SUPREME COURT OF THE STATE OF NEW YORK
NEW YORK COUNTY - PART 29

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Global Access Investment Advisor LLC and
Global Access Consultoria Financeira LTDA.

Plaintiff

-against- Index Number. 600291/2010

Oscar Lopes, Pali Capital Inc., Banif (Cayman) LTD.,
Luis Marino and Gustavo Serpa

Defendant

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The Plaintiffs' motion to reject the Special Referee's interim report (mot seq 008); Plaintiffs' motion to reject the Special Referee's final report and recommendation (mot seq 009) and Banif (Cayman) LTD's cross-motion to confirm the Special Referee's final report recommendation (mot seq 009) are decided as follows:

- Plaintiffs' motion to reject the Special Referee's interim report dated February 24, 2016 (mot seq 008) is hereby denied;
- the Special Referee's interim report dated February 24, 2016 is hereby confirmed;
- Plaintiffs' motion to reject the Special Referee's final report and recommendation (mot seq 009) is hereby denied; and
- Banif (Cayman) LTD's cross-motion to confirm the Special Referee's final report and recommendation (mot seq 009) is hereby granted to the extent that the Court confirms the Special Referee's Report and Recommendation that this Court lacks personal jurisdiction over the Defendant Banif (Cayman) LTD for the reasons so stated in the instant decision.

Underlying Allegations and Procedural History

The Plaintiffs Global Access Investment Advisor LLC ('Global NY") and Global Access Consultoria Financeira LTDA ("Global Brazil") (collectively "Global") commenced the underlying action against Oscar Lopes, Pali Capital Inc. ("Pali"), Banif (Cayman) LTD. ("Banif"), Luis Marino and Gustavo Serpa. Global NY is a New York limited liability company, with its principal place of business located in New York, NY. Global Brazil is a corporation organized under the laws of Brazil with its

principal place of business located in Brazil. The Defendant Oscar Lopes is an individual residing in New Jersey, and was a former employee of Global NY from February 2002 until November 2008. Pali is a corporation organized under the laws of the state of Delaware, with its principal place of business located in New York, NY. Banif is a corporation organized under the laws of the Cayman Islands with its principal place of business in the Cayman Islands. Global NY provides investment advisory and wealth management services to non-United States, and mainly Latin American residents.

The Plaintiffs allege that the underlying action arose from Oscar Lopes' theft of funds and diversion of business opportunities from Global. Plaintiffs further allege that Lopes accomplished his theft and diversion of business opportunities with the knowing and substantial assistance of the Defendants Pali and Banif. Plaintiffs allege that in numerous instances, Lopes entered into arrangements with Pali pursuant to which Lopes received and/or split with Pali fees owed to Global Brazil. Plaintiffs further allege that, in connection with transactions involving Global NY's clients and Pali, Lopes and Pali deceived Global by reporting to Global that fees that were earned on a transaction were lower than the fees actually earned. Plaintiffs further allege that Banif (whose operations are overseen from the United States by Valdemar Battista, Lopes' father) assisted Lopes by allowing him to open accounts with Banif to receive and retain funds that Banif knows belong to Global. Plaintiffs allege that despite due demand made by Plaintiffs' counsel, Banif has refused to provide Global with any information about said illegal accounts and/or turnover Global's funds held therein.

The underlying action originally appeared before the Honorable Justice Singh in 2010. The Defendants made a motion to dismiss the underlying action as to Banif for lack of jurisdiction and the Plaintiffs made motions to compel Banif to disclose certain documents and answer interrogatories.

The Defendants' first motion to dismiss the underlying action as to Banif for lack of personal jurisdiction (mot seq 001)

On or about September 30, 2010, the Defendants moved to dismiss the underlying action as to Banif on the basis that the Court lacked personal jurisdiction over Banif. The Plaintiffs opposed, arguing that Banif is subject to long-arm jurisdiction based upon Banif's transaction of business in New York. The Plaintiffs further argued that they should be given the opportunity to conduct discovery on the issue of long-arm jurisdiction. By decision dated May 25, 2011, Justice Singh denied the Defendants' motion to dismiss for lack of jurisdiction and granted the Plaintiffs discovery on the issue of jurisdiction. The court further ordered that following said discovery, there would be a hearing on the issue of jurisdiction before a Special Referee, who would hear and report on the issue of whether or not long-arm jurisdiction could be exercised over the Defendant Banif.

Plaintiffs' motions to compel discovery against Banif and Lopes (mot seq 002 and 003)

On or about November 8, 2011, the Plaintiffs moved to compel Banif to disclose documents and answer interrogatories relating to the question of whether or not the court has long-arm jurisdiction over Banif (mot seq 002). On or about November 8, 2011, the Plaintiffs also moved to compel the Defendant Oscar Lopes to disclose certain documents and information (mot seq 003). The Defendants opposed. By decision dated June 20, 2013, Justice Singh consolidated the Plaintiffs' motions for decision. The court indicated in said decision that Banif had responded to Global's discovery requests, and the court sustained Banif's objection to requests 1 and 3 of said discovery requests.[1] The court further determined and stated that the Plaintiffs' requests 1 and 3 for discovery as "to documents pertaining to the

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[1] The Plaintiffs' first request for the production of documents from Banif reads in relevant part as follows:

1. All documents reflecting, referring or relating to any communications by Banif with any person or entity located or residing in the State of new York, including without limitation any person or entity with which Banif had or sought to have a business relationship.

...

3. All documents reflecting, referring or relating to phone calls made to, or received from, any person or entity located and residing in the State of New York, including without limitation all phone bills reflecting such phone calls.

solicitation of business service and relationship, payment for business located or residing in the State of New York" were not material or necessary to the question of long-arm jurisdiction over Banif. The Court once again referred the matter to a Special Referee to hear and report on whether Banif is subject to long-arm jurisdiction in the State of New York pursuant to CPLR 302.

Plaintiffs' motion requesting the issuance of a commission requesting the Circuit Court of the State of Virginia to issue a subpoena duces tecum and ad testificandum upon ITX Design, LLC (mot seq 004)

Prior to its decision on motion seq 002 and 003, the court rendered a decision on Plaintiffs' motion seq 004. On or about June 27, 2012, the Plaintiffs moved for an order pursuant to CPLR §§ 3108 and 3111 for the issuance of a commission requesting the Circuit Court of the State of Virginia to issue a subpoena duces tecum and ad testificandum upon ITX Design, LLC ("ITX") (mot seq 004).

By decision dated July 20, 2012, Justice Singh granted the Plaintiffs' motion upon the consent of all of the Parties.

Plaintiffs' motion requesting the issuance of a commission requesting the Superior Court of the State of New Jersey to issue subpoenas duces tecum and ad testificandum upon Alfonso Finocchiaro and Valdemar Lopes (mot seq 005)

After deciding the Plaintiffs' motion seq 002 and 003, the court rendered a decision on Plaintiffs' motion seq 005. On or about July 16, 2013, the Plaintiffs moved for an order pursuant to CPLR §§ 3108 and 3111 for the issuance of a commission requesting the Superior Court of the State of New Jersey to issue subpoenas duces tecum and ad testificandum to Alfonso Finocchiaro and Valdemar Lopes. The Plaintiffs argued in support of said motion that in opposition to the Defendants' motion to dismiss the underlying action as against Banif for lack of personal jurisdiction (mot seq 001), Plaintiffs submitted an affidavit by Global NY's president, Raquel Borges. Borges stated in said affidavit that an employee of Banif, Fernando Mendes regularly traveled to and communicated with Global's New York office in order to solicit business on behalf of Banif and its subsidiary, FINAB-International Corporate Management Services Ltd. ("FINAB"). The Plaintiffs further argued that in response to said argument, Banif argued that Fernando Mendes was not acting for Banif but for FINAB. The Plaintiffs argued that documents produced by Banif show that Valdemar Lopes served as the General Manager of Banif and the Managing

Director of FINAB. Plaintiffs further argued that said documents also showed that Alfonso Finocchiaro has been a Director and the Chief Executive Officer of FINAB, and served as a director of at least one other Banif entity.

Plaintiffs argued three points in support of their motion (mot seq 005):

1. Plaintiffs seek to take discovery of Valdemar Lopes and Alfonso Finocchiaro in furtherance of Plaintiffs' argument that FINAB acted as Banif's agent;

2. Plaintiffs seek to take discovery of Valdemar Lopes and Alfonso Finocchiaro with respect to business that Banif solicited from Global, on its own or through FINAB; and

3. Plaintiffs seek to take discovery of Valdemar Lopes and Alfonso Finocchiaro in connection with Plaintiffs' argument that Banif failed to preserve documents upon being put on notice of potential litigation (i.e. spoliation).

By decision dated January 10, 2014, Justice Singh denied the Plaintiffs' motion for the issuance of a commission pursuant to CPLR §§ 3108 and 3111. Said decision specifically indicates that "[t]he depositions of Valdemar Lopes and Alfonso Finocchiaro are neither material or necessary to whether long arm jurisdiction can be exercised over Banif".[2]

Plaintiffs' motion for spoliation sanctions against Banif pursuant to CPLR 3126 (mot seq 006)

On or about August 11, 2015, the Plaintiffs moved pursuant to CPLR 3126 for sanctions against Banif for failure to preserve evidence (i.e. spoliation) and for partial summary judgment in favor of the Plaintiffs, finding that the Court has long-arm jurisdiction over Banif in the underlying action.

By Order dated January 19, 2016, this Court removed the Plaintiffs' motion from the calender on the basis that the Plaintiffs failed to submit working copies of their moving papers and exhibits to the Court as required in this Court's rules.

[2] On January 10, 2014, Justice Singh signed an amended decision denying the Plaintiffs' motion and indicating that "[t]he depositions of Valdemar Lopes and Alfonso Finocchiaro are neither material or necessary to whether long are jurisdiction can be exercised over Banif".

The first appearance of the underlying action before this Court.

The underlying action was transferred to this Court and the Parties first appeared before this Court for a compliance conference on August 17, 2015. This Court noted that the underlying action had been commenced approximately five years earlier and that the underlying action had yet to appear before a Special Referee to hear and report on the question of long-arm jurisdiction, despite the fact that Justice Singh had signed multiple orders referring the matter to a Special Referee to hear and report on the issue of long-arm jurisdiction. Although this Court was informed of the Plaintiffs' pending spoliation motion, at no point during said appearance did the attorney for the Plaintiffs indicate to this Court that the issue of spoliation was in any way related to the issue of determining whether or not this Court has long-arm jurisdiction over Banif. In particular, Plaintiffs' attorney never argued before this Court that the issue of long-arm jurisdiction could not be determined without first determining the issue of spoliation.

This Court issued an Order dated August 17, 2015 indicating as follows:

- pursuant to Justice Singh's June 20, 2013 order, the instant matter is referred to a Special Referee to hear and report on the issue of whether or not Banif is subject to long-arm jurisdiction in New York pursuant to CPLR §302(a);

- within five days (of the date of the Court's Order), the Plaintiffs will file a copy of the instant order and Justice Singh's June 20, 2013 order with the Trial Support Office, and upon payment of the appropriate fees, the matter will be placed upon the Special Referee's calender to hear and report; and

- Plaintiffs' spoliation motion (mot seq 006) is held in abeyance until the Special Referee makes a recommendation to the Court in the issue of long arm jurisdiction.

Parties' hearing before the Special Referee on the issue of long-arm jurisdiction.

On or about November 23, 24, 25 and 27 of 2015, the Parties appeared before a Special Referee for a hearing on the issue of long-arm jurisdiction over Banif. During the course of said hearing, Plaintiffs' counsel argued that the arguments made in support of the Plaintiffs' spoliation motion also directly related to the question of whether or not this Court has long-arm jurisdiction over Banif. Specifically, Plaintiffs' counsel argued before the Special Referee that certain emails that were allegedly "destroyed", would have gone towards establishing that the Court has long-arm jurisdiction over Banif.

The Special Referee indicated that the hearing would only address the issue of long-arm jurisdiction, without considering the issue of spoliation. During the course of the hearing, each of the Parties produced a single witness. The Plaintiffs produced Raquel Borges, the owner of Global NY, and the Defendants produced Ricardo Jose Mendes, a director and current general manager of Banif.

During the course of Borges' testimony, Defendants' counsel made multiple objections arguing that significant portions of Borges' testimony were inadmissible hearsay. Plaintiffs' counsel argued that the challenged testimony referred to "verbal acts" and, as such, did not constitute hearsay.

On February 24, 2016, the Special Referee issued an interim report addressing multiple hearsay objections that Banif raised during the course of Borges' testimony. The Special Referee indicated that upon review of the hearing transcript and application, she made the following findings as to specific portions of Borges' testimony:

- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 49, lines 2-26 constituted hearsay;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 86, lines 22-26 and p 87, lines 2-7 constituted hearsay;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 52, line 26 and p. 53, lines 2-3 concerning the hiring of an IT professional was admissible;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 53, lines 3-5 constituted hearsay;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 66, lines 18-22 through p. 67, lines 2-7 constituted hearsay;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 70, lines 21-26 and p. 71, lines 2- the first part of 3 constituted hearsay;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 71, lines 3-4 was admissible;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 75, lines 4-6 constituted hearsay;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 75, lines 7-8 was admissible;

- Borges' testimony as transcribed in the November 24, 2015 hearing transcript p. 141, lines 22-26 constituted hearsay;

- Borges' testimony as transcribed in the November 25, 2015 hearing transcript p. 318, lines 18 through p. 319, line 21 was admissible[3]; and

- Borges' testimony as transcribed in the November 25, 2015 hearing transcript p. 321, lines 13 through p. 322, line 7 was admissible[4].

On or about August 31, 2016, the Special Referee submitted a final report and recommendation to the Court recommending that the Court lacked long-arm jurisdiction over the Defendant Banif.

Plaintiffs' motion for the Court to reject the Special Referee's interim report (mot seq 008)

On or about March 10, 2016, the Plaintiffs made a motion pursuant to CPLR 4403 for the Court to reject the Special Referee's February 24, 2016 interim report.

Plaintiffs' motion for the Court to reject the Special Referee's final report and recommendation and Defendant's motion for the Court to confirm the Special Referee's final report and recommendation (mot seq 009)

On or about September 29, 2016, the Plaintiffs made a motion for the Court to reject the final report and recommendation issued by the Special Referee. The Plaintiffs argued in sum and substance that the Court should reject the Special Referee's final report and recommendation as the Special Referee:

- ignored the Plaintiffs' spoliation argument as against Banif;

- excluded crucial evidence including portions of Borges testimony (as hearsay), concluded that Borges was not credible, did not allow the Plaintiffs to introduce certain third-party witnesses, and excluded certain evidence; and

- erroneously concluded that the Court lacked long-arm jurisdiction over Banif.

On or about November 7, 2016, Banif made a cross-motion for the Court to confirm the final report and recommendation of the Special Referee.

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[3] Said finding by the Special Referee was a reconsideration of a finding that the Special Referee made during the hearing.

[4] Said finding by the Special Referee was also a reconsideration of a finding that the Special Referee made during the hearing.

Parties Appearance before the Court on December 21, 2016

On December 21, 2016, the Parties appeared before this Court on the Plaintiffs' motion to reject the Special Referee's report and recommendation and Banif's cross-motion to confirm.

At said appearance, the Court indicated to both of the Parties that their respective motion and cross-motion were both untimely pursuant to CPLR 4403. Specifically, neither of the Parties had made their respective motions to confirm or reject the Special Referee's report and recommendation within fifteen days of the Special Referee filing her report. The Parties' attorneys indicated to the Court that they had entered into a stipulation extending the time for them to make said motions. However, there is no statutory authority for the Parties to extend the fifteen day requirement of CPLR 4403 absent the consent of the Court.

The Court further indicated to the Parties that the Plaintiffs' spoliation motion (mot seq 006) had been removed from the calender based upon the Plaintiffs' failure to follow the Court's rules and submit working copies of their motion papers. The Court further indicated that the Plaintiffs had taken no steps to either submit working copies of their moving paper to the Court or otherwise have their spoliation motion restored to the Court's motion calender.

Plaintiffs' attorney indicated to the Court in sum and substance that a determination on the issue of long-arm jurisdiction required a determination on the issue of spoliation. The Plaintiffs further argued that Justice Singh made no determinations on the issue of spoliation that constitute the "law of the case", since any arguments presented before Justice Singh on the issue of spoliation were made solely within the context of discovery motions.

The Court indicated that it would decide the Plaintiffs' motion to reject the Special Referee's interim report as to the Defendant's objections to Borges' testimony (mot seq 008), the Plaintiffs' motion for the Court to reject the Special Referee's final report and recommendation, and Defendants' cross- motion for the Court to confirm the Special Referee's final report and recommendation (mot seq 009). The Court allowed the Plaintiffs to reorganize and resubmit their arguments (made in their

previous motion, mot seq 006) on the issues of spoliation and to confirm or reject the Special Referee's report and recommendation to conform to the Court's motion rules. The Court also allowed for the Defendants to respond to said reorganized/resubmitted arguments if the Defendants so chose (December 21, 2016 Tr. at 36-41). In addition, the Court set the matter down for oral argument.

Plaintiffs' collected arguments on the issue of spoliation as it relates to the Special Referee's recommendation that the Court does not have long-arm jurisdiction over Banif

In their moving papers, Plaintiffs argue that Banif has employed a two part strategy in order to have the underlying action dismissed as against Banif. First, Plaintiffs argue that Banif did not take steps to preserve all of the relevant documentary evidence within its control, which would have proven Plaintiffs' long-arm jurisdiction arguments, and that Banif did nothing to prevent said documents from later being destroyed. Second, Plaintiffs argue that at the hearing before the Special Referee, Banif attacked Global's founder Raquel Borges' testimony as hearsay and not credible. Plaintiffs further argue that at the hearing before the Special Referee, Banif fought to prevent Global from presenting any third-party witnesses, who would have corroborated Borges' testimony and rebutted Banif's witness Ricardo Mendes.

Plaintiffs argue that the first issue for the Court to determine is the question of whether or not Banif should be sanctioned for spoliation. Plaintiffs argue that the missing evidence would have supported Plaintiffs' arguments that this Court has long-arm jurisdiction over Banif and that Banif's primary argument in opposition is that Global submitted insufficient documentary proof to establish that this Court has long-arm jurisdiction over Banif. Plaintiffs argue that the Special Referee erroneously refused to hear evidence on the issue of spoliation, that she made erroneous evidentiary rulings and that she refused to allow the Plaintiffs to call certain witnesses. Plaintiffs further argue that the Court should reject the Special Referee's report and exercise long-arm jurisdiction over Banif, or in the alternative, reopen the hearing on long-arm jurisdiction and direct the Special Referee to also consider the spoliation issue.

Parties' arguments on the issue of spoliation

On the issue of spoliation, the Plaintiffs argue in sum and substance that Banif failed to preserve email evidence after Banif knew that the instant litigation was pending. Plaintiffs further argue that FINAB knowingly authorized the destruction of said evidence between the time that Plaintiffs made their motion for a commission requesting the Circuit Court of the State of Virginia to issue a subpoena duces tecum and ad testificandum upon ITX (mot seq 006) and the time that said motion was granted (by Justice Singh upon the consent of the Defendants). Plaintiffs argue that after Banif was informed of the underlying lawsuit, Banif divested itself of control over documents that could have been used to establish long-arm jurisdiction over Banff in the State of New York and that Banif sold its ownership interest in FINAB.

Plaintiffs argue that Banif failed to produce multiple emails in response to discovery, including one email between Fernando Mendes and Oscar Lopes. Plaintiffs further argue that Banif and FINAB shared employees and that these employees frequently conducted Banif business through their FINAB email accounts. Plaintiffs further state that on June 5, 2012, FINAB closed its email account with ITX, which resulted in the deletion of the emails contained therein. Plaintiffs argue that if Banif had complied with its duty to preserve evidence upon learning of the filing of the instant lawsuit, it would have preserved the critical emails that were later destroyed when FINAB canceled its email account with ITX.

Plaintiffs argue that on or about February 22, 2010, Global sent an e-mail to Banif and FINAB stating, "As you are aware [Global] has began in a Civil court a lawsuit against Oscar Lopes, Pali Capital and Banif Cayman." Plaintiffs argue that Banif had full access to and control of FINAB's emails when Banif received the February 22, 2010 email. Plaintiffs further reference to Fernando Mendes' affidavit dated October 3, 2014, wherein he states that he worked for both Banif and FINAB during 2009 until September 2010. Mendes further stated that Banif and FINAB maintained documents and records at their shared office space in the Cayman Islands, and that Banif and FINAB employees could each access the other company's electronic records via a shared computer system. Mendes further indicated in his

affidavit that if he personally ever needed to review a FINAB document or email relating to a Banif client, he could access it either from the laptop computer he used to work on both Banif and FINAB matters or obtain hard-copy documents from the client files in the shared office space. Plaintiffs argue that Banif and FINAB were in effect the same business, that Banif had full access to and control of FINAB's documents, and that Banif failed to preserve the evidence in question.

The Plaintiffs further argue on the issue of spoliation that Banif also failed to preserve the emails after their specific relevance arose in the litigation. Plaintiffs argue that upon being informed by Mendes that copies of the emailed documents could be obtained from ITX, a third-party hosting service, Plaintiffs obtained a commission from the court to take discovery from ITX and served a subpoena on ITX dated October 4, 2012. Plaintiffs argue that upon receiving ITX's response to Global's subpoena on November 7, 2012, Global learned that, between the time Global obtained the commission and the time Global served a subpoena upon ITX, FINAB knowingly authorized the destruction of its documents stored on ITX's servers.

The Plaintiffs argue that Banif's failure to preserve evidence has effectively prevented Global from conclusively establishing that there is an account at Banif made up of illegally obtained Global funds. Specifically, the Plaintiffs refer to an affidavit by Saige Stefan Rivers, dated July 26, 2012, who states that he was employed by FINAB from 2010 until February 2012. Rivers states that he personally saw and scanned records relating to Global's account at Banif. He further states that a couple of weeks after Mendes was dismissed, senior officers of FINAB, Banif Lisbon, Banif Miami and Banif Bahamas were at FINAB's offices and removed all Banif hard copy records from the premises. Plaintiffs argue that, taken together, Mendes and Rivers' affidavits are sufficient to establish that an account existed at Banif in Global's name and that Banif's failure to preserve evidence had effectively prevented Global from confirming this fact.

The Plaintiffs further argue that the destroyed evidence is directly related to their argument that this Court has long-arm jurisdiction over Banif. Plaintiffs argue in sum and substance that FINAB is an agent of Banif, and as such FINAB's business transactions should be imputed to Banif for the purpose of establishing long-arm jurisdiction over Banif. The Plaintiffs argue that it can be inferred that the destroyed evidence (i.e. the emails) would have supported their argument that FINAB solicited Global's business in the state of New York as Banif's agent.

The Plaintiffs argue that Banif's failure to preserve evidence after being informed that the Plaintiffs were commencing the underlying action has both prevented the Plaintiffs from confirming that Global had an account with Banif and from establishing that Banif had sufficient contact with New York State (through the actions of FINAB) for this Court to exercise long-arm jurisdiction over Banif.

The Plaintiffs further argue that any determinations that Justice Singh may have previously made relating to the Plaintiffs' spoliation arguments do not constitute the "law of the case". Specifically, the Plaintiffs argue that they never made a spoliation motion before Justice Singh and that any determinations Justice Singh may have made as to the Plaintiffs' spoliation arguments were made in the context of a discovery motion. Plaintiffs argue that court determinations made in the context of a discovery motion cannot constitute the "law of the case".

As such, the Plaintiffs argue that the Court should reject the Special Referee's report and recommendation since the Special Referee failed to consider the issue of the spoliation in addressing the question of long-arm jurisdiction.

In opposition to the Plaintiffs' spoliation arguments and in support of its own cross-motion to confirm the Special Referee's report and recommendation, Banif argues that the issue of spoliation has been resolved as a matter of law in the underlying action. Banif argues in sum and substance that the Plaintiffs previously argued the issue of spoliation in support of their motion for a commission to take depositions of Alfonso Finocchiaro and Valdemar Lopes (mot seq 005). Banif argues that the Plaintiffs sought to depose Alfonso Finocchiaro and Valdemar Lopes in connection with FINAB's alleged

destruction of its email files. Banif argues that the Plaintiffs already presented their spoliation arguments before Justice Singh in support of their motion for a commission and that Justice Singh determined that Plaintiffs' spoliation arguments were unavailing in denying the Plaintiffs' motion for a commission.

In addition, Banif argues that Plaintiffs' spoliation argument rests upon false accusations. Banif argues that there is no basis for the Plaintiffs' allegations that Banif sold its interest in FINAB after receiving emails from Borges referring to a potential lawsuit. Banif further argues that there is no basis for the Plaintiffs' argument that Banif hindered discovery for the purpose of destroying any relevant FINAB documents, including emails. Specifically, Banif argues that of the three discovery motions made by the Plaintiffs during the course of discovery, two were denied and one was only granted upon Banif's consent. In particular, Banif reiterates that Justice Singh denied the Plaintiffs' motion for a commission to take depositions of Alfonso Finocchiaro and Valdemar Lopes (mot seq 005) and that Justice Singh denied said motion after hearing Plaintiffs' spoliation arguments.

Banif further argues that five emails, which Plaintiffs argue discussed a fraudulent Global account being held by Banif, in no way suggest that such an account exists. Banif argues that four of said emails were admitted at the hearing before the Special Referee for the purpose of impeaching Borges' testimony. Banif further argues that two of said emails reflect Fernando Mendes telling Borges that there is no Global account at Banif and that none of these four emails reflects the existence of such an account. As for the fifth email referring to "GA account activity", Banif argues that Borges neither sent nor received said email and could not testify before the Special Referee as to the meaning of the phrase "GA account activity". In addition, Banif argues that the phrase "GA account activity" actually refers to commissions owed by FINAB to Global under their contract.

Banif further argues that Defendants' Exhibit 9A submitted at the hearing before the Special Referee showed that FINAB made a request to ITX to terminate FINAB's email account prior to January 2, 2012 and that as of January 14, 2012, ITX indicated that it had terminated said account. As such, Banif argues that there is no basis for the Plaintiffs' argument that FINAB terminated its email account

with ITX in response to Plaintiffs' discovery efforts in the underlying action, which were made after FINAB had already terminated its account.

Banif further argues that it is undisputed that, as of January 2012, Banif did not have an ownership interest in FINAB. Banif argues that there is no basis to conclude that Banif could have exercised any control over FINAB's email servers at that point in time. In addition, Banif argues that it requested documents from FINAB during the course of the underlying action and that Fernando Mendes, on behalf of FINAB, rejected Banif's request. Banif argues that this directly contradicts the Plaintiffs' argument that Banif exercised any direct control over FINAB as to the production of documents.

Finally, Banif argues that Plaintiffs do not identify the supposedly destroyed emails or explain how said documents would have helped their case. Banif argues that Plaintiffs refer to "bank statements" for Lopes' alleged illegal account at Banif. However, Banif argues that said "bank statements" have significant indica of fabrication, and that Global made no effort to admit said documents at the hearing before the Special Referee.

Parties' arguments as to the Special Referee's reference and report, separate and apart from the issue of spoliation

Separate and apart from the issue of spoliation, the Plaintiffs also argue that the Court should reject the Special Referee's report and recommendation on the bases that the Special Referee erroneously excluded evidence crucial to Plaintiffs' arguments and that the Special Referee erroneously concluded that Banif is not subject to the long-arm jurisdiction of this Court. Plaintiffs argue that the Special Referee erred in excluding portions of Borges' testimony as hearsay. Specifically, the Plaintiffs argue that the portions of Borges' testimony that the Special Referee excluded as hearsay were admissible as party admission and/or verbal acts. The Plaintiffs further argue that the Special Referee erred in finding the Borges was not a credible witness.

In addition, the Plaintiffs argue that the Special Referee erred in not allowing Global to present their non-party witnesses. Specifically, the Plaintiffs argue that the Special Referee erred in excluding the following non-party witnesses: Saige Rivers, Euclides Pitta, and Fernando Mendes. The Plaintiffs

further argue that the Special Referee erroneously excluded some of the evidence that the Plaintiffs introduced at the hearing without allowing Plaintiffs the opportunity to respond to the Special Referee's concerns as to said evidence.

The Plaintiffs argue that based upon the submitted evidence and arguments presented at the hearing, Plaintiffs established that the Court has long-arm jurisdiction over Banif and that the Special Referee erroneously reached the opposite conclusion. Specifically, Plaintiffs argue that FINAB is Banif's agent for purposes of long-arm jurisdiction and that Banif solicited business from Global NY through FINAB.

Finally, Plaintiffs argue that if the Court is not willing to decide whether it has long-arm jurisdiction over Banif based upon the current record, the Court should reopen the hearing and direct the Special Referee to consider the spoliation issue, hear testimony from Global's additional witnesses, and reconsider the issue of long-arm jurisdiction.

In opposition to the Plaintiffs' spoliation arguments and in support of its own cross-motion to confirm the Special Referee's report and recommendation, Banif argues that the Plaintiffs failed to submit any admissible evidence at the hearing to establish that Banif solicited Global NY to open up a bank account with Banif. Banif argues that Borges testified that she was not in Global's New York office due to illness in 2006 and 2007, which Banif argues would have made it impossible for Banif to solicit her in New York for seven consecutive years starting in 2002, as alleged by the Plaintiffs. Banif further argues that the only evidence of said alleged solicitation comes from Borges' testimony. Banif argues that the Special Referee correctly excluded portions of Borges' testimony as hearsay and that the Plaintiffs have failed to establish that said portions of Borges' testimony were admissible as admissions and/or verbal acts. Banif further argues that the Special Referee correctly found that Borges did not provide credible testimony as to Banif's alleged solicitation.

Banif further argues that the Special Referee correctly found that solicitation of business alone is insufficient to establish long-arm jurisdiction, and that Banif did not engage in "purposeful activities" in New York sufficient to establish long-arm jurisdiction. Banif further argues that even assuming arguendo that Banif had solicited Global to open an account and that said solicitation constituted "transacting business', Plaintiffs still failed to establish that there is a substantial nexus between the underlying claim and Banif's alleged transaction of business in New York.

Finally, Banif argues that Plaintiffs failed to establish at the hearing that Banif transacted business with Global through FINAB and/or that Banif profited from said business. Banif further argues that Plaintiffs also failed to establish a nexus between any actions by FINAB that should be attributed to Banif.

Parties' oral argument before the Court on February 8, 2017

On February 8, 2017, the Parties appeared before this Court for oral argument. Plaintiffs reiterated their arguments that the Special Referee erred in not addressing the Plaintiffs' spoliation arguments, that a determination of the Plaintiffs' spoliation arguments was essential to determine the issue of long-arm jurisdiction, and that even assuming that this Court were to determine that the Plaintiffs' spoliation arguments have no bearing upon the issue of long-arm jurisdiction, the Special Referee still erred in determining that the Court does not have long-arm jurisdiction over Banif. Plaintiffs' counsel also reiterated that this Court must either decide the issue of spoliation as it pertains to long-arm jurisdiction or re-open the hearing before the Special Referee and direct the Special Referee to consider the issue of spoliation.

On the issue of spoliation, Plaintiffs argued that there is significant evidence to establish that Banif had notice that Plaintiffs were commencing an action against Banif; that Banif had practical control over certain emails contained within the FINAB email servers; and that after receiving notice that the Plaintiffs were commencing an action against Banif, Banif failed to preserve the emails held by FINAB. The Plaintiffs argued at oral argument in sum and substance that the FINAB emails that Banif

failed to preserve would have further established that this Court has long-arm jurisdiction over Banif. Plaintiffs argued that said emails would have further established that Banif solicited business from Global within the State of New York and gone towards establishing that Lopes had a bank account with Banif made up of illegally obtained Global funds.

Plaintiffs reiterated their argument that in February of 2010, Borges sent an email to Banif indicating in sum and substance that the Plaintiffs had commenced an action against Banif. Plaintiffs further argued that said email was sufficient to give Banif a "reasonable belief" that the Plaintiffs had or were going to commence the underlying action against Banif, which in turn created a duty on the part of Banif to preserve materials that were relevant to the underlying action. Plaintiffs further argued that upon receiving said notice, Banif did not take the necessary steps to preserve said materials, such as sending out a litigation hold notice, identifying the appropriate custodians of electronic records and/or stopping the deletion of the relevant records.

Plaintiffs further argued that Banif exercised "practical control" over the email records held in FINAB's email servers, and therefore Banif had a duty to preserve said email records. In support of their "practical control" argument, Plaintiffs argued that Banif was the primary shareholder in FINAB when Banif received notice of the underlying lawsuit and that Banif and FINAB shared common employees. Plaintiffs also referred to two emails which they argue are sufficient to establish that Banif had "practical control" over FINAB. Plaintiffs emphasized at oral argument that the issue of Banif's duty to preserve the emails contained within the FINAB email server hinged upon the question of whether or not Banif exercised "practical control" over FINAB, not the issue of whether or not Banif and FINAB were one and the same entity. Plaintiffs further argued that Banif simply had to request documents from FINAB in order to obtain said documents.

Plaintiffs acknowledged at oral argument that to their knowledge Banif did not have its own email server and that Plaintiffs have not seen a single email off of a Banif server. However, the Plaintiffs argue that they were able to recover two emails that indicated that were from the FINAB

server. The Plaintiffs further argue that, at the hearing before the Special Referee, Plaintiffs submitted emails sent by Banif employees using the FINAB server. Based upon these emails, the Plaintiffs argue that Banif made its email communications through the FINAB email server, and therefore Banif had practical control over the emails in the FINAB email server.

The Plaintiffs further acknowledged at oral argument that Banif divested itself of its interest in FINAB in July of 2010 and that the Plaintiffs did not serve their document demands upon Banif until after Banif had so divested its interests in FINAB. However, the Plaintiffs argue that Banif had a duty to preserve the emails in FINAB's emails server as of February 2010, when Borges sent the email notifying Banif of the underlying action. Plaintiffs further clarified that their "main argument" was that "for the three to four month period when they [Banif] owned the majority of the stock in this company, they [Banif] had a duty under *Voom* [*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 44 (1st Dept 2012)] to gather up whatever they had practical control of."(February 8, 2017 oral argument at 30: 15-19).

The Plaintiffs further acknowledged at oral argument that they had previously presented their spoliation arguments before Justice Singh in support of Plaintiffs' motion for a commission to take certain depositions (mot seq 005) and that Justice Singh had denied said motion after considering the Plaintiffs' spoliation arguments. However, the Plaintiffs argue that Justice Singh's determination was limited to the issue of discovery and as such is not binding upon this Court as the "law of the case". The Plaintiffs further argue that although Justice Singh denied their discovery motion, he did not specifically indicate that he was denying Plaintiffs' discovery motion on the basis that their spoliation argument was without merit.

In opposition to the Plaintiffs' argument on the issue of spoliation, Banif argued that Justice Singh clearly denied the Plaintiffs' motion for a commission to conduct depositions (mot seq 005) on the basis that the Plaintiffs' spoliation arguments were without merit. Banif argued that the Plaintiffs specifically sought the depositions of Alfonso Finocchiaro and Valdemar Lopes in support of the

Plaintiffs' spoliation argument. Banif further argued that had Justice Singh found said spoliation argument to be credible, he would have granted Plaintiffs' motion. Banif further argued that the Plaintiffs are incorrect in arguing that determinations on discovery motions can never constitute the "law of the case". Banif argued that based upon the case law, the "law of the case" doctrine does not apply to discretionary case management decisions made in the course of discovery. Banif argued in sum and substance that Justice Singh's denial of Plaintiffs' discovery motion requesting a commission to take depositions of Alfonso Finocchiaro and Valdemar Lopes was based upon Justice Singh's substantive determination that the Plaintiffs' spoliation arguments lacked merit. Therefore, Banif argued that Justice Singh's substantive determination does constitute the law of the case regardless of the fact that he made said determination within the context of denying a discovery motion.

Banif further argued that the Plaintiffs have failed to establish that Banif received sufficient notice of the underlying action in February 2010 to trigger any duty on the part of Banif to preserve any documents at said time. Banif argued that it is a foreign corporation with no presence in New York, and that the email referred to by the Plaintiffs does not constitute notice sufficient to notify Banif that the Plaintiffs were intending to commence the underlying action against Banif. Specifically, Banif argues that the email it received from Borges in the beginning of 2010 was insufficient to give rise to any duty on the part of Banif to preserve materials in expectation that the Plaintiffs were commencing a legal action against Banif in the State of New York. Banif further argues that it did not receive notice of the Plaintiffs' instant lawsuit until some time towards the end of the summer/early fall of 2010, when the Plaintiffs served Banif with the summons and complaint in August of 2010. Banif argues that by the time Banif received notice of the underlying action, Banif had already divested itself of its interest in FINAB (by sales contract dated July 20, 2010). Banif argued in sum and substance that Borges' February 2010 email cannot constitute notice for the purpose of triggering Banif's duty to preserve, since Borges' letter was unspecific and Banif is a foreign corporation with no presence in New York. Banif argues that a foreign corporation with no presence in New York cannot be expected to view Borges'

unspecific email as an indication that the Plaintiffs were commencing a legal action against Banif in New York and/or that Banif had a duty to preserve potential evidence. Banif further argued that there is no basis in the relevant case law to conclude that unspecific emails sent to a foreign corporation, with no presence in New York, constitute sufficient notice (giving rise to a duty to preserve potential evidence). Banif further argued that the Plaintiffs have no basis for their assertions that once Banif was served with the summons and complaint that Banif did nothing to preserve potential evidence.

Banif further argued that it did not have "practical control" over FINAB as argued by the Plaintiffs. Banif specifically refers to Ricardo Mendes' testimony at the hearing (before the Special Referee) that Ricardo Mendes requested FINAB documents from Fernando Mendes and received one document. Banif argued that Ricardo Mendes specifically testified that Banif requested other documents from FINAB, and that Fernando Mendes, acting on behalf of FINAB, refused to provide Banif's attorneys with any further requested documents. Banif argued that FINAB's refusal to provide Banif with the requested documents disproves the Plaintiffs' argument that Banif exercised "practical control" over the documents being sought and/or FINAB.[5]

Banif further argued that the Plaintiffs have failed to show that the allegedly "destroyed" evidence would support Plaintiffs' claims against Banif in the underlying action. Banif argued that the Plaintiffs' underlying claims against Banif center upon the allegation that Banif was holding accounts made up of funds that Oscar Lopes illegally procured from Global. Banif argued that the emails that the Plaintiffs point to as proof of the existence of other "destroyed" emails do not in any way support the Plaintiffs' claims against Banif. Specifically, Banif argued that in said emails, Fernando Mendes indicates to Borges that she did not have an account with Banif and that Borges only has an account receivable based upon Global's relationship with FINAB. Banif further argues that there nothing in the emails relating to embezzled money or secret accounts being held by Banif. As such, Banif argued that

[5] Banif further argued at oral argument that had the issue of spoliation been addressed at the hearing, Banif was prepared to produce emails from Fernando Mendes, speaking for FINAB, denying Banif's request for additional documents. Said emails are not before this Court, and the Court did not consider the potential existence of said emails in rendering the instant decision.

the Plaintiffs have failed to establish that any of the allegedly "destroyed" emails would have been beneficial to their claim against Banif.

Banif further argued in sum and substance that there is nothing linking FINAB's choice to cancel its email account at ITX to any action taken by Banif. Specifically, Banif argued that FINAB requested that ITX terminate FINAB's email account at some point prior to January 2, 2012 and that as of January 14, 2012, ITX indicated that it had terminated FINAB's email account. Banif argues that it is undisputed that as of January 2012, Banif had already divested itself of any interest in FINAB. As such, Banif argues that there is no basis for Plaintiffs' argument that Banif was in any way responsible for FINAB canceling FINAB's email account with ITX or that Banif could have prevented FINAB from canceling said email account. In addition, Banif argues that ITX indicated that it had terminated FINAB's email account as of January 14, 2012, which was well before June or August 2012, when Global claims that Banif took steps to destroy evidence in response to Global's litigation activities.

Banif further argued that there is no proof that Banif used the FINAB email account. Banif argued that the emails from the FINAB account only addressed FINAB business, and that Fernando Mendes indicated in his email exchange with Borges that she does not have a bank account with Banif. Banif further argued that the reason why it did not produce very many emails relating to Global is because Banif had no relationship with Global, held no account for Global, and had no communications with Global. As such, there were no relevant emails for Banif to produce in response to Plaintiffs' discovery requests.

On the issue of long-arm jurisdiction, separate and apart from the issue of spoliation, Plaintiffs argued at oral argument that the Special Referee erred in determining that this Court does not have long-arm jurisdiction over Banif. Specifically, the Plaintiffs argued that the Special Referee erred in excluding portions of Borges' hearing testimony as hearsay, that she erred in finding Borges' testimony not to be credible, and that she also erred in determining that certain items of Plaintiffs' submitted evidence were not credible/reliable. The Plaintiffs further argued that the Special Referee erred in not

allowing the Plaintiffs to produce three additional non-party witnesses to testify at the hearing, and that said error was a violation of the Plaintiffs' due process rights. Plaintiffs argued that had the Special Referee considered all of the excluded evidence, and even based solely upon the evidence that was presented at the hearing, there was enough evidence to establish that this Court has long-arm jurisdiction over Banif.

Plaintiffs acknowledged that one of their potential witnesses, Fernando Mendes, was not under their control at the time of the hearing and that Justice Singh had referred the underlying action for a hearing before a Special Referee in 2011 and 2015. However, the Plaintiffs argued that the reason Fernando Mendes refused to appear to testify at the hearing before the Special Referee was because Mendes was, in effect, threatened not to testify. Plaintiffs submitted an unauthenticated email dated August 11, 2016, purportedly by Fernando Mendes, indicating that unidentified individuals threatened to reinstate criminal proceedings against Mendes if he testified. However, Plaintiffs acknowledged that they did not have a sworn affidavit by Fernando Mendes.

On the issue of Banif's alleged solicitation of business in the State of New York (through FINAB as alleged by the Plaintiffs), the Plaintiffs reiterated the arguments they presented before the Special Referee. Specifically, Plaintiffs argued that they established at the hearing that Valdemar Lopes and Fernandez Mendes came to New York to solicit business from Borges on behalf of Banif.

The Plaintiffs further argued that the Special Referee excluded evidence and portions of Borges' testimony as hearsay. However, Plaintiffs argued that said evidence and testimony were admissible as "verbal acts" and/or party admissions.

Analysis

The Special Referee specifically did not address the Plaintiffs' spoliation arguments at the hearing

The Court recognizes that the Special Referee specifically indicated that she would not consider the Plaintiffs' spoliation arguments at the long-arm jurisdiction hearing. The Special Referee's indication that she would not address the Plaintiffs' spoliation arguments was consistent with this Court's prior order that the Plaintiffs' spoliation motion would be stayed pending a hearing on the issue of long-arm jurisdiction. As previously stated in the instant decision, the Plaintiffs failed to inform the Court, prior to the hearing, that the Plaintiffs' arguments on the issue of spoliation also directly related to the question of long-arm jurisdiction.

Based upon its review of the Special Referee's report, the transcript of the four day hearing, the Parties submitted post hearing papers, the Special Referee's interim report and the Parties' submitted papers on the Special Referee's interim report, the Court finds that the Special Referee conducted a thorough and complete hearing on the issue of the long-arm jurisdiction within the parameters set forth by this Court, and by Justice Singh in his prior order, which did not include the Plaintiffs' spoliation arguments. However, the Plaintiffs now argue that their spoliation arguments directly relate to the issue of personal jurisdiction, and the Court will now address said spoliation arguments on their merits in order to determine whether or not they are relevant to the issue of long-arm jurisdiction.

The Court will decide the Plaintiffs' spoliation arguments upon their merits as part of Plaintiffs' motion for the Court to reject the Special Referee's final report and recommendation.

As previously stated in the instant decision, by order dated January 19, 2016 this Court removed the Plaintiffs' motion for spoliation sanctions (mot seq 006) from the motion calender for failure to obey the Court's rules as to motion practice. The Plaintiffs have now had the opportunity to present substantive arguments on the issue of spoliation before this Court in both their submitted papers and at oral argument on their instant motion for the Court to reject the Special Referee's final report and recommendation. The Court allowed the Plaintiffs to reorganize and resubmit their spoliation arguments and their arguments for the Court to reject the Special Referee's final report and recommendation

(December 21, 2016 Transcript pp 36-41). The Court also gave Banif the opportunity to respond to the Plaintiffs' resubmitted arguments. The Plaintiffs spoliation arguments as presented before this Court in the instant motion for the Court to reject the Special Referee's final report and recommendation are the same arguments that the Plaintiffs made in their prior spoliation motion (mot seq 006).

As such, the Court will decide the Plaintiffs' spoliation arguments upon their merits in determining the Plaintiffs' motion for the Court to reject the Special Referee's final report and recommendation and the Defendant's cross-motion to confirm said final report and recommendation (mot seq 009).

Plaintiffs argue that Banif "spoliated" evidence and that the appropriate sanction would be a finding of long-arm jurisdiction over Banif as a mater of law.

Plaintiffs argue in their submitted papers and at oral argument that the missing emails spoliated by Banif would have gone towards establishing Plaintiffs' long-arm jurisdiction argument. As such, the Plaintiffs argue that the Court should find that Banif spoliated the missing emails and that the Court should sanction Banif by finding that this Court has long-arm JJurisdiction over Banif.

New York Courts "possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action". (*Ortega v. City of New York*, 9 NY3d 69, 76 (NY 2007)).

The questions of whether Banif spoliated evidence and the appropriate sanction for said alleged spoliation are separate issues. Should this Court determine that Banif is subject to sanctions for spoliation, this Court is not confined to imposing any one type of sanction. Even assuming arguendo that the Plaintiffs are able to establish that Banif spoliated evidence, unless Plaintiffs can also establish a basis for this Court to conclude that there is strong possibility that said spoliated evidence would have spoken to the issue of long-arm jurisdiction, this Court will not sanction Banif by finding that this Court has long-arm jurisdiction over Banif as a matter of law. If Plaintiffs can establish that Banif spoliated

evidence, but are unable to establish any basis for this Court to believe that the spoliated evidence would have spoken to the issue of long-arm jurisdiction, this Court is free to consider other potential sanctions more appropriate to the underlying action than a finding that it has long-arm jurisdiction over Banif.

Justice Singh's prior determination on the Plaintiffs' motions for a committee to take depositions of Alfonso Finocchiaro and Valdemar Lopes does not specifically indicate that the Plaintiffs' spoliation arguments bore no relevance to the issue of long-arm jurisdiction and as such, the Plaintiffs' spoliation arguments have not been previously determined so as to constitute the "law of the case".

"[T]he doctrine of law of the case may be applied 'where a court directly passes upon an issue which is necessarily involved in the final determination on the merits'. However, 'its application is exclusively to questions of law', and the doctrine does not apply to rulings, such as case management decisions, which are based on the discretion of the court" (*Brothers v. Bunkoff Gen. Contrs.*, 296 A.D.2d 764, 765 (3rd Dept 2002) [internal citations omitted]; *see also Allstate Ins. Co. v. Buziashvili*, 71 AD3d 571, 572 (1st Dept 2010)).

Upon review of the Parties' submitted papers on the Plaintiffs' motion for a commission to take discovery of Alfonso Finocchiaro and Valdemar Lopes (mot seq 005), the Court finds that the Plaintiffs previously presented their spoliation arguments before Justice Singh in support of said motion. The Plaintiffs specifically state in their affirmation in support of motion seq 005 that they are seeking discovery of Alfonso Finocchiaro and Valdemar Lopes for three reasons:

- "First, Global seeks to take discovery in furtherance of its argument that FINAB acted as Banif's agent"
- "Second, Global seeks to take discovery with respect to business that Banif solicited from Global, on its own or through FINAB" and
- "Third, Global seeks to take discovery relating to Banif's failure to preserve documents" (Plaintiffs' affirmation in support of its motion, mot seq 005)

Plaintiffs specifically state in their affirmation that "Global seeks to take discovery from Valdemar Lopes and Finocchiaro with respect to Banif's efforts to preserve documents" (Plaintiffs' affirmation in support of its motion, mot seq 005).

In addition, the Plaintiffs' papers submitted in reply (to Banif's opposition to their motion) reiterate Plaintiffs' spoliation argument in detail as a basis for arguing that Justice Singh should allow the Plaintiffs to take discovery of Valdemar Lopes and Alphonso Finocchiaro. The Plaintiffs also reiterated in their reply papers that they sought discovery of Valdemar Lopes and Alphonso Finocchiaro for the purpose of supporting their argument that FINAB acted as Banif's agent and solicited business from Global on behalf of Banif. Plaintiffs indicated in their reply papers that they sought "to adduce further evidence that FINAB was the agent of Banif in order to show that, even if Mendes acted for FINAB, FINAB acted for Banif, and thus the Court may exercise jurisdiction over Banif based on the acts of FINAB" (Plaintiffs' reply affirmation, mot seq 005).

The Court recognizes that Justice Singh denied Plaintiffs' motion and stated that "the depositions of Valdemar Lopes and Alphonso Finocchiaro are neither material or necessary to whether long-arm jurisdiction can be exercised over Banif". This strongly implies that Justice Singh determined that allowing discovery of Valdemar Lopes and Alphonso Finocchiaro would have no bearing upon either the Plaintiffs' spoliation arguments or upon the question of long-arm jurisdiction. However, the fact remains that Justice Singh made no specific reference to the Plaintiffs' spoliation argument in his written decision denying the Plaintiffs' discovery motion nor did he specifically state that the issue of spoliation had no bearing upon the issue of long-arm jurisdiction. Further, neither the Plaintiffs nor Banif have submitted to the Court a copy of any oral argument held before Justice Singh for this Court to determine the specific issues presented before Justice Singh and/or his specific determinations as to said issues. In the absence of any further proof as to the arguments that the Parties presented before Justice Singh on motion seq 005, the Court cannot conclude that Justice Singh made a determination as to the relevance of Plaintiffs' spoliation argument as a whole to the question of whether or not this Court has long-arm jurisdiction over Banif.

The Court finds that there is an insufficient basis to conclude that the Plaintiffs' spoliation arguments have been previously determined so as to constituted the "law of the case". As such, the Court will determine the Plaintiffs' spoliation arguments upon the merits.

Elements of spoliation

"New York's common-law doctrine of spoliation refers to 'willful, deliberate, or contumacious destruction of evidence.' Sanctions for spoliation have also been imposed where the evidence was destroyed negligently rather than willfully. Spoliation occurs 'when a party destroys key evidence before the other side can examine it.'" (*Rogers v Affinia Dumont Hotel*, 2017 NY Slip Op 30259U (NY Sup Ct, NY Cnty Feb. 8, 2017) *citing Strong v City of New York*, 112 AD3d 15 (1st Dept 2013); *Kirkland v. New York City Hous. Auth.*, 236 AD2d 170 (1st Dept 1997)). "Under the common-law doctrine of spoliation, a party may be sanctioned where it negligently loses or intentionally destroys key evidence. The party requesting sanctions for spoliation has the burden of demonstrating that a litigant intentionally or negligently disposed of critical evidence, and fatally compromised its ability to prove its claim or defense" (*Gaoming You v Rahmouni*, 147 AD3d 729, 730 (2nd Dept 2017) (internal citations omitted)).

A party seeking sanctions under CPLR 3126 based on spoliation of evidence must demonstrate that "(1) that the party with control over the evidence had an obligation to preserve it at the time it was destroyed; (2) that the records were destroyed with a culpable state of mind'; and finally, (3) that the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense." (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 44 (1st Dept 2012) *citing Zubulake v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003; *see also Duluc v AC & L Food Corp.*, 119 AD3d 450 (1st Dept 2014)). As indicated in *Voom*, a Party seeking sanctions for spoliation must establish all of three of these elements.

Further "[a] 'culpable state of mind' for purposes of a spoliation sanction includes ordinary negligence" and "[f]ailures which support a finding of gross negligence, when the duty to preserve electronic data has been triggered, include: (1) the failure to issue a written litigation hold, when appropriate; (2) the failure to identify all of the key players and to ensure that their electronic and other records are preserved; and (3) the failure to cease the deletion of e-mail" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, *supra* at 45 *citing Treppel v. Biovail Corp.*, 249 FRD 111 (SDNY 2008); *Pension Comm. of the Univ. of Montreal Pension Plan v. Banc of Am. Sec., LLC*, 685 F. Supp. 2d 456 (SDNY 2010)).

Borges' February 22, 2010 email was insufficient to put Banif on notice that Global was commencing a legal action against Banif in the state of New York, and so the earliest that Banif could have had notice of the underlying action was in August of 2010.

"Once a party reasonably anticipates litigation, it must suspend its routine document retention/destruction policy and put in place a 'litigation hold' to ensure the preservation of relevant documents. [This] ... standard is harmonious with New York precedent in the traditional discovery context, and provides litigants with sufficient certainty as to the nature of their obligations in the electronic discovery context and when those obligations are triggered." *(VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 36 (1st Dept 2012) [referring to *Zubulake v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003)]). "A reasonable anticipation of litigation arises when an organization is on notice of a credible probability that it will become involved in litigation, seriously contemplates initiating litigation, or when it takes specific actions to commence litigation" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 43 (1st Dept 2012) *quoting Zubulake v. UBS Warburg LLC*, 220 FRD 212, 269 (SDNY 2003)).

However, "[t]he burden of forcing a party to preserve when it has no notice of an impending lawsuit, and the difficulty of assessing damages militate against establishing a cause of action for spoliation... where there was no duty, court order, contract or special relationship." *Metlife Auto & Home v. Joe Basil Chevrolet, Inc.*, 1 N.Y.3d 478, 484 (2004)). "[C]ourts are reluctant to impose them

[spoliation sanctions] when a party is not yet on notice of a pending claim, and the evidence was discarded in "good faith and pursuant to its normal business practices'"" (*Steuhl v Home Therapy Equip., Inc.*, 23 AD3d 825, 826-827 (3d Dept 2005) quoting *Conderman v Rochester Gas & Elec. Corp.*, 262 AD2d 1068, 1070, 693 NYS2d 787 (1999)).

The instant motion presents a unique question on the issue of what constitutes "notice of impending lawsuit" upon a foreign company sufficient to trigger a potential party's duty to preserve evidence. The Plaintiffs argue that Banif had a duty to preserve the alleged emails as of February 22, 2010, when Borges sent an email to Fernando Mendes, Alfonso Finocchiaro, Banif and FINAB indicating that a legal action was being commenced against Banif. Plaintiffs argue in sum and substance that said email provided Banif with sufficient notice of an impending lawsuit so as to trigger Banif's duty to preserve potential evidence. Plaintiffs did not argue in their submitted papers nor at oral argument that Banif's duty to preserve evidence stemmed from or was triggered by anything other than said email.

Borges' February 22, 2010 email to Fernando Mendes Alfonso Finocchiaro, Banif and FINAB reads in relevant part as follows:

> Dear Fernando,
>
> It is a pleasure to know that all e-mails sent by myself have been forward directly to your lawyer. As you have been aware of Global Access Investment Advisor and Global Access Consultoria Financeira Ltda has began in a Civil court a lawsuit against Oscar Lopes, Pali Capital and Banif Cayman.
>
> As you can see I have just told the truth: "Series of thefts of funds and diversions of business opportunities by defendant Oscar Lopes. Lopes accomplished his schemes with the knowing and substantial assistance of defendants Pali and Banif Cayman Ltd. "

Upon a plain reading, the Court finds that said email clearly informed Banif that Global had or was about to commence a legal action against Banif. However, the Court cannot ignore the fact that in the underlying action it is undisputed that Banif is a corporation organized under the laws of the Cayman Islands with its principal place of business in the Cayman Islands. Further, although Borges' email

informs Banif that Global has begun a lawsuit against Banif "in a Civil court", said email does not specifically indicate that Global commenced the lawsuit in New York State. In addition, said email does not specifically direct Banif to preserve any documents, emails, or evidence of any kind as relevant to the pending lawsuit. Further, the Plaintiffs do not allege that Banif had an extensive presence in New York or even that Banif solicited business as a general matter in New York.[6] As such, the question arises as to whether or not Borges' email was sufficient to trigger a duty on the part of a foreign corporation, located outside of the United States, to preserve potential evidence in accordance with the specific statutory discovery requirements of New York State.

Upon review of the case law, this Court can find no prior decisions that speak definitively on the issue of whether or not such an email would constitute sufficient notice of a pending litigation to trigger a duty to preserve upon a foreign corporation located outside of the United States. All of the cases reviewed by this Court on the issue of notice sufficient to trigger a duty to preserve potential evidence addressed companies and corporations that were incorporated within New York and/or were physically located in New York. As such, the Court must determine this question as a matter of first impression.

There is no general constitutional right of discovery in the context of criminal cases (*See Miller v. Schwartz*, 72 NY2d 869 (1988); *Matter of Hoovler v De Rosa*, 143 AD3d 897 (2d Dept 2016)), and it can be reasonably concluded that no such "general constitutional right of discovery" exists in the context of civil actions between private entities. As such, the scope and extent of disclosure in a civil case is defined according to the rules laid out in the numerous sections of Article 31 of the CPLR. The issue of spoliation falls within the scope of discovery, specifically CPLR 3126.

The nature of "discovery", including the duty to preserve evidence upon notice of a pending action, is defined by New York State statutes (Article 31 of the CPLR) and the New York case law specifically addressing discovery issues. Further, it is undisputed that Banif is a foreign corporation

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[6] The Plaintiffs' central argument for long-arm jurisdiction over Banif is that Banif solicited business from Global in New York, not that Banif solicited business in general from individuals located in the New York or that Banif had a significant business presence within New York.

organized under the laws of the Cayman Islands with it principal place of business in the Cayman Islands. In addition, there is nothing to suggest that Banif generally solicited business in New York, conducted business in New York, or had a presence in New York. As such, the Court finds that there is no basis to conclude that Banif had any reason to believe that it would ever be subject to the discovery laws of the state of New York, had knowledge of or should have had knowledge of the discovery laws of the state of New York.

Although Borges' email notified Banif that Global was commencing a legal action against Banif "in a Civil court", there was no indication that the action would be brought in New York. Further, said email made no reference to any duty on the part of Banif to preserve anything in anticipation of a pending legal action. In addition, Borges' February 10, 2010 email was not a direct communication by Global or Global's attorneys to Banif, and the email specifically indicates that both Global NY and Global Brazil were bringing a legal action against Banif. As such, Borges' letter was insufficient to notify Banif that Global was commencing a legal action against Banif in the state of New York. In point of fact, it would have been more reasonable for Banif to conclude, based upon Borges' email, that Global was commencing an action against Banif in the Cayman Islands, where Banif was located, incorporated and conducted its business. The Court finds that Borges' February 10, 2010 email did not notify Banif that Global was bringing an action against them in New York, did not indicate that Banif would be subject to the discovery requirements for actions brought within New York, and did not suggest that Banif had any obligation to preserve potential evidence of any kind. Given that Banif is a foreign corporation located outside of the United States, this Court finds that Borges' email was insufficient to trigger Banif's duty to preserve potential evidence in expectation of a pending ligation in New York State.

Upon review of the submitted papers and the record, the Court finds that the earliest date that Banif could have been put on notice of the pending litigation in New York State for the purpose of the Plaintiffs' spoliation argument was August 1, 2010.[7] As such, the Court finds that Banif had no duty to preserve any potential evidence until at earliest August 1, 2010, by which time Banif had already divested itself of its interests in FINAB.

Plaintiffs have failed to establish that Banif exercised practical control over FINAB as to alleged "missing"FINAB e-mails on and around August 1, 2010

As previously stated in the instant decision, the Plaintiffs specifically indicated at oral argument that their "main argument" was that "for the three to four month period when they [Banif] owned the majority of the stock in this company, they [Banif] had a duty under Voom [*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 44 (1st Dept 2012)] to gather up whatever they had practical control of" from the time Banif received Borges' email (February 8, 2017 oral argument 30: 15-19). As such, this Court's determination that Banif had no duty to preserve any potential evidence until at earliest August 1, 2010, after Banif had already divested itself of its interests in FINAB, negates the Plaintiffs' "main argument" that Banif had a duty to preserve the missing FINAB emails during the time that Banif held an ownership interest in FINAB. However, in the interest of fully addressing the spoliation issue, this Court will also address the question of whether or not Banif had any duty to preserve the missing FINAB emails at any point on or after August 1, 2010 despite the fact that Banif had already divested its interest in FINAB by that point.

"As a general matter, sanctions for destruction of evidence are applied against the entity responsible for the destruction of the evidence." (*Platinum Equity Advisors, LLC v SDI, Inc.*, 51 Misc. 3d 1230(A) (NY Sup Ct NY Cnty 2016) *citing O'Reilly v. Yavorskiy*, 300 AD2d 456 (2d Dept 2002); *Hartford Fire Ins. Co. v. Regenerative Bldg. Constr., Inc.*, 271 AD2d 862 (3rd Dept 2000); *see also 272*

[7] Banif indicated at oral argument before this Court that it was served with the summons and complaint in August of 2010. The Plaintiffs did not oppose Banif on this point at oral argument, nor did any of Plaintiffs' submitted motions papers on any of the motions submitted before this Court address the issue of when they effected service of the summons and complaint upon Banif. Based upon the submitted papers and arguments presented at oral argument, the Court will treat August 1, 2010 as the earliest date that Banif could have received notice of the underlying action being brought in New York.

Realty Holding Corp. v Madison, 2016 NY Slip Op 32577(U), 14 (NY Sup Ct NY Cnty 2016)). The First Department has stated that one company may have "practical control" over another company during the relevant period of time (i.e. when the controlling company was aware of potential litigation) so as to trigger a duty in the controlling company to prevent the "controlled" company from destroying potential evidence (*See Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 A.D.3d 428, 429 (1st Dept 2014))[8]

As such, August 1, 2010 marks the beginning of the period that the Court must evaluate in order to determine whether or not Banif exercised practical control over FINAB. Any submitted proof as to Banif's alleged control over FINAB's emails that predate August 1, 2010 are irrelevant to the issue of whether or not Banif exercised "practical control" over FINAB's emails on and after August 1, 2010.

Upon review of the Parties' submitted papers and submitted evidence, the Court finds that the Plaintiffs have failed to meet their burden to show that Banif exercised practical control over FINAB from August 1, 2010 [the presumed earliest date of service of the summons and complaint] so as to place a duty upon Banif to either maintain FINAB's emails or prevent FINAB from destroying said emails. It is undisputed that, by sales contract dated July 30, 2010, Banif formally divested itself of all of its stock interests in FINAB. This divestment of interest reflects that a significant change occurred in the relationship between Banif and FINAB, prior to Banif receiving notice that Plaintiffs were commencing a legal action against Banif in the state of New York. The fact that Banif divested itself of interest in FINAB prior to August 1, 2010 is not determinative on the question of whether or not Banif still exercised "practical control" over FINAB from August 1, 2010. However, divestiture of interest is a significant factor that the Court will consider in determining whether or not Banif exercised "practical control" over FINAB when Banif received notice of the pending litigation. Further, the majority of the

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[8] While the First Department's decision in *Pegasus Aviation I* was reversed by the Court of Appeals, the reversal was on other grounds and the Court left the control analysis intact. *See Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 26 NY3d 543, 553-54 (2015) ["On this record, we see no reason to disturb the unanimous finding of the lower courts that the MP defendants had sufficient control over VarigLog to trigger a duty on its part to preserve the ESI."].

proof that Plaintiffs submit in support of their argument that Banif exercised practical control over FINAB significantly predates August 1, 2010 (*See* e.g. Gordon Aff., Ex. H, mot seq 006 [Emails that were sent in May of 2008 and May of 2009]; Gordon Aff., Ex. Q, mot seq 006 [two Cayman Island Land Registers opened on October 18, 1999 and July 12, 2002 respectively, showing that Banif held a proprietorship over block and parcel no. OPV 45H18 as of September 17, 1999 and that FINAB held a held a proprietorship over that same block and parcel as of July 3, 2002]; Gordon Aff., Ex. T, mot seq 006 [emails sent in March of 2010, and an attached email sent in February of 2008]; Gordon Aff., Ex. U, mot seq 006 [an email sent in October 26, 2005]; Gordon Aff., Ex. V, mot seq 006 [an attached email sent in April 2007]).

The Plaintiffs also submit a copy of what purports to be the "About Us" section of the FINAB website dated July 10, 2013 (Gordon Aff., Ex. W, mot seq 006). Although this section indicates that "Finab was created in 1999 by BANIF", it also states that "[t]oday Finab operates independent of BANIF". Assuming the truth of said representation, the fact that Banif founded FINAB in 1999 does not necessarily imply that Banif held "practical control" eleven years later on or around August 1, 2010.

Plaintiffs also refer to Banif's supplemental response to Plaintiffs' first set of interrogatories, specifically Banif's supplemental response to Plaintiffs' interrogatory number 16 (Gordon Aff., Ex. Q, mot seq 006). Plaintiffs' interrogatory number 16 requests that Banif "[i]dentify all officers, directors and employees of Banif, and all office addresses, phone number and fax numbers used by Banif, since from 1999. Banif responds to said interrogatory stating in substantive part as follows:

> "[I]t [Banif] is producing herewith a document (BANIF 000044) identifying Banif's officers and directors from 2005 through July 2010, and documents (BANIF 000046, BANIF 000048) identifying Banif's address from 2005 through July 2010. Without waiving any objections, Banif further states that, from 2005 through July 2010, its employees (other than those listed on BANIF 00004) were Renato Dionisio and Fernando Mendes, that its telephone number was (345) 945 8060 and that its facsimile number was (345) 938-8061"

(Gordon Aff., Ex. R, mot seq 006)

By its plain language, all of the information that Banif provided to Plaintiffs in response to Plaintiffs' interrogatory number 16 refers to information about Banif that pre-dated August 1, 2010. As

such, it does not go towards establishing whether or not Banif had practical control over FINAB on or after August 1, 2010, when Banif had already gone through and completed the process of divesting itself of its interests in FINAB.

In addition to Banif's supplemental response to interrogatories, the Plaintiffs also submit a printout of what purports to be a copy from the website caymandirectory.com (Gordon Aff., Ex. R, mot seq 006). This printout is dated 6/25/13 and indicates that FINAB's main phone number is (345) 945-8060, the same phone number that Banif indicated in response to Plaintiffs' interrogatory number 16 was Banif's phone number from 2005 through July 2010. Putting aside the fact that there is nothing to authenticate or confirm that the information provided on the website printout is in any way accurate, the Court reiterates that Banif's response to Plaintiffs' interrogatory number 16 only provided information about Banif as to the time period from 2005 through July 2010. As such, even read together with the unauthenticated website printout, there is nothing from Banif's response to Plaintiffs' interrogatory number 16 that speaks to the question of whether or not Banif exercised practical control over FINAB on or after August 1, 2010.

The only two items of proof submitted by the Plaintiffs that may speak to the issue of whether Banif exercised practical control over FINAB on or after August 1, 2010 are the October 3, 2014 affidavit of Fernando Mendes and the July 26, 2012 affidavit of Saige Stefan Rivers.[9] However, upon review, the Court does not find that these two affidavits are sufficient to establish that Banif exercised practical control over FINAB on or after August 1, 2010.

Mendes states in his October 3, 2014 affidavit that he worked for both Banif and FINAB during 2009 and until September 2010. He further states that he is familiar with how both Banif and FINAB maintained and preserved their documents and emails during that time period. Mendes states in sum and

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[9] The Court notes that the Plaintiffs also submitted an affidavit by Fernando Mendes dated February 21, 2012. Said affidavit does not speak directly to the issue of whether not Banif exercised "practical control" over FINAB nor does it speak to the issue of whether or not this Court has long arm jurisdiction over Banif. However, Mendes does indicate in said affidavit that "During my tenure with Banif, Global did have an account at Banif". The Plaintiffs submit said affidavit as part of their submitted papers, and as such the Court read said affidavit in determining the instant motions.

substance that Banif and FINAB maintained documents and records at their shared office space and that Banif and FINAB employees could access each other's offices, files and electronic records via a shared computer system. He further states that almost all FINAB clients maintained bank accounts at Banif, and it was very common for Banif and FINAB employees to access documents relating to a client account from the other entity. In particular, Mendes states in his affidavit that after Banif sold its majority interest in FINAB in July 2010, all said described arrangements remained unchanged.

The Court cannot ignore the fact that Mendes' representations in his October 3, 2014 affidavit directly contradict statements he made in a December 20, 2010 affidavit. Similarly, the Court cannot ignore the fact that Mendes made his December 20, 2010 affidavit on behalf of Banif's motion to dismiss the underlying action for lack of long-arm jurisdiction (mot seq 001), and that he made his October 3, 2014 affidavit on behalf of Plaintiffs' motion for spoliation sanctions against Banif (mot seq 006). Mendes specifically indicates in his December 20, 2010 affidavit that "I have never been to New York to conduct any Banif Cayman business, including to see clients and "I have never done any business development work on behalf of Banif Cayman in New York or elsewhere". However, in his October 3, 2014 affidavit he states that "My trips to New York had, as one of their primary purposes, promoting the business interests of Banif". In his December 20, 2010 affidavit Mendes stated that "FINAB has offices in the same building as Banif Cayman." but includes the following distinction "[h]owever, FINAB owns, by itself, office space in that building". In his October 3, 2014 affidavit, Mendes states that Banif and FINAB shared office space and that "this shared office had only one entrance and was maintained so that Banif and FINAB employees could access the other's offices and files". It is clear that Mendes' December 20, 2010 affidavit and his October 3, 2014 affidavit made adverse representations and implications. Mendes' December 20, 2010 affidavit suggests that Banif and FINAB are primarily separate entities, while his October 3, 2014 affidavit suggests that Banif and FINAB are more unified.

In addition, Mendes attaches with his October 3, 2014 affidavit a document that purports to be a ruling by the Grand Court of the Cayman Islands Criminal Side on Mendes' application to stop prosecution of a criminal case brought against him. Assuming the accuracy of said document, the "Relevant Chronology in relation to the application for a Stay" section of the ruling indicates that on February 10, 2011 Alfonso Fincchario, the CEO and primary shareholder of FINAB and main prosecution witness, made a criminal complaint against Mendes. The report further indicates that on February 11, 2011 Alfonso Fincchario suspended Mendes and that Mendes was arrested at the offices of FINAB. It further indicates that on February14, 2011, Mendes was dismissed from employment with FINAB.

Assuming the accuracy of the document, the Grand Court of the Cayman Islands stayed the prosecution of the criminal case and discharged Mendes as a Defendant. However, regardless of said outcome, between the time that Mendes prepared his contradictory affidavits, the CEO of FINAB made a criminal complaint against Mendes, Mendes was arrested at the FINAB offices and Mendes was fired from FINAB. The Court further notes that the purported ruling by the Grand Court of the Cayman Islands was presented to this Court for the first time as part of Mendes' affidavit in support of the Plaintiffs' spoliation motion (Gordon Aff., Ex. R, mot seq 006). As such, it can be reasonably assumed that Mendes has submitted said ruling as an accurate description of a criminal action that FINAB, in effect, caused to be commenced against him in February of 2011. Given that Mendes' October 3, 2014 affidavit directly contradicts his December 20, 2010 affidavit and that FINAB both fired and commenced a criminal action against Mendes in the Cayman Islands in February of 2011, the Court finds that there is significant reason to question the reliability of Mendes' October 3, 2014 affidavit.

Further, Saige Stefan Rivers' affidavit is insufficient to establish that Banif exercised practical control over FINAB on or after August 1, 2010. Rivers states that he was employed by FINAB from 2010 until February 2012. However, said affidavit does not speak to the specific question of whether or not Banif exercised practical control over FINAB on or after August 1, 2010. Rivers states that he was

employed by FINAB from 2010 until February 2012 and that he "personally saw and scanned records relating to Global's account at Banif". However, there is nothing in River's affidavit to indicate when he saw and scanned these things. Rivers' affidavit makes no reference to either the fact that Banif divested itself of its interests in FINAB in July of 2010, nor does Rivers specifically refer to the relationship between FINAB and Banif, to the extent that one existed, after Banif divested itself of its interest in FINAB.

Further, in light of the information in Mendes' affidavit, it is unclear whether Rivers' alleged observations have any relevance to the issue of spoliation as it relates to the underlying action. Rivers states in his affidavit that "a couple of weeks after Fernando Mendes dismissal, senior officers of finab, Banif Lisbon, Banif Miami and Banif Bahamas were at Finab offices and removed all Banif Hard Copy Records from the premises...". Based upon Mendes' affidavit, there is significant reason to believe that said "documents" were related to the Cayman Island criminal action against Mendes and not related to the allegedly "missing emails" that are the subject of the Plaintiffs' spoliation motion. At most, Rivers' statement that senior officers of FINAB and Banif removed records suggests that FINAB and Banif did have some sort of relationship as of Mendes' dismissal. However, in the absence of any other reliable proof as to FINAB and Banif's relationship on and after August 1, 2010, the Court does not find that Rivers' affidavit is sufficient to establish that Banif had "practical control" over FINAB for the purpose of determining the issue of spoliation.

Read in their entirety, the Court finds that the Plaintiffs' submitted proof and affidavits are insufficient to establish that Banif exercised "practical control" over FINAB on or after August 1, 2010.

Plaintiffs failed to show that Banif had practical control over FINAB's email accounts at the time FINAB made a request to ITX to terminate said accounts

As previously stated, the first element that a party seeking sanctions under Section 3126 based on spoliation of evidence must demonstrate is that "the party with control over the evidence had an obligation to preserve it at the time it was destroyed (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 44 (1st Dept 2012) citing *Zubulake v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003); *see also Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 AD3d 428 (1st Dept 2014); *Sarach v M&T Bank Corp.*, 140 AD3d 1721, 1726 (4th Dept 2016)).

Courts have considered the presence (or lack) of ownership interests in determining whether or not one company exercised "practical control" over another within the context of spoliation, i.e. whether one entity can be held responsible for another entity's destruction of potential evidence (*See e.g. New GPC Inc. v Kaieteur Newspaper Inc.*, 124 AD3d 437 (1st Dept 2015); *Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 AD3d 428 (1st Dept 2014); *Platinum Equity Advisors, LLC v SDI, Inc.*, 51 Misc. 3d 1230(A) (NY Sup Ct NY Cnty 2016). Further, courts have also determined that one company lacks "practical control" over another based in part upon a lack of common ownership interests (*See e.g. New GPC Inc. v Kaieteur Newspaper Inc.*, 124 AD3d 437 (1st Dept 2015); *Platinum Equity Advisors, LLC v SDI, Inc.*, 51 Misc. 3d 1230(A) (NY Sup Ct NY Cnty 2016)). However, a determination of "practical control" does not hinge solely upon the issue of ownership interests, and one company has been found to have exercised practical control over another company based upon other factors (*See 272 Realty Holding Corp. v Madison*, 2016 NY Slip Op 32577(U) (NY Sup Ct NY Cnty 2016) [finding that Defendants had practical control over a non-party contractor hired to remove a water tank that should have been preserved as potential evidence]).

Upon review of the relevant case law, this Court could find no case addressing the issue of practical control where a potentially "controlling" company divested itself of its ownership interest in another company at or near the time the "controlling" company received notice of a pending litigation, but significantly prior to receiving a specific discovery demand. Once again, this Court faces an issue of

first impression on the question of spoliation.

Even assuming arguendo that Plaintiffs had established that Banif exercised practical control over FINAB on or before August 1, 2010 so as to give rise to a duty on the part of Banif to prevent FINAB from destroying said emails, the Plaintiffs failed to establish that Banif still maintained the same level of "practical control" over FINAB to prevent FINAB from closing its email account with ITX. Plaintiffs' argument on this point rests upon the presumption that once Banif had a duty to prevent FINAB from destroying any potential evidence, Banif had a continuous duty to insure that FINAB preserved potential evidence regardless of when Plaintiffs ultimately made their discovery demands. However, said argument ignores the fact that when Banif divested itself of its ownership interest, this potentially had a significant effect upon its "control" relationship with FINAB. Plaintiffs' argument also ignores the reasonable expectation that when one company divests itself of its ownership interest over another, over time any "control" relationship that may have existed between the companies will likely weaken the longer the companies remain independent entities.

There is a significant difference between the "control" relationship that may exist between two companies where one company has and continues to have an ownership interest in the other, and the relationship that exists between two companies where one relinquishes its prior ownership interest in the other. Where the ownership interest is continuous and on-going, it is reasonable to presume, absent some significant change, that the "control" relationship (to the extent that it is shown to exist based in part upon other factors) between the two companies is also continuous and on-going. This same presumption of a "continuous control relationship" cannot be made where a company divests itself of its ownership/stock interest. One company may have "practical control" over another company while the first company possesses an ownership interest in the second company, and possibly even maintain "practical control" for a period of time after it has divested its interests. However, it is reasonable to assume that over time, the company that has divested its ownership interest will also lose its "practical control" over the other company.

Although the first company that has divested its ownership/stock interest may have had "practical control" over the second company when the first company was notified of a pending litigation (prior to or immediately following the divestiture of ownership interest), the first company may have lost "practical control" over the second company by the time that an actual discovery request is made. As such, it is possible that although the first company may have taken steps to preserve evidence held by the second company upon being put on notice of a pending litigation, as time passes the first company may lose the level of control necessary to prevent the second company from later destroying/losing said evidence. Although the first company may have had "practical control" over the second company so as to prevent the loss of potential evidence at the time the first company was put on notice of a pending litigation, the first company cannot be "held responsible for the destruction of the evidence" where the first company loses the "practical control" necessary to actually prevent the second company from destroying/losing said evidence prior to a discovery request.

In the underlying action, the Plaintiffs did not serve their discovery request upon Banif as to FINAB's emails until approximately one year after Banif had divested itself of its interests in FINAB. Yet the Plaintiffs do not submit sufficient proof to establish that Banif was in any position to obtain the "missing" emails from FINAB or prevent FINAB from closing its email accounts after Banif divested itself of its ownership interest in FINAB at or around the time that Plaintiffs made their discovery request. Even assuming arguendo that Banif had "practical control" over FINAB as of August 1, 2010, Plaintiffs have failed to submit sufficient proof to show that Banif still exercised this same level of "practical control" over FINAB at or around the time when Plaintiffs made their discovery request. In particular, Plaintiffs failed to offer sufficient proof to establish that Banif had practical control over FINAB at or around the time that FINAB requested that ITX close FINAB's email account. In point of fact, the Plaintiffs have failed to even show that Banif was aware that FINAB had requested that ITX close said email account prior to FINAB making said request.

In the absence of any proof that Banif maintained practical control over FINAB when FINAB requested that ITX close FINAB's email accounts in 2012, the question of whether or not Banif took steps to preserve evidence when it was notified of the potential lawsuit in 2010 is largely irrelevant since there is no showing that Banif maintained the level of "practical control" necessary to force FINAB to actually preserve said evidence in 2012. Assuming arguendo that Banif had initiated a litigation hold over FINAB's email account in 2010, the Plaintiffs have submitted no proof to indicate that Banif was in any position to require that FINAB comply with said litigation hold in 2012, two years after Banif had divested itself of its ownership interest in FINAB.

The Court recognizes the Plaintiffs' argument that Banif should have "gather[ed] up whatever they had practical control of" (February 8, 2017 oral argument 9:22) upon receiving notice of the potential litigation. However, there is nothing to indicate that Banif had the authority to "gather up" FINAB's emails after Banif had already divested itself of its ownership interest in FINAB. Further, even assuming arguendo both that Banif previously held practical control over FINAB and that Banif had "gathered up" all of FINAB's emails during the time period when Banif had practical control over FINAB, there is no reason to believe that Banif would have been free to provide said emails to Plaintiffs absent FINAB's express permission once Banif no longer had an ownership interest in FINAB.

Regardless of the "control" relationship that may have previously existed between Banif and FINAB, the fact that Banif divested itself of its interest in FINAB significantly changed the relationship between Banif and FINAB in the months and years following Banif's divestiture. Said change in relationship does not close off the possibility that Banif may have held practical control over FINAB as of 2012 (assuming arguendo that Banif ever held practical control over FINAB). However, the Plaintiffs cannot rest upon the assumption that prior practical control implies continuous practical control where Banif divested itself of its interest in FINAB prior to the Defendant's discovery request. The Court further notes that there was nothing preventing Banif from divesting itself of its ownership interest in FINAB, nor have the Plaintiffs submitted any proof connecting Banif's divestiture of its ownership

interest with the underlying action.

The Plaintiffs have failed to submit sufficient evidence to establish that Banif had practical control over FINAB at the time Plaintiffs served their discovery requests upon Banif and/or at the time FINAB requested that ITX close FINAB's email account. As such, Plaintiffs have not met their burden to show that BANIF should be held responsible for FINAB's alleged destruction of potential evidence.

Plaintiffs have failed to show that the allegedly destroyed evidence was relevant to their underlying claim such that the trier of fact could find that the evidence would support that claim or defense

As previously stated, the third element that a party seeking sanctions under Section 3126 based on spoliation of evidence must demonstrate that "the destroyed evidence was relevant to the party's claim or defense such that the trier of fact could find that the evidence would support that claim or defense" (*VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 44 (1st Dept 2012) *citing Zubulake v. UBS Warburg LLC*, 220 FRD 212 (SDNY 2003); *see also Pegasus Aviation I, Inc. v. Varig Logistica S.A.*, 118 AD3d 428 (1st Dept 2014); *Sarach v M&T Bank Corp.*, 140 AD3d 1721, 1726 (4th Dept 2016).

Plaintiffs' amended complaint sets forth fifteen causes of actions, only three of which relate to Banif:

- Plaintiffs' ninth cause of action on behalf of Global Brazil alleging that Banif aided and abetted Oscar Lopes in his illegal conversion of Global Brazil's funds;
- Plaintiffs' tenth cause of action on behalf of Global NY alleging that Banif aided and abetted Oscar Lopes in his illegal conversion of Global NY's funds; and
- Plaintiffs' eleventh cause of action on behalf of Global NY alleging that Banif aided and abetted Oscar Lopes in his breach of his duty of loyalty claim to Global NY.

Plaintiffs claim in sum and substance that Oscar Lopes stole funds from Global and opened an account at Banif to hold said funds. Plaintiffs further claim that said account could only have been opened with Banif's knowledge and cooperation. Plaintiffs further claim that Banif was attempting to have Global open up an account in order to cover up the fraudulent account that Oscar Lopes had already opened with Banif.

Upon review of the Plaintiffs' submitted papers, proof, and having conducted oral argument, the Court finds that the Plaintiffs have failed to establish that the allegedly "missing" emails would have spoken to their underlying claims against Banif. As stated, Global alleges that Banif aided and abetted Oscar Lopes in his scheme to opened an account at Banif using illegally obtained Global funds. However, none of the evidence submitted by the Plaintiffs points to the existence of the alleged "illegal" account, nor is there anything to indicate that the allegedly "missing" emails would have spoken to this point.

The evidence submitted by the Plaintiffs points to a business relationship that may have existed between FINAB and Global. However, the evidence is insufficient to suggest that Banif was involved in said business relationship. More to the point, there is nothing in the Plaintiffs' submitted evidence to suggest that the allegedly missing emails would have spoken to the existence of an account opened by Oscar Lopes at Banif made up of Global funds.

As such, the Plaintiffs have failed to meet their burden to show that the allegedly missing emails would have supported their claims against Banif for aiding and abetting Lopes.

Even assuming arguendo that the Court had found that Banif should be sanctioned for spoliation, the Court would still not have sanctioned Banif by making a finding that this Court has long-arm jurisdiction over Banif

"When parties involved in litigation engage in the destruction of evidence, a number of remedial options are provided by existing New York statutory and common law." (*Ortega v. City of New York*, 9 NY3d 69, 76 (2007)). CPLR 3126 requires that [i]f any party... refuses to obey an order for disclosure or wilfully fails to disclose information which the court finds ought to have been disclosed pursuant to this article, the court may make such orders with regard to the failure or refusal as are just". "New York courts therefore possess broad discretion to provide proportionate relief to the party deprived of the lost evidence, such as precluding proof favorable to the spoliator to restore balance to the litigation, requiring the spoliator to pay costs to the injured party associated with the development of replacement evidence, or employing an adverse inference instruction at the trial of the action". (*Ortega v. City of New York*, 9

NY3d 69, 76 (NY 2007)). "The nature and severity of the sanction depends upon a number of factors, including, but not limited to, the knowledge and intent of the spoliator, the existence of proof of an explanation for the loss of the evidence, and the degree of prejudice to the opposing party" (*Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713, 714 (2nd Dept 2013) *citing* 1A NY PJI3d 1:77, Comment; 6-3126 Weinstein-Korn-Miller, NY Civ Prac CPLR ¶ 3126.05). Where the spoliation is as a result of an intentional act of a party, the relevance of the evidence is presumed and a sanction must reflect "an appropriate balancing under the circumstance" (*Arbor Realty Funding, LLC v Herrick, Feinstein LLP*, 140 AD3d 607, 609 (1st Dept 2016) *citing VOOM HD Holdings LLC v EchoStar Satellite L.L.C.*, 93 AD3d 33, 44 (1st Dept 2012)). Further, the "Supreme Court possesses broad discretion to determine what sanction, if any, to impose for the spoliation of evidence, and its determination will remain undisturbed absent a clear abuse of that discretion (*Weiss v Bellevue Maternity Hosp.*, 121 AD3d 1480, 1481 (3d Dept 2014) [internal citations omitted]; *see also Samaroo v Bogopa Serv. Corp.*, 106 AD3d 713 (2nd Dept 2013)).

One of the specific sanctions requested by the Plaintiffs in their spoliation motion is a finding of long-arm jurisdiction over Banif.[10] The Plaintiffs' spoliation arguments are only relevant to the issue of long-arm jurisdiction if the Court both finds that Banif failed in its duty to preserve evidence and also finds that the correct sanction for said failure was a finding of long-arm jurisdiction. For all of the reasons so stated, the Court finds that Banif did not fail in its duty to preserve evidence. However, even assuming arguendo that this Court had determined that Banif was subject to spoliation sanctions, this Court would not have sanctioned Banif by finding that it has long-arm jurisdiction over Banif as a matter of law.

[10] Plaintiffs' other requested sanction is that the Court determine that there was an account at Banif in Global's name.

The Plaintiffs cite to two New York federal cases, *City of New York v. A-1 Jewelry & Pawn, Inc.*, (501 F. Supp. 2d 369 (EDNY 2007)) and *Hamilton v. Accu-Tek*, (32 F. Supp. 2d 47, 74 (EDNY. 1998) in support of their argument that a finding of long-arm jurisdiction would be the appropriate spoliation sanction in the underlying action.

In *Hamilton v. Accu-Tek*, (32 F. Supp. 2d 47 (EDNY. 1998)) a hearing was held before a Special Referee on the issue of long-arm jurisdiction. The federal court indicated that the determination of long-arm jurisdiction turned upon the plaintiffs' allegations that the Defendant had substantial interstate revenue, however, the defendant had failed submit additional information on this issue. The court also found that this "necessary information" was within the defendants' exclusive control, and the court determined that where the defendants failed to provide said information, the Plaintiffs satisfied their burden to establish long-arm jurisdiction (*See Hamilton v. Accu-Tek*, 32 F. Supp. 2d 47, 68 (EDNY 1998).

Similarly, in *City of New York v. A-1 Jewelry & Pawn, Inc.* (501 F. Supp. 2d 369 (EDNY. 2007)), the federal court made an "adverse inference" that the court had long-arm jurisdiction over a defendant, based upon said defendant's spoliation of evidence. In said action, the federal court found that "discovery suggests" that immediately after receiving notice of said lawsuit, one of the defendants deliberately took steps to dispose of relevant documents and hide said defendant's assets in order to avoid the court's jurisdiction and any ultimate finding of liability. The federal court determined that said strategy to conceal records "after this lawsuit was commenced creates an adverse inference supporting the decision that the facts demonstrate that this court has long-arm jurisdiction over [the defendant]" (*See City of New York v. A-1 Jewelry & Pawn, Inc.*, 501 F. Supp. 2d 369, 388-389 (EDNY 2007)).

In the underlying action, the issues relating to spoliation are significantly distinguishable from both *Hamilton v. Accu-Tek* and *City of New York v. A-1 Jewelry & Pawn, Inc.* In particular, the Plaintiffs in both *Hamilton v. Accu-Tek* and *City of New York v A-1 Jewelry & Pawn, Inc.* were able to establish certain arguments before the federal courts that the Plaintiffs have failed to do before this Court. In *Hamilton,* the federal court's determination that the appropriate spoliation sanction was a finding of long-arm jurisdiction was based in part upon the federal court's determination that the missing evidence was both "necessary" to determining the issue of long-arm jurisdiction and that said evidence was within the exclusive control of the defendant. In contrast, in the instant action the Plaintiffs have failed to establish either the likelihood that the allegedly "missing" emails would have spoken to the issue of long-arm jurisdiction or that Banif had "exclusive control" over said emails. On the issue of long-arm jurisdiction, the Plaintiffs argued in sum and substance before the Special Referee that Fernando Mendes solicited business from Borges in the State of New York on behalf of Banif. For the reasons so stated in the Special Referee's report, the Special Referee found that the Plaintiffs had failed to meet their burden upon said argument sufficient to establish long-arm jurisdiction over Banif.[11] For these same reasons, the Court finds that the Plaintiffs have failed to establish that the allegedly "missing" emails would have gone towards establishing the Plaintiffs' arguments for long-arm jurisdiction. Similarly, the documentary evidence and emails that the Plaintiffs attached with their written submitted papers on their motions before this Court are also insufficient to establish any likelihood that the allegedly "missing" emails would have spoken to the issue of whether or not Banif solicited business from Global in the State of New York.

In addition, the Plaintiffs have failed to submit any evidence to establish that Banif had "exclusive control" over the FINAB emails. In point of fact, Plaintiffs recognize that it was FINAB who allegedly "destroyed" the emails by requesting that ITX close FINAB's email account. The Court notes that the Plaintiffs have made it a point to argue that Banif exercised "practical control" over FINAB as to

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[11] The Court will address the Special Referee's report and recommendation on the issue of long-arm jurisdiction in more detail in the section of the instant decision specifically addressing the issue of long-arm jurisdiction.

the allegedly "missing" emails and that the Plaintiffs specifically do not argue that FINAB is an alter-ego or "agent" of Banif in support of Plaintiffs' spoliation argument (February 8, 2017oral argument 23:16-26; 24:11-21; 72:23-26).[12] The Court further notes that FINAB is not named as a defendant in the underlying action nor is there any indication that Plaintiffs ever served FINAB with discovery demands related to the underlying action.

In *City of New York v. A-1 Jewelry & Pawn, Inc.* the federal court determined that a finding of long-arm jurisdiction was an appropriate spoliation sanction based in part upon its determination that the defendant deliberately engaged in a strategy to conceal records upon receiving notice of the pending legal action. However, in the instant action the Plaintiffs have presented no such evidence to suggest that Banif in any way deliberately engaged on a strategy to destroy the allegedly missing emails. The Plaintiffs do not argue that Banif specifically instructed any entity to destroy the allegedly missing emails, took any affirmative step to move the alleged emails from one location to another, nor do the Plaintiffs argue that Banif specifically directed FINAB to close its email account with ITX. In point of fact, the Plaintiffs' entire argument on the issue of spoliation is built around the argument that Banif failed to preserve the allegedly missing emails and did nothing to prevent FINAB from closing its email account with ITX. This is not the equivalent of arguing that Banif deliberately engaged in any strategy to destroy the allegedly missing emails.

As such, even assuming arguendo that this Court had determined that Banif should be subject to spoliation sanctions, given the specific proof presented by the Plaintiffs, this Court would not have determined that a finding of long-arm jurisdiction over Banif would have been the appropriate spoliation sanction. As previously stated, this Court has wide latitude in determining the appropriate sanction upon a finding of spoliation. Given the lack of proof that the allegedly missing emails would have spoken to the issue of long-arm jurisdiction, the lack of proof that Banif exercised "exclusive control" over the

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[12] The Court notes that Plaintiffs do argue that FINAB was Banif's "agent" in terms of determining long arm jurisdiction. At oral argument, Plaintiffs attorney specifically indicated that the "agency" argument related to the issue of long arm jurisdiction and not spoliation (February 8, 2017oral argument 72:23-26).

allegedly missing emails, and the lack of proof that Banif deliberately engaged in a strategy to hide and/or dispose of the allegedly missing emails, this Court would not have sanctioned Banif for spoliation by finding that it has long-arm jurisdiction over Banif as a matter of law.

The Plaintiffs have failed to show that Banif "spoliated" any evidence and the Plaintiffs' spoliation arguments do not speak to the issue of long-arm jurisdiction.

For all of the so stated reasons, this Court finds that the Plaintiffs have failed to meet their burden to show that Banif "spoliated" any of the allegedly missing emails. The Court further finds that the Plaintiffs' spoliation arguments do not speak to the issue of whether or not this Court has long-arm jurisdiction over Banif. Specifically, the Court finds that the Plaintiffs have failed to establish that any of the allegedly missing emails would have in any way supported their argument that this Court has long-arm jurisdiction over Banif based upon Banif's alleged business dealings with Global in New York.

As such, the Court finds that the Special Referee did not need to consider the Plaintiffs' spoliation arguments in order to fully address the issue of long-arm jurisdiction at the hearing. To this extent, the Special Referee conducted the hearing properly. The Court will not reopen the hearing on long-arm jurisdiction and/or reject the Special Referee's report on the sole basis that the Special Referee did not consider the issue of spoliation in reaching her recommendation that this Court does not have long-arm jurisdiction over Banif.

The Court will now address the Plaintiffs' remaining non-spoliation related arguments for the Court to reject the Special Referee's report and recommendation.

The Special Referee was correct in her exclusion of certain portions of Borges' testimony, her refusal to allow the Plaintiffs to produce additional non-party witnesses for testimony and her recommendation, based upon the admissible evidence and testimony, that this Court does not have long-arm jurisdiction over Banif.

A referee's report is not binding upon the Court but is intended "merely to inform the conscience of the court" (*See IF Second Generation Partners, L.P. v Rodeo Bar & Grill, Inc.*, 2016 NY Slip Op 30197U (NY Sup Ct NY Cnty 2016) *citing Gehr v Board of Education*, 304 NY 436 (NY 1952)). "The referee's function is to determine the issues referred to him (or her), as well as to resolve conflicting testimony and matters of credibility. Pursuant to CPLR § 4403 the court may confirm or reject, in whole or in part, any report made by the Special Referee." (*Evans v Perl*, 2010 NY Slip Op 31363U (NY Sup Ct NY Cnty 2010)). However, "[i]t is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Steingart v Hoffman*, 80 AD3d 444, 445 (1st Dept 2011) *quoting Nager v. Panadis*, 238 AD2d 135 (1st Dept 1997); *see also Melnitzky v Uribe*, 33 AD3d 373 (1st Dept. 2006); *Kaplan v Einy*, 209 AD2d 248 (1st Dept. 1994)). Further "where questions of fact are submitted to a referee, it is the function of the referee to determine the issues presented, as well as to resolve conflicting testimony and matters of credibility" (*Herman v Gill*, 61 AD3d 433 (1st Dept 2009) *quoting Kardanis v Velis*, 90 AD2d 727 (1st Dept 1982); *see also Campaign for Fiscal Equity, Inc. v. State*, 29 A.D.3d 175 (1st Dept 2006) *aff'd as modified*, 8 NY3d 14 (2006)). In addition, [i]t is well settled that a Special Referee's findings of fact and credibility will generally not be disturbed where substantially supported by the record" (*RC 27th Ave. Realty Corp. v N.Y. City Hous. Auth.*, 305 AD2d 135 (1st Dept 2003)).

Initially, the Court notes that the Special Referee conducted an extensive hearing on the question of whether or not the Court has long-arm jurisdiction over Banif pursuant to CPLR 302(a). The hearing lasted four days, during which time the Parties each produced a witness for testimony and submitted extensive documents into evidence. Further, when Banif made numerous hearsay objections to significant portions of Borges' testimony, the Special Referee allowed both Parties the opportunity to

submit written arguments prior to rendering an interim report on said hearsay objections. Said interim report not only addressed all of the Parties' arguments as presented in their submitted papers, but also addressed the specific disputed portions of Borges' testimony in a line-by-line fashion. The Special Referee separately analyzed each disputed line of Borges' testimony in order to determine whether or not is was admissible over Banif's hearsay objection.

Further, after allowing both Parties the opportunity to submit post hearing briefs, the Special Referee issued an extensive report that addressed all of the arguments that the Parties presented in their post-hearing papers, analyzed the evidence and testimony introduced at the hearing, and made a recommendation to this Court based upon said analysis. In the instant action, the Special Referee's report both throughly addressed all of the issues presented at the hearing and reflected that the Special Referee presented both sides with a full and fair opportunity to present their arguments on the issue of long-arm jurisdiction.

Upon review of the record, including the full transcript of the four day hearing, the Parties' submitted papers before the Special Referee and the Special Referee's report, the Court finds that all of the Special Referee's evidentiary rulings were proper and correct based upon the evidence and testimony that the Parties sought to introduce at the hearing. In addition, the Special Referee's choice not to allow the Plaintiffs to introduce three potential nonparty witnesses was entirely correct given the age of the underlying case, the fact that the Plaintiffs never gave notice to the Special Referee and/or Banif that Plaintiffs would be producing said "potential witnesses", and the fact that the Plaintiffs did not have control over said potential witnesses. Further, the Special Referee's choice not to allow said "potential witnesses" to testify in no way violated the Plaintiffs' due process rights.

Upon review of the entire record, the Court further finds that the Special Referee's report and recommendation that this Court lacks long-arm jurisdiction is fully supported by the evidence and testimony introduced at the hearing. In addition, the Court find that the Special Referee's finding that the testimonies of both Borges and Mendes were unreliable was fully supported by the evidence and

testimony introduced at the hearing. Further, the Special Referee's findings of fact and credibility as to the presented testimony and submitted evidence are fully supported by the record.

The Special Referee was incorrect in indicting that the Plaintiffs failed to establish that FINAB acted as Banif's agent due in part to Plaintiffs' failure to establish that FINAB and Banif are alter-egos.

The only "recommendation" by the Special Referee that this Court disagrees with is the Special Referee's indication in her report that Plaintiffs failed to establish that FINAB acted as Banif's agent (for jurisdictional purposes) based in part upon Plaintiffs' failure to establish that FINAB was an alter-ego of Banif. The Plaintiffs were not required to establish that FINAB and Banif were alter-egos in order to establish that FINAB acted as Banif's agent for the purpose of determining long-arm jurisdiction. "To be considered an agent for jurisdictional purposes, the local agent must have 'engaged in purposeful activities in [the] State in relation to [a] transaction for the benefit of and with the knowledge and consent of the [defendant] and that [the defendant] exercised some control over [the agent] in the matter'". 'The activities of a representative of a nondomiciliary in New York may be attributed to it . . . if it requested the performance of those activities and the activities benefit it'" (*America/International 1994 Venture v Mau*, 146 AD3d 40, 54 (2nd Dept 2016) *quoting Kreutter v McFadden Oil Corp.*, 71 NY2d 460, 467 (NY 1988); *Parke-Bernet Galleries, Inc. v Franklyn*, 26 NY2d 13 (NY 1970); *East New York Sav. Bank v Republic Realty Mortg. Corp.*, 61 AD2d 1001 (2nd Dept 1978); *CutCo Indus. v Naughton*, 806 F2d 361, 366 (2d Cir NY 1986); *Grove Press, Inc. v Angleton*, 649 F2d 121, 122 (2d Cir NY 1981); *Barbarotto Int'l Sales Corp. v Tullar*, 188 AD2d 503 (2nd Dept 1992)). Aside from the incorrect recommendation that Plaintiffs were required to show that FINAB was an alter-ego of Banif in order to establish that FINAB acted as Banif's agent for the purpose of determining jurisdiction, the Court finds that the Special Referee's findings are all supported by the record and that the Special Referee has clearly defined the issues and resolved matters of credibility.

As such, this Court need not re-examine every aspect of the Special Referee's findings in the instant decision. However, as the Plaintiffs have presented an extensive argument in support of their motion to reject the Special Referee's report and recommendation, this Court will address certain key portions of the Plaintiffs' argument in the instant decision. The Court will also review the record of the hearing before the Special Referee in order to determine whether or not the Plaintiffs have established that FINAB acted as Banif's agent for jurisdictional purposes.

None of the disputed portions of Borges' testimony were admissible as "verbal acts" or admissions against interest.

As it as been repeatedly defined, "[h]earsay is 'a statement made out of court . . . offered for the truth of the fact asserted in the statement'" (*People v. Goldstein*, 6 N.Y.3d 119, 127 (NY 2005) *cert denied* 547 US 1159, 126 S Ct 2293, 164 L Ed 2d 834 (2006) (Internal citations omitted)). Such a statement "may be received in evidence only if [it] fall[s] within one of the recognized exceptions to the hearsay rule, and then only if the proponent demonstrates that the evidence is reliable" (*Nucci v. Proper*, 95 NY2d 597, 602 (2001) *quoting People v Brensic*, 70 NY2d 9, 14 (1987)).

As previously stated in the instant decision the Special Referee found in the interim report that the following portions of Borges' testimony constituted inadmissible hearsay:

- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 49, lines 2-26;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 86, lines 22-26 and p 87, lines 2-7;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 53, lines 3-5;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 66, lines 18-22 through p. 67, lines 2-7;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 70, lines 21-26 and p. 71, lines 2- the first part of 3;
- Borges' testimony as transcribed in the November 23, 2015 hearing transcript p. 75, lines 4-6; and

- Borges' testimony as transcribed in the November 24, 2015 hearing transcript p. 141, lines 22-26

The Plaintiffs argue that said portions of Borges' testimony were admissible under the "verbal acts doctrine" and as admissions against interest.

"Under the verbal act doctrine, words which accompany certain acts or conduct are admissible as nonhearsay because they are not offered to prove the truth of the statement but, rather, to assist in giving legal significance to some 'otherwise ambiguous conduct'" (*People v Guy*, 93 AD3d 877, 880 (3d Dept 2012) *citing People v. Acomb*, 87 AD2d 1 (4th Dept 1982); *In re Alexander "EE"*, 267 AD2d 723 (3d Dept 1999)). In order to qualify as a verbal act, and thus not hearsay, the conduct to be characterized by the attendant words must be independently material to the case, must be equivocal, and the statements must aid in giving significance to the conduct" (*In re Alexander "EE"*, 267 AD2d 723, 726 (3d Dept 1999) *quoting People v. Acomb*, 87 AD2d 1, 6 (4th Dept 1982)).

Upon examination, the Court finds that none of the so stated portions of Borges' testimony were admissible as descriptions of "verbal acts". Specifically, it is clear from the context of the testimony that Borges offered said hearsay statements for their truth and not to assist in giving legal significance to some otherwise ambiguous conduct. In addition, the Court does not find that any of the so stated portions of Borges' testimony described equivocal verbal conduct independently material to the underlying action other than being offered for the truth asserted. As such, the Court finds that the portions of the Borges' testimony that were precluded by the Special Referee were not admissible as descriptions of "verbal acts".

Further, the Plaintiffs' argument that the precluded portions of Borges' testimony fall within the hearsay exception for admissions against interest is without merit. In particular, the portions of Borges' testimony as to a single instant wherein Fernando Lopes allegedly came to New York to solicit business from her are not admissible as statements against interest. Nothing in Borges' description of said alleged solicitation, even assuming that it was done on behalf of Banif, links the alleged solicitation to Plaintiffs' underlying action against Banif. Specifically, there is nothing in the substance of Borges' testimony as

to Fernando Lopes' alleged solicitation of business from her that in any way supports the Plaintiffs' claim that Banif held an account made up of illegally obtained Global funds.

Similarly, the portions of Borges' testimony referring to Fernando Mendes' alleged repeated solicitations of business from her are also not admissible as statements against interest. The Plaintiffs' argument on this point hinges upon their argument that Fernando Mendes solicited business from Borges on behalf of Banif and not (or at least not entirely) on behalf of FINAB. However, the only substantive proof that the Plaintiffs submit in support of their argument that Mendes was soliciting business from Borges on behalf of Banif is Mendes' October 3, 2014 affidavit. As previously stated in the instant decision, there is significant reason to question the reliability of Mendes' October 3, 2014 affidavit. As such, the Court finds that the Plaintiffs have failed to show that any of the excluded portions of Borges' testimony were admissible as statements against interest.

The Court adopts and confirms the Special Referee's interim report dated February 24, 2016

Accordingly and for the reasons so stated, the Court hereby adopts and confirms the Special Referee's interim report excluding certain portions of Borges' testimony as hearsay.

The Special Referee was correct in not allowing the Plaintiffs additional time to call Fernando Mendes, Euclides Pitta and/or Saige Rivers as witnesses at the hearing.

Before addressing the Specials Referee's choice not to allow the Plaintiffs additional time to call Fernando Mendes, Euclides Pitta and/or Saige Rivers as witnesses at the hearing, this Court must recognize certain facts about the timing of the underlying action and when it was referred to a Special Referee to hear and report on the question of long-arm jurisdiction:

- the underlying action was commenced by the Plaintiffs in 2010, approximately five years before the underlying action finally appeared for a hearing before the Special Referee on the issue of wether or not the court has long-arm jurisdiction over Banif;

- the Defendants moved to dismiss the underlying action as to Banif for lack of long-arm jurisdiction in 2010, approximately five years before the underlying action finally appeared for a hearing before the Special Referee[13];

[13] In point of fact, said motion was the first motion made in the underlying action (motion sequence 001)

- by decision dated May 25, 2011, more than four years before the underlying action finally appeared for a hearing before the Special Referee, Justice Singh denied the Defendants' motion to dismiss for lack of jurisdiction, granted the Plaintiffs discovery on the issue of jurisdiction and ordered that following said discovery, the matter would be referred to a Special Referee to hear and report on the issue of whether or not long-arm jurisdiction could be exercised over the Defendant Banif; and

- by decision dated June 20, 2013, more than two years before the underlying action finally appeared for a hearing before the Special Referee, Justice Singh again referred the underlying action to a Special Referee to hear and report on whether Banif is subject to long-arm jurisdiction in the State of New York.

Given the age of the underlying action, the fact that the Defendants moved for dismissal on the grounds of lacking of long-arm jurisdiction approximately five years before the matter finally appeared before a Special Referee, the fact that the Plaintiffs had over four years to conduct discovery specifically relating to the question of long-arm jurisdiction, and the fact that Justice Singh issued two orders referring the underlying action to a special referee, there can be no doubt that the Plaintiffs were given ample and sufficient opportunity to prepare their witnesses, gather evidence and construct their arguments in preparation for the hearing before the Special Referee. At the very least, the Plaintiffs had approximately four years to gather evidence, potential witnesses and prepare for a hearing on the single issue of long-arm jurisdiction. Further, this Court referred the underlying action to a Special Referee on August 17, 2015, more than three months before the hearing was finally held before the Special Referee. This was again, ample time for the Plaintiffs to gather their witnesses for a hearing that they had, in effect, been on notice of for the past four years.

The Plaintiffs now argue that the Special Referee denied them their due process rights by refusing to allow them additional time to call Euclides Pitta as a witness at the hearing. This is despite the fact that Plaintiffs admitted at the hearing both that Pitta was not readily available and that the Plaintiffs had never previously identified Pitta as a potential witness. Similarly, the Plaintiffs also argue that the Special Referee denied them their due process rights by refusing to allow them additional time to produce Fernando Mendes as a witness when Mendes failed to appear at the hearing and Plaintiffs indicated that they could not locate him.

This Court finds the Plaintiffs' arguments on this point to be entirely without merit. It is clear from the long history of the underlying action that the non-appearance of Pitta and Mendes at the hearing were due to the Plaintiffs' inability to locate their witnesses and/or the refusal of said witnesses to appear for the hearing. The fact that the Plaintiffs were unable to produce and/or make their own witnesses available to testify at the hearing does not in any way reflect a denial of Plaintiffs' due process rights.

The Plaintiffs submit with their moving papers an unauthenticated email dated April 11, 2016 (Gordon Aff., Ex. G, mot seq 009), almost five months after the hearing was concluded. Said unauthenticated email purports to be from Fernando Mendes[14] and indicates in sum and substance that "Fernando" executed a settlement and confidentiality agreement with Alfonso Finocchiaro and Sergio Capela in 2015. The email goes on:

> "Last year a couple of days before I had to travel to NY to testify, I received [an] anonymous phone calls stating that if I testify, Confidentiality Agreement would be enforced and I would be sue[d]. The anonymous person that called also stated that they would enforce [the] Cayman Islands court order passed against me in 2011 and have me arrested.
>
> Due to the reason above, I was afraid of getting in trouble. At this time, and for justice to prevail, I am willing without any doubt to travel to NY and testify. I wont let them intimidating me any longer.
>
> I am prepared to execute an affidavit stating the above. ".

First and foremost, this Court does not find that a single unsigned, unauthenticated email, purported sent by Fernando Mendes almost five months after he failed to appear as a witness at the hearing, is sufficient to suggest that Mendes was in any way "intimidated" into not appearing before the Special Referee. Even assuming that the Court were to treat this unsigned unauthenticated email as a communication from Fernando Mendes, the Court cannot ignore the fact that during the course of the underlying action, Mendes has already signed two affidavits that directly contradict each other. As such, there is already significant reason to question the reliability of the representations made by Fernando Mendes. Further, Mendes specifically indicated in his October 2014 affidavit that the Cayman Island

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[14] The Court notes that the email is unsigned, only indicates that it is from "Fernando" and indicates that it was "sent" from F M <rey1266@live.com >.

Court "fully exonerated" him of "any wrong doing" pursuant to an August 2014 order staying the prosecution of a criminal action. However, the April 11, 2016 email, purportedly from Mendes, seems to indicate that there exists a 2011 order against Mendes that is still potentially enforceable and could potentially form a basis for his arrest.

The Court further finds that the Special Referee properly denied the Plaintiffs' request to produce Rivers as a rebuttal witness. At the conclusion of the hearing, Plaintiffs acknowledged that they failed to disclose Rivers as a rebuttal witness. Further, there was no testimony presented at the hearing referring to Rivers. The Plaintiffs were given the opportunity to make an offer of proof before the Special Referee, and Plaintiffs indicated that Rivers would testify as to account statements he had allegedly seen for an account that Banif's witness, Ricardo Jose Mendes, testified that Ricardo Jose Mendes couldn't find. The Special Referee precluded Rivers from testifying since Rivers would in effect be testifying as to the contents of documents that were not before the Court. Specifically, the Plaintiffs did not have the account statements that Rivers would testify that he saw during the course of his employment with FINAB. The Special Referee correctly concluded that said proposed testimony would consist entirely of hearsay.

As such, this Court finds that the Special Referee properly and correctly denied the Plaintiffs additional time to produce Pitta to appear as a witness based upon Plaintiffs' failure to identify Pitta as a potential witness prior to the hearing and the fact Pitta was not readily available to testify at the hearing. The Court further finds that the Special Referee properly and correctly denied the Plaintiffs additional time to produce Fernando Mendes as a witness based upon his failure to appear at the hearing and Plaintiffs inability to locate him at the time of the hearing. In addition, the Court finds that the Plaintiffs have submitted insufficient proof to present any reason to re-open the hearing for the purpose of allowing Fernando Mendes another opportunity to testify. Finally, the Court finds that the Special Referee properly and correctly denied the Plaintiffs' request to produce Rivers as a rebuttal witness, on the basis that Rivers' proposed testimony would have consisted entirely of hearsay.

The Special Referee's finding that Borges' testimony was not credible is supported by the record

As previously stated in the instant decision, "The referee's function is to determine the issues referred to him (or her), as well as to resolve conflicting testimony and matters of credibility" (*Evans v Perl*, 2010 NY Slip Op 31363U (NY Sup Ct NY Cnty 2010)). Further "[i]t is well settled that the report of a Special Referee shall be confirmed whenever the findings contained therein are supported by the record and the Special Referee has clearly defined the issues and resolved matters of credibility" (*Steingart v Hoffman*, 80 AD3d 444, 445 (1st Dept 2011) *quoting Nager v. Panadis,* 238 AD2d 135 (1st Dept 1997); *see also Melnitzky v Uribe*, 33 AD3d 373 (1st Dept. 2006); *Kaplan v Einy*, 209 AD2d 248 (1st Dept. 1994)).

Upon review of the record, the Court finds that the record fully supports the Special Referee's finding that Borges' testimony was not credible. At the hearing, Borges' testimony included allegations that were not made in either the Amended Complaint nor her November 11, 2010 affidavit. In particular, Borges testified that in 2002 Valdemar Lopes came to Global NY's office and encouraged her to open an account for Global with Banif. However, Borges' November 11, 2010 affidavit makes no mention of Valdemar Lopes' attempt to solicit Global business. Further, although Borges testified that Fernando Mendes actively solicited her in New York to open an account for Global with Banif, her November 11, 2010 affidavit indicates only that Fernando Mendes asked that Global NY make arrangements to have Global NY clients open accounts at Banif Cayman.

The Court further recognizes that the Special Referee conducted the hearing, and as such was in the best position to make determinations of credibility based upon Borges' testimony, her demeanor, her responses to direct examination and her responses to cross-examination. The Special Referee found that Borges' testimony was not credible based upon the evidence and testimony adduced at trial. Said finding was fully supported by the record and as such, the Court will not disturb the Special Referee's finding that Borges' testimony was not credible.

The Special Referee did not "exclude" the alleged "email string" that Plaintiffs introduce at trial, but made a finding as to the reliability/credibility of said evidence based upon a review of said evidence.

The Plaintiffs argue in their submitted papers that the Special Referee improperly "excluded" an "email string" that Plaintiffs submitted into evidence at the hearing (Plaintiffs' Ex. 6 at the hearing). However, upon review of the Special Referee's report, the Court finds that the Special Referee did not "exclude" said evidence from consideration. Rather, the Special Referee made a finding as the reliability of the email string based upon her review of the submitted evidence. The Special Referee indicated in her report that the email string presented as Plaintiffs' exhibit 6 was "not sequential and appears to have been altered". She then gives a detailed description of the time stamps for each email in the email string. Said evaluation is not tantamount to an "exclusion" of the evidence, but reflects a detailed evaluation of the evidence based upon its contents, including the time stamps. The Special Referee further indicates in her report that these issues were not addressed at the hearing. The Plaintiffs do not argue that they were denied the opportunity to fully explain every aspect of the evidence they introduced at the hearing, nor do they deny that they did not specifically address the time stamps on the email string when they introduced it as evidence at the hearing or in the post hearing submissions to the Special Referee. It is only now, upon a motion to reject the Special Referee's report and after reading the Special Referee's report, that the Plaintiffs present an explanation as to the time stamps on the email string.

As a finder of fact, the Special Referee evaluates the evidence based upon how it is presented by the Parties. It is upon the Parties to create a context for their submitted evidence and present it in a way that addresses any discrepancies that might appear on its face. However, this Court is not bound to adopt all of the Special Referee's recommendations as to the credibility/reliability of evidence[15], and the Court recognizes that the Plaintiffs have presented a reasonable explanation in their submitted papers for the fact that the time stamps on the emails are not sequential. Specifically, the Plaintiffs argue in their

[15] Though the Court recognizes that the Special Referee's indication that the email string in Plaintiffs' exhibit 6 were "not sequential" is fully supported by both the record and the evidence itself.

submitted papers that the non-sequential time stamps on the submitted email chain are the result of the one-hour time difference between New York (where Oscar Lopes sent his emails) and the Cayman Islands (where Fernando Mendes sent is replies). As such, the Court will consider the email string (submitted at the hearing as Plaintiffs' exhibit 6), in light of the Plaintiffs' explanation and in determining whether or not to confirm the Special Referee's recommendation that this Court does not have long arm jurisdiction over Banif.

Upon review of the entire record and even upon consideration of the evidence and testimony excluded by the Special Referee, the Court finds that it does not have long-arm jurisdiction over Banif.

"Under CPLR 302 (a) (1)... long-arm jurisdiction over a nondomiciliary exists where a defendant transacted business within the state, and the cause of action arose from that transaction. 'If either prong of the statute is not met, jurisdiction cannot be conferred'. Under the statute, 'proof of one transaction in New York is sufficient to invoke jurisdiction ... so long as the defendant's activities here were purposeful and there is a substantial relationship between the transaction and the claim asserted'. '[J]urisdiction is not justified where the relationship between the claim and transaction is too attenuated'" (*Copp v Ramirez*, 62 AD3d 23, 28 (1st Dept 2009) *lv denied* 12 NY3d 711 (2009) *citing Johnson v Ward*, 4 NY3d 516 (NY 2005); *Kreutter v McFadden Oil Corp.*, 71 NY2d 460 (NY 1988); *see also Wilson v Dantas,* 128 AD3d 176 (1st Dept 2015); *Deutsche Bank Sec., Inc. v. Montana Bd. of Invs.*, 7 NY3d 65 (NY 2006)).

> "Determining whether long-arm jurisdiction exists under the 'transacts any business' provision of CPLR 302 (a) (1), therefore, is a two-pronged inquiry: 'a court must decide (1) whether the defendant transacts any business in New York and, if so, (2) whether [the] cause of action aris[es] from such a business transaction'. Both prongs must be met in order for long-arm jurisdiction to attach. 'In effect, the 'arise-from' prong limits the broader 'transaction-of-business' prong to confer jurisdiction only over those claims in some way arguably connected to the transaction'
>
> The assertion of personal jurisdiction must also be predicated on a defendant's 'minimal contacts' with New York to comport with due process . This requires an examination of the 'quality and the nature of the defendant's activity' and a finding of 'some act by which the defendant purposefully avails itself of the privilege of conducting activities within [New York], thus invoking the benefits and protection of its laws'"
> (*Wilson v Dantas*, 128 AD3d 176, 181-182 (1st Dept 2015) *citing Licci v Lebanese Can. Bank, SAL,* 20 NY3d 327 (NY 2012); *Johnson v Ward*, 4 NY3d 516 (NY 2005); *George Reiner & Co.*

v Schwartz, 41 NY2d 648 (NY 1977); *Int'l Shoe Co. v Wash.*, 326 US 310 (US 1945))

"Purposeful activities are those with which a defendant, through volitional acts, avails [himself or herself] of the privilege of conducting activities within [New York], thus invoking the benefits and protections of its laws" (*Chen v Guo Liang Lu*, 144 AD3d 735 (2nd Dept 2016) *quoting Fischbarg v. Doucet,* 9 NY3d 375, 380 (NY 2007)). "Mere solicitation of business within New York will not subject a defendant to New York's jurisdiction. Instead, a plaintiff asserting jurisdiction under CPLR 301 must satisfy the standard of 'solicitation plus,' which requires a showing of 'activities of substance in addition to solicitation'" (*Mejia-Haffner v Killington, Ltd.*, 119 AD3d 912, 913 (2nd Dept 2014) *citing Cardone v. Jiminy Peak, Inc.*, 245 AD2d 1002 (3rd Dept 1997); *Sedig v Okemo Mountain*, 204 AD2d 709 (2nd Dept 1994); *Arroyo v Mountain School*, 68 AD3d 603 (1st Dept 2009)).

Further, in determining whether a plaintiff's causes of action arise from a defendants' New York contacts "[t]he standard does not require plaintiff to have been involved in the transaction; rather, plaintiff need only demonstrate that, 'in light of all the circumstances, there [is] an articulable nexus or substantial relationship between the business transaction and the claim asserted'. The Court of Appeals 'ha[s] consistently held that causation is not required, and that the inquiry under the statute is relatively permissive'" (*Wilson v Dantas*, 128 AD3d 176, 184 (1st Dept 2015) *citing Licci v Lebanese Can. Bank, SAL*, 20 NY3d 327 (NY 2012)).

Based upon a totality of the evidence submitted before the Special Referee, the testimony at the hearing and the papers and arguments submitted before this Court, this Court finds that the Plaintiffs have failed to set forth sufficiently a basis for exercising long-arm jurisdiction over Banif pursuant to CPLR 302(a)(1).

Borges' testimony that Valdemar Lopes had a conversation with her in New York in 2002 concerning Global opening an account with Banif was insufficient to establish that said conversation constituted "business transactions" for the purpose of determining jurisdiction.

Even assuming arguendo that all of Borges' testimony had been deemed admissible, said testimony still would have been insufficient to establish that this Court has long-arm jurisdiction over Banif. It is clear from the presented testimony that Borges' alleged conversation with Valdemar Lopes in 2002 concerning Global opening an account with Banif arose during a trip that Valdemar Lopes made to New York to see his son. There is insufficient proof to suggest that said trip was for business or that Valdemar Lopes came to New York specifically to solicit business from Borges. The fact that in 2002, Valdemar Lopes and Borges may have had a casual conversation over coffee that may have touched upon the possibility of Global opening an account with Banif is insufficient to establish long-arm jurisdiction over Banif. This Court does not find that such an interaction rises to the level of a solicitation, let alone a "transaction of business" sufficient to establish long-arm jurisdiction over Banif.

The Plaintiffs failed to establish that FINAB acted as Banif's agent for jurisdictional purposes

Borges also testified at the hearing that Fernando Mendes met with her in person in New York and raised the subject of Global opening accounts with Banif. As previously stated in the instant decision, "[t]o be considered an agent for jurisdictional purposes, the local agent must have 'engaged in purposeful activities in [the] State in relation to [a] transaction for the benefit of and with the knowledge and consent of the [defendant] and that [the defendant] exercised some control over [the agent] in the matter'". 'The activities of a representative of a nondomiciliary in New York may be attributed to it . . . if it requested the performance of those activities and the activities benefit it'" (*America/International 1994 Venture v Mau*, 146 AD3d 40, 54 (2nd Dept 2016) (internal citations omitted)). "The critical factor is the degree of control the defendant principal exercises over the agent" (*America/International 1994 Venture v Mau, supra*).

The Plaintiffs' entire long-arm jurisdiction argument hinges on their argument that FINAB is Banif's agent for the purposes of determining jurisdiction, and as such Fernando Mendes solicited business from Borges in New York on behalf of Banif. However, the Plaintiffs' testimony and evidence are insufficient to establish that an agency relationship existed between Banif and FINAB for jurisdictional purposes. The Court recognizes that the company name FINAB is B-a-n-i-f spelled backwards and that the companies had office space in the same building in the Cayman Islands. The Court further recognizes that Banif previously held stock in FINAB and that some employees may have worked for both companies at one time or another. However, the two companies had different charters and different businesses. Banif is a bank, while FINAB acted as an agent for foreign companies. The fact that the Plaintiffs had a business relationship with FINAB, does not automatically translate into a business relationship with Banif for purposes of jurisdiction. In addition, the fact that Banif held stock in FINAB is insufficient to establish that FINAB acted as Banif's agent in soliciting business in New York.

Further, even assuming that all of Borges' hearing testimony had been deemed admissible, her testimony that she had in-person meetings, telephone calls and emails concerning the subject of Global opening an account with Banif is insufficient to establish that Banif was doing business in New York for purposes of establishing long-arm jurisdiction. The fact that individuals associated with Banif and/or FINAB may have had conversations with and/or solicited Borges to open an account with Banif in order to allow for the transfer of commissions from FINAB, are insufficient to subject Banif to long-arm jurisdiction in New York.

In addition, Borges' testimony as to her conversations with Fernando Mendes reflect that said conversations were largely about commissions owed by FINAB to Global, and that Fernando Mendes was soliciting business from Global clients for FINAB not Banif. From Borges' testimony, any discussion about Global potentially opening an account with Banif seems to have been a minor part of her alleged conversations with Fernando Mendes. Further, nothing from Borges' testimony nor the

submitted evidence indicates that Banif exercised any degree of control over Fernando Mendes as to the conversations he allegedly had with Borges.

The only proof that the Plaintiffs submit that might establish a basis for their argument that FINAB and its employees acted as Banif's agents in soliciting business from Global is Fernando Mendes' October 3, 2014 affidavit. However, as previously stated in the instant decision, there is significant reason to question the reliability of said affidavit. Further, Fernando Mendes failed to appear to testify at the hearing despite the fact that the Plaintiffs specifically noticed him as one of their witnesses.

The Plaintiffs failed to establish that Borges' alleged 2002 conversation with Valdemar Lopes and/or her alleged interactions with Fernando Mendes related to the Plaintiffs' underlying cause of action against Banif.

Even assuming arguendo that the Court were to treat Valdemar Lopes' 2002 alleged conversation with Borges and Fernando Mendes' alleged multiple conversations with Borges as "business transactions" made on behalf of Banif, the Court would still find that the Plaintiffs have failed to establish the second prong of CPLR 302 (a) (1). Based upon the totality of the evidence submitted before the Special Referee, the testimony at the hearing and the papers and arguments submitted before this Court, this Court finds that the Plaintiffs have failed to establish that the alleged non-domiciliary activities of Banif had "a substantial relationship" to Plaintiffs' claims against Banif.

Specifically, nothing from the submitted evidence and/or Borges' testimony suggests that any of these conversations related in any way to Plaintiffs' causes of action against Banif. The Plaintiffs' claims against Banif allege that Banif aided and abetted Oscar Lopes in opening and maintaining an illegal account at Banif made up of Global funds. However, nothing in the Plaintiffs' submitted evidence and/or Borges' testimony points to the existence of any Global account with Banif. Further, it is undisputed that Global never opened an account with Banif as a result of Borges' alleged conversation with Valdemar Lopes in 2002 or the alleged repeated solicitations by Fernando Mendes on behalf of FINAB. Even assuming arguendo that both Valdemar Lopes and Fernando Mendes solicited Global to

open a bank account with Banif, said solicitations have no substantial nexus with any alleged illegal account that Oscar Lopes allegedly opened at Banif using illegally obtained Global funds.

In addition, the Plaintiffs have failed to offer any evidence as to when Oscar Lopes allegedly opened the alleged illegal account. Any alleged solicitations that were made prior to Oscar Lopes' alleged opening of the illegal account would not support the Plaintiffs' theory that Banif aided and abetted Oscar Lopes in opening an illegal account using Global funds. Similarly, the Plaintiffs would also be hard pressed to establish that any alleged solicitations made significantly after Oscar Lopes allegedly opened an illegal account spoke to the question of whether or not Banif aided and abetted Oscar Lopes in allegedly opening up an illegal account with Banif. In the absence of any proof as to when Oscar Lopes allegedly opened an illegal account at Banif using Global's funds, the Plaintiffs have failed to establish that the alleged "business transactions" that Banif and FINAB allegedly engaged in within the state of New York (i.e. allegedly soliciting Borges to open a Global account with Banif) gave rise to the Plaintiffs claims against Banif.

Further, the Plaintiffs' submitted evidence is also insufficient to establish that their claims against Banif arose from Fernando Mendes' alleged solicitation of business from Global NY (through his alleged conversations with Borges). At the hearing, the Plaintiffs submitted an email string purportedly between Fernando Mendes and Oscar Lopes (Plaintiffs' exhibit 6 at the hearing) as proof that Oscar Lopes opened up an illegal account at Banif using Global funds. Said email exchange only refers to "GA account activity" and does not in any way indicate that Global had an account with Banif. In point of fact, said email exchange makes no mention of Banif. Further, Borges did not send or receive any of the emails in this email string and could not testify as to the meaning of the phrase "GA account activity" except to indicate that Global used the term "GA" to refer to Global Access (Hearing Transcript 147-151). In addition, when read together with the other emails submitted at the hearing, it is clear that Plaintiffs' exhibit 6 is insufficient to establish that Oscar Lopes opened an illegal account with Banif. In particular, the Defendants' exhibit 4 at the hearing was an email exchange purportedly between

Fernando Mendes and Borges, wherein Mendes specifically states that "Global Access and/or Raquel Borges have no account with Banif Group". Similarly, Defendants' exhibit 3 includes an email purportedly from Fernando Mendes to Borges, wherein Mendes specifically states "I have NO knowledge whatsoever of a Global Access account with Banif". Upon review of the emails that Plaintiffs submitted at the hearing, it is clear that Borges was the only person who ever indicated via email that a Global account had been opened with Banif.

Upon review of the testimony and evidence introduce at the hearing before the Special Referee, this Court finds that the Plaintiffs have failed to establish that the underlying action arose from Banif's alleged transaction of business in New York. As such, the Plaintiffs have failed to meet the second prong required to establish long-arm jurisdiction over Banif pursuant to CPLR 302 (a) (1).

Conclusion

Accordingly and for the reasons so stated it is hereby

ORDERED that the Plaintiffs' motion to reject the Special Referee's interim report dated February 24, 2016 (mot seq 008) is hereby denied; it is further

ORDERED that the Special Referee's interim report dated February 24, 2016 is hereby confirmed; it is further

ORDERED that the Plaintiffs' motion to reject the Special Referee's final report and recommendation (mot seq 009) is hereby denied; it is further

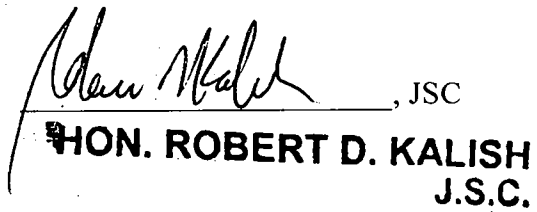
ORDERED that Banif's cross-motion to confirm the Special Referee's final report and recommendation is hereby granted to the extent that the Court confirms the Special Referee's report and recommendation that this Court lacks personal jurisdiction over the Defendant Banif (Cayman) LTD for the reasons so stated in the instant decision; it is further

ORDERED that Banif shall serve a copy of the instant order with notice of entry upon the Plaintiffs' attorneys and the attorneys for any Defendants in the underlying action not represented in common by Banif's attorneys; it is further

ORDERED that upon proof of service of a copy of the instant order with notice of entry upon Plaintiffs' attorneys and the attorneys for any Defendants in the underlying action not represented in common by Banif's attorneys, the Clerk of the Court is hereby directed to enter a judgement in accordance with the instant order dismissing the underlying action as against Banif.

The foregoing constitutes the Order and decision of the Court.

Dated: May 31, 2017



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HON. ROBERT D. KALISH
J.S.C.