UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 19-25100-CIV-GRAHAM/McALILEY

ALAN WIEGAND, et al.,

Plaintiffs,

v.

ROYAL CARIBBEAN CRUISES LTD.,

Defendant.
_____/

PLAINTIFFS' MOTION FOR SANCTIONS FOR SPOLIATION OF EVIDENCE

The Plaintiffs, ALAN WIEGAND, et al., by and through undersigned counsel and pursuant to Federal Rules of Civil Procedure, hereby move for sanctions against Defendant, ROYAL CARIBBEAN CRUISES LTD. ("Royal Caribbean") for the spoliation of the video footage explicitly requested by Plaintiffs and the U.S. Coast Guard, and state as follows:

AFTER THIS PREVENTABLE TRAGEDY THAT TOOK CHLOE'S LIFE, BOTH THE UNITED STATES COAST GUARD AND THE ATTORNEYS FOR THE WIEGAND FAMILY IMMEDIATELY REQUESTED (WITHIN 48 HOURS) THE CCTV FOOTAGE WHICH SHOWED *WHO* OPENED THE SUBJECT WINDOW AND *WHEN* IT WAS OPENED. ROYAL CARIBBEAN WAS AWARE OF BOTH OF THESE REQUESTS, BUT NONETHELESS KNOWINGLY AND INTENTIONALLY DESTROYED CRITICAL CCTV FOOTAGE OF THE TIME LEADING UP TO THE INCIDENT. ROYAL CARIBBEAN'S CLEAR INTENT TO DEPRIVE THE PLAINTIFFS OF THIS CRITICAL INFORMATION TO USE IN THE LITIGATION WARRANTS THE IMPOSITION OF THE HARSHEST SANCTIONS, INCLUDING ENTRY OF DEFAULT JUDGMENT AGAINST ROYAL CARIBBEAN.

I. Factual Background

The instant matter involves the tragic death of 18-month-old Chloe Wiegand ("Chloe"), who fell from a pool deck window during a Royal Caribbean cruise when she slipped from her grandfather, Salvatore Anello's hands. [D.E. 1, ¶¶11, 20].

It was preventable because, before this incident, Royal Caribbean ***knew*** that the pool deck windows, which are next to a children's waterpark, were a fall hazard for small children. Royal Caribbean ***knew*** that passengers were sitting, standing and climbing on, over and across railings. Royal Caribbean ***knew*** parents placed children on the railings and next to open windows. Royal Caribbean ***knew*** that, even without adults placing them near the windows, children could still access the windows by climbing the furniture placed right next to the railings. All of this was ***known*** because Royal Caribbean's Guest Conduct Policy and crewmembers warned passengers of these dangers, and there were numerous incidents involving these hazardous circumstances, including one child's near-fall incident merely two years before Chloe's death.[1]

However, Royal Caribbean chose to ignore those prior incidents and known hazards and consequently, this tragedy occurred. In the aftermath of this tragedy, Royal Caribbean's strategy has become apparent:

1. Blame Chloe's grandfather (non-party, Salvatore Anello);
2. Lie to authorities, and
3. **Destroy evidence specifically requested by Plaintiffs' counsel and the Coast Guard**.

As shown herein, Royal Caribbean's bad faith, corporate misconduct warrants the imposition of the harshest sanctions.

ROYAL CARIBBEAN'S LIES TO THE COAST GUARD

On July 8, 2019, the day after the subject incident, the Captain of the *Freedom of the Seas*, Frank Martinsen, reported the incident to the United States Coast Guard and the Bahamas Maritime Authority, as required by law. The Captain stated, in pertinent part:

[1] An in-depth analysis of Royal Caribbean's prior knowledge of the precise dangers which led to Chloe's death is laid out in Plaintiffs' Motion for Partial Summary Judgment, filed contemporaneously with the instant motion.

> … Mr. Salvatore [Anello] peeps out of the said open window looking down. At 16:05:25 H, Mr. Salvatore is seen picking up Ms. Chloe and ***putting her out of the said open window***. At 16:06:04 H, Mr. Salvatore is seen ***bending more outside the window***…
>
> [Page 4 of July 8, 2019 email, attached as Exhibit 1] (emphasis added).

Then, on July 10, 2019, the U.S. Coast Guard expressly asked Royal Caribbean for closed-circuit television ("CCTV") footage preceding the incident, among other information, in an email that read as follows:

> Good day Captain,
>
> I wanted to thank you again for all your cooperation during this sensitive investigation. I would also like to ask a few more questions about this case due to the high media interest. We have had questions from media outlets regarding the window the toddler fell out of, mainly ***how long was the window open and who open [sic] the window***. According to some articles in the media, the step grandfather is stating he didn't know the window was open at the time of the incident. ***Is there video footage of the window being opened by either a passenger or crew member?*** Do any of the crew members working in the area where the toddler death occurred know how the [*sic*] long the window had been opened for? Also can we get written statements from the two crew members who notified the bridge of the incident? We want something in writing stating what they saw, if they have knowledge of ***when the windows were opened, who may have opened the windows*** and what they saw in the aftermath of the incident.
>
> Please let me know if you need further clarification of our request. ***If you find CCTV footage of the windows of the 11th deck being opened, please let me know*** and we can send someone out to the ship when it returns on Sunday to collect it.
>
> Thanks in advance!
>
> [Page 3 of July 10, 2019 email, attached as Exhibit 2] (emphasis added).

On the same day (July 10, 2019), the Captain responded to the Coast Guard's requests, as follows:

> Good evening,
>
> In regards to your question please find my response below to your question:

1. How long was the window open and who open [*sic*] the window : Answer The window or any windows up on deck 11 do not have any set timing for opening or closing as they are part of the wind breakers structure, any body can open and close the window bracers as they see fit.

2. According to some articles in the media, the step grandfather is stating he didn't know the window was open at the time of the incident. Is there video footage of the window being opened by either a passenger or crew member?
Answer : According to camera 327 deck 11 pool deck port side ***it is clear*** that before he lift [*sic*] the baby he [*sic*] seen bending over the railing looking over and out of the window, his ***upper body passing outside the window frame itself*** at 1605.16 hrs aprox. as per provided video that was given to you, (please review video provided).

3. Also can we get written statements from the two crew members who notified the bridge of the incident?
Answer: Please find attached statement on file.
Please note that CM Safaraz Khan was the first reporter to the Bridge, the rest of the statements belong to other crew members who witnessed the incident.

4. Please let me know if you need further clarification of our request. If you find CCTV footage of the windows of the 11th deck being opened, please let me know and we can send someone out to the ship when it returns on Sunday to collect it.
Answer : As per my answer above, we don't have a specific schedule for wind breaker windows and **based on that we cant [*sic*] determine for how long the windows were open and who opened it**.

[Id. at p. 2] (emphasis added).

In response, the Coast Guard wrote: "Hi Captain Frank, Thank you very much for the information…***We will make this part of our investigation.***" [Id. at p. 1] (emphasis added).

With the benefit of discovery herein, it is clear that the Captain repeatedly lied to the U.S. Coast Guard. The Captain reported to the U.S. Coast Guard that Chloe's grandfather, Mr. Anello, had to know the window was open because Mr. Anello's "his upper body was outside the window frame itself" before Chloe fell. [Id. at p. 2]. This, however, was a lie because the Captain later admitted **under oath** that, despite his previous statement to the U.S. Coast Guard, ***Mr. Anello's upper body was never outside the window frame at any point while Mr. Anello was in the window area.*** [*See* Exhibit 3, 120:5-121:3, 122:10-14, 124:13-20, 130:10-131:19].

Considering this lie became a part of the Coast Guard's investigation, it is quickly seen that this blatant lie from the Ship's Captain was the genesis of the Puerto Rican authorities ultimately pressing (baseless) criminal charges against Mr. Anello. Yet it was just the beginning of Royal Caribbean's bad faith and misconduct in this matter.

ROYAL CARIBBEAN'S KNOWING AND INTENTIONAL DESTRUCTION OF CRITICAL EVIDENCE

In addition to lying to authorities, Royal Caribbean knowingly and intentionally destroyed evidence critical to this case.

The incident occurred on July 7, 2019. [D.E. 1, ¶¶11, 20]. **Less than 48 hours after the incident**, on July 9, 2019, Plaintiffs' counsel requested in writing that Royal Caribbean preserve "[a]ny and all video depicting the area of the incident for **12 hours prior to the incident**[.]" [*See* Letter dated July 9, 2019, attached as Exhibit 4]. Again, the following day, on July 10, 2019, the Coast Guard requested CCTV footage showing who opened the window and when it was opened. [Exhibit 2, p. 3].

Despite these requests, it was evident at the outset that Royal Caribbean was determined to evade inquiries (and destroy evidence) concerning who opened the window and how long it was open before the incident.

For instance, the Captain ignored the Coast Guard's question as to whether there was CCTV footage showing who opened the window. And the Captain ignored the Coast Guard's request to provide them CCTV footage of the windows being opened. Instead, the Captain simply said Royal Caribbean did not have a specific schedule for the windows to be opened, "***and based on that***[,]" Royal Caribbean could not determine who opened the windows or how long they were opened. [Exhibit 2, p. 2] (emphasis added). The Captain's statement is simply untrue. The angle of one of the cameras that captured the subject incident plainly shows much of the subject area and

would clearly show who opened and closed the subject windows. Clearly, Royal Caribbean just did not want this information to come to light.

Royal Caribbean did not comply with the Coast Guard's request to refer back to the CCTV and provide them with the footage of who opened the windows. Royal Caribbean merely referred to a *nonexistent* "set timing for [the] opening or closing" of the windows, and because of that *nonexistent* schedule, Royal Caribbean lied and said it was unable to determine who opened the windows. [Id.].[2]

Royal Caribbean's bad faith and misconduct was not limited to its false and evasive email responses. In fact, despite clear requests from the Plaintiffs and the Coast Guard, Royal Caribbean failed to preserve CCTV footage depicting the window area 12 hours before the incident (as requested by Plaintiffs' counsel); or depicting when and who opened the window (as requested by the U.S. Coast Guard). [*See* Exhibit 5, 161:9-188:2].

Instead, Royal Caribbean reviewed the footage requested, unilaterally determined it was not relevant, and retained **only 30 minutes of footage** prior to the incident from the cameras that captured the incident. Thereafter, Royal Caribbean knowingly and intentionally destroyed the remaining CCTV footage. [Id.]. In doing so, Royal Caribbean violated its own internal policy to preserve at least one hour before the incident. [Id.].

Had Royal Caribbean complied with the requests by Plaintiffs' counsel and the Coast Guard, Royal Caribbean would have been able to determine when the window was opened and

[2] Additional proof of Royal Caribbean's evasive conduct and bad faith: (1) In his response to the Coast Guard, the Captain omitted (and therefore ignored) the Coast Guard's question, "Do any of the crew members working in the area where the toddler death occurred know how the [*sic*] long the window had been opened for?" (2) The Captain also omitted (and therefore ignored) the Coast Guard's request for "something in writing stating what [crewmembers] saw, if they have knowledge of when the windows were opened, [and] who may have opened the windows[.]"

whether it was a crewmember or a passenger who opened the window (i.e., an individual wearing a uniform or regular clothing). Royal Caribbean, however, refused to comply with the requests by Plaintiffs' counsel and the Coast Guard.

The evidence Royal Caribbean knowingly and intentionally destroyed is dispositive to the instant matter for three main reasons. First, Royal Caribbean was aware of the windows being a fall hazard when they were opened, and because of that, crewmembers had previously been ordered to keep the windows closed. [*See* Declaration of Elton Koopman, attached as Exhibit 6]. Second, if it was a crewmember who opened the window, the crewmember would be responsible for creating the dangerous condition, and Royal Caribbean would be vicariously liable for the crewmember's action. *See Langfitt v. Fed. Marine Terminals, Inc.*, 647 F.3d 1116, 1121 (11th Cir. 2011) (acknowledging that an "employer [is] variously liable for the negligent acts of its employee acting within the scope of employment"). Third, if it was a crewmember who opened the window, Plaintiffs would not be required to prove notice, based on Royal Caribbean's vicariously liability for the crewmember's action. *See id.*; *see also Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225 (11th Cir. 2014).[3]

As such, the record evidence is clear that, Royal Caribbean knowingly and intentionally destroyed evidence critical to this case, and to the truth.

ROYAL CARIBBEAN'S SPOLIATION

Based on the deposition of Royal Caribbean's corporate representative, Royal Caribbean reviewed the footage requested by Plaintiffs' counsel and the Coast Guard, unilaterally (and

[3] The issue of whether *Pizzino v. NCL (Bahamas) Ltd.*, 709 Fed.Appx. 563 (11th Cir. 2017), applies outside the premises-liability context (i.e., in the context of vicariously liability) is currently pending before the Eleventh Circuit. *See Yusko v. NCL (Bahamas) Ltd.*, Case No. 20-10452 (11th Cir. 2020).

conveniently) determined it was not relevant, and retained only 30 minutes of footage from the cameras that captured the incident. [*See* Exhibit 5, 161:9-188:2]. The 30 minutes Royal Caribbean preserved do not depict who opened the window, and by retaining only 30 minutes, Royal Caribbean violated its own internal policy to preserve at least one hour before the incident. [Id.].

Royal Caribbean's corporate representative testified as follows:

Page 174, Line 4:

Q: Okay. You would agree that had more footage been preserved or even looked at, it would have likely revealed who opened the subject window?

A: No. And, again, it's not an issue who opened the subject window in Royal Caribbean's -- Royal Caribbean is not saying that nobody should have opened the window. It could have been a crew member or it could have been a passenger. ***It's irrelevant as to who opened the window.*** We have no policies against anybody opening or closing the window. So whoever opened the window, it wouldn't have made a difference. ***It wasn't even in -- in our thought process because those windows are allowed to be opened and closed.***

Q: You know, the Wiegands think it's relevant who opened that window, and the Wiegands think it's relevant for how long that window was opened. So wouldn't you agree that had the footage been looked at, it would have shown who opened the video -- who opened the window and how long the video [sic] was open?

…

A: Again, in terms of Royal Caribbean violating any policies or in terms of the thought process as to who opened the window, ***it wasn't a thought in the process because the window is able to be opened by anybody.*** There's no policies against opening those windows. So Royal Caribbean investigators at that time ***would never even have thought of who opened the window*** because there's no policies against it and there's no rules or regulations or anything saying that a passenger or crew member can't open the window. ***So it wasn't even a thought for Royal Caribbean as to who opened that window.***

Q: Even though the Coast Guard emailed the captain asking specifically who opened it and how long it was opened, it wasn't on Royal Caribbean's mind?

A: Well, Royal Caribbean I guess was ***unable to determine who opened the window. I think that was looked at at some point, but we couldn't make a determination.***

Q: Oh, so *now it was looked at,* but you couldn't make the determination and it wasn't preserved.[4] So Royal Caribbean got to look at it, but my clients don't get to look at it and the Coast Guard doesn't get to look at it?

A: I guess not. But ***Royal Caribbean did make the determination*** -- and, again, Royal Caribbean is not contending or saying in this lawsuit or saying in any -- any portion of anything that the window couldn't have been opened or closed by a passenger or a crew member. We're saying that the window was open.….

Royal Caribbean ***couldn't make a determination as to who opened the window through reviewing the CCTV.*** That -- that video that they used to try to make that determination was not necessary for this because ***it wouldn't have shown anything.*** And I don't think it deprived your clients because at the end of the day, ***the window was open and the incident occurred because he put her through a window.*** I don't think that -- I don't think that Royal Caribbean is saying that the window is not open. So –

Q: Where is –

A: ***It's irrelevant as to who opened it.***

Q: I'm so glad you keep thinking it's irrelevant. I certainly think it's relevant. So we're going to have to agree to differ on that.

<u>Page 184, Line 25:</u>

Q: I just -- I'm wondering, again, why it is that Royal Caribbean would track the movements of the entire family, yet only save a half an hour of footage from each of the two cameras that actually caught the incident.

A: … Because they -- ***they preserved what was relevant in this case, which was the actual incident itself***. Prior to that, your clients weren't on the vessel so Royal Caribbean did not have any reason to believe that any of that prior to them being on the vessel had any relevance whatsoever.

[Exhibit 5].

As established by Royal Caribbean's corporate representative, Royal Caribbean preserved only "what was relevant in the case, which was actual incident itself." [Id. at 185:7-9]. This line

[4] This is yet another example of Royal Caribbean's ever-changing narrative. First, Royal Caribbean didn't even think about who opened the subject window. Then, when confronted with a simple question showing this position was a lie, the narrative changed on a dime and suddenly it was considered and determined to be irrelevant.

may work for Royal Caribbean in other cases, when an incident occurs aboard their vessel, and there are no immediate requests for Royal Caribbean to preserve any footage in particular. Under those circumstances, perhaps Royal Caribbean has a little more discretion to determine what is or is not "relevant" for preservation purposes. But in this case, Royal Caribbean did not have that discretion because there were specific requests by Plaintiffs' counsel and by the Coast Guard for Royal Caribbean to preserve the pre-incident footage in particular. If Royal Caribbean had an issue with Plaintiffs' request, then it could (and should) have contacted Plaintiffs' counsel in an effort to confer and resolve their issue. Royal Caribbean, however, never responded to Plaintiffs' request, and as such, Plaintiffs were under the impression that Royal Caribbean complied with their request.

Furthermore, Royal Caribbean cannot claim the footage was too voluminous to preserve because Royal Caribbean **actually preserved much more footage** that was *not even requested* by Plaintiffs, nor the Coast Guard. In fact, Royal Caribbean produced a total of 83 videos in this matter. Royal Caribbean also provided the Puerto Rican authorities a total of over 300 videos in Royal Caribbean's merciless efforts to have Mr. Anello charged with (baseless) criminal charges.

Among the footage Royal Caribbean produced are videos tracking the movements of Plaintiffs' *entire* family (consisting of eight people) the *entire* time they were on the cruise ship, which was approximately three hours before the incident. All of that footage was preserved, including when the family was having lunch or going to the restroom. This fact begs the question: why in the world would Royal Caribbean preserve all of this clearly irrelevant footage while at the same time knowingly and intentionally destroying CCTV footage that both Plaintiffs' counsel and the U.S. Coast Guard requested? The answer is bad faith on the part of Royal Caribbean underscored by a clear intent to deprive Plaintiffs, and the Coast Guard, from this critical data.

This data would not only likely exonerate Mr. Anello, it would also be fatal to Royal Caribbean's defense in this litigation.

Royal Caribbean also preserved footage from the incident area for several minutes every day from June 14, 2019 through July 6, 2019 – i.e., ***24 days before the incident***. This is the same camera that captured the actual incident. How is it possible that snippets of 24 days of prior footage from the camera that captured the incident was relevant to Royal Caribbean, but the footage of the time leading up to the subject incident, that was requested by Plaintiffs' counsel and the U.S. Coast Guard, was irrelevant? The answer is it is not possible. And it is not believable. Instead, it is bad faith that must be harshly punished by this Honorable Court.

Royal Caribbean offers no reasonable nor credible explanation for its knowing and intentional destruction of the CCTV footage explicitly requested by the U.S. Coast Guard and by the Plaintiffs. The only credible, logical explanation for this admitted spoliation of critical evidence is bad faith and a clear intent to deprive Plaintiffs of this evidence for use in this litigation. As such, the Plaintiffs respectfully request a finding of bad faith spoliation and move for harsh sanctions in order to right this injustice.

II. Applicable Standard of Law

Spoliation is "defined as the destruction of evidence or the significant and meaningful alteration of a document or instrument." *Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1184 (11th Cir. 2020) (citation omitted). In some circumstances, a party's "spoliation of critical evidence may warrant the imposition of sanctions." *Id.* (citation omitted). Sanctions for spoliation may include "(1) dismissal of the case; (2) exclusion of expert testimony; or (3) a jury instruction on spoliation of evidence which raises a presumption against the spoliator." *Id.* (citation omitted).

Federal Rule of Civil Procedure 37(e) "address[es] the spoliation of electronically stored information [("ESI")]," *ML Healthcare Servs., LLC v. Publix Super Mkts., Inc.*, 881 F.3d 1293, 1307 (11th Cir. 2018), stating:

> **Failure to Preserve Electronically Stored Information.** If electronically stored information that should have been preserved in the anticipation or conduct of litigation is lost because a party failed to take reasonable steps to preserve it, and it cannot be restored or replaced through additional discovery, the court:
>
> (1) upon finding prejudice to another party from loss of the information, may order measures no greater than necessary to cure the prejudice; or
>
> (2) only upon finding that the party acted with the intent to deprive another party of the information's use in the litigation may:
>
> (A) presume that the lost information was unfavorable to the party;
>
> (B) instruct the jury that it may or must presume the information was unfavorable to the party; or
>
> (C) dismiss the action or enter a default judgment.
>
> Fed. R. Civ. P. 37(e).

Rule 37(e) authorizes courts to impose sanctions for destruction of ESI where the following four conditions are met:

> [A]s a preliminary matter, the rule applies only to ESI, so the first inquiry is whether ESI is what was lost. Assuming that the alleged spoliation does indeed involve ESI, then three additional questions must be resolved. First, should the spoliated ESI have been preserved in the anticipation or conduct of the litigation? Second, is the loss of the ESI due to the party's failure to take reasonable steps to preserve the ESI? Third, can the ESI be restored or replaced through additional discovery? Where the "[a]nswer to any of [the three] questions ... is 'no,' ... a motion for spoliation sanctions or curative measures must be denied

Easterwood, 2020 WL 6781742, at *3 (citing *Hoover v. NCL (Bah.) Ltd.*, No. 19-22906-CIV, 2020 WL 4505634, at *8 (S.D. Fla. Aug. 5, 2020; *Living Color Enters., Inc. v. New Era Aquaculture, Ltd.*, No. 14-cv-62216, 2016 WL 1105297, at *4-5 (S.D. Fla. Mar. 22, 2016)) (footnote omitted).

Ultimately, Rule 37(e) sets forth two categories of relief. First, "if a court finds prejudice to another party from the loss of ESI that 'should have been preserved in the anticipation or conduct of litigation,' then it may 'order measures no greater than necessary to cure the prejudice.'" *Easterwood*, 2020 WL 6781742, at *4 (citation omitted); *see also* Fed. R. Civ. P. 37(e)(1). Alternatively, "if the Court finds that the party that destroyed the ESI 'acted with the intent to deprive another party of the information's use in the litigation,'" then the court can impose the harsher sanctions, based upon that bad faith spoliation, as set forth in subsection (2). *Id.*; *see also* Fed. R. Civ. P. 37(e)(2). At bottom, however, both of the categories of relief under Rule 37(e) "require that the preliminary four factors be established," and depend on "a finding that destruction of the evidence resulted in prejudice to the opposing party." *Easterwood*, 2020 WL 6781742, at *4 (internal citation omitted).

III. Royal Caribbean should have preserved the pre-incident CCTV footage, and its bad faith warrants the "harsher sanctions" authorized under Rule 37(e)(2).

All four preliminary factors are met in this case, and a review of the facts makes it clear that Royal Caribbean acted with the intent to deprive Plaintiffs of the pre-incident CCTV footage explicitly requested by the U.S. Coast Guard and the Plaintiffs. As such, the "harsher sanctions" set forth in Rule 37(e)(2) should be imposed.

A. All four preliminary factors under Rule 37(e) are met in this case.

1. The CCTV footage sought constitutes ESI.

Consistent with holdings from multiple courts in this district, there should be no dispute that the first requirement is satisfied because the CCTV footage constitutes ESI. *See Easterwood*, 2020 WL 6781742, at *4 (collecting cases); *see also Sosa v. Carnival Corp.*, 18-20957-CIV, 2018 WL 6335178, at *11-15 (S.D. Fla. Dec. 4, 2018).

2. <u>The ESI should have been preserved in anticipation of litigation, especially in light of requests by the U.S. Coast Guard and Plaintiffs' counsel.</u>

The second factor is to determine whether Royal Caribbean should have preserved the ESI in anticipation of litigation. Considering the pre-incident CCTV footage was requested by the U.S. Coast Guard as well as by the Plaintiffs, the answer is a resounding yes.

Generally, "[a] party's duty to preserve evidence only 'arises once litigation is pending or reasonably foreseeable.'" *Easterwood*, 2020 WL 6781742, at *5 (citing *Graff v. Baja Marine Corp.*, 310 Fed. Appx. 298, 301 (11th Cir. 2009)). In *Easterwood*, the alleged spoliated ESI was CCTV footage of a *different* incident that occurred *before* the plaintiff's incident. 2020 WL 6781742, at *1, 6. The Court concluded that the defendant "did not have a duty to preserve [the] CCTV footage" because there was no indication that the defendant "was ***aware*** that the video of [the previous incident] would be relevant" to the plaintiff's injuries. *Id.* at *6 (emphasis added).

The extent of a party's awareness is also relevant to the determination of whether a party acted in bad faith. For instance, in *Tesoriero*, the Eleventh Circuit illustrated bad faith conduct for spoliation purposes using a previous case, *Flury v. Daimler Chrysler Corp.*, 427 F.3d 939 (11th Cir. 2005). *See Tesoriero*, 965 F.3d at 1185. The plaintiff in *Flury* "sued a vehicle manufacturer alleging that he was injured when his car's airbags did not inflate during a crash[,]" and "[s]hortly after the lawsuit was filed, the defendant sent a letter requesting the location of the vehicle so that it could conduct an inspection." *Tesoriero*, 965 F.3d at 1185 (citing at *Flury*, 427 F.3d at 940-42). However, even though the plaintiff was "***fully aware*** that defendant wished to examine the vehicle," the plaintiff "ignored defendant's request and allowed the vehicle to be sold for salvage without notification to defendant of its planned removal." *Tesoriero*, 965 F.3d at 1185 (citing at *Flury*, 427 F.3d at 945) (emphasis added). According to the Eleventh Circuit, "[i]t is no surprise that [they] found bad faith on those facts." *Tesoriero*, 965 F.3d at 1185.

The Eleventh Circuit compared the conduct in *Flury* with the cruise line's conduct in *Tesoriero*, where the plaintiff moved for spoliation due to Carnival's failure to preserve the chair plaintiff fell on, and the distinguishing factor was the party's "awareness" (or lack thereof). Specifically, the Eleventh Circuit found that the plaintiff in *Tesoriero* did not establish that the cruise line's failure to preserve evidence "rose to the level of bad faith" because, "unlike the plaintiff in *Flury*, Carnival **cannot be said to have been 'fully aware'** of *Tesoriero's* desire to further inspect the chair." *Tesoriero*, 965 F.3d at 1185 (citing *Flury*, 427 F.3d at 945).

Similarly, the Court in *Hoover v. NCL (BAHAMAS) Ltd.*, 19-22906-CIV, 2020 WL 4505634 (S.D. Fla. Aug. 5, 2020), also recognized that a request to preserve is a "substantial factor" in determining whether a defendant acted in bad faith. *Id.* at *11. Relying on *Flury* and *Tesoriero*, the Court found no bad faith because the plaintiff never requested an inspection or otherwise advised the cruise line of her desire to inspect the incident area; and as a result, the cruise line was deemed "not 'fully aware'" of the desire. *Hoover*, 2020 WL 4505634 at *11; *see also Williford v. Carnival Corp.*, 17-21992-CIV, 2019 WL 2269155, at *12 (S.D. Fla. May 28, 2019) (finding no bad faith because the cruise line "was not aware of the significance, if any, of the [ESI] until after an amended lawsuit was filed").

Returning to this case, there is no question that Royal Caribbean was "***fully aware***" of the impending litigation and, specifically, of Plaintiffs' desire for the pre-incident CCTV footage because, merely ***two days*** after the incident (on July 9, 2019), Plaintiffs sent Royal Caribbean a letter explicitly requesting that the footage be preserved. [Exhibit 4]. Notably, Royal Caribbean admits it received Plaintiffs' preservation letter. [*See* Exhibit 5, 182:16-19]. It was therefore under a duty to preserve the pre-incident CCTV footage requested by Plaintiffs.

There should also be no question that Royal Caribbean was "***fully aware***" of the relevance of the footage Plaintiffs requested because, merely ***three days*** after the incident (on July 10, 2019), the U.S. Coast Guard also requested the same footage for purposes of determining who opened the window. [Exhibit 2]; *see also Williford*, 2019 WL 2269155, at *7 ("the 'requisite notice' (that the evidence is potentially relevant) occurs when 'it can reasonably anticipate impending litigation – that is, litigation that has 'more than a possibility' of occurring – to which the evidence would be relevant'"). Royal Caribbean therefore knew determining who opened the windows (and when) was "potentially relevant" when it received the requests from the Coast Guard and the Plaintiffs.

Despite its awareness, Royal Caribbean knowingly and intentionally destroyed footage of the incident area during the 12 hours before the incident (as requested by Plaintiffs), and it knowingly and intentionally destroyed footage showing when and who opened the window (as requested by the U.S. Coast Guard).

Instead, again, Royal Caribbean only preserved 30 minutes of pre-incident footage from the cameras that captured the incident. The 30 minutes of pre-incident footage does not depict who opened the window or when the window was opened, and it even fell short of the minimum Royal Caribbean required to be preserved according to its own policies.

To that last point, Royal Caribbean's corporate representative testified that when an incident results in death (as it did here), Royal Caribbean typically retains footage from **one hour before the incident** and one hour after the incident. [Exhibit 5, 161:9-163:22]. Yet it failed to do that here, despite the above requests. Applying the Eleventh Circuit's analysis herein, not only should Royal Caribbean have preserved the footage, but because Royal Caribbean was "fully aware" of the requests and relevance, its knowing and intentional destruction was done in bad faith.

3. The ESI is lost because Royal Caribbean failed to take reasonable steps to preserve it, despite multiple requests by the U.S. Coast Guard and Plaintiffs' counsel.

The third factor is to determine whether the ESI is lost because Royal Caribbean failed to take reasonable steps to preserve it, and once again, the answer is yes.

When the alleged spoliator offers no explanation for the failure to preserve evidence, courts effectively consider it a failure to take reasonable steps. *See Williford*, 2019 WL 2269155, at *11-12 (concluding that defendant failed to take reasonable steps where it offered no explanation for the failure to preserve evidence); *see also Sosa*, 2018 WL 6335178, at *19 (concluding that defendant failed to take reasonable steps to preserve spoliated evidence where it only offered speculative possibilities to explain the missing CCTV video).

Additionally, bad faith can be established by **circumstantial evidence** when the "act causing the loss cannot be credibly explained as *not* involving bad faith by the reason proffered by the spoliator[."] *Tesoriero*, 965 F.3d at 1185 (citing *Calixto v. Watson Bowman Acme Corp.*, No. 07-60077-CIV, 2009 WL 3823390, at *16 (S.D. Fla. Nov. 16, 2009)) (emphasis added).

In this case, as stated, Royal Caribbean admits it received Plaintiffs' letter requesting the pre-incident CCTV footage be preserved. [*See* Exhibit 5, 182:16-19]. Yet it offers no reasonable explanation for the failure to preserve the footage. While Royal Caribbean may argue the request was too voluminous, that excuse fails for two reasons. First, it is in direct conflict with the hundreds of videos they preserved and produced in this case and provided to the Puerto Rican authorities for the criminal case. Second, Royal Caribbean could have resolved that issue by conferring with Plaintiffs' counsel and request Plaintiffs to narrow down the request.

The only "reason" put forth by Royal Caribbean was the purported lack of relevance, but that excuse also fails for multiple reasons. First, it is in direct conflict with the mountain of

'irrelevant' footage Royal Caribbean chose to preserve, including the family's every move aboard ship and the 24 days before the cruise, as outlined above. Second, the U.S. Coast Guard's email requesting the footage of who opened the window should have been sufficient for Royal Caribbean to realize the relevance of Plaintiffs' request.

Royal Caribbean is not an amateur to lawsuits. It is sued hundreds of times every single year. Royal Caribbean is well aware of the discovery process. It is well aware that relevance is determined by the Court, not by the party being sued. What precedent would the Court be setting if, after destroying critical evidence, all a litigant had to say was: "hey, I didn't think it was relevant"?

Furthermore, *if* Plaintiffs would have told Royal Caribbean that they had text messages with Mr. Anello on the date of the incident, but deleted them all because they "didn't think it was relevant," how would Royal Caribbean respond? How would this Honorable Court respond? What if Royal Caribbean had explicitly asked Plaintiffs to preserve all communication with Mr. Anello, and they still deleted the text messages after receiving Royal Caribbean's request? Pleadings would most likely be stricken in this scenario and that is precisely what should occur herein.

These hypotheticals seem outrageous, and yet that is exactly what Royal Caribbean did here. Royal Caribbean received requests from the Plaintiffs' counsel and the Coast Guard within days of the incident (when the footage still existed), and Royal Caribbean still knowingly and intentionally destroyed the evidence. Once Royal Caribbean received the requests, it did not have any discretion to determine what was or was not relevant. Its options at that point should have been to either (1) confer with Plaintiffs' counsel on any objections in an attempt to resolve the issue, or (2) preserve the footage and wait for a Court's ruling on the objections. Considering the

voluminous number of discovery hearings the parties have had in this case, Royal Caribbean certainly cannot claim ignorance.

The lack of credible reason for the destruction of this critical evidence inescapably leads to Royal Caribbean's bad faith. Indeed, if Royal Caribbean was acting in good faith, it could have taken any of the following reasonable steps:

- Preserve the footage from both cameras that captured the incident for 12 hours before the incident (pursuant to Plaintiffs' request);
- Preserve the footage from both cameras that captured the incident for the time period that the window was opened (pursuant to the U.S. Coast Guard's request and what was relevant);
- Preserve the footage from both cameras that captured the incident for one hour before the incident (pursuant to Royal Caribbean's internal policy); or
- Confer with Plaintiffs' counsel on any objections to the 12-hour request in an effort to resolve the issue.

But Royal Caribbean did not take any of the above steps. Royal Caribbean failed to preserve any pre-incident footage that either showed when or who opened the window. And Royal Caribbean failed to confer with the Plaintiffs' counsel to resolve any issue with the 12-hour request.

Royal Caribbean should not be given a 'get out of jail free' card because they simply make up the excuse that they determined it was not relevant. Royal Caribbean knows full well this is not how relevancy determinations are made. They are made by a court of law, not by a defendant in a wrongful death case involving a toddler.

Setting aside Royal Caribbean's thinly veiled excuses, it is apparent that this critical evidence was destroyed in bad faith. The CCTV was destroyed because it was fatal to Royal

Caribbean's defense and would have exonerated Mr. Anello. The video likely shows that a crewmember opened the window and thus created the very condition that led to Chloe's death. This is not a narrative that Royal Caribbean would allow. Only the harshest of sanctions can remedy the extreme prejudice suffered by the Wiegands.

4. <u>The ESI cannot be restored or replaced through additional discovery</u>

Lastly, there should be no dispute as to the last requirement because there is no other video available to show who opened the window, and Royal Caribbean claims it does not know who opened the window. [*See* Exhibit 5, 142:8-11].

B. <u>"Harsher sanctions" are merited in this case, based on Royal Caribbean's intent to deprive Plaintiffs of the pre-incident CCTV footage showing who opened the window.</u>

As established, Royal Caribbean's actions prove that its intent was to deprive Plaintiffs of the pre-incident CCTV footage. Despite receiving multiple requests from Plaintiffs and the U.S. Coast Guard, Royal Caribbean destroyed the evidence showing who opened the window, and it did so without any reasonable explanation.

Again, this destroyed evidence is critical, if not dispositive, of Plaintiffs' claims. If the footage showed it was a crewmember who opened the window, it would prove both Royal Caribbean's notice of the dangerous condition as well as its vicarious liability for the crewmember's actions in creating the condition. Based on Royal Caribbean's bad faith in destroying the evidence, Plaintiffs respectfully request some or **all** of the following sanctions, in accordance with Rule 37(e)(2):

(A) a presumption that the lost information was unfavorable to Royal Caribbean;

(B) an instruction to the jury that it may or must presume the information was unfavorable to Royal Caribbean; and/or

(C) a default judgment.

WHEREFORE, based on the foregoing, Plaintiffs respectfully request this Honorable Court enter an Order granting the instant motion in its entirety, as well as any and all further relief this Court deems just and proper.

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 7.1

Undersigned counsel hereby certifies that they have conferred with counsel for Royal Caribbean regarding this motion, and Royal Caribbean opposes the relief sought herein.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by

CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to electronically receive Notices of Electronic Filing.

By: /s/ Michael Winkleman
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SERVICE LIST
Wiegand v. Royal Caribbean Cruises Ltd.
Case No. 19-cv-25100-DLG

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