue. [Exhibit “E,” Plant depo. at 14:17-19]. Even if Carnival’s assertion that the CCTV footage did not capture the floor is taken as true, this leaking/dripping occurrence is very likely to be depicted on the CCTV footage, because it occurred above the floor.

These events would also go to **notice**, along with **the existence of a dangerous condition**, which are essential components of Plaintiff’s maritime negligence claim. *See Caldwell v. Carnival Corp.*, 944 F. Supp. 2d 1219, 1223 (S.D. Fla. 2013) (looking to *McLaren v. Celebrity Cruises, Inc.*, 2012 WL 1792632, \*8 (S.D. Fla. May 16, 2012) for pleading requirements “that the defendant had actual or constructive notice of dangerous conditions” sufficient to survive a motion to dismiss). Defendant also denies that any such condition “was not dangerous and if in existence, was otherwise such an open and obvious condition that the Plaintiff did or should have observed and comprehended same,” highlighting the importance of this element. [Ans. at 6, D.E. 15].

Next, at least three of the eyewitnesses testified that they observed no wet floor sign in the area before Mrs. Sosa slipped and fell. [Exhibit “E,” Plant depo. at 17:5-7; Exhibit “G,” Lee depo. at 11:9-16; 46:20-25; Exhibit “H,” Henry depo. at 13:10-12; 16:13-21]. This goes directly to Carnival’s breach of its duty of reasonable care by **failing to warn** passengers, including Plaintiff, of the dangerous condition of which it was aware. Again, Carnival disputes this element by



alleging that any dangerous condition was open and obvious, and Carnival did not need to warn. [See Ans. at 6].

At least two of the eyewitnesses testified that Mrs. Sosa fell in an awkward, and what appeared to be painful, position on the floor. [Exhibit “E,” Plant depo. at 11:17-20 (“I didn’t know if she broke her arm or her neck or her leg. I mean, she was pretty mangled on the floor.”); Exhibit “I,” Olmos depo. at 9:23-24; 31:15-22 (“I just know she did the splits and then after that, she fell forward (indicating) very hard on her – on her face, her upper body torso (indicating.)”). Even Defendant’s security officer’s notes reflect that Plaintiff fell with her right foot forward. [See Ex. “D”].

As a result of the slip and fall, Mrs. Sosa suffered severe and painful injuries, including a torn hamstring in her right leg, a torn rotator cuff in her left shoulder, and lower back injuries. If the CCTV footage showed Mrs. Sosa falling, it would go to **causation**. Defendant raises three affirmative defenses implicated here: alleged comparative negligence on the part of Plaintiff; alleged lack of causation; and that Plaintiff’s injuries are allegedly unrelated to the incident and pre-existing. [See Ans. (1st, 5th, and 10th defenses), D.E. 15]. Defendant’s affirmative defenses demonstrate that causation is a crucial element of Plaintiff’s claim, and Defendant should not be allowed to raise these defenses after destroying the only solid evidence that may have disproven them.

Finally, some of the eyewitnesses testified that it took Carnival crewmembers an inordinate amount of time to get Mrs. Sosa medical assistance. [Exhibit “E,” Plant depo. at 12:2-7 (“[I]t felt like forever for them to, first of all, get anybody to even call. And then they—medical showed up. It felt—I don’t know how long it was, but they showed up with a wheelchair, not even a gurney to take her on ....”); Exhibit “I,” Olmos depo. at 10:18-23 (“It took a substantial amount of time for

them to get there to help her.”)]. This is also likely depicted on the CCTV footage; and provides even further support for why Carnival’s security officer likely deleted or failed to save the footage during the course of his investigation.

Plaintiff also doubts Defendant’s security officer’s unilateral assertion that “the exact condition of the floor could not be seen in CCTV as the view was blocked by couch walls,” especially in light of the contradictory note immediately before this sentence, which states that the CCTV footage “revealed that Ms. Sosa was walking in the aisle at Freedom restaurant, aft, starboard side heading towards the end of the buffet line and *her right foot apparently slipped* and she fell on the floor.” [Exhibit “D,” Def’s Resp. dtd. 9/10/18 (emphasis supplied)]. If the CCTV footage did not capture the floor, then how could he know that Plaintiff’s right foot slipped in the fall?

Here, the evidence at issue is the **actual footage of the incident taking place**, along with significant events (placing Carnival on notice) that transpired immediately before and after Plaintiff’s slip and fall. Defendant takes the position that its own internal notes reflect the totality of what was captured on tape—however, Defendant’s own corporate representative testified that its notes are not conclusive. [Ex. “A,” at 62-63; 136-137]. Further, Defendant’s later account of what was depicted on the CCTV footage is undoubtedly self-serving. Similar to the security officer in *Long*, who reported that Ms. Long did not trip on a piece of metal on the stairs as she alleged, but instead noted that she “had merely missed the step”—the security officer in this case noted that the CCTV footage “did not depict the condition of the floor.” [See Ex. “D”]. Of course, the CCTV footage no longer exists, and the security officer remains in India, so no one can verify his report.

Plaintiff proffers that the subject CCTV videotape depicted not only Plaintiff’s fall, but also the events above described by the eyewitnesses at deposition, including crucial elements of

negligence, such as notice, the existence of a dangerous condition, and causation, which go directly to Plaintiff's *prima facie* case of negligence. As such, Plaintiff has satisfied the third element of spoliation of evidence under the standard announced in this District. *Walter*, 2010 WL 2927962, \*2; *Long*, 2013 WL 12092088, \*5-6 (finding three elements of spoliation satisfied). Plaintiff has also satisfied the first element of circumstantial evidence of Carnival's bad faith in seeking sanctions for its spoliation of evidence, as the CCTV footage "could fairly be supposed to have been material to the proof ... of a claim at issue in the case." *Walter*, 2010 WL 2927962, \*2.

**D. Circumstantial Bad Faith Element #2: Carnival engaged in an affirmative act causing the CCTV footage to be lost or destroyed.**

The fact that Carnival violated its own evidence preservation procedures in this case lends credit to Plaintiff's theory that *Carnival's security officer intentionally destroyed* the CCTV footage when he unilaterally decided that Plaintiff's incident was suddenly "non-reportable". [See Ex. "A," Petisco depo. at 50:10-13 ("It was deemed non-reportable. I'm not sure why."); 53:14-16 ("I'm not sure why this particular incident was not investigated."); 80:10-20; 81:1-17 ("In this case I don't know why the security started taking statements of all the witnesses and a Guest Injury Statement and all that. I couldn't tell you why they did that.")] This also furthers Plaintiff's showing of circumstantial evidence of bad faith on the part of Carnival.

Carnival's security officer in charge of the investigation and the preservation of evidence, a Mr. James Desouza, purposely failed to complete his internal investigation. In the midst of the accident investigation, after speaking to witnesses, following them around the ship to obtain their written statements, having Mrs. Sosa fill out a "Passenger Injury Statement," taking Mrs. Sosa to the infirmary on a later-provided stretcher, and pulling a Movement Report, Desouza arguably did not like the way the inchoate investigation was going, and decides that Mrs. Sosa's incident is

suddenly “**not reportable.**” [Ex. “D,” Def’s 3d RFP Resp. dtd. 9/10/18; Ex. “A,” Petisco depo. at 50:10-13]. Even Carnival’s own corporate representative testified that she could not explain why the investigation was suddenly halted. [Ex. “A,” Petisco depo. at 50:10-13; 53:14-16; 80:10-20; 81:1-17].

As a result of Desouza’s decision that Mrs. Sosa’s incident was “not reportable,” Desouza failed to complete a Carnival incident report, failed to complete a Coast Guard form 2692, and failed to open an incident entry in Carnival’s database, INFO Ship®. [*Id.* at 80-81]. Plaintiff believes it was during this time that Desouza either intentionally failed to save the CCTV footage to the correct storage device, or deleted the CCTV footage of the incident altogether. Carnival can offer no other viable explanation for why Desouza decided in the middle of his accident investigation that Mrs. Sosa’s incident was “not reportable,” and Defendant offers no other explanation for why the CCTV footage was not properly saved by its own security officer, who was obligated to obtain and preserve evidence in anticipation of litigation. This is certainly “an inference of consciousness of a weak case.” *See Bashir v. Amtrak*, 119 F.3d 929, 931 (11th Cir. 1997).

Pursuant to its own evidence preservation procedures, Carnival was required to preserve the CCTV footage for at least fourteen (14) days.<sup>3</sup> [*See* Exhibit “J,” Ans. to Rogs. dtd. 9/7/18, at 5]. The incident occurred on April 27, 2017, so the CCTV footage should have been preserved until at least May 11, 2017. [*See* Ex. “A,” Petisco depo. at 37:14-38:4]. Carnival, however, had notice on May 10, 2017—**which was Day 13**—that Mrs. Sosa would be filing a claim, yet it still

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<sup>3</sup> In today’s world of modern technology, with cloud storage devices and other devices with unlimited storage capacity, a 14-day preservation window seems insufficient in itself. What happens if a passenger embarks on a 14-day cruise? The footage would be lost before a passenger even has a chance to consult with an attorney.

failed to take immediate and secure steps to preserve the footage. [*Id.* at 39:21-40:4]. This circumstance, in itself, shows that Carnival (most likely by and through said security officer) intentionally destroyed the CCTV footage before it could ever be preserved on Day 13.

In *Mitchell v. Royal Caribbean Cruises, Ltd.*, 2013 WL 12066018, the Southern District of Florida declined to award sanctions, pointing out that the CCTV “tape recorded over itself within 14 days after the incident, long before Plaintiff commenced this lawsuit.” *Mitchell v. Royal Caribbean Cruises, Ltd.*, 2013 WL 12066018, \*2. Here, Carnival had notice prior to the expiration of the 14-day window that Mrs. Sosa would be filing a claim, yet still failed to preserve the evidence.

Further, Carnival’s discovery responses and its deposition testimony directly contradict Carnival’s own internal evidence preservation procedures, in several instances. First, Carnival testified that its policies and procedures governing evidence preservation call for CCTV footage to be preserved in a “**dropbox**” for at least 14 days. [*See* Exhibit “A,” Petisco depo at 15:25-16:4, Exhibit “J,” Def’s Ans. to Rogs. dtd. 9/07/18, at 5]. A dropbox is understood to be a temporary storage device, as opposed to a permanent storage device such as a flash drive or server. [*See id.* at 21-22]. This representation directly contradicts Desouza’s internal notes indicating that he saved the CCTV footage to an “**F: Drive**”—a permanent storage device (and not a dropbox [*see* Exhibit “D”] and not a **server** [*see id.*]).

Second, Carnival testified that there is no “chain of custody” form for documenting the preservation of evidence onboard its vessels. [Ex. “A,” Petisco depo. at 30:23-31:1-4 (“[T]here’s no form or anything like that.”)]. Meanwhile, Carnival’s own evidence preservation procedures (subsequently confidentially produced by Carnival pursuant to Plaintiff’s Motion to Compel, argued at discovery hearing on 9/21/18, and to be filed as Exhibit “K,” under seal) state that

“Chain of custody must be strictly preserved and documented using a standardized form.” [Exhibit “K,” at 3]. By failing to complete a chain of custody form for the CCTV footage, Carnival *yet again* violated its own evidence preservation policies and procedures.

Notwithstanding the contradictory evidence in this case as to what device Carnival security should have used to preserve the CCTV footage, if Carnival’s representation that it is required to preserve video footage for a minimum of fourteen (14) days is taken as true, Carnival’s failure to take immediate steps on Day 13 to preserve the CCTV footage upon receiving notice of Plaintiff’s claim is additional circumstantial evidence of Carnival’s bad faith. This likely meant that the footage no longer existed at this point in time because Carnival’s security officer made the decision to destroy it when he unilaterally decided that Plaintiff’s incident was “not reportable”.

The CCTV footage in this case admittedly “**no longer exists**” [Ex. “A,” Petisco depo. at 32:21-24]—the same status as the CCTV footage in *Long v. Celebrity* where the court awarded sanctions:

After 14 days, the ship’s CCTV’s video, which is maintained on a computer hard drive, is overwritten in the normal course. The original CCTV footage of the Plaintiff’s fall was thus **permanently lost** at that point in time. And, as it turns out, neither [the security officer] nor the subordinate unknown Officer he asked for assistance were able to download the video footage onto a thumb drive or [the security officer’s] laptop before that happened. Consequently, **the video footage no longer exists**.

*Long*, 2013 WL 12092088, \*1 (emphasis supplied). In *Long*, the Southern District found this reckless destruction of evidence sufficient to warrant sanctions.

But Plaintiff submits that there are more circumstances showing bad faith spoliation of evidence in this case than even there were in *Long v. Celebrity*. In addition to Carnival deciding the incident was suddenly “not reportable” and failing to complete its own investigation, violating its own evidence preservation procedures, and giving conflicting testimony as to said procedures,

there is one additional factor this Court should consider. In *Long*, Celebrity produced its security officer for deposition to explain what happened to the CCTV footage. *See id.* at \*6. Here, Carnival sent the security officer to India in the middle of discovery specifically aimed at Carnival's spoliation of evidence. (Carnival's impeccable timing is discussed in further detail in Section F, *infra.*)

**E. Circumstantial Bad Faith Element #3: Carnival knew of its duty to preserve the CCTV footage at the time it was destroyed.**

As discussed in section B, *supra*, Carnival knew of its duty to preserve the CCTV footage in this case. *See Long*, 2013 WL 12092088, \*5 (“Why else would he have tried to save the video in the first place but for its possible use in future litigation?”).

**F. Circumstantial Bad Faith Element #4: Carnival cannot credibly explain the loss or destruction of the CCTV footage as not involving bad faith.**

In fact, Carnival effectively “hid the ball” from Plaintiff during the course of discovery into this issue. As a matter of “coincidence,” Carnival's security officer in charge of Plaintiff's onboard investigation was sent home “on vacation” to India on Sunday, September 9, 2018, after being disclosed as having knowledge of the CCTV preservation efforts in this case on Friday, September 7, 2018—effectively thwarting any effort by Plaintiff to take his deposition. [*See Ex. “J,” Def's Ans. to Rogs. dtd. 9/07/18, at 5*]. Plaintiff believes the timing of this “vacation” and Carnival's discovery responses were no coincidence. A brief timeline supports Plaintiff's position:

First, upon receipt of Carnival's July 31, 2018 discovery responses indicating it was no longer in possession of the CCTV footage, Plaintiff immediately amended the areas of inquiry in the corporate representative deposition notice on August 1, 2018, to include areas regarding evidence preservation and factual circumstances surrounding the CCTV footage in this case.

[Exhibit “L,” Plaintiff’s Notice of Deposition]. Additionally, on August 3, 2018, Plaintiff propounded spoliation discovery to Carnival. [Exhibit “M,” Plaintiff’s Spoliation discovery].

Carnival’s responses to Plaintiff’s spoliation discovery were due in thirty (30) days, by September 4, 2018. *See* Fed. R. Civ. P. 33, 34. Carnival did not respond, so Plaintiff reached out in good faith pursuant to Rule 37, and as a professional courtesy, agreed to allow until Friday, September 7, 2018, for Carnival to respond. [Exhibit “N,” e-mails].

In Carnival’s spoliation discovery responses served on Friday, September 7, 2018, it disclosed **for the first time** the names of the individual security officers responsible for the preservation of the CCTV footage in this case. [Exhibit “J,” at 5]. Carnival also indicates that these security officers are currently onboard Carnival vessels. Carnival failed to disclose that officer Desouza allegedly was set to take a “vacation” to India as of September 9, 2018. [Ex. “A,” at 29:10-15 (“I believe he signed off maybe a day or two ago on vacation.”)].

On Monday, September 10, Plaintiff requested the deposition of Desouza and the other security officer involved in the investigation. [*See* Exhibit “O,” Letter requesting depos.] Of course, no response was received from Carnival because, unknown to Plaintiff, Desouza had already been sent home to India. It was not until Carnival’s deposition on Tuesday, September 11, 2018, where Carnival’s corporate representative testified that Desouza had (rather conveniently) been sent home to India (and out of reach of Plaintiff’s counsel) only a few days earlier. [Ex. “A,” Petisco depo. at 81:15 (“The answers are in India.”)]. Carnival’s rather flippant attitude surrounding Desouza’s “vacation” is even more outrageous. [*See id.*]. If the alleged “vacation” was pre-planned, why didn’t Carnival produce Desouza upon receipt of Plaintiff’s spoliation discovery requests and put this issue to bed?



At the discovery hearing on September 21, 2018, Carnival counsel indicated that officer Desouza was the officer in charge of Plaintiff's investigation, and that he alone had knowledge of what happened to the CCTV footage in this case. The Honorable Magistrate Judge Goodman ordered Carnival to produce Desouza for deposition from India within the next two weeks—which would have been on or before Friday, October 5, 2018—the date of this Motion. (A copy of the hearing transcript has been ordered and will be filed under separate cover.) As of this date, Carnival has disregarded Judge Goodman's instructions and failed to produce Desouza for deposition, or offer an explanation as to why he has not been produced.

Carnival's counsel's explanation for the destruction of the CCTV footage in this case is that officer Desouza somehow forgot to save it. But this does not explain why Desouza decided Plaintiff's incident was "non-reportable" or why Carnival violated most of its own evidence preservation procedures in this case. The more likely explanation is that Desouza intentionally destroyed the CCTV footage when he unilaterally decided Plaintiff's incident was "not reportable." [Exhibit "D"]. Of course, Plaintiff may never know—which is why sanctions should be granted based on the foregoing circumstances. *Long*, 2013 WL 12092088, \*6 ("Courts recognize that because a movant often faces a difficult burden in proving bad faith, and as direct evidence of bad faith is rarely available, circumstantial evidence can be used." (citations omitted)).

**G. Plaintiff's requested sanctions: adverse jury instruction or striking of defenses.**

Upon a finding of bad faith, even with circumstantial evidence, the Court has the discretion to award appropriate sanctions. *Long*, 2013 WL 12092088; *Walter*, 2010 WL 2927962; *Boston Boat*, 310 F.R.D. 510, 514-515 ("Factors to be considered when determining the seriousness of the sanctions to impose against a party for failure to preserve critical evidence in its custody vary according to (1) the willfulness or bad faith of the party responsible for the loss or destruction of

the evidence; (2) the degree of prejudice sustained by the opposing party; and (3) what is required to cure the prejudice.” (citation omitted)).

Plaintiff respectfully requests that the Court award a mandatory adverse inference jury instruction at trial as a sanction for Carnival’s intentional destruction of the CCTV footage in this case. Plaintiff’s proposed mandatory instruction is as follows:

**The term “spoliation” refers to the failure to preserve evidence that is necessary to contemplated or pending litigation. The law provides that spoliation creates a rebuttable presumption that the evidence not preserved was unfavorable to the party responsible for the spoliation.**

**The Court has determined as a matter of law that the Defendant is responsible for the spoliation of the CCTV footage of the incident in this case. The Court has further determined that Plaintiff is prejudiced by Defendant’s spoliation of evidence.**

**Accordingly, you must infer or presume that the spoliated evidence was unfavorable or harmful to the Defendant’s case, and that it was favorable to the Plaintiff’s case. The Defendant may, however, rebut that presumption.**

Plaintiff also recognizes that the Court may not agree that Plaintiff’s proposed mandatory adverse inference is appropriate. In the alternative, Plaintiff proposes the following permissive adverse inference instruction (still a rebuttable presumption):

**You have heard testimony about potential evidence which the Defendant failed to produce. Plaintiff has argued that this evidence was in Defendant’s control and would have proven facts material to the issue of negligence.**

**If you find that this evidence was then within Defendant’s control, that Defendant could have preserved this evidence so that it was available for the parties in preparing for trial in this case, and that this evidence would have been material in deciding the facts in dispute in this case, then you are permitted, but not required, to infer that the evidence would have been favorable to the Plaintiff and unfavorable to the Defendant.**

**Any inference you make should be based on all of the facts and circumstances in this case.**

Plaintiff additionally requests that the Court strike Carnival's affirmative defenses that the CCTV footage would have disproven, had it been properly preserved. The affirmative defenses applicable are Defendant's first, fifth, and tenth affirmative defenses, as described above. [See Ans., D.E. 15]. Plaintiff requests the Court strike said defenses as an additional sanction for Carnival's destruction of evidence.

### **CONCLUSION**

As a result of Carnival's intentional destruction of the CCTV footage depicting the incident in this case, Plaintiff seeks spoliation sanctions against Carnival in the form of a mandatory adverse inference jury instruction, or a permissive adverse inference jury instruction, and requests the Court strike Carnival's affirmative defenses related to comparative negligence, pre-existing conditions, and relatedness of Plaintiff's injuries. [See Def's Ans., D.E. 15]. Plaintiff is undoubtedly prejudiced by Carnival's destruction of the CCTV footage in this case. *Boston Boat*, 310 F.R.D. 510, 514-515.

Plaintiff, however, does not request a sanction similar to that the Southern District awarded in *Long v. Celebrity*, where the court barred both parties from referencing the contents of the CCTV footage at trial. *Long*, 2013 WL 12092088, \*8. Instead, Plaintiff deservedly believes the destruction of the CCTV footage was the lynchpin in this case, Desouza believed it also, and Plaintiff wants to present this issue to the jury. *Boston Boat*, 310 F.R.D. at 514 ("A party is permitted to ask the trial court to allow it to introduce into evidence at trial the circumstances surrounding the opposition's failure to retain and produce evidence, even when the trial court rejects the request for an adverse inference jury instruction." (citation omitted)).

**WHEREFORE**, Plaintiff respectfully requests that this Honorable Court enter an Order sanctioning Defendant, Carnival, for its bad faith in the destruction of CCTV footage depicting the

incident in this case; specifically, Plaintiff seeks a mandatory adverse inference jury instruction at trial, or a permissive adverse inference jury instruction at trial, as set forth above; and sanctions in the form of the Court striking Defendant's first, fifth, and tenth affirmative defenses. Should the Court deny Plaintiff's requests for sanctions, Plaintiff seeks leave of Court to present this spoliation issue to the jury, as recognized in *Boston Boat*. 310 F.R.D. at 514.

**RULE 7.1(a)(3) CERTIFICATION**

Pursuant to Local Rule 7.1(a)(3) of the Local Rules for the Southern District of Florida, I hereby certify that undersigned counsel for Plaintiff has conferred with counsel for Defendant, specifically Noah Silverman, Esq., on several occasions regarding this issue. The undersigned even noticed this issue for a discovery hearing for September 21, 2018, [*see* D.E. 33], before the Honorable Magistrate Judge Goodman, but was advised by the Court at that hearing that Plaintiff should proceed to file a written motion. Plaintiff was further advised that, upon filing a written motion, the Honorable District Judge Altonaga may or may not refer the issue to Magistrate Goodman for resolution.

Respectfully submitted this 5th day of October, 2018.

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By: /s/ Jessica Quiggle  
JESSICA QUIGGLE, ESQ.  
Florida Bar No.: 107051

**CERTIFICATE OF SERVICE**

I hereby certify that a copy of the foregoing document was served via E-Mail on this **5th day of October, 2018**, to counsel for Defendant, J. Michael Magee, Esq., at [mmagee@carnival.com](mailto:mmagee@carnival.com), CARNIVAL CRUISE LINES, 3655 NW 87th Ave., Miami, Florida 33178, Defendant's co-counsel, Jeffrey Foreman, Esq., at [jforeman@fflegal.com](mailto:jforeman@fflegal.com), and Noah Silverman, Esq., at [nsilverman@fflegal.com](mailto:nsilverman@fflegal.com), FOREMAN FRIEDMAN, P.A., 2 S. Biscayne Blvd., Suite 2300, Miami, Florida 33131, and Plaintiff's co-counsel, Joseph Madalon, Esq., at [pleadings@madalonlaw.com](mailto:pleadings@madalonlaw.com).

By: /s/ Jessica Quiggle  
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