APPENDIX

APPENDIX A

United States Court of Appeals
For the First Circuit

No. 19-2249

LUZ GONZÁLEZ-BERMÚDEZ,

Plaintiff, Appellee,

v.

ABBOTT LABORATORIES P.R. INC.; KIM PÉREZ,

Defendants, Appellants.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO,

[Hon. Juan M. Pérez-Giménez, U.S. District Judge]

Before

Lynch, Thompson, and Kayatta,
Circuit Judges.

[Counsel omitted]

March 3, 2021

KAYATTA, Circuit Judge. After being demoted, threatened with termination, and denied several promotions in 2013 and 2014, Luz González-Bermúdez filed suit against her employer, Abbott Laboratories, and her direct supervisor, Kim Pérez (collectively, "Abbott"), alleging age discrimination and retaliation under the Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621–34; Puerto Rico Law 100, P.R. Laws Ann. tit. 29, §§ 146–51; and Puerto Rico Law 115, id. §§ 194–194b. After a six-day trial, the jury found for González, awarding back pay in the amount of $250,000 and an additional $4 million for emotional distress. The district court upheld the liability verdict and entered judgment against Abbott on all counts but reduced the damages to just over $500,000 (to be doubled under Law 100, see id. § 146(a)(1)). On appeal, Abbott argues that the evidence was insufficient to support the jury's verdict. For the following reasons, we find that Abbott is entitled to judgment as a matter of law on González's ADEA claims and her corresponding claims under Law 100 and Law 115. But because Abbott failed to preserve its challenge to the jury's separate finding that Abbott retaliated against González for reporting to the State Insurance Fund (SIF), in violation of Law 115, we decline to upset the jury's verdict in that respect.

I.

We begin by briefly summarizing the facts, viewing the record in the light most favorable to González and drawing all reasonable inferences in her favor. See Muñoz v. Sociedad Española de Auxilio Mutuo y Beneficiencia de P.R., 671 F.3d 49, 55 (1st Cir. 2012). González began working at Abbott Laboratories in 1984. Over the next twenty-five years, she eventually became a National Sales Manager, which was designated as a Level 18 position on the Abbott Laboratories pay scale. In November 2010, Abbott underwent a reorganization and eliminated González's position, as well as the positions of two other employees, Rocio Oliver and Dennis Torres. All three employees accepted transfers to lower-level positions. As a result, González assumed the role of Institutional Marketing Manager, a newly created Level 17 position supervised by Kim Pérez. González does not challenge the lawfulness of this transfer.

González's transition to the new position was less than smooth. She disliked Pérez's style of supervision, and in November 2011 she filed an internal complaint against Pérez for harassment, which was ultimately found unsubstantiated. In addition to getting used to a new supervisor, González had to adjust to a new workload: While she had previously supervised twenty-eight employees in her role as a National Sales Manager, she was expected to complete her tasks independently in her new Institutional Marketing Manager position. At trial, González admitted that she was unable to timely perform all the duties of her new position, resulting in a "partially achieved" performance rating for 2011 -- her first ever negative performance evaluation at Abbott. González's duties were subsequently redistributed at her request, and she

received an overall positive "achieved expectations" rating for 2012. However, she still received a negative "partially achieved" rating for two categories of tasks relating to communication, organization, and meeting deadlines.

On March 18, 2013, Abbott reassigned González to a Level 15 Product Manager position supervised by Pérez. At trial, Pérez testified that the reassignment decision was made to reflect the duties González had been performing since some of her responsibilities from the Level 17 position were redistributed in 2012. González, by contrast, testified that she believed she was demoted in 2013 because of her age: She was fifty-three years old at the time, and the two other employees who had accepted lower-level positions as a result of the 2010 reorganization, Oliver (age forty-four) and Torres (age forty-one), were not similarly demoted.

Upon learning that she was being demoted on March 18, 2013, González experienced symptoms of anxiety and immediately reported to the company doctor. On the doctor's advice, she reported to the SIF and was placed on rest until July 10, 2013. But she returned to work just a few weeks later, cutting her medical leave short, after receiving a letter from Abbott threatening to terminate her employment if she did not report to work by April 8, 2013.

According to González's 2013 mid-year performance evaluation, González continued to miss project deadlines after returning to work. Nevertheless, González testified that based on her mid-year review, she believed she was "on track" and achieving the expectations of her position. One month later, in mid-October 2013, González's attorneys informed Pérez that González intended to sue her for age discrimination,

based on the March 2013 demotion decision. Later that month, González filed an administrative claim of age discrimination. According to González's testimony at trial, her professional relationship with Pérez worsened after she filed her complaint of age discrimination. For example, González testified that Pérez deprived her of information she needed to participate in a meeting held on October 30, 2013.

In November 2013, González became aware that a Level 16 Senior Product Manager position had opened up. She emailed Matt Harris, Abbott's general manager in Puerto Rico, expressing her interest in the position and her belief that she had not been informed of the opening out of retaliation for her complaint of age discrimination. Unbeknownst to González, Abbott had begun recruiting externally for the position via LinkedIn in August 2013. After receiving González's email, Harris had the position posted internally so that Abbott employees could compete with external candidates. González subsequently submitted her name for consideration. Meanwhile, the hiring committee designed the process by which they would select a candidate to fill the position. In doing so, the members of the hiring committee -- Harris, Pérez, and two members of Abbott's human resources department -- discussed González's discrimination complaint among themselves and with counsel. After conducting an initial review of the candidate slate, the hiring committee selected three finalists -- González and two external candidates.

In December 2013, the hiring committee interviewed González and the other two finalists for the Senior Product Manager position. After the interviews, the hiring committee informed all three finalists that they would each be required to give a mock

sales presentation the following day. González had never heard of such a requirement in an Abbott interview process. And she thought it was unnecessary for her to fulfill such a requirement because she had given similar presentations in the course of her employment at Abbott to various individuals, including members of the hiring committee. Concluding that the presentation requirement was imposed specifically to prevent her promotion, González refused to participate. Despite her withdrawal from the presentation component of the selection process, González emailed one of the members of the hiring committee two days later to reiterate her interest in the position, at which point she was informed that one of the other finalists -- who had fulfilled the presentation requirement -- had already been hired.

In January 2014, González sought to be promoted to a Level 18 Regional Sales Manager position that had been posted internally. The following month, she received her end-of-year evaluation for 2013. Pérez had given her an overall negative, "partially achieved" performance rating, rendering her ineligible for promotion in 2014 according to Abbott's general policy or practice. Pérez testified at trial that she gave González a negative evaluation because González had repeatedly missed deadlines and lost her composure with colleagues when confronted about her untimely work. González did not specifically dispute the contents of the evaluation but disagreed with Pérez's overall assessment of her performance and requested that the human resources department conduct its own review. In connection with that request, she asked that her emails from 2013 be reinstated, but was informed that the emails had already been deleted and

could not be retrieved. Hearing this, González filed an administrative complaint for retaliation.

While González's request for review of her performance evaluation and her administrative complaints were pending, Abbott determined that a different employee should be promoted to the Level 18 Regional Sales Manager position. Because promoting that employee would leave a Level 16 Senior District Manager position open, Abbott began looking for yet another employee to promote. Harris directed the hiring committee to keep this news quiet, but González found out about the Senior District Manager opening anyway and emailed Harris in March 2013 asking to be considered. Harris flatly denied her request, stating that she had failed to meet minimum expectations in several areas for the last three years. Ultimately, Abbott preselected another employee for the Senior District Manager position without requiring her to compete with other candidates for the promotion.

In April 2014, the human resources department developed a "Talent Management Review" document, which listed developmental actions and future potential promotions for some Abbott employees. The document did not identify any developmental actions or potential promotions for González. Nor was González placed on an official "performance improvement plan" to help her raise her performance rating from a negative "partially achieved" in 2013 to a positive "achieved expectations" in 2014. González nevertheless received a positive performance evaluation for both 2014 and 2015, albeit from a new supervisor.

II.

We review de novo the district court's denial of Abbott's motion for judgment as a matter of law. See Muñoz, 671 F.3d at 55. Reversal is appropriate only if, based on the evidence in the record, "reasonable persons could not have reached the conclusion that the jury embraced." Id. (quoting Sanchez v. P.R. Oil Co., 37 F.3d 712, 716 (1st Cir. 1994)).

A.

We begin with González's claim of age discrimination. This claim is based solely on her demotion in March 2013. The district court held that the jury could have found age discrimination under both the ADEA and Law 100 on a theory of disparate treatment, citing evidence that two employees younger than the fifty-three-year-old González -- Rocio Oliver (age forty-four) and Dennis Torres (age forty-one) -- were not demoted in 2013.

This was error. "[I]n order to be probative of discriminatory animus, a claim of disparate treatment 'must rest on proof that the proposed analogue is similarly situated in material respects.'" Vélez v. Thermo King de P.R., Inc., 585 F.3d 441, 451 (1st Cir. 2009) (quoting Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 752 (1st Cir. 1996)). Though the comparison cases "need not be perfect replicas," García v. Bristol-Myers Squibb Co., 535 F.3d 23, 31 (1st Cir. 2008) (quoting Conward v. Cambridge Sch. Comm., 171 F.3d 12, 20 (1st Cir. 1999)), they must be similar enough that "apples are compared to apples," Cardona Jiménez v. Bancomercio de P.R., 174 F.3d 36, 42 (1st Cir. 1999) (alteration omitted) (quoting Dartmouth Rev. v. Dartmouth Coll., 889 F.2d 13, 19 (1st Cir. 1989)).

No matter how generously one views the trial record, it is apparent that Oliver and Torres were not similarly situated to González in several important respects. Although Oliver and Torres, like González, saw their positions eliminated as a result of Abbott's reorganization three years earlier in 2010, this at most shows that they were similarly situated to González in one respect in 2010. For the next three years, Oliver and Torres occupied lower positions, performed different duties, and reported to different supervisors than did González. See García, 535 F.3d at 32–33 (finding two employees not similarly situated where they held different positions and had different responsibilities); Rodríguez-Cuervos v. Wal-Mart Stores, Inc., 181 F.3d 15, 20–21 (1st Cir. 1999) (finding two employees not similarly situated where the employees had different supervisors and worked under different circumstances). Moreover, there is no evidence in the record regarding Oliver and Torres's job performance between 2010 and 2013, which would be necessary for González to establish that Abbott discriminated against her by demoting her without also demoting Oliver and Torres. See Alvarez-Fonseca v. Pepsi Cola of P.R. Bottling Co., 152 F.3d 17, 26 (1st Cir. 1998) (rejecting a disparate treatment claim where two employees had different performance records). In sum, if Oliver and Torres were apples in 2013, González was not even a fruit.

Without this unsuitable comparator evidence, González is left with no evidence that in any way suggests that she was demoted in March 2013 because of age discrimination. At oral argument, counsel could cite none. In her brief, González tries to rely on the fact that months later, after she asserted her claim that the March 2013 demotion was discriminatory,

Pérez mentioned the claim while discussing the selection process for the Senior Product Manager position. But an employer's awareness that a discrimination claim has been made hardly provides evidence that the claim is valid. Otherwise, there would necessarily be evidence of discrimination in every case of claimed discrimination.[1]

The district court speculated that perhaps Pérez had designed the Level 17 job to which González was transferred in the 2010 reorganization to be so difficult that González would fail in it. But there is no evidence to support this rather remarkable speculation, and even González did not challenge her transfer to the new position in 2010. See Brandt v. Fitzpatrick, 957 F.3d 67, 75 (1st Cir. 2020) (explaining that a plaintiff cannot avoid judgment as a matter of law in an employment discrimination case based on "rank conjecture," "improbable inferences," and "unsupported speculation" (first quoting Pina v. Children's Place, 740 F.3d 785, 795 (1st Cir. 2014); then quoting Ray v. Ropes & Gray LLP, 799 F.3d 99, 116–17 (1st Cir. 2015))).

Nor is there evidence showing that Abbott told any material lies that might in context have been viewed as attempts to conceal a discriminatory motive. The district court found that the jury could have reasonably believed Abbott "had something to hide," citing only the rather trivial disagreement among Abbott witnesses about whether González's 2013 demotion should be characterized as a "demotion" or a

[1] By contrast, awareness of a claim is certainly relevant (indeed necessary) to establishing a retaliatory motive for a subsequent adverse employment action. Medina-Rivera v. MVM, Inc., 713 F.3d 132, 139 (1st Cir. 2013).

"transfer." This evidence does not support an inference of discrimination. See Zapata-Matos v. Reckitt & Colman, Inc., 277 F.3d 40, 45 (1st Cir. 2002) (explaining that courts must weigh the evidence "case by case," asking "not whether the explanation was false, but whether discrimination was the cause" of the adverse employment action).

There is evidence that González and Pérez had a difficult professional relationship from the get-go, leading González to file an unsubstantiated harassment claim against Pérez back in 2011. The district court, too, found Pérez to be "haughty" while on the stand at trial. But that stands far removed from proving discrimination. If anything, it suggests that the two simply did not get along.

González falls back on a claim of waiver, asserting that Abbott failed to preserve its challenge to the sufficiency of the evidence on the age discrimination claim concerning the March 2013 demotion. Abbott moved for judgment as a matter of law pursuant to Rule 50(a) at the close of the evidence, arguing that there was "no direct evidence of discrimination" and not "a scintilla of evidence" that the elimination of González's position was "associated" with any "lies." But in staking out that position, Abbott did not specifically mention and refute the comparator evidence that González relied on in attempting to prove age discrimination. Therefore, reasons González, Abbott waived the right to make any arguments concerning that evidence.

We disagree. A party certainly must move for judgment as a matter of law under Rule 50(a) at the close of the evidence in order to preserve fully the ability to press a renewed motion for judgment as a matter

of law under Rule 50(b) after the verdict. See Osorio v. One World Techs., Inc., 659 F.3d 81, 87 (1st Cir. 2011). Here, Abbott indisputably filed a timely motion under Rule 50(a) at the close of the evidence and specifically asserted that there was no evidence to support the age discrimination claim. Our caselaw does not as a general matter require more specificity. See id. at 88 ("[Rule 50(a)] does not require technical precision in stating the grounds of the motion." (alteration in original) (quoting Lynch v. City of Boston, 180 F.3d 1, 13 n.9 (1st Cir. 1999))). Otherwise, Rule 50(a) motions -- often made while the jury awaits argument and instructions -- would necessarily turn into lengthy analyses of every possible piece of evidence in the other party's possible favor. In this very case, the district court told counsel to "make it very short because I know what the evidence is. So just make it short." When Abbott later filed its Rule 50(b) motion, which specifically pointed out the insufficiency of González's comparator evidence, the district court expressed no surprise and found no waiver. Finally, the record suggests that no more precision was necessary to avoid prejudice to González. There is, in short, no reason to find that Abbott lost the opportunity to explain on appeal why it was correct in timely asserting that there was no evidence of age discrimination in the March 2013 demotion.

Finding no waiver and no evidence that González was demoted in March 2013 because of her age, we conclude that the evidence at trial was not sufficient to support a verdict against Abbott for age discrimination under the ADEA. And while González correctly points out that Law 100 shifts the burden of proof to the employer on the issue of discrimination if the challenged employment action is unjust, see Alvarez-

Fonseca, 152 F.3d at 27, she has not put forth any evidence of unjustness in her demotion. Even if she had, Abbott established a total absence of evidence that its actions were motivated by González's age.[2] See Baralt v. Nationwide Mut. Ins. Co., 251 F.3d 10, 17–21 (1st Cir. 2001) (rejecting the plaintiffs' Law 100 claim because the record was "bereft of indicia of discriminatory intent").

B.

We turn next to González's retaliation claims under the ADEA and Law 115. Both statutes prohibit an employer from taking adverse employment action against an employee because of her protected activity. See Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 94, 97 (1st Cir. 2018). The district court held that the evidence at trial was sufficient for the jury to find Abbott liable for retaliating against González on three separate occasions. We address each in turn.

1.

At trial, González argued that Abbott retaliated against her in violation of Law 115 by threatening her with termination after she reported to the SIF. Recall that after González was informed of her demotion in March 2013, she reported to the SIF and went on medical leave. Approximately one to two weeks later, she received a letter from Abbott stating that if she did not cut her medical leave short and return to work, Abbott

[2] Because the jury could not reasonably have found that Abbott demoted González because of her age, we need not decide whether Kim Pérez (González's supervisor) could have been held personally liable for age discrimination under Law 100.

would terminate her employment. Presumably based on that threat of termination, the jury found that Abbott retaliated against González for reporting to the SIF, which is undisputedly protected activity for purposes of Law 115. The district court upheld this aspect of the jury's verdict, finding that Abbott had waived any objection in its Rule 50(a) motion.

On appeal, Abbott suggests that the SIF claim could not support a finding of retaliation under Law 115 because a threat of termination is not an adverse employment action. But it provides no support for this proposition, and it does not attempt to explain why the contrary authorities cited by the district court are inapplicable. And insofar as Abbott argues that its letter threatening to terminate González's employment was authorized by Puerto Rico law and thus could not constitute unlawful retaliation under Law 115, it does not adequately develop that argument on appeal. Nor does it develop any argument as to why the district court's Rule 50(a) waiver ruling was wrong. Rather, it simply states that it "strongly disagree[s]" with the district court's logic. We therefore deem Abbott's contentions regarding González's SIF claim waived for lack of sufficient argumentation, see United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990), and affirm the district court's decision to the extent that it upholds the jury's verdict on that claim under Law 115.

2.

González's second theory of retaliation arises out of Abbott's refusal to promote her to the Senior Product Manager position in December 2013, following her complaint of age discrimination against Pérez in October 2013. The district court held that the jury could

have believed that the selection process for this position was intentionally stacked against González and that her non-promotion was therefore retaliatory.

In a retaliatory failure-to-promote case, a plaintiff must ordinarily show, among other things, that "she applied for a particular position ... for which she was qualified." Velez v. Janssen Ortho, LLC, 467 F.3d 802, 807 (1st Cir. 2006). No reasonable jury could find that González has met this threshold burden. The undisputed evidence in the record shows that González refused to participate in the mock-presentation component of the application process. As such, she voluntarily forfeited her eligibility for promotion to the Senior Product Manager position. Cf. Zabala-De Jesus v. Sanofi-Aventis P.R., Inc., 959 F.3d 423, 430–31 (1st Cir. 2020) (holding that an employer did not discriminate against the plaintiff by failing to hire him for a position for which he did not apply); Love v. Alamance Cnty. Bd. of Educ., 757 F.2d 1504, 1510 (4th Cir. 1985) (rejecting a claim of discriminatory non-promotion where the employee withdrew her application).

Of course, if an employer makes it clear that completing the application process is futile on account of a potential applicant's recent complaint of age discrimination, then the law may require only that the plaintiff show that she would have otherwise applied for and obtained the job. Cf. Int'l Bhd. of Teamsters v. United States, 431 U.S. 324, 365 (1977) ("If an employer should announce his policy of discrimination by a sign reading 'Whites Only' ... , his victims would not be limited to the few who ignored the sign and subjected themselves to personal rebuffs."). We might also imagine an extreme case in which an employer unlawfully made it impossible or dangerous for a person to complete the application process.

This is not such a case. González only argues that the sales presentation was not a usual part of Abbott's hiring process. That is beside the point. It was plainly job-related, and it was required equally of all the finalists who were selected to interview for the position. Perhaps she would have done well. Perhaps not. We do not know only because she did not try. As a general rule, it is not for the plaintiff to predict the employer's hiring decision and then claim to be the victim of that predicted decision. See Brown v. Coach Stores, Inc., 163 F.3d 706, 711 (2d Cir. 1998) ("It would be unthinkable to routinely permit non-applicant plaintiffs in individual suits to recover ... based on what amounts to mere speculation that they would have been rejected for discriminatory reasons had they applied." (quoting 1 Lex K. Larson, Employment Discrimination § 8.02[2], at 8-30-8-31 (2d ed. 1997))); see also Hoffman-García v. Metrohealth, Inc., 918 F.3d 227, 230 (1st Cir. 2019) (describing the plaintiff's failure to apply for the position at issue as a "fatal defect").

González also suggests that her failure to complete the application process for the Senior Product Manager position is not dispositive because Abbott had already retaliated against her by requiring her to apply in the first place, given that other Abbott employees were offered promotions without having to compete with external candidates. However, the undisputed evidence in the record shows that Abbott began soliciting external candidates for the Senior Product Manager position in August 2013, well before González engaged in protected activity by filing her age discrimination complaint against Pérez in October 2013. So Abbott's failure to offer González the Senior Product Manager position outright could not have been a retaliatory response to her October 2013 complaint of

age discrimination.[3] See Morón-Barradas v. Dep't of Educ., 488 F.3d 472, 481 (1st Cir. 2007) ("It is impossible for [an employer] to have retaliated against [an employee] before she engaged in protected activity.").

3.

Finally, the district court held that the jury could have reasonably found Abbott liable for retaliating against González in violation of the ADEA and Law 115 by giving her a "partially achieved" performance evaluation for 2013 and then denying her two promotions in early 2014. On appeal, Abbott argues that the record lacked sufficient evidence for a reasonable jury to find that either the 2013 performance evaluation or the 2014 non-promotions were motivated by retaliatory animus rather than legitimate business judgments.

a.

González's claim that her worse performance evaluation for 2013 was retaliatory rested primarily on chronology: She testified that she received a favorable rating from Pérez at her mid-year evaluation in September 2013, then filed her claim of age discrimination against Pérez in October 2013, and then received the less favorable end-of-year review from Pérez in February 2014. So, she reasons, the "drop" from mid-year to end-of-year must have been a retaliatory response to her October claim.

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[3] Having determined that González's failure to complete the application process for the Senior Product Manager position in December 2013 bars her corresponding retaliation claim, we need not consider her other arguments for why the jury could have found retaliation.

Chronology alone can sometimes support an inference of improper motive, but only where the circumstances make such an inference reasonable. See Colburn v. Parker Hannifin/Nichols Portland Div., 429 F.3d 325, 337–38 (1st Cir. 2005). The immediate problem with González's reasoning is that she had also filed an internal complaint against Pérez in 2011, before the 2013 mid-year review. Yet, says González, that was a good and fair review. So we question the reasonableness of any inference that the lesser end-of-year review was necessarily the result of González's October 2013 claim against Pérez, and ask whether something else accounts for the lower review.

The record answers that question in the affirmative. It contains undisputed evidence that González's performance worsened after her mid-year evaluation had been completed. According to the mid-year evaluation, she missed only three deadlines in the first eight months of 2013 -- one on January 15, one on July 15, and one on August 1. The end-of-year evaluation indicates that González missed at least three more deadlines over just the next four months -- including one on September 30, one in mid-October, and one on November 5 -- and failed altogether to complete one of the late projects that had been discussed at her mid-year evaluation. These facts are not disputed by González, and they buttress the unreasonableness of any inference of retaliation arising from the chronology she relies on. See id. at 336–38 (finding that the timing of the plaintiff's termination raised no inference of retaliation because, during the period between his protected conduct and his termination, his employer determined that he had lied about his reasons for being absent from work on two occasions); Mesnick v.

Gen. Elec. Co., 950 F.2d 816, 828 (1st Cir. 1991) (similar).

The district court nevertheless suggested that the jury reasonably could have disbelieved Abbott's missed-deadlines argument because Abbott had deemed González a finalist for promotion to the Senior Product Manager position in December 2013, just days before the end of the yearlong period on which her 2013 performance evaluation was based. In the district court's view, this evidence implied that González's performance was sufficiently competent in 2013 to qualify her for promotion and therefore suggested that her negative evaluation must have been motivated by retaliatory animus rather than her poor performance. But undisputed trial testimony indicates that González was included in the pool of finalists for that position based on her positive performance evaluation for 2012, which was her most recent performance evaluation at the time, rather than on her performance in 2013. In short, there was no inconsistency between González's partial success in seeking a promotion based on her 2012 performance and her subsequent receipt of a negative rating for her 2013 performance.[4]

The district court also identified other actions that it viewed as incompatible with Abbott's contention that González's poorer evaluation was justified by her poorer performance. Specifically, the district court noted that Abbott had not placed González on a "performance improvement plan" or formally identified

[4] Moreover, that partial success of being selected as one of the three finalists out of more than one hundred applicants came after González filed her charge of age discrimination. This only reinforces our conclusion that Abbott did not retaliate against her.

"developmental actions" for her to take in 2014. But it is undisputed that Abbott only instituted performance improvement plans for employees who had received two consecutive negative performance evaluations, not for employees like González who had received only one. And while several witnesses at trial offered different reasons for Abbott's failure to identify developmental actions for González, documentary evidence admitted at trial indisputably indicates that Abbott did not list developmental actions for every employee, or even for every employee whose performance needed improvement.

Finally, the district court suggested that the jury nevertheless could have found Abbott liable for retaliation based on her 2013 performance evaluation because the jury reasonably could have regarded González's poorer performance as the result of "sabotage[ ]" by Pérez, based on González's testimony that Pérez had excluded her from meetings and deprived her of information essential to the performance of her duties. But González's actual testimony indicates only that she complained about being deprived of information with respect to a single meeting on October 30, 2013, regarding a single project, which does not explain the multiple missed deadlines listed in her end-of-year evaluation. And there is no evidence in the record that González was excluded from meetings -- only that she felt "sidelined" during the October 30 meeting just mentioned.

In sum, it is apparent from the record that González repeatedly missed deadlines throughout 2013, and that her job performance worsened after she received critical feedback regarding her late work. The evidence cited by the district court and González, viewed collectively, does not suggest otherwise. More

generally, it matters not whether González or Abbott is correct in characterizing the quality of her performance. Rather, the question is whether Abbott falsely claimed that it regarded her performance as poorer and, if so, whether the jury could reasonably infer that the real reason for the poorer performance rating was retaliation. Brandt, 957 F.3d at 82. Given that González's performance indisputably worsened to some extent between the September review and the end-of-year review, no reasonable jury could infer that Abbott's less favorable characterization of that performance, by itself, implied a retaliatory motive. See Carreras v. Sajo, García & Partners, 596 F.3d 25, 37 (1st Cir. 2010) (rejecting an employee's retaliation claim because "[t]he evidence was consistent on the essential point, i.e., that [his] work was untimely and therefore unsatisfactory").

b.

We quickly dispose of González's remaining retaliation claim, which arises out of Abbott's refusal to promote her to either Regional Sales Manager or Senior District Manager in early 2014. It is undisputed that, during the relevant time period, Abbott ordinarily did not promote employees who had received a "partially achieved" rating for the preceding year. Witnesses at trial, including González herself, consistently testified that this was the reason González was not promoted in 2014. It is true that the trial record contains discrepancies regarding whether this general rule was a "policy" or a mere "practice" at Abbott; whether González was "considered" for the promotions she sought before she was ultimately rejected; and whether Abbott relied on alleged performance shortcomings from 2011 and 2012 as well as from 2013 when deciding not to promote her. But such debates about tangential

characterizations are, as a matter of law, insufficient to prove retaliation. See Carreras, 596 F.3d at 37.

III.

For the foregoing reasons, we affirm the judgment of the district court in part, reverse in part, and remand for a new trial on the sole issue of damages resulting from Abbott's April 2013 letter threatening to terminate González's employment after she reported to the SIF, which the jury found to be unlawful retaliation.[5] We award no costs.

[5] Having concluded that González's other claims of discrimination and retaliation lack adequate support in the record, we deny as moot Abbott's alternative request for a new trial on those claims. And, having concluded that a new trial as to damages is appropriate, we need not con-sider Abbott's alternative request for further remittitur.

APPENDIX B

United States Court of Appeals
For the First Circuit

NO. 19-2249

LUZ GONZÁLEZ-BERMÚDEZ,

Plaintiff, Appellee,

v.

ABBOTT LABORATORIES P.R. INC.; KIM PÉREZ,

Defendants, Appellants.

JUDGMENT

Entered: March 3, 2021

This cause came on to be heard on appeal from the United States District Court for the District of Puerto Rico and was argued by counsel.

Upon consideration whereof, it is now here ordered, adjudged and decreed as follows: The judgment of the district court is affirmed in part and reversed in part, and the matter is remanded for a new trial consistent with the opinion issued this day. No costs are awarded.

By the Court:
Maria R. Hamilton, Clerk

[cc's omitted]

APPENDIX C

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

LUZ GONZALEZ-BERMUDEZ, Plaintiff, v. **ABBOTT LABORATORIES P.R. INC., ET. AL.,** Defendants.	CIVIL NO. 14-1620 (PG)

OMNIBUS OPINION AND ORDER

Plaintiff Luz Gonzalez-Bermudez (hereinafter "Plaintiff" or "Gonzalez") filed this action pursuant to the Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. §§ 621-634, against her employer Abbott Laboratories PR Inc. ("Abbott" or "the Company") and her supervisor Kim Perez (hereinafter "Perez"). The Plaintiff also raised supplemental state law claims of age discrimination under Puerto Rico's antidiscrimination statute, Law No. 100 of June 30, 1959 ("Law No. 100"), P.R. Laws Ann. tit. 29, § 146, et seq., as well as claims of retaliation under Puerto Rico's anti-retaliation statute, Law No. 115 of December 20, 1991 ("Law No.

115"), P.R. Laws Ann. tit. 29, § 194a. The case proceeded to trial and the jury found in favor of Plaintiff, awarding her $4,000,000.00 ($3,000,000.00 against Abbott; $1,000,000.00 against Perez) in compensatory damages and $250,000.00 in back pay. See *Verdict*, Docket No. 138. Pursuant to the doubling provisions of the applicable local statutes, the court entered judgment in the amount of $8,500,000 in both pack-pay and emotional damages, plus an additional $250,000 in liquidated damages. See Docket No. 150.

Defendants filed several post-judgment motions seeking various remedies. The court already denied defendants' motion for judgment as a matter of law under Rule 50(b) of the Federal Rules of Civil Procedure. See *Opinion and Order*, Docket No. 187. Therein, the court held that defendants did not meet their burden of showing that the evidence presented at trial, taken in the light most favorable to Gonzalez, was so overwhelmingly inconsistent with the verdict that no reasonable jury could conclude that defendants discriminated and retaliated against Plaintiff. Id. Pending now before the court are: (1) a motion for new trial or alternatively for remittitur, under Rules 50(b), 59(a) and 59(e) (Docket No. 164); (2) a motion for relief from judgment or order under Rule 60 and/or motion to alter or amend judgment under Rule 59(e) (Docket No. 165). For the reasons that follow, the court **GRANTS IN PART AND DENIES IN PART** the defendants' requests.

I. STANDARDS OF REVIEW

A. Rule 59 – Motion for New Trial / Motion to Alter Judgment / Motion for Remittitur

Rule 50(b) of the Federal Rules of Civil Procedure provides that if the court does not grant a motion for judgment as a matter of law made under Rule 50(a), "the movant may file a renewed motion for judgment as a matter of law and may include an alternative or joint request for a new trial under Rule 59." Fed. R. Civ. P. 50. Pursuant to Rule 59(a)(1)(A), the court may grant a new trial "after a jury trial, for any reason for which a new trial has heretofore been granted in an action at law in federal court; ..." Fed. R. Civ. P. 59(a)(1)(A). "A trial court may 'set aside a jury's verdict and order a new trial only if the verdict is against the demonstrable weight of the credible evidence or results in a blatant miscarriage of justice.'" Sindi v. El-Moslimany, 896 F.3d 1, 13 (1st Cir. 2018) (citing Sanchez v. P.R. Oil Co., 37 F.3d 712, 717 (1st Cir. 1994)).

Alternatively, Rule 59(e) permits a motion "to alter or amend a judgment[.]" Fed. R. Civ. P. 59(e). "A party may ask a court to amend its judgment under Rule 59(e) of the Federal Rules of Civil Procedure based on newly discovered material evidence or an intervening change in the law, or because the court committed a manifest error of law or fact." Casco, Inc. v. John Deere Constr. & Forestry Co., No. CV 13-1325 (PAD), 2017 WL 4226367, at *2 (D.P.R. Mar. 30, 2017) (citing Bogosian v. Woloohojian Realty Corp., 323 F.3d 55, 72 (1st Cir. 2003); Aybar v. Crispin-Reyes, 118 F.3d 10, 16 (1st Cir. 1997)). When a party moves for remittitur pursuant to Rule 59(e), "[i]t is within the district

court's discretion 'to order a remittitur if such an action is warranted in light of the evidence adduced at trial.'" Climent-Garcia v. Autoridad de Transporte Maritimo y Las Islas Municipio, 754 F.3d 17, 21 (1st Cir. 2014) (citing Trainor v. HEI Hospitality, LLC, 699 F.3d 19, 29 (1st Cir.2012)). "When a movant attacks an award of damages as excessive, a court may remit the award only if 'the award exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before it.' " Sindi, 896 F.3d at 13 (citing Trainor, 699 F.3d at 29).

B. Rule 60 – Motion for Relief from Judgment

Rule 60(b) provides that a court may relieve a party from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;
(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);
(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;
(4) the judgment is void;
(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or
(6) any other reason that justifies relief.

Fed. R. Civ. P. 60 (b). "Rule 60(b) grants federal courts the power to vacate judgments 'whenever such action is appropriate to accomplish justice.'" Bouret–Echevarria v. Caribbean Aviation Maint. Corp., 784 F.3d 37, 41 (1st Cir.2015) (quoting Local No. 59 v. Superline Transp. Co., 953 F.2d 17, 19 [1st Cir.1992])). "Success under that rule requires more than merely casting doubt on the correctness of the underlying judgment." Fisher v. Kadant, Inc., 589 F.3d 505, 512 (1st Cir. 2009) (citing Karak v. Bursaw Oil Corp., 288 F.3d 15, 19 (1st Cir.2002))). Rather, "[r]elief under Rule 60(b) is 'extraordinary in nature' and is therefore 'granted sparingly.'" Caisse v. DuBois, 346 F.3d 213, 215 (1st Cir. 2003) (citing Karak, 288 F.3d at 19)). A party seeking relief under Rule 60(b) must demonstrate "at a bare minimum, that his motion is timely; that exceptional circumstances exist, favoring extraordinary relief; that if the judgment is set aside, he has the right stuff to mount a potentially meritorious claim or defense; and that no unfair prejudice will accrue to the opposing parties should the motion be granted." Fisher, 589 F.3d at 512.

II. DISCUSSION

A. Insufficiency of the Evidence

"A district court's power to grant a motion for a new trial is much broader than its power to grant a [motion for judgment as a matter of law]." Jennings v. Jones, 587 F.3d 430, 436 (1st Cir. 2009). "Under Rule 59, '[t]rial judges have more leeway to grant new trials than to set aside verdicts based on insufficiency of the evidence under Rule 50. They may consider their view of the credibility of the witnesses in doing so, but must

be careful not to invade the jury's province." Oliveras-Zapata v. Univision Puerto Rico, Inc., 939 F. Supp. 2d 82, 84 (D.P.R. 2012), (citing Valentin–Almeyda v. Municipality of Aguadilla, 447 F.3d 85, 103 (1st Cir.2006)). Despite this broad authority, the First Circuit Court of Appeals "[has] often emphasized that a 'district judge cannot displace a jury's verdict merely because he disagrees with it' or because 'a contrary verdict may have been equally ... supportable.'" Jennings, 587 F.3d at 436 (citing Ahern v. Scholz, 85 F.3d 774, 780 (1st Cir.1996)).

In their motion, Defendants move for a new trial claiming the evidence was not sufficient to sustain a verdict of age discrimination and retaliation. See Docket No. 164 at page 24. The court disagrees for the reasons already expressed in the court's Opinion and Order (Docket No. 187), incorporated by reference herein. Contrary to defendants' assertions, the evidence on record strongly supported the jury's verdict. As such, the court declines to set aside the jury's verdict and order a new trial. Defendants' motion for a new trial on insufficiency of the evidence grounds is thus **DENIED**.

B. Prejudicial Errors

In addition to their claim that the evidence was insufficient to support the verdict, defendants also argue that the cumulative effect of the errors committed during trial proceedings mandates a new trial. The court will discuss each alleged error in turn.

Court's Interrogation of Adames

During her case in chief, Plaintiff's counsel extensively questioned Luz Miriam Adames

("Adames"), Abbott's Human Resources Director, about an email Plaintiff received on March 19, 2014 regarding her performance. The court also asked Adames some questions about the email. The email in question was sent by Matt Harris ("Harris"), Abbott's General Manager in Puerto Rico and the Caribbean at the time. In this email, Harris told Plaintiff that she had failed to meet the minimum expectations of several key job competencies during the "last three years," even though Plaintiff had been a finalist for promotion just some months before he sent this email. Because of this discrepancy, the court expressed confusion after Adames responded to the questions about the Company's promotion and performance evaluation processes. See Docket No. 126 at pages 69-72; see also *Opinion and Order*, Docket No. 187 at page 24.

In their motion, defendants complain that the court caused them prejudice by "extensively" asking Adames questions on the subject, by reiterating Plaintiff's counsel's "loaded" questions and by openly expressing "confusion" after she finished testifying. See Docket No. 164 at page 3. As a result, defendants suggest that the court exceeded its power's limitations and claim that the court's intervention unfairly disadvantaged them.

In response, Plaintiff argues that defendants waived or forfeited any challenge to the court's questioning of the witness by failing to timely object. Plaintiff also responded that the court's attempt to clarify Adames' testimony was within "the acceptable range of judicial behavior." See Docket No. 170 at page 4. However, in their reply, defendants clarify that they did not raise this issue as an independent ground for a new trial, "but rather to give context to

why counsel's subsequent improper and unethical comments during closing arguments about Mr. Harris having 'lied,' and the Court's lax treatment of the same, were particularly prejudicial to Defendants' case." Docket No. 177 at page 10.

Per the foregoing, the court finds that, not only did defendants fail to timely object to the court's conduct during trial, but also voluntarily abandoned this claim of prejudice in their reply memo (Docket No. 177). The court will thus now move on to their argument regarding the accusations of mendacity against Harris.

Plaintiff's Counsel's Lying Accusations Against Harris

Defendants argue that attorney for Plaintiff engaged in prejudicial misconduct during closing arguments when he accused Harris of lying. See Docket No. 164 at pages 5-7. Despite timely objecting to the characterization of Harris' credibility, defendants also complain that the court denied their strong objections and failed to admonish Plaintiff's counsel. Defendants stress that these statements were particularly harmful because attorney for Plaintiff made them during his rebuttal argument, after which they did not have an opportunity to reply. The relevant portion of the rebuttal argument in the trial transcript reads as follows:

> MR. GONZALEZ: ... Ladies and gentlemen of the jury, since I sat down after completing my opening statement -- closing argument, one thing hasn't changed; they haven't produced a document, contemporary document, that proves that what they were saying is correct. Not one. Not one. I

> have four that I want to talk to you about. The first one is his statement was that Ms. Gonzalez had a bad performance for two years. Is that what Mr. Harris says? Why do you have to lie? Why do you have to lie?
>
> MR. CASELLAS: Objection, Your Honor. Objection.
>
> THE COURT: Denied.
>
> MR. GONZALEZ: Why do you have to lie when giving a manual to an employee? Their system, Abbott's system, says that if you "Achieve expectations," you have nothing to worry about, and that is not what Mr. Harris is saying there.

Docket No. 152 at pages 105-106.

Additionally, Defendants claim that the curative instruction the court agreed to give the jury after their renewed objection[1] was "bland" and "amounted to no

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[1] Defendants' renewed objection in the trial transcript reads as follows:

> MR. CASELLAS: Whether a witness is lying or telling the truth, that's the function of the jury. I submit that it was a very prejudicial statement for counsel to stand here and tell that a witness is lying on the stand without any foundation on the record that the witness has admitted to saying something that's not correct. That argument by itself is prejudicial, and I request a contemporaneous instruction to the jury to disregard that statement specifically made by counsel during closing, and to instruct the jury that the credibility of all the witnesses is for the jury to decide. The Court overruled my objection. I think there is already a – the jury has been contaminated by counsel's statement that this witness lied, and that's a material issue for the jury of credibility in this case, and **it would be prejudicial if this jury is allowed**

curative instruction at all." Docket No. 164 at page 10. The curative instruction the court gave the jury after defendants reiterated their objection was the following:

> THE COURT: All right. Should we go ahead then with the instructions?
>
> **MR. CASELLAS: Your Honor, will there be a ruling on my motion for a cautionary instruction?**
>
> THE COURT: Yes, there will be a ruling.
>
> ...
>
> (WHEREUPON, the following further proceedings were had in open court in the presence and hearing of the jury:)
>
> THE COURT: All right. Now I am going to give you the instructions, and you will hear from the instructions that I give you -- **and I bring this up because there was an argument to the effect that one of the witnesses lied, but as you will hear from my instructions, the credibility of the witnesses is up for you to decide.** And if you, in your consideration of the evidence, you come to a conclusion differently than what was stated in the closing arguments, it's your recollection that prevails, not whatever it was mentioned by the attorneys. So you will be judging the credibility of all the witnesses in this case.

Docket No. 152 at pages 110-111 (emphasis added). Despite the instruction, defendants contend that the

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> **to make a verdict without a cautionary instruction in that regard.**

Docket No. 152 at pages 108-109 (emphasis ours).

prejudice the accusations caused them warrants a new trial.

In her opposition, Plaintiff points out that although the court originally denied defendants' objection, it later did exactly as Plaintiff requested: it gave a timely and curative instruction to the jury. See Docket No. at page 34. Plaintiff contends that defendants are now precluded from raising an untimely objection because they did not object to the court's curative instruction when given and did not request a mistrial before the jury was discharged. See Docket No. 170 at pages 22-23, 34.

The court will address the merits of parties' arguments in turn.

Firstly, the court notes that in support of their request for a new trial, defendants rely heavily on the First Circuit Court of Appeals' holding in Polansky v. CNA Ins. Co., 852 F.2d 626, 627 (1st Cir. 1988),[2] where

[2] In Polansky, both the Trustee (Glenn Polansky) for a trust that owned an apartment building and the Trust itself (Londonderry Estates Realty Trust) filed breach of contract suit against the insurer (CNA Insurance Company) that had insured against damage to the building. The insurer had refused to reimburse Trustee for the damages the building sustained in a fire on New Year's Day of 1983, in which five people died. The contract also insured Polansky against liability to third parties for personal injuries. CNA refused to reimburse Polansky, claiming that the policy was void because Polansky had set the fire deliberately, had filed a fraudulent claim of damages, and had impeded CNA's investigation of the conflagration through deception. CNA believed that Polansky had set the fire to collect the insurance proceeds and then rehabilitate the apartments. The jury found in favor of plaintiffs and CNA appealed. The First Circuit held that defendant CNA was entitled to a new trial due to the errors caused by the misconduct of plaintiff's counsel at trial. See Polansky v. CNA Ins. Co., 852 F.2d 626 (1st Cir. 1988).

the Court found that the errors caused by the misconduct of plaintiff's counsel at trial warranted a new trial. In Polansky, the Court cited six instances in which plaintiff's counsel, throughout his closing argument, "was unable to keep his opinions and personal beliefs to himself." Id. at 627. Despite opposing counsel's four objections, "the court stated simply that it would inform the jury that argument of counsel is not evidence ...." Id. at 628. The Court stated that "[c]ourts have long recognized that statements of counsel's opinions or personal beliefs have no place in a closing argument of a criminal or civil trial." Id. As a result, it found that counsel's statements violated various applicable rules of professional conduct and that the trial court erred "by not dealing promptly with counsel's remarks, upon timely objection by opposing counsel, and informing offending counsel that his expression of personal beliefs and opinions would not be tolerated by the court." Id. But the First Circuit's finding of error is limited to the circumstances in Polansky, where the lower court had simply given a blanket instruction that was not directed at the offending counsel. To that effect, the First Circuit specified that "[a]lone, a blanket instruction from the court that argument of counsel is not evidence will not rectify a violation of this rule." Id. The Court added that "[w]e will be particularly reluctant to condone such behavior of counsel when, as here, there has been timely objection, no provocation by the opposition, and no 'timely curative instruction directed particularly to [counsel's] comments.'" Id. (citing United States v. Young, 470 U.S. 1, 8 (1985)).

In contrast, the court here reconsidered its original denial of defendants' objection and granted their

request for a curative instruction. The same was given immediately following the sidebar at the end of rebuttal. As can be gleaned from the trial transcript, in so doing, the court made specific reference to plaintiff's counsel's comment that one of the witnesses had lied. These important factual differences render Polansky inapposite to the situation at hand, particularly because the instruction given here was both curative and timely.

Alternatively, the court must point out that defendants did not object to the cautionary instruction after it was given. The record shows that after closing arguments, their specific request to the court was granted *as requested*. After the court addressed the matter with the jury, defendants did not complain that the charged instruction was "bland" or not forceful enough until the filing of their post-judgment motions. They waited to complain about the insufficiency of the cautionary instruction after the verdict was rendered and they lost the case. Their silence, however, rendered them at a huge self-induced disadvantage in light of the applicable rules[3] and caselaw.

To that effect, the First Circuit has held that "silence after instructions ordinarily constitutes a

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[3] "Under the procedure outlined in Rule 51, before the trial court charges the jury it must inform the parties of its proposed instructions and receive any objections.... An objection made at that time 'preserves the underlying issue for appeal.'" Booker v. Massachusetts Dep't of Pub. Health, 612 F.3d 34, 40–41 (1st Cir. 2010) (citing Fed.R.Civ.P. 51(b); Surprenant v. Rivas, 424 F.3d 5, 15 (1st Cir.2005)). "The requirements of Rule 51 'are not to be taken lightly' and 'there is a high price to be paid for noncompliance.'" Booker, 612 F.3d at 41 (citing DeCaro v. Hasbro, Inc., 580 F.3d 55, 60 (1st Cir.2009)).

forfeiture of any objections ...." See Muniz v. Rovira, 373 F.3d 1, 6-7 (1st Cir. 2004) (citing Putnam Res. v. Pateman, 958 F.2d 448, 456 (1st Cir.1992)). In Muniz v. Rovira, the defendant argued on appeal "that the district court erred in failing to give a stronger instruction concerning the jury's obligation to render a verdict solely on the basis of the evidence and uncontaminated by undue passion, prejudice, or sympathy." 373 F.3d at 6. The defendant, however, had not requested such an instruction at the charge conference or objected to the charge as given. As a result, the Court held that defendant procedurally defaulted on his claim. Id. (citing Fed.R.Civ.P. 51; Moore v. Murphy, 47 F.3d 8, 11 (1st Cir.1995) (holding that a "failure to object to [jury] instructions at the time, and in the manner, designated by Rule 51 is treated as a procedural default")).

Here, defendants requested a cautionary instruction at sidebar. "The 'purpose of a sidebar objection is to inform the judge exactly what he got wrong and what he should do to remedy the incipient harm.'" Booker v. Massachusetts Dep't of Pub. Health, 612 F.3d 34, 42 (1st Cir. 2010) (holding that employee forfeited objection that jury instruction misstated legal standard applicable to her retaliation claim by not objecting after hearing the final instruction given to jury) (citing DeCaro v. Hasbro, Inc., 580 F.3d 55, 61 (1st Cir.2009)). The instruction that defendants requested and that addressed their concern was indeed given without objection to the charge. "By failing to object to the ... instruction ... after the charge, [defendants] failed to inform the court that [they] believed the instruction was still problematic, specify the grounds for [their] objection, or give the court an opportunity to correct any error." Booker, 612

F.3d at 42. Pursuant to the foregoing, the court finds that the defendants forfeited their objection to this remedial jury instruction.

Notwithstanding, "Rule 51 sets forth a procedure for parties to request jury instructions and to object to jury instructions as given." Long v. Abbott, No. 2:15-CV-00291-JAW, 2017 WL 2787605, at *3 (D. Me. June 27, 2017) (citing Fed. R. Civ. P. 51(d)(2) ("A court may consider a plain error in the instructions that has not been preserved as required by Rule 51(d)(1) if the error affects substantial rights.")); see also United States v. Brandao, 448 F.Supp.2d 311 (D.Mass.2006) (it is appropriate for district courts to apply plain error review to post-trial objections concerning jury instructions because of district courts' appellate role in these circumstances) *aff'd*, 539 F.3d 44 (1st Cir. 2008). "Under plain error review, we will consider a forfeited objection only if: (1) an error was committed; (2) the error was 'plain' (i.e. obvious and clear under current law); (3) the error was prejudicial (i.e. affected substantial rights); and (4) review is needed to prevent a miscarriage of justice." Aguayo v. Rodriguez, No. 14-1059 (MEL), 2016 WL 3522259, at *3 (D.P.R. June 21, 2016), *aff'd sub nom.* Mejias-Aguayo v. Doreste-Rodriguez, 863 F.3d 50 (1st Cir. 2017). "The requirement that the error is likely to alter the outcome is particularly important in this context because '[a]n erroneous jury instruction necessitates a new trial only if the error could have affected the result of the jury's deliberations.' " Colon-Millin v. Sears Roebuck De Puerto Rico, Inc., 455 F.3d 30, 41 (1st Cir. 2006) (citing Allen v. Chance Mfg. Co., 873 F.2d 465, 469 (1st Cir.1989)). "The standard is high, and 'it is rare indeed for a panel to find plain error in a civil case.'" Long, 2017 WL 2787605, at *3

(citing Diaz-Fonseca v. Puerto Rico, 451 F.3d 13, 36 (1st Cir. 2006)).

After careful review of the trial record, the court finds no indication that the accusation lodged against Harris in rebuttal arguments influenced the final outcome of the trial. If defendants really believe that the jury found in favor of Plaintiff simply because opposing counsel said this witness was lying, defendants sorely disregard the weight of the evidence as a whole. See *Opinion and Order*, Docket No. 187. The court's findings in its Opinion and Order denying defendants' motion for judgment as a matter of law overwhelmingly demonstrate that even if plaintiff's attorney engaged in misconduct, it could not have affected the jury's verdict. Hence, no prejudice ensued from Plaintiff's attorney's comments.

Pursuant to the foregoing, defendants' request for a new trial based on the prejudice caused by the accusations against Harris' credibility and the purported insufficiency of this court's curative jury instruction is **DENIED**.

Other Claims of Improper Comments (Not Objected)

The same holding goes for defendants' other claims of improper conduct on the part of Plaintiff's attorney. These instances are itemized in footnote 2 of defendants' motion for new trial. See Docket 164 at page 7 n. 2. Therein, defendants list some remarks made during opening and closing arguments, which they now claim constituted misconduct and were unduly prejudicial. Their explanation for not objecting during trial is simply that it "would have been filled with constant interruptions had Defendants objected

to each and every one" of these instances. See Docket No. 164 at page 7 n. 2. Thus, the claims of error are admittedly unpreserved.

"Failure to timely object to an attorney's misconduct will frequently result in the denial of a motion for new trial, but such denials typically occur in cases where a party did not raise the objection at all until after the jury had returned a verdict." Fonten Corp. v. Ocean Spray Cranberries, Inc., 469 F.3d 18, 21 (1st Cir. 2006).

> In general, the law ministers to the vigilant, not to those who sleep upon perceptible rights. Consequently, a litigant who deems himself aggrieved by what he considers to be an improper occurrence in the course of trial or an erroneous ruling by the trial judge ordinarily must object then and there, or forfeit any right to complain at a later time. The policy reasons behind the raise-or-waive rule are rock solid: calling a looming error to the trial court's attention affords an opportunity to correct the problem before irreparable harm occurs. Then, too, the raise-or-waive rule prevents sandbagging; for instance, it precludes a party from making a tactical decision to refrain from objecting, and subsequently, should the case turn sour, assigning error (or, even worse, planting an error and nurturing the seed as insurance against an infelicitous result).

United States v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995).

This court is reluctant to view defendants' argument as anything more than an unfounded, *post hoc* attempt to dodge responsibility for their strategic

decision to avoid "constant interruptions" during trial. "In any event, [defendants] did not lodge a contemporaneous objection to [plaintiff's] closing, and the allowance of the statements certainly did not rise to the level of plain error." Baker v. Goldman, Sachs & Co., 771 F.3d 37, 58 n. 16 (1st Cir. 2014) (citing Portugues–Santana v. Rekomdiv Int'l Inc., 725 F.3d 17, 26 (1st Cir.2013) (where party fails to object to statements made in closing, claim of improper argument reviewed for plain error)). As a result, the court **DENIES** defendants' claims of prejudicial attorney misconduct for statements they failed to object to.

Plaintiff's Cruise Trip

Defendants raised another claim of attorney misconduct on account of a statement Plaintiff's counsel made during his rebuttal argument regarding a cruise ship Plaintiff took during her second medical leave after reporting to the State Insurance Fund (SIF). See Docket No. 164 at pages 8-9. But again, defendants fail to show prejudice.

One of Plaintiff's claims in this case was related to a letter Abbott sent Plaintiff on April 1, 2013, after she reported to the SIF for a second time. In the letter, the Company informed her that if she did not report to work by April 8th, Abbott would terminate her employment. During Plaintiff's cross-examination, she admitted that she went on a one-week trip on a cruise ship during her medical leave in March of 2013. See Docket No. 130 at pages 127-128. Subsequently at trial, defendants' attorney made reference to this trip during his closing argument:

> And do you remember what the plaintiff was doing while on medical leave? She took a one-week cruise while on medical leave. She was enjoying a one-week cruise. Is it wrong that the employer is going to try to reach out to her; Report to work, Come back to work? You have been out for the State Insurance Fund already. This is the second time.

Docket No. 152 at pages 94-95. While addressing the jurors, defendants' counsel later questioned: "I ask you this: Is a person who celebrates every year at Abbott's Christmas parties and took a one-week cruise while on medical leave worthy of any compensation for emotional distress?" Docket No. 152 at page 104. Plaintiff's counsel responded to these statements in his rebuttal, which prompted defendants' attorney to object:

> MR. GONZALEZ: ... The case is not based on stories. The case is not based on interpretations. What if the psychiatrist at the State Insurance Fund told her to go on a cruise to relax?
>
> MR. CASELLAS: Objection; there is no foundation for that on the record.
>
> THE COURT: Yes, there is testimony on the record; her testimony.
>
> MR. GONZALEZ: So again -- and I am not taking any more time. Whatever your decision, do it on the evidence. Thank you very much.

Docket No. 152 at page 108.

Outside the presence of the jury, while discussing the issue of the accusations laid against Harris, the court also addressed Plaintiff's counsel's statements regarding the cruise ship trip. To this, defendants'

attorney responded: "I didn't raise a point about that right now. I am more concerned about what counsel said about the credibility of our witness [Harris]." Docket No. 152 at page 110. After this discussion with counsel, the court reminded the jury that it was their recollection of the evidence that ultimately prevailed.[4] See Docket No. 152 at pages 111, 115.

In their post-judgment motion, defendants complain that both opposing counsel's and the court's misstatements regarding the cruise trip were unfairly prejudicial because they were not based on the evidence presented. According to defendants, "[t]he

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[4] The court notes that prior to closing arguments it had already instructed the jury that:

> The closing arguments are not evidence in the case. Each attorney will argue to you the way that they think the evidence -- what the evidence shows, and the inferences that you may draw from facts which have been proven. But if the attorneys say something is a fact that you think or you remember that is differently, it's your recollection that counts, not the attorneys -- not what the attorneys tell you what they think.

Docket No. 152 at page 68. Thereafter, the court specified:

> Certain things are not evidence. **The arguments and the statements of the lawyers are not evidence.** The lawyers are not witnesses. **What they say in their opening statements and in their closing arguments and at other times is intended to help you interpret the evidence, but it is not evidence.** If the facts as you remember them from the evidence differ from the way the lawyers have stated them to you, your memory is the one that controls. The questions and the objections of the lawyers are not evidence. The lawyers have a duty to their client to object when they believe a question is improper under the rules of evidence, and **you should not be influenced by the objections or by my rulings on the objections.**

Docket No. 152 at page 115.

jury had an undisputed factual basis from which to infer that the cruise was a joy ride taken by a plaintiff abusing her medical leave privileges, that is, until Plaintiff's counsel purported to debunk the inference with inadmissible evidence." Docket No. 164 at page 8. Defendants now argue that despite the court's previous ruling that statements from Plaintiff's physicians were hearsay,[5] the court mistakenly confirmed Plaintiff's lawyer's mischaracterization of the evidence in the presence of the jury. Defendants contend that Plaintiff's counsel's misstatement of the evidence should have instead been stricken from the record after their timely objection.

In her opposition, Plaintiff concedes that the record contains no evidence that Gonzalez's physician recommended that she take a cruise ship in order to relax. See Docket No. 170 at page 36. However, Plaintiff disagrees with Abbott's argument that this misstatement was so harmful as to warrant a new trial. See Docket No. 170 at page 36. According to

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[5] The hearsay ruling was as follows

BY MR. GONZALEZ:

Q. Tell us what happened at the State Insurance Fund in terms of the treatment that you were supposed to receive.... In 2013. In March of 2013.

A. The doctor suggested --

MR. CASELLAS: Objection, Your Honor; Rule 701(a) would not permit this lay witness to give a statement about a diagnosis, if any, by a physician or any other health professional. Also, the statement about what the State Insurance Fund doctor may have told her is inadmissible hearsay.

THE COURT: That's correct, but she can testify as to what she felt.

Docket No. 130 at pages 7-8.

Plaintiff, the impact of an isolated reference to evidence not in the record is *de minimis* when compared to "the waves of evidence" in support of the verdict. See Docket No. 170 at page 14 n. 38.

The court agrees with Plaintiff: counsel's brief reference to a fact of such little significance is not the type of trial error that amounts to a miscarriage of justice. "The trial court may order a new trial if 'the verdict is against the clear weight of the evidence, is based upon evidence that is false, or resulted from some trial error and amounts to a clear miscarriage of justice.'" CardiAQ Valve Techs., Inc. v. Neovasc Inc., No. 14-CV-12405-ADB, 2016 WL 6465411, at *10 (D. Mass. Oct. 31, 2016) (citing Payton v. Abbott Labs, 780 F.2d 147, 152 (1st Cir. 1985), *aff'd*, 708 F. App'x 654 (Fed. Cir. 2017)). Here, neither the misstatement of the evidence or the denial of the objection thereto changed the trial's outcome or amounted to a miscarriage of justice given the weight of the evidence in Plaintiff's favor. Although there was no evidentiary basis on record for Plaintiff's counsel's suggestion and for this court's subsequent assertion, the undersigned concludes, nonetheless, that this misstatement, "in the context of the substantial circumstantial evidence supporting the jury's verdict, did not prejudice [defendants] ...." United States v. Hughes, 211 F.3d 676, 687 (1st Cir. 2000) (citing United States v. Rodriguez–Cardona, 924 F.2d 1148, 1153–54 (1st Cir.1991) (no plain error where improper remarks in government's closing statement did not affect the outcome of the trial given the strength of the government's case against the defendant)).

The argument that had it not been for this misstatement, the jury would have believed that Plaintiff abused her medical leave by going on a "joy

ride" and found in defendants' favor is not only farfetched, but also wishful thinking. As the court sees it, there is not a snowball's chance in hell that, absent the purported misstatement, the jury would have found in favor of defendants. On the contrary, "the record reveals that the jury's verdict could hardly have been the result of passion inspired by the brief remarks of the [plaintiff's counsel] but rather was based upon lengthy testimony [and] vigorous argument ...." United States v. Maccini, 721 F.2d 840, 847 (1st Cir. 1983) (citing United States v. Capone, 683 F.2d 582, 587 (1st Cir. 1982)).

At any rate, under the circumstances of this case, the jury instructions given were sufficient to correct the effect of both Plaintiff's counsel's unfounded suggestion during his rebuttal and this court's denial of defendants' objection. See United States v. MacDonald & Watson Waste Oil Co., 933 F.2d 35, 60 n. 31 (1st Cir. 1991) (finding that government's counsel "marginal" misstatements of facts during closing argument were harmless error, especially given the court's instructions that statements by the lawyers are not evidence); United States v. Maccini, 721 F.2d 840, 847 (1st Cir. 1983) ("Additionally, the impact of the prosecutor's misstatements was lessened, if not completely obliterated, by the trial judge's strong and pointed, curative instructions."). As set forth *supra*, the court instructed the jury on **three** separate occasions that their recollection of the evidence prevailed over attorneys' arguments or statements. Additionally, the court apprised them that they should not be influenced by the court's rulings on objections. Hence, any error in admitting the statement about her cruise ship's medical justification does not rise to the level of plain error.

See United States v. Fernandez, 94 F.3d 640 (1st Cir. 1996) (finding that prosecutor's misstatements of evidence did not rise to level of plain error given misstatement's brevity and isolation and judge's later instruction to the jurors that counsel's argument did not constitute evidence, but that their recollection of the facts controlled); United States v. Flaherty, 668 F.2d 566 (1st Cir. 1981) (arguing evidence not presented is harmless error if the judge, on objection, instructs the jury that closing arguments are not evidence and that the jury's recollections control, and if the absent evidence does not weigh heavily on the other evidence).

Pursuant to the foregoing, the court **DENIES** defendants' request for a new trial on account of the misstatement regarding the cruise ship the Plaintiff took during her medical leave.

Elimination of Statute of Limitations Jury Instruction

Another issue related to the jury instructions is the subject of a claim of error. In essence, defendants complain that the court mistakenly eliminated a jury instruction that specified that any adverse employment action that took place before January 1, 2013 was time-barred by the applicable statute of limitations (SOL). According to defendants, the ruling was inconsistent with the court's Order finding that Plaintiff had waived pre-January 1, 2013 claims, as well as with the discussions held during the charge conference. Defendants argue that the court's "refusal to charge the jury with the SOL instruction was an error of law and a manifest abuse of discretion because it impermissibly allowed the jury to impose liability and award compensation for time-barred and

allegedly adverse employment actions or claims pre-January 1, 2013." Docket No. 164 at pages 14-15. Plaintiff opposes this argument on two grounds: that defendants' claim is unsubstantiated and that pursuant to the totality of the record, it was clear to the jury that the Plaintiff was only seeking compensation for her demotion in March of 2013 and for the retaliation that took place thereafter. See Docket No. 170 at page 27. The court agrees with Plaintiff.

As to the applicable standard of review in these situations, the First Circuit has held that "the judge is not obligated to instruct on every particular that conceivably might be of interest to the jury ...." Rosa-Rivera v. Dorado Health, Inc., 787 F.3d 614, 620 (1st Cir. 2015). Rather, "[a] trial court is obliged to inform the jury about the applicable law, but, within wide limits, the method and manner in which the judge carries out this obligation is left to his or her discretion." Elliott v. S.D. Warren Co., 134 F.3d 1, 6 (1st Cir. 1998). "Consequently, though both sides have a perfect right—indeed, a duty—to advise the judge what type of instructions they believe are fitting, neither is entitled to dictate the turn of phrase the judge should use to acquaint lay jurors with the applicable law." Elliott, 134 F.3d at 6 (1st Cir. 1998) (citing United States v. McGill, 953 F.2d 10, 12 (1st Cir.1992) (warning that no litigant has a license "to put words in the judge's mouth")).

Now, "the real test is whether as a whole 'the instructions adequately illuminate the law applicable to the controlling issues in the case without unduly complicating matters or misleading the jury.'" Rosa-Rivera, 787 F.3d at 620 (citing United States v. DeStefano, 59 F.3d 1, 3 (1st Cir.1995)). "A refusal to

give a particular instruction constitutes reversible error only if the requested instruction was (1) correct as a matter of substantive law, (2) not substantially incorporated into the charge as rendered, and (3) integral to an important point in the case." Estate of Keatinge v. Biddle, 316 F.3d 7, 17 (1st Cir. 2002) (citing Elliott, 134 F.3d at 6).

Here, after defendants objected to the court's refusal to charge the SOL instruction, the court explained that it did not read it because it deemed it would confuse the jury. See Docket No. 152 at page 134. In this court's discretion, the proffered instructions conveyed the thrust of the applicable law and the record was already clear as to the which were Plaintiff's actionable claims. As explained below, the totality of the trial record gives context to the court's stance.

First of all, both the attorneys' statements and the jury instructions established that Plaintiff's demotion in March of 2013 was the only basis for the age discrimination claim. To begin, Plaintiff's attorney stated during opening statements that "[i]n [Plaintiff's] complaint, Mrs. Gonzalez alleges that those defendants unlawfully discriminated against her due to her age when they **demoted** her ...." Docket No. 154 at page 4 (emphasis added). Regarding the demotion, defendants' attorney stated as follows during closing arguments: "[f]urther, there's no evidence of any retaliation. The change to Grade Level 15 became effective in March of 2013,"[6] to which Plaintiff's counsel objected: "[o]bjection, Your Honor; that is not Plaintiff's theory. There is no retaliation

[6] Docket No. 152 at page 93.

with the demotion. Exclusively age discrimination, Your Honor."[7]

The jury instructions also shed light on the age discrimination issue. The instruction on age discrimination stated that once the Plaintiff has established her prima facie case, which included proving "that she was the subject of adverse employment actions by the defendants, for example, **demotion**..., she is entitled to a rebuttable presumption of age-based discrimination; in other words, that the adverse job action, that is, **demotion**, was caused by her age." Docket No. 152 at page 119 (emphasis added); *Jury Instructions*, Docket No. 132 at page 12. The retaliation instruction, which made reference to the age discrimination claim, stated that "even if you do not find that the defendants discriminated against Ms. Gonzalez on account of her age **on her demotion claim**, you may still find that the defendants retaliated against her for engaging in protected conduct." Docket No. 152 at page 120; Docket No. 132 at page 13 (emphasis added). Finally, the Law No. 100 instruction stated, in relevant part, that:

> In order to trigger the presumption that her **demotion** was discriminatory, Ms. Gonzalez has to establish, first, that she was discriminated, that is, **demoted**, or that the defendants failed to select her for the positions to which she applied; second, that the demotion was without just cause; and third, introduce evidence of the mode of discrimination, in this case age, connected to the **demotion**.

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[7] Docket No. 152 at page 92-93.

See Docket 152 at pages 123-124; Docket 132 at page 18 (emphasis added). It cannot be questioned then, that the only actionable age discrimination claim (the demotion) was substantially incorporated and specified in the charge to the jury.

As to the claims of retaliation, the record was also unequivocal from the very beginning of the jury trial as to when these actionable instances took place. Throughout the trial, parties' attorneys made clear to the jury that the retaliation claims were limited to the adverse employment actions that took place *after* Plaintiff's demotion in March of 2013.

The first instance of protected conduct took place when Gonzalez reported to the SIF in March of 2013. Plaintiff's closing argument specified that her claim of retaliation for reporting to the SIF in March of 2013 stemmed from the letter she received in April of 2013 threatening her with termination. See Docket No. 152 at pages 76-77, 85. During defendants' turn, their attorney also clarified that: "Plaintiff is now claiming that her reporting to the State Insurance Fund in March of 2013 was retaliation." Docket No. 152 at page 94.

Thereafter, Plaintiff engaged in protected conduct when her attorneys sent letters to defendants and when she filed her administrative complaints. Plaintiff's attorney explained during closing arguments that Gonzalez had engaged in protected conduct on two instances: when her attorneys sent Kim Perez and Matt Harris a letter complaining of age discrimination and when she filed an administrative claim before the Department of Labor's Anti-Discrimination Unit. See Docket No. 152 at page 77. To that effect, defendants' attorney stated in his

closing argument that "[c]oncerning retaliation, the letters threatening litigation by the lawyers were in October of 2013. There was a charge at the Equal Employment Opportunity Commission the year later." Docket No. 152 at page 94.

Subsequent to these instances of protected conduct, defendants rejected Plaintiff for promotion in December of 2013 and 2014, and gave her a negative performance evaluation during this time frame. To that effect, Plaintiff's attorney specified during opening statements that "Mrs. Gonzalez ... alleges that she was **subsequently** retaliated against for having engaged in protected conduct when she was rejected for several positions to which she applied within Abbott and when she was given a negative work performance evaluation." Docket No. 154 at pages 4-5 (emphasis added). The record was thus clear that the protected conduct took place in 2013 and that the retaliatory adverse employment actions took place thereafter, well within the statute of limitations period. Hence, all acts of retaliation attached to Plaintiff's protected conduct were timely. As such, the lack of the SOL instruction could not have had any effect on the jury's appraisal of the retaliation claim.

Pursuant to the foregoing, the court finds that it did not err by not including the SOL instruction: the instructions and the record were clear as to the relevant charges. "Ultimately, a trial judge has wide latitude in deciding how to best communicate complicated rules to the jury," Rosa-Rivera, 787 F.3d at 620, and the court here did not abuse this discretion.

In the alternative, "[a] district court's refusal to grant a proposed jury instruction only constitutes

reversible error if it was prejudicial when evaluating the record as a whole." McDonald v. Town of Brookline, 863 F.3d 57, 64 (1st Cir. 2017) (citing McKinnon v. Skil Corp., 638 F.2d 270, 274 (1st Cir. 1981) ("As long as the judge's instruction properly apprises the jury of the applicable law, failure to give the exact instruction requested does not prejudice the objecting party.")). Even though defendants contend that the sizeable award the jury gave Plaintiff demonstrates that she was compensated for events that were time barred, their argument is mere conjecture and lacks support. On the contrary, the court believes the opposite. The bulk of defendants' discrimination and retaliation against Plaintiff took place within the statute of limitations period: (1) the demotion in March of 2013; (2) the threat of termination in April of 2013 after reporting to the SIF a second time; (3) her exclusion from meetings and withholding of necessary information to perform her duties during 2013; (4) the rejection for promotion in December of 2013; (5) the purportedly unwarranted negative performance review for 2013; (6) the determination to not interview her for promotion in January of 2014 after having just been a finalist for promotion; and, (7) the lack of consideration for promotion in March of 2014. That is, whatever happened before January of 2013 is peanuts when compared to what happened thereafter. In sum, defendants' speculative argument affords them no relief and they have failed to establish prejudice.[8]

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[8] See Giorgio v. Duxbury, No. CV 12-11171-LTS, 2016 WL 1229041, at *8 (D. Mass. Mar. 28, 2016) ("Duxbury has 'pointed to nothing, other than the amount of the award, that might indicate to us that the verdict was the product of undue passion.' ...

Finally, within the context of this claim of error, defendants also explained that they did not object to the verdict form (to presumably include dates) because the court had agreed to charge the jury with the SOL instruction. See Docket No. 164 at page 13. However, after objecting to the court's omission to give out the SOL jury instruction, defendants did not object to or challenge the content of the verdict form. At the time of the objection to the elimination of the SOL instruction, the verdict form had already been distributed to all parties, reviewed and approved. So, after objecting, defendants were well aware that "[n]one of the interrogatories in the Verdict Form had a time restriction. None was circumscribed to alleged adverse employment acts that were not time-barred."[9]

However, the 'size of the jury's award does not prove the verdict was the product of undue passion.' ... Accordingly, there is no basis upon which to conclude that the jury's verdict was the result of undue passion or unfair prejudice."); Gutierrez-Rodriguez v. Cartagena, 882 F.2d 553 (1st Cir. 1989) (finding jury verdict of $4,500,000 compensatory damages and $600,000 punitive damages against various police officers in civil rights deprivation case was not influenced by passion and prejudice **simply because of size of award**).

[9] The court notes that prior to and during the trial, both parties had the opportunity to submit proposed jury instructions and proposed verdict forms. Much like the final verdict form approved, defendants' *proposed* verdict form (Docket No 120), filed *before* the parties' charge conference, also did not include any time restriction. At the time of defendants' docket filing, the court had yet to agree to charge the jury with the SOL instruction. Hence, defendants' argument that they did not object to the final version of the verdict form because the court had agreed to include the SOL instruction is hardly convincing. The truth of the matter is that they never sought to include such language in the first place.

Docket No. 164 at page 14. They waited until after the jury returned an unfavorable verdict to raise this objection for the very first time in their motion for new trial. Therefore, the court agrees with Plaintiff[10] that defendants failed to raise a timely objection to the verdict form. See Azimi v. Jordan's Meats, Inc., 456 F.3d 228 (1st Cir. 2006) (finding that pursuant to Fed. R. Civ. P. 51, employee failed to timely raise punitive damages awards issue where he did not object to jury instructions or to special verdict form until he filed motion for new trial).

Notwithstanding, "[f]ailures to object, unless a true waiver is involved, are [mere forfeitures that are] almost always subject to review for plain error." Diaz-Fonseca, 451 F.3d at 35 (citing Chestnut v. City of Lowell, 305 F.3d 18, 20 (1st Cir.2002)). But even plain error review would not help defendants when it is hardly plain that the court erred in choosing not to charge the jury with an instruction on an issue that was clear considering the totality of the record and when no prejudice has been shown. See Quiles v. Kilson, 346 F. Supp. 2d 376, 379 (D. Mass. 2004), *aff'd*, 426 F.3d 486 (1st Cir. 2005) (denying plaintiffs' motion for a new trial on grounds that verdict form was in error because it failed to limit scope of claim where plaintiffs failed to timely object after jury instructions were delivered and plaintiffs failed to establish that verdict was in error and resulted in clear miscarriage of justice).

Based on the foregoing, the court concludes that the refusal to give the instruction requested by defendants is not error and no prejudice was caused

[10] See Docket No. 170 at page 5 n. 12.

by the omission. Accordingly, the court finds that the instructions given to the jury in this case were proper. The defendants' motion is **DENIED** on those grounds.

Evidence of Spoliation

Defendants also raise claims of error as to some of the court's evidentiary rulings before and during trial. In their motion, defendants first argue that the court erred by allowing Plaintiff to introduce evidence to prove that defendants spoliated her e-mails after a litigation hold should have been in place at Abbott. See Docket No. 164 at pages 15-16. According to defendants, even though the jury was not charged with an adverse inference instruction, the evidence of destruction itself amounted to a sanction and was both inflammatory and unduly prejudicial. See id. In other words, according to defendants, merely questioning witnesses about the lost emails and the legal hold, or lack thereof, was a sanction.

Defendants cite two cases in support of their position that the discovery sanction was unwarranted. The first is Booker v. Massachusetts Dept. of Health, 612 F. 3d 34 (1st Cir. 2010). In Booker, the plaintiff contended that "the court erred in refusing to instruct the jurors that they could draw an adverse inference if they found that defendants destroyed documents relevant to Booker's claims." Booker, 612 F.3d at 45. The plaintiff had submitted a proposed jury instruction on the spoliation of evidence, and during trial, **witnesses were questioned** about their deletion of email correspondence concerning Booker. Notwithstanding, the court refused to give the requested instruction finding defendants had not engaged in the "deliberate spoliation of evidence" that merited such

an instruction. Booker objected and appealed, but the First Circuit affirmed and held that the district court had not abused its discretion "in finding that she failed to lay an adequate foundation for a spoliation instruction." Id. at 46.

The second case cited by defendants is Virtual Studios, Inc. v. Stanton Carpet, 2016 WL 5339601 (N.D. Ga. 2016). In Virtual Studios, the district court found that plaintiff had a duty to preserve electronically stored information and "failed to take reasonable steps to preserve the e-mails at issue." Id. at *10. The court concluded that sanctions were warranted because the loss of the e-mails was prejudicial to defendant insofar as the e-mails at issue would have been "helpful in evaluating the merits of the Parties' positions." Id. However, the court declined to impose sanctions under Rule 37(e)(2)[11] of the

[11] Rule 37(e)(2) of the Federal Rules of Civil Procedure states as follows:

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

Federal Rules of Civil Procedure because defendant had not shown that plaintiff acted in bad faith or with the requisite intent. Id. at *11. Instead, the court found the evidence indicated that the plaintiff was only negligent or careless, which was insufficient to allow the court to give an adverse jury instruction against it. Id. As a result, the court decided to impose sanctions under Rule 37(e)(1) instead, concluding "that the appropriate sanction [was] to allow [defendant] to introduce evidence concerning the loss of the e-mails and to make an argument to the jury concerning the effect of the loss of the e-mails." Id.

Contrary to defendants' contention, a reading of these cases actually supports this court's ruling on the matter. In its Opinion and Order, this court held that Abbott had a duty to preserve Plaintiff's emails and that she was prejudiced by Abbott's failure to do so. See Docket No. 106 at page 38. This failure, whether for carelessness or bad faith, warranted sanctions. However, the undersigned was unable to grant the Plaintiff's specific request for an adverse inference instruction to the jury because of the lack of evidence at the summary judgment stage that Abbott had acted with the requisite "intent to deprive" under Rule 37(e)(2). Id. Hence, the court decided to allow evidence to that effect during trial. Specifically, this court held that "[t]he matter .. be revisited at trial and determined upon completion of the presentation of evidence." Id.

(C) dismiss the action or enter a default judgment.

Fed. R. Civ. P. 37(e)(2).

During trial, Adames testified about the Company's legal hold policy and the issue of the lost emails. Adames admitted that she could not produce the emails Plaintiff had requested in order to challenge the negative performance review she received for 2013. See Docket No. 125 at page 60. Adames also testified that while she understood that the litigation hold applied to her own e-mails, she was not sure how Abbott's legal department applied the policy in regard to Gonzalez's emails. See Docket No. 126 at pages 22-23. Notwithstanding, Adames believed that Gonzalez could have saved the emails herself. See Docket No. 126 at page 67.

Plaintiff also testified about the deleted e-mails during her direct examination. She claimed these messages detailed her achievements and her efforts to complete projects. At the time Plaintiff requested them, defendants had rejected her for promotion to an available vacancy because she was purportedly not meeting expectations. According to Plaintiff, however, these messages would have allowed her to properly refute the performance rating she received. See Docket No. 130 at pages 59-60. Attorney for defendants did not object during this line of questioning. On the contrary, during cross examination, defendants' counsel went into detail about the failed litigation hold and, in turn, attempted to place the blame of the lost emails onto Plaintiff by suggesting that she failed to preserve those emails herself. Id. at 128-130.

As stated by Plaintiff in her opposition, Gonzalez "decided not to seek an adverse inference instruction regarding the spoliation issue." Docket No. 170 at pages 37-38 n. 71. Yet defendants *still* complain. Despite their failure to object and the testimony they

themselves elicited during Plaintiff's cross-examination, they now complain that the court *erroneously* allowed proof on the destruction of these e-mails. Worse yet, in support of their argument, defendants cite a case that precisely supports the undersigned's evidentiary ruling: that when a party fails to preserve evidence when litigation is anticipated, and this negligence or carelessness causes prejudice to the other party, the court may allow the prejudiced party to introduce evidence about this loss and make an argument to the jury concerning the effect of this loss. See Virtual Studios, 2016 WL 5339601, at *11. The court is thus at a loss to understand how the cases defendants cite support the opposite of what this court held. Nevertheless, the court will not do their legwork.

"It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones." United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990). "[A] litigant has an obligation to spell out its arguments squarely and distinctly,' or else forever hold its peace." Id. The court finds that defendants failed to meet this burden with regards to the issue of spoliation. Accordingly, the defendants' motion is **DENIED** on the grounds that the court erred in allowing evidence of spoliation to be introduced at trial.

Admission in Evidence of Plaintiff's Lawyer's Letter

Defendants argue that the court erred by allowing three exhibits to be introduced into evidence, namely: (1) Plaintiff's notice of age discrimination charge sent to Harris and Perez by Plaintiff's attorney and dated October 15, 2013 (Plaintiff's Exhibit 8); (2) an e-mail

dated March 11, 2014, written by Plaintiff and sent to Harris and Perez complaining of age discrimination and retaliation (Plaintiff's Exhibit 20); and, (3) an e-mail dated November 18, 2013, sent by Harris to Adames with Plaintiff's letter of November 18, 2013 attached, in which Plaintiff informed Harris that she knew a vacancy was only announced externally and stating she felt discriminated and retaliated against by not having been informed (Plaintiff's Exhibit 30). During trial, defendants objected to the admissibility of these documents because they purportedly contained "unsubstantiated statements and conclusions of law made by counsel and plaintiff of 'discrimination' concerning the 'illegality' of Defendants' actions. They were inadmissible hearsay and improper lay opinions or should have been excluded as not probative or unfairly prejudicial." Docket No. 164 at page 16. Defendants argue that the court's error was prejudicial when coupled with the court's other errors. Id.

In support of their claim, defendants cited the rules of evidence, as well as Polansky, 852 F.2d at 629. In the cited portion of the case, the First Circuit simply held that Polansky's attorney's remarks during opening and closing statements referring to the decedents' families' claims against the insurer were "completely irrelevant" to the claims being tried before the jury because "[t]hese families were not parties to the suit and this argument was made for clearly inflammatory purposes." Polansky, 852 F.2d at 629. The court is mystified as to how Polansky's holding supports defendants' argument that the documentary evidence in question should have been deemed inadmissible. Defendants simply do not explain. And if defendants attempt to imply that this evidence was

unduly inflammatory, the facts of Polansky are clearly inapposite, and thus, useless for comparison purposes. Once again, the court feels the need to stress that "[t]he court will not do counsel's work," Gonzalez-Bermudez v. Abbott Labs. PR Inc., 214 F. Supp. 3d 130, 156 (D.P.R. 2016), and independently find grounds for their argument or make connections where there obviously are none.

What is more, contrary to defendants' argument, this court has previously deemed that comparable exhibits are admissible in evidence. One of such cases is Colon-Fontanez v. Municipality of San Juan, 671 F. Supp. 2d 300, 312 (D.P.R. 2009), *aff'd*, 660 F.3d 17 (1st Cir. 2011), where this court summarily dismissed a municipal employee's complaint against the Municipality of San Juan and others, alleging defendants discriminated and retaliated against her on the basis of her disability in violation of the Americans with Disabilities Act (ADA), as well as other federal and state statutes. One of the documents the court considered was a letter that the Municipality sent to plaintiff, in which it denied her request for advance sick leave and noted her pattern of absenteeism. The plaintiff objected to the admissibility of this letter "**without citing any authority**, on the basis that the letter constitutes inadmissible hearsay." Id. at 312 n. 16 (emphasis added). Instead, the court agreed with the defendant and held "that the letter is admissible because it is a business record, allowed under Federal Rule of Evidence 803(6) 'Records of Regularly Conducted Activity.' In addition, the letter is relevant not for the truth of the matter asserted, but for its effect on the recipient." Id.

Another such example is Rodriguez-Garcia v. Municipality of Caguas, 495 F.3d 1 (1st Cir. 2007),

where the plaintiff, a career municipal employee, appealed the district court's dismissal of her claim of political discrimination and retaliation against the municipality, its mayor, and its vice mayor. Among other things, the First Circuit reviewed the district court's limited admission into evidence of some letters exchanged between the plaintiff and defendants. One of these letters sent by "[plaintiff's] attorney to the mayor's office served the purpose of giving the defendants notice of a claim." Id. at 11. A second letter from plaintiff's attorney to the mayor reiterated plaintiff's request for a transfer, and a third letter announced his intention to file a lawsuit. See id. at 12. Upon review of a motion in limine, the district court had "allowed the Letters into evidence, but only 'for the limited purpose of negating defendants' contention that plaintiff herself requested a transfer.'" Id. at 7. The Court of Appeals reversed the district court's determination and stated that "[plaintiff] should have been permitted to use the Letters as evidence that the mayor personally had notice of her claims, an indispensable element of her theory of liability, rather than simply as evidence that she had not requested a transfer ...." Id. at 12 (1st Cir. 2007).

The same rulings hold here: the exhibits in question were properly admitted into evidence as both business records and proof of defendants' knowledge that Plaintiff engaged in protected conduct and believed she was the victim of illegal discrimination and retaliation. This knowledge was a crucial element of Gonzalez's case. See Torres-Medina v. Dep't of the Army, No. CV 15-2085 (BJM), 2018 WL 3155001, at *3 (D.P.R. June 25, 2018) ("Causality assumes a link between the decision-maker, the protected activity, and the adverse action. The link consists of

knowledge. To that end, the retaliating party must be aware of the protected activity that he is believed to be retaliating against.") (citations omitted).

Defendants' argument is not only without legal merit, but also accommodating. Curiously, they do not seek to exclude documents containing language that would be deemed similarly conclusory under their line of reasoning, but that instead, supports *their* theory of the case. Plaintiff noted this lack of consistency on defendants' part, responding that Abbott's argument is "bogus" because other exhibits contain "unsubstantiated statements" that would have to be excluded on the very grounds defendants now raise to challenge the admission of other exhibits. See Docket No. 170 at page 9 n. 22. For example, Plaintiff's Exhibit 21 (Harris' email response to Plaintiff denying any discrimination or retaliation against her and explaining that her poor performance accounted for lack of promotion) is an example of Harris' own conclusory statements as to *the absence* of discrimination and retaliation against Plaintiff and her lack of qualifications for promotion. If Plaintiff's counsel's letter and her e-mail complaints could not be admitted into evidence for fear that a jury would believe the truth of the matter asserted, then by the same token, Harris' email conclusorily stating that Plaintiff was *not* discriminated against and was unqualified for promotion should have also been stricken on the same grounds. Yet, defendants conveniently disregard the content of Harris' e-mail for purposes of their claim of error. Defendants' contradictory stance thus prompts the court to remind their attorneys of a well-known idiom: "counsel in glass houses ought not throw stones." Serra v. Quantum Servicing, Corp., 747 F.3d 37, 40 n. 2 (1st Cir. 2014).

Pursuant to the foregoing, the court **DENIES** the defendants' claim that the court erred by allowing the admission into evidence of the exhibits listed *supra*.

Cumulative Effect

Defendants also request that the court order a new trial based on the cumulative error doctrine. "In assessing whether reversal is warranted under the cumulative-error doctrine, this court evaluates whether '[i]ndividual errors, insufficient in themselves to necessitate a new trial, may in the aggregate have a more debilitating effect.'" United States v. Candelario-Santana, 834 F.3d 8, 26 (1st Cir. 2016) (citing United States v. Laureano–Perez, 797 F.3d 45, 79 (1st Cir. 2015)). "Of course, '[a]bsent any particularized error, there can be no cumulative error.'" Candelario-Santana, 834 F.3d at 26 (citing Williams v. Drake, 146 F.3d 44, 49 (1st Cir. 1998)).

In the case at hand, there were either no such errors or they were not deemed prejudicial. As such, the court finds the cumulative error argument to be meritless. See Granfield v. CSX Transp., Inc., 597 F.3d 474, 492 n. 14 (1st Cir. 2010) (declining to order a new trial based on the cumulative error doctrine where district court committed no errors).

B. Back Pay Award

Remittitur

The jury awarded Plaintiff $250,000 in back pay. See *Verdict*, Docket No. 138 at page 2. In their motion, defendants argue that the court should vacate the back pay award because there was no evidentiary support for this amount. See Docket No. 164 at page

21. Alternatively, defendants contend that the back pay award is excessive and "must be remitted to no more than $79,134.57, which is the maximum amount awardable for back-pay that could be sustained on the admissible evidence." Id. Per defendants' calculation, this amount is "the differential between her current salary since March 2013 at the grade level 15 position, and her salary at the grade level 18(I) position that ceased to exist in March 2013." See id. at page 19 n. 11. In other words, the annual differential between both grades ($26,378.19) multiplied times three (3) years (2013-2016) yields the suggested amount. Id.

In her response, the Plaintiff "agrees with Abbott that her back pay amounted to $26,378.19 per year." Docket No. 170 at page 38. However, she disagrees with "the length of time during which the back pay should be calculated. Gonzalez's back-pay from March 18, 2013 until October 31, 2016 amounts to 43 ½ months at a monthly rate of $2,198.18 ($26,378.19 ÷ 12) for a total of $95,620.83." Id. at pages 38-39. Despite Plaintiff's concession, defendants insist in their reply that no evidentiary support existed for an award of back pay. See Docket No. 177 at pages 12-13.

"With respect to economic damages such as backpay, 'the jury is free to select the highest figures for which there is adequate evidentiary support.'" Oliveras-Zapata, 939 F. Supp. 2d at 85 (citing Mercado-Berrios v. Cancel-Alegria, 611 F.3d 18, 29 (1st Cir.2010)). Here, Plaintiff testified that after her demotion from a grade 18 to a grade 15 in March of 2013, she no longer had stock options available,[12] her

[12] Docket No. 129 at page 14.

base salary was reduced by approximately $10,000,[13] her prospective salary increases were frozen because she was capped in that lower grade,[14] the company car was a lower level car,[15] and her incentive bonus decreased by half or more.[16] In addition to Plaintiff's testimony, Plaintiff's Exhibit 29 contains the figures defendants used to calculate their suggested salary differential. See id. at page 19 nn. 10 & 11. In light of the foregoing, the court finds that there was sufficient support on the record for the jury to find that a back pay award was warranted.

Although a back pay award was appropriate, the court agrees with defendants that the amount of the award was excessive. "When a movant attacks an award of damages as excessive, a court may remit the award only if 'the award exceeds any rational appraisal or estimate of the damages that could be based upon the evidence before it.'" Sindi v. El-Moslimany, 896 F.3d 1, 13 (1st Cir. 2018) (citing Trainor v. HEI Hosp., LLC, 699 F.3d 19, 29 (1st Cir. 2012)). Thus, the court **GRANTS IN PART and DENIES IN PART** defendants' request that the back pay award be remitted to an amount supported by the evidence. The back pay award is hereby reduced to $95,620.83, which is the monthly differential of $2,198.18, corresponding to the forty three and a half (43½) months between her demotion in March of 2013 until entry of judgment in October of 2016.

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[13] Docket No. 129 at page 22.

[14] Docket No. 129 at pages 23-24.

[15] Docket No. 130 at pages 71-72.

[16] Docket No. 130 at page 72.

No Doubling Under Local Law

The jury in this case made a finding of willfulness. See *Verdict*, Docket No. 138 at page 2. "Willfulness is an issue in ADEA cases because the statute entitles a prevailing plaintiff to doubled backpay in situations involving 'willful violations.'" Sanchez v. Puerto Rico Oil Co., 37 F.3d 712, 721 (1st Cir. 1994) (citing 29 U.S.C. § 626(b)). Before entering judgment, Plaintiff moved the court to enter an award of liquidated damages equal to the back pay award and to double the back pay award in the compensatory damages calculation under local law. See Docket No. Docket No. 143. The court granted this request (Docket No. 149) and entered judgment accordingly (Docket No. 150).

In a separate motion for relief from judgment or to alter or amend judgment (Docket No. 165), defendants argue that the court erred by essentially tripling the back pay award. In her response, Plaintiff simply made reference to the arguments set forth in her original request that these damages be tripled when a finding of willfulness exists. See Docket No. 170 at page 1 n. 1.

The main ground for defendants' argument is this district court's holding in Pratt v. Premier Salons, Inc., 181 F. Supp. 3d 158 (D.P.R. 2015), where a jury found in favor of employees, awarded back pay and emotional damages, and found that defendants acted willfully in discriminating against employees on the basis of their age. Like here, the back pay award was *not* exclusively limited to the ADEA claim. See id. at 160 n. 2. After the plaintiffs in Pratt[17] moved to amend

[17] The court notes that the plaintiffs in Pratt were represented by the same attorneys as Gonzalez. Hence, Plaintiff's

the judgment, Judge Pedro A. Delgado ruled that the employees were entitled to twice the amount the jury had awarded for back pay under the liquidated damages provision of the ADEA, but not to an additional doubling of this amount under Puerto Rico's Law 100. See id. at 161. The court did not believe it was "feasible to bypass the Puerto Rico Supreme Court's description of Law No. 100," and its most recent decisions unequivocally characterizing the local statute's doubling mechanism as punitive. Id. at 160 (citing Ramirez Ferrer v. Conagra Foods PR, 175 P.R. Dec. 799, 816, 826, 2009 WL 1066079 (2009); Guardiola Alvarez v. Depto. de la Familia, 175 P.R. Dec 668, 681–682, 2009 WL 806563 (2009); Cruz Roche v. De Jusus, 182 P.R. Dec. 313, 327, 2011 WL 2611136 (2011); Belk Arce v. Martinez, 146 D.P.R. 215, 240 (1998); Lopez Vicil v. ITT Intermedia, 142 P.R. Dec. 857, 1997 WL 189488 (1997)). Accordingly, the court imposed punitive liability by awarding back pay and liquidated damages for the same amount under the ADEA, but denied the request for an additional doubling of the base back pay award to increase that liability under Law No. 100. Pratt, 181 F. Supp. 3d at 161. The court's objective was precisely "to prevent the double recovery that plaintiffs request." Id. at 160 n. 2.

The undersigned finds the conclusion in Pratt to be well-reasoned an on-point, and thus, **GRANTS** defendants' request (Docket No. 165). The Plaintiff's

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attorneys are thoroughly familiar with Judge Pedro A. Delgado's holding. The court will refrain from discussing whether it believes that Gonzalez's attorneys purposely misled the court in their original motion (Docket No. 143) by omitting any reference to this case. Nevertheless, attorneys are strongly cautioned against this practice going forward.

award will include back pay and liquidated damages for the same amount, but the amount of the back pay award will not be included in the doubled compensatory damages calculation under the local statutes.

C. Remittitur of Compensatory Damages

The jury in this case awarded Plaintiff $4,000,000 in compensatory damages ($3,000,000 - Abbott; $1,000,000 - Kim Perez), before doubling under the local statutes. See *Verdict*, Docket No. 138. In their motion, defendants argue that the jury's compensatory damages award must be vacated, or alternatively remitted, because it was excessive and disproportionate to the proven injury. See Docket No. 164 at pages 22-24. Defendants characterize the evidence regarding the nature of Plaintiff's suffering and medical conditions as meager, noting that "Plaintiff did not offer in evidence any medical records or medical expenses, nor did she offer medical expert testimony to buttress her claim of mental anguish." Id. at page 22. Defendants also point out that, in contrast, she admitted she took a one-week cruise during her medical leave, and attended the Company's holiday parties and kick off meetings, where she had a good time. As a mitigating factor, defendants contend that although she may have feared for her job, defendants never terminated her from her employment. Id. at page 24. In short, defendants contend that Gonzalez's testimony regarding her emotional damages was too general and unspecific, and as such, did not warrant such a large award. Defendants suggest that the court remit "the total award to no more than $100,000 total ($90,000 - Abbott; $10,000 - Mrs. Perez), which is the

highest amount of damages for emotional distress for which there is adequate evidentiary support." Id. at page 24 (citing Koster v. Trans World Airlines, Inc., 181 F.3d 24, 36 (1st Cir. 1999) (affirming remittitur from $716,000 to $250,000 in age discrimination case with evidence of anxiety, insomnia, damaged family life and heartburn, but no evidence that plaintiff ever sought medical treatment)).

In response, Plaintiff references several cases where the jury awarded large sums to the employee-plaintiff. See Docket No. 170 at pages 39-42. Plaintiff argues that the sum is warranted because, among other things, she was the victim of not one, but **six** different adverse employment actions in less than two years. See Docket No. 170 at page 42. Finally, Gonzalez restates the emotional injuries suffered through the years, such as: the lack of job security, the lack of upward mobility, the negative impact on her self-esteem, the rejection she has suffered, and the fear of continuing to work with Kim Perez as General Manager. Id. at 43. In sum, Gonzalez concludes that the court should not alter the jury's award.

As previously set forth, "a district court has discretion to order a remittitur if such an action is warranted in light of the evidence adduced at trial." Trainor, 699 F.3d at 29. "Remittitur is a practice used in connection with civil cases tried by jury, whereby the court may grant the plaintiff an election to remit a stated portion of the amount awarded as damages, or submit to a new trial." Santos Arrieta v. Hosp. Del Maestro, Inc., No. CV 15-3114 (MEL), 2019 WL 4060466, at *12 (D.P.R. Aug. 28, 2019) (citations omitted).

In the case at hand, the defendants complain about the award's excessiveness, arguing that the sum is not consonant with the evidence. The First Circuit has "noted that 'the obstacles which stand in the path of' such claims of excessiveness 'are formidable ones.' " Smith v. Kmart Corp., 177 F.3d 19, 30 (1st Cir. 1999) (citing Wagenmann v. Adams, 829 F.2d 196, 215 (1st Cir.1987)). "Translating legal damage into money damages is a matter peculiarly within a jury's ken, especially in cases involving intangible, non-economic losses ...." Travers v. Flight Servs. & Sys., Inc., 808 F.3d 525, 540 (1st Cir. 2015) (citations and quotation marks omitted). Hence, the court "will not disturb an award of damages because it is extremely generous or because we think the damages are considerably less." Muñoz v. Sociedad Española De Auxilio Mutuo y Beneficiencia De Puerto Rico, 671 F.3d 49, 61 (1st Cir. 2012) (citing Koster, 181 F.3d at 34). "Remittitur is called for where an award is 'grossly excessive, inordinate, shocking to the conscience of the court, or so high that it would be a denial of justice to permit it to stand.'" Tuli v. Brigham & Women's Hosp., 656 F.3d 33, 44 (1st Cir. 2011) (citing Acevedo–Garcia v. Monroig, 351 F.3d 547, 566 (1st Cir.2003)). "In reviewing an award of damages, the district court is obliged to review the evidence in the light most favorable to the prevailing party ...." Wortley v. Camplin, 333 F.3d 284, 297 (1st Cir. 2003).

In this case, the evidence supporting the award for compensatory damages consisted of Gonzalez's own testimony. During trial, Gonzalez testified that when she was informed of her demotion she suddenly felt her chest tighten and other symptoms of anxiety. See Docket No. 130 at page 5. She immediately saw the Company doctor, who referred her to the State

Insurance Fund. Id. at 6. She was placed on rest, but this period was cut short when she received a letter from the Company stating that if she did not return to work shortly, she would lose her job. Id. at pages 8-9. She reported to the SIF's doctor and requested to be sent back to work even though she still "did not feel well" because she "could not be left without a job." Id. at page 9. After Gonzalez returned to Abbott, she experienced a myriad of work-related discriminatory and retaliatory incidents that took seven days of trial to address. A summary of these events can be found in the court's Opinion and Order of October 30, 2018 (Docket No. 187), and is hereby incorporated by reference.

It stemmed from Gonzalez's testimony that on top of the anxiety that the news of her demotion caused, she also endured additional pain and suffering. Plaintiff spoke about the humiliation she felt when she was a finalist for promotion along with two individuals with no experience at Abbott[18] and when Kim Perez wanted her to attend a seminar for beginners, even though she had been in the Company for more than thirty years.[19] Plaintiff also testified that she endured a pattern of hostility against her, felt discriminated against, and feared losing her job.[20] Gonzalez also admitted at trial that she was still in treatment with her psychiatrist.[21] Although she did not present any medical testimony to bolster her claim of emotional damages, it has long been held that "such testimony although helpful is not required to show

[18] Docket No. 130 at page 50.

[19] Docket No. 130 at pages 120-121.

[20] Docket No. 130 at pages 72-73.

[21] Docket No. 130 at page 134.

emotional harm ...." Tuli, 656 F.3d at 45 (citing Koster, 181 F.3d at 35).

The question here boils down to whether remittitur of the jury's $4 million compensatory damages award should be granted. Having heard the evidence, the court finds that the award Plaintiff received was *excessively* generous, even when she suffered emotional damages for some years. The court recognizes that a "jury's assessment of the appropriate damages award is entitled to great deference,"[22] but the trial evidence does not support such a large award, particularly where Plaintiff did not detail her symptoms, did not lose her job, and admitted to feeling more "comfortable" and "at ease" since working under her new supervisor.[23]

The court must now determine the appropriate amount, an exercise in which "[a]wards in comparable cases are instructive." Aponte-Rivera v. DHL Sols. (USA), Inc., 650 F.3d 803, 811 (1st Cir. 2011). In addition to the cases defendants and plaintiff cited for guidance, the court independently examined remittitur issues and damages awards upheld in the employment discrimination and retaliation context in our Circuit. See McPadden v. Wal-Mart Stores E., L.P., No. 14-CV-475-SM, 2016 WL 4991488, at *3 (D.N.H. Sept. 16, 2016) (finding jury award of $500,000.00 in compensatory damages for workplace discrimination claims was generous and substantial but not grossly disproportionate to plaintiff's emotional injuries and mental suffering after being

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[22] Guzman v. Boeing Co., 366 F. Supp. 3d 219, 228 (D. Mass. 2019) (citing Monteagudo v. Asociacion de Empleados del Estado Libre Asociado, 554 F.3d 164, 174 (1st Cir. 2009)).

[23] Docket No. 130 at page 70.

fired); Oliveras-Zapata, 939 F. Supp. 2d 82 (D.P.R. 2012) (remitting "grossly disproportionate" award of $1,100,000 in compensatory damages to $500,000, where former employee filed claims alleging violations of the ADEA, Title VII, and Puerto Rico law, and evidence of compensatory damages consisted entirely of his own often conclusory testimony asserting emotional distress and economic hardship, but he did not seek any medical or psychological help); Wirshing v. Banco Santander de Puerto Rico, 254 F. Supp. 3d 271, 276 (D.P.R. 2015) (finding jury's $351,018.34 compensatory damages award was commensurate with noneconomic damages awards that have been upheld in the employment discrimination context); Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164 (1st Cir. 2009) (finding that jury's award of $333,000 in compensatory damages to employee for her sexual harassment claims against employer, under Title VII and Puerto Rico laws, was neither grossly excessive as would shock conscience of Court of Appeals, nor exaggeratedly high, precluding remittitur of damages award, since award was proportionate to harm suffered by employee and commensurate with non-economic compensatory damage awards in other Title VII and employment discrimination cases); McDonough v. City of Quincy, 452 F.3d 8, 22 (1st Cir.2006) (upholding $300,000 award where "bulk of the award" was for emotional distress in the form of humiliation, damage to reputation, and strained family relations); Rodriguez–Torres v. Caribbean Forms Mfg., Inc., 399 F.3d 52, 64 (1st Cir.2005) (affirming $250,000 emotional distress award where plaintiff testified that employment discrimination caused her marriage to suffer and a depression "for

quite some time" even though testimony was unsupported by expert medical evidence).

"It goes without saying that 'converting feelings such as pain, suffering, and mental anguish into dollars is not an exact science'...." Guzman v. Boeing Co., 366 F. Supp. 3d 219, 228 (D. Mass. 2019) (citing Correa v. Hosp. San Francisco, 69 F.3d 1184, 1198 (1st Cir. 1995)). But after careful review of the record and analogous cases, the court **GRANTS IN PART** the defendants motion requesting remittitur and hereby finds that $450,000 ($400,000 against Abbott; $50,000 against Kim Perez)[24] is the maximum award that can be justified based on the facts of this case. The $450,000 award, if accepted by Plaintiff, is then doubled to $900,000.00 pursuant to the Puerto Rico statutes. If Plaintiff refuses to remit, a new trial will be held on all issues, not only the issue of damages.[25]

III. CONCLUSION

Pursuant to the foregoing, the court hereby **GRANTS IN PART and DENIES IN PART** the defendants' "Motion and Memorandum of Law for a

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[24] Although defendants submit that the award against Kim Perez is unsupported by the evidence, see Docket No. 164 at page 24, the court disagrees. Gonzalez's workplace complaints began when Kim Perez became her direct supervisor and the court will not disturb the jury's finding of liability.

[25] A new trial on all issues is warranted because "given the nature of the claims raised by Plaintiff, her damage claims are so intertwined with her underlying claims regarding liability that a retrial on solely damages would result in juror confusion too substantial to overcome with instructions and caveats from the court." Nieves v. Municipality of Aguadilla, No. 3:13-CV-01132 JAF, 2015 WL 3932461, at *11 (D.P.R. June 26, 2015).

New Trial" (Docket No. 164) and **GRANTS** the defendants' "Motion for Relief from a Judgment or Order under Rule 60 and/or Motion to Alter or Amend Judgment under Rules 59(e)" (Docket No. 165). The court remitted the back pay award to $$95,620.83. The court also remitted the compensatory damages award against Abbott to $400,000 and against Kim Perez to $50,000, both of which are doubled pursuant to local law. The total award is as follows:

Back Pay	$95,620.83
Liquidated Damages	$95,620.83
Compensatory Damages (Abbott)	$800,000.00
Compensatory Damages (Perez)	$100,000.00
Total	**$1,091,241.66**

Plaintiff shall inform the court **within 30 days** of entry of this order if she will remit to the amount ordered above. If Plaintiff refuses to remit, the court will order a new trial be held.

IT IS SO ORDERED.

In San Juan, Puerto Rico, September 30, 2019.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PEREZ-GIMENEZ
SENIOR U.S. DISTRICT JUDGE

APPENDIX D

IN THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF PUERTO RICO

LUZ GONZALEZ-BERMUDEZ, Plaintiff, v. **ABBOTT LABORATORIES P.R. INC., ET. AL.,** Defendants.	CIVIL NO. 14-1620 (PG)

OPINION AND ORDER

Plaintiff Luz Gonzalez-Bermudez (hereinafter "Plaintiff" or "Gonzalez") filed this action pursuant to the Age Discrimination in Employment Act ("ADEA" or "the Act"), 29 U.S.C. §§ 621-634, against her employer Abbott Laboratories PR Inc. ("Abbott" or "the Company") and her supervisor Kim Perez (hereinafter "Perez"). Plaintiff also raised supplemental state law claims of age discrimination under Puerto Rico's antidiscrimination statute, Law No. 100 of June 30, 1959 ("Law No. 100"), P.R. Laws Ann. tit. 29, § 146, et seq., as well as claims of retaliation under Puerto Rico's anti-retaliation statute, Law No. 115 of December 20, 1991 ("Law No.

115"), P.R. Laws Ann. tit. 29, § 194a. After denying defendants' motion for summary judgment, a jury trial was held. At the end of Plaintiff's case in chief, and again before the case went to the jury, defendants moved for judgment as a matter of law under Rule 50(a)(1) of the Federal Rules of Civil Procedure. On both occasions, the court kept the motions under advisement. After deliberating, the jury found in favor of Plaintiff and awarded her $4,000,000.00 ($3,000,000.00 against Abbott; $1,000,000.00 against Perez) in compensatory damages and $250,000.00 in back pay. See Docket No. 138. Pursuant to the doubling provisions of the applicable statutes, the court entered judgment in the amount of $8,250,000 in both back-pay and emotional damages, plus $250,000 in liquidated damages. See Docket No. 150.

Defendants filed several post-judgment motions seeking various remedies, namely: (1) a renewed motion for judgment as a matter of law pursuant to Rule 50(b) of the Federal Rules of Civil Procedure (Docket No. 163); (2) a motion for new trial or alternatively for remittitur, under Rules 50(b), 59(a) and 59(e) (Docket No. 164); (3) a motion for relief from judgment or order under Rule 60 and/or motion to alter or amend judgment under Rule 59(e) (Docket No. 165). Below, the court will address the arguments defendants raised in their motion for judgment as a matter of law under Rule 50(b). For the reasons that follow, the court **DENIES** defendants' request.

I. STANDARD OF REVIEW

Rule 50(b) – Motion for Judgment as a Matter of Law

Pursuant to Rule 50(a) of the Federal Rules of Civil Procedure, if a party has been fully heard on an issue during a jury trial and a reasonable jury would not

have a legally sufficient evidentiary basis to find for the party on that issue, an opposing party may file a motion for judgment as a matter of law at any time before the case is submitted to the jury. Fed. R. Civ. P. 50(a). Rule 50(b) provides that, if the court does not grant the motion, a party may renew a motion for judgment as a matter of law "[n]o later than 28 days after the entry of judgment — or if the motion addresses a jury issue not decided by a verdict, no later than 28 days after the jury was discharged." Fed. R. Civ. P. 50(b). The movant may file the renewed Rule 50(b) motion and may include an alternative or joint request for a new trial under Rule 59. "In ruling on the renewed motion, the court may: (1) allow judgment on the verdict, if the jury returned a verdict; (2) order a new trial; or (3) direct the entry of judgment as a matter of law." Id. As a procedural matter, the party renewing a motion for judgement as a matter of law pursuant to Rule 50(b) "is required to have moved for judgment as a matter of law at the close of all evidence." Ginorio v. Contreras, No. CV 03-2317 (PG), 2008 WL 11424136, at *2 (D.P.R. June 13, 2008), aff'd sub nom. Guillemard-Ginorio v. Contreras-Gomez, 585 F.3d 508 (1st Cir. 2009) (citing Keisling v. SER-Jobs for Progress, Inc., 19 F.3d 755, 758 (1st Cir. 1994)). "In addition, this motion must include every claim upon which the party bases its request for judgment as a matter of law. Failure to do so is a 'fatal omission.'" Ginorio, 2008 WL 11424136 at *2 (citing Sanchez v. Puerto Rico Oil Company, 37 F.3d 712, 723 (1st Cir. 1994)).[1]

[1] "A party may renew its motion no later than 10 days after the entry of judgment. ... However, only those grounds specified

In examining a Rule 50 motion, "[o]ur review is weighted toward preservation of the jury verdict ...." N. Laminate Sales, Inc. v. Davis, 403 F.3d 14, 26 (1st Cir. 2005). "[A] jury's verdict must be upheld unless the facts and inferences, viewed in the light most favorable to the verdict, point so strongly and overwhelmingly in favor of the movant that a reasonable jury could not have [returned the verdict]." Astro-Med, Inc. v. Nihon Kohden Am., Inc., 591 F.3d 1, 13 (1st Cir. 2009) (quotation marks omitted) (citing Borges Colon v. Roman–Abreu, 438 F.3d 1, 14 (1st Cir.2006)). "[W]e view the facts in the light most favorable to the verdict, deferring 'to the jury's discernible resolution of disputed factual issues.'" Ciolino v. Gikas, 861 F.3d 296, 299 (1st Cir. 2017) (quoting Raiche v. Pietroski, 623 F.3d 30, 35 (1st Cir. 2010)). "[W]hen a party challenges a jury verdict, it is not our position to evaluate the credibility of witnesses or the weight of the evidence." Long v. Fairbank Reconstruction Corp., 701 F.3d 1, 4 (1st Cir. 2012) (citing Attrezzi, LLC v. Maytag Corp., 436 F.3d 32, 37 (1st Cir.2006)).

II. DISCUSSION

As follows, the court will discuss each of the arguments defendants raised in their renewed motion pursuant to Rule 50(b) in turn.

1. Age Discrimination – Demotion of March 2013

Plaintiff filed age discrimination claims under both ADEA and Law No. 100. The ADEA makes it unlawful

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at the close of all the evidence, and no others, are preserved for review." Ginorio, 2008 WL 11424136 at *2 n.3 (citing Correa v. Hospital San Francisco, 69 F.3d 1184, 1192 (1st Cir. 1995)).

for an employer to "fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." Velez v. Thermo King de Puerto Rico, Inc., 585 F.3d 441, 446 (1st Cir. 2009) (quoting 29 U.S.C. § 623(a)(1)). A plaintiff must "establish that age was the 'but-for' cause of the employer's adverse action." Gross v. FBL Fin. Servs., Inc., 129 S.Ct. 2343, 2351 (2009). "Law 100 bans employment age discrimination. ... [O]n the merits, claims under both statutes 'are coterminous.'" Morales-Guadalupe v. Oriental Bank & Tr., No. 16-1535 (GAG), 2018 WL 1116544, at *8 (D.P.R. Feb. 26, 2018) (citing Davila v. Corporacion De Puerto Rico Para La Difusion Publica, 498 F.3d 9, 18 (1st Cir. 2007)).

Plaintiff's age discrimination claim stems from a demotion she suffered in March of 2013. As follows, the court will summarize some relevant background information for context.

Gonzalez began to work at Abbott in November of 1984 as a medical sales representative with a specialty in nutrition in a Level 12[2] position. See Docket No. 129 at p. 4. Within fifteen years, she moved up the ranks to a Level 14 position and eventually became a Senior Sales Rep. See id. at pp. 5-6. On or about 2005, she became a Product Manager (Level 15). See id. at pp. 6-7. She subsequently became a District Manager, then a Pediatric Unit Manager (Level 17), and then a National Sales Manager (Level 17-18). See

[2] Exempt and non-exempt positions at Abbott are assigned levels. Exempt employees' levels are in numbers. See Docket No. 125 at pp. 4-5.

id. at pp. 8-10. As the latter, she supervised twenty-eight (28) employees, among them other supervisors and sales reps. See id. at p. 10. Before 2011, Plaintiff had always obtained ratings of Achieved Expectations ("AE") or Exceeded Expectations ("EE") in her performance evaluations. See id. at pp. 11-12.

In November of 2010, Abbott underwent a reorganization ("the Reorganization"), as a result of which the Company eliminated the positions of three employees in its Nutrition Division, namely: Plaintiff, Rocio Oliver ("Oliver") and Dennis Torres ("Torres"). See Docket No. 125 at pp. 46-48. At the time of the Reorganization, Plaintiff was a National Sales Manager (Level 18) and supervised both Oliver and Torres. See Docket No. 129 at pp. 9-10, 12. Instead of terminating their employment, the Company placed these three employees in lower-level positions.[3] See Docket No. 125 at pp. 47-48. Notwithstanding, these employees were notified that they would continue to receive the compensation of the positions they held prior to the Reorganization for an interim period of two years. See id. at p. 48.

As a result of the Reorganization, co-defendant Kim Perez became Plaintiff's supervisor as of January 10, 2011, see Docket No. 129 at p. 14, and Gonzalez was named HCP Institutional Marketing Manager, which was a Level 17 position, see id. at pp. 15-16.

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[3] The employees affected by the Reorganization had a duty to apply to other positions during this two-year period, but none of them did. See Docket No. 126 at p. 34; Docket No. 155 at p. 3; Docket No. 129 at p. 19. Gonzalez testified that she did not apply to any position because the Company did not announce vacancies in any position that was graded above the one that she was occupying during this time. See id.

Towards the end of 2011, Gonzalez filed a workplace harassment complaint against Kim Perez. Abbott's Human Resources department investigated in accordance with the Company's policies. See Docket No. 125 at pp. 9-11. After investigating Plaintiff's allegations, the Company determined that Kim Perez had not engaged in any wrongdoing, with which Plaintiff disagreed. See Docket No. 130 at pp. 124-125. On December 8, 2011, Plaintiff left on sick leave until June 8, 2012. See Docket No. 155 at p. 60.

After the two-year interim period ended in March of 2013, Gonzalez was informed that going forward, she would occupy a Product Manager Level 15 position. See Docket No. 125 at p. 58. That is, between the time of the Reorganization up until March of 2013, the Company decreased Gonzalez's positions three grade levels. Her income was reduced and because she was placed at the upper end of the Level 15 salary range, her salary was capped ("frozen") and despite a good performance, she was unable to receive any salary increases or raises. See Docket No. 129 at pp. 22-23.

In their Rule 50(b) motion, defendants first argue that Plaintiff failed to establish a prima facie case of age discrimination or that age was the "but-for" reason for her readjustment to a lower-level position in March of 2013. In support of their request, defendants argue the following: (1) that she did not suffer an adverse employment action because she voluntarily accepted the demotion to avoid a layoff when she agreed to the terms of the Reorganization, Docket No. 163 at p. 4; (2) that she is not similarly-situated to Oliver and Torres because "they were serving in different jobs with different responsibilities, had different supervisors and were not compa-

rable to Plaintiff in any way," id. at pp. 5-6; (3) that Plaintiff "was not meeting Abbott's legitimate or sensible business expectations and the requirements for her performance" while occupying the Level 17 position during the interim period, id. at pp. 5-6; and, (4) that Plaintiff failed to show that age was the "but-for" reason her position was adjusted downward, id. at pp. 7-9.

As a threshold matter, Plaintiff argues in her opposition that applying the McDonnell Douglas[4] burden-shifting framework at this stage is futile because once a case has been tried on the merits, the analysis should be confined to the ultimate question of discrimination and retaliation. See Docket No. 170. In support, Plaintiff cites Sanchez v. Puerto Rico Oil Co., in which the First Circuit Court of Appeals held that "when, as now, an employment discrimination action has been submitted to a jury, the burden-shifting framework has fulfilled its function, and backtracking serves no useful purpose." 37 F.3d 712, 720 (1st Cir. 1994).

The court agrees with Plaintiff's argument. "To focus on the existence of a prima facie case after a discrimination case has been fully tried on the merits is to 'unnecessarily evade[ ] the ultimate question of discrimination vel non.'" Id. (citing United States Postal Serv. Bd. of Govs. v. Aikens, 460 U.S. 711, 713–14 (1983)). "This is because, at that stage, McDonnell Douglas has served its purpose, and the evaluation of a post-trial motion assesses whether the plaintiff met his overall burden of establishing discrimination." Aly

[4] McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1973).

v. Mohegan Council, Boy Scouts of Am., 711 F.3d 34, 47 (1st Cir. 2013) (citing Sanchez, 37 F.3d at 720). See also Oliveras-Zapata v. Univision Puerto Rico, Inc., 939 F.Supp.2d 82, 84 (D.P.R. 2012) ("[Defendant] spills a great deal of ink in its 102–page motion arguing that [plaintiff] failed to establish a prima facie case, which, as the First Circuit has noted, is not the correct focus at this juncture."). As a result, the court will confine its review to the ultimate question of discrimination.

Plaintiff also opposes defendants' Rule 50(b) motion on the grounds that defendants ignored the applicable standard of review by failing to present the facts in the light most favorable to the verdict, focusing exclusively instead on the evidence that supported their theory of the case, which the jury clearly rejected. See Docket No. 170 at pp. 20-22. As set forth *supra*, the court must "examine the evidence in the light most favorable to the nonmovant and will grant the motion only when the evidence points so strongly and overwhelmingly in favor of the moving party that no reasonable jury could have returned a verdict adverse to that party." Alejandro-Ortiz v. Puerto Rico Elec. Power Auth. (PREPA), 756 F.3d 23, 26 (1st Cir. 2014) (citations and quotation marks omitted). After review of defendants' motion, the court agrees that what the movants would have the court do is weigh the evidence in their favor and substitute defendants' views for those of the jury without regard to the significant amount of evidence to the contrary. Regardless of how defendants framed their arguments, the court will address these in accordance with the applicable law and standard of review, viewing the facts in the light most favorable towards the preservation of the verdict.

First, defendants claim that Gonzalez voluntarily accepted her demotion to avoid a layoff and that the terms of the Reorganization were explained to her. Citing to Plaintiff's testimony at trial, defendants point out that she "knew that her salary and fringe benefits could be lowered in the future corresponding to the position that would become available" when the two-year period ended. See Docket 163 at p. 4. In contrast to what defendants posit, Plaintiff testified that she understood that once the two-year period ended, her salary and benefits would be readjusted to the HCP Marketing Manager position (Level 17) she was occupying. See Docket No. 129 at pp. 17-19. That is, she understood that she would only suffer a downward adjustment of just one level at the end of the interim period. But such was not the case. Instead, Human Resources Director Luz Miriam Adames ("Adames") and co-defendant Perez informed Gonzalez that the position she was currently occupying was being eliminated and that going forward she would hold the position of Product Manager, which was a Level 15 position. See id. at pp. 16-17. As a result of these news, Plaintiff testified that she felt ill and anxious and was referred to the State Insurance Fund ("SIF") by the doctor that works at the Company. See Docket No. 130 at pp. 5-6. From this testimony, a reasonable jury could have concluded that Plaintiff did not "accept" the demotion - as defendants propose in their post-judgment motions – because the prospect of having the position she was occupying during the interim period be suddenly eliminated is not something Gonzalez understood at the time of the Reorganization. The court thus rejects this argument in support of their request.

Defendants' second argument is that Plaintiff was not "comparable" or "similarly situated" to Torres and Oliver, the other two employees that were impacted by the Reorganization. According to defendants, these two employees were not similarly-situated to Plaintiff because they were performing other duties for different supervisors and "were not comparable to Plaintiff in any way," Docket No. 163 at p. 5. In addition, defendants argue that both of these employees were within the same protected age group as Plaintiff, thereby diminishing any indication of age bias. See id.

The record in this case shows that subsequent to the Reorganization, Oliver was assigned to a Level 14 position, but continued to receive the salary and benefits of the Level 15 position she previously occupied. In regard to Torres, the Company assigned him to a Level 14 position, but he would continue to receive the salary and benefits of the Level 16 position he used to hold. See Docket No. 125 at p. 48. At the end of the two-year term, both of these employees were assigned to the position they were occupying during this interim period and their salary and benefits were adjusted to the Level 14 positions they were respectively holding. However, as Plaintiff points out, the positions they were holding as incumbents were not eliminated and none of them suffered an additional downward adjustment in March of 2013. As a result, Plaintiff complains that these employees were in fact treated differently, and that age was the basis for this disparate treatment. See Docket No. 170 at p. 25.

"[I]n order to be probative of discriminatory animus, a claim of disparate treatment 'must rest on proof that the proposed analogue is similarly situated

in material respects.'" Velez, 585 F.3d at 451 (citing Perkins v. Brigham & Women's Hosp., 78 F.3d 747, 752 (1st Cir.1996)). "The test is whether a 'prudent person, looking objectively at the incidents, would think them roughly equivalent and the protagonists similarly situated.'" Perkins, 78 F.3d at 751 (citing Dartmouth Review v. Dartmouth College, 889 F.2d 13, 19 (1st Cir.1989)). "While an exact correlation is not necessary, the proponent must demonstrate that the cases are fair congeners." Velez, 585 F.3d at 451.

Contrary to defendants' point of view, a reasonable jury may have thought that both Oliver and Torres were "comparable" to Plaintiff in the sense that they were all "in the same boat" in terms of the repercussions of the Reorganization on the status of their employment at Abbott, as well as in regards to the conditions of the offer that the Company made them at the time of the Reorganization. Although their employment situations were not identical, having different posts and responsibilities, their respective situations need not be a carbon copy of each other for purposes of a disparate treatment claim. Consequently, defendants' argument loses a leg to stand on in this regard. And even though both Torres and Oliver were also within the protected age group under the relevant age discrimination laws, it is a fact that both of them were *substantially younger* than Plaintiff: Torres was twelve (12) years younger, whereas Oliver was nine (9) years younger. See Docket No. 126 at pp. 3-5. "The First Circuit Court of Appeals has not set a bright line rule as to age difference that constitutes 'significantly younger,' but has outlined that a three-year age difference is insignificant while a seven-year age difference is significant." Lopez-Rosario v. Programa Seasonal

Head Start/Early Head Start de la Diocesis de Mayaguez, 245 F.Supp.3d 360, 379 (D.P.R. 2017) (citing Williams v. Raytheon Co., 220 F.3d 16, 20 (1st Cir. 2000) (finding a three-year age difference between plaintiff and similarly situated employee was "too insignificant to support a prima facie case of age discrimination"); Velez, 585 F.3d 441, 444, 450 n.5 (finding age differences of seven, twenty, and twenty-eight years to be significant)). Per the foregoing, the court finds that sufficient evidence was presented at trial for a reasonable jury to conclude that defendants treated Gonzalez disparately to her younger counterparts when her post was adjusted downward at the end of the two-year interim period.

Defendants next claim that Plaintiff was not meeting Abbott's legitimate performance expectations by March of 2013. They point out that Gonzalez received a PA rating in 2011 and that she admitted during trial to not being able to comply with deadlines and perform all of the duties of the HCP Marketing Manager position. See Docket No. 163 at pp. 5-6. As a result of these failures, her duties were redistributed at Plaintiff's request. See id. at p. 6.

It is an uncontested fact that co-defendant Kim Perez was in charge of developing the job description for the HCP Marketing Manager position to which Gonzalez was assigned after the Reorganization. No one had held this position before. See Docket No. 155 at pp. 31-33. Kim Perez testified in detail about this new position's broad duties and responsibilities. See id. at pp. 34-36. During this testimony, the court noted that as HCP Marketing Manager, Gonzalez supervised "nobody." Id. at p. 34. In contrast, Plaintiff testified that when she held the position of National Sales Manager, she had twenty-eight (28) employees

under her supervision. See Docket No. 129 at pp. 9-10. Therefore, a reasonable fact-finder could conclude from these facts that Perez concocted a position with a significant number of accountabilities, but Gonzalez suddenly had no one to delegate on and assist her in their fulfillment. Therefore, a sensible jury could have deemed Plaintiff's request to eliminate some of these duties was warranted, and not a sign of deficient performance. As a matter of fact, a reasonable jury could have inferred that Perez set Plaintiff up for failure by giving her unattainable goals without the proper supporting staff.[5]

Moreover, given the Plaintiff's track record at Abbott, the jury was right to question defendants' explanations for her demotion. From the time Gonzalez became an Abbott employee in 1984 until the Reorganization, Plaintiff had always obtained ratings of Achieved Expectations ("AE") or Exceeded Expectations ("EE") in her performance evaluations. See Docket No. 129 at pp. 11-12. Plaintiff first received a Partially Achieved ("PA") rating for her job performance in the year 2011, which was after Kim Perez became her supervisor. See id. at p. 30. At any rate, in March of 2013, her most recent job

[5] See Antonucci v. Life Care Centers of Am., Inc., No. CIV.A. 06-108ML, 2008 WL 417675, at *9 (D.R.I. Feb. 13, 2008) ("Viewing these facts in the light most favorable to Plaintiff, [Plaintiff's supervisor] conceivably ratcheted up Plaintiff's duties in an effort to cause her to underperform."); Zimmerman v. Direct Fed. Credit Union, 121 F. Supp. 2d 133, 144 (D. Mass. 2000), aff'd, 262 F.3d 70 (1st Cir. 2001) ("It could reasonably be found that Zimmerman was unsuccessfully set up to fail by being assigned three presentations to be delivered to the board of directors with minimal time to prepare and no management support.").

performance evaluation was an AE ("Achieve Expectations"),[6] which dispels defendants' theory that Plaintiff was having competency issues immediately prior to her demotion.

Finally, defendants contend that Plaintiff failed to set forth proof that her age was the "but for" reason for the "adjustment" to her position in March of 2013. See Docket No. 163 at pp. 7-9. Although the court already did away with the burden-shifting framework of analysis at this stage, the court will discuss why defendants' argument is unavailing.

First of all, this court has already held that a reasonable jury could have found enough evidence was presented to support the conclusion that Plaintiff was the victim of disparate treatment on the basis of age when her position was adjusted downward. "Disparate treatment may be 'competent proof that the explanation given for the challenged employment action was pretextual, provided the plaintiff-employee can make a preliminary showing that others similarly situated ... in all relevant respects were treated [more advantageously] by the employer.'" Aly, 711 F.3d at 46 (citing Straughn v. Delta Air Lines, Inc., 250 F.3d 23, 43–44 (1st Cir.2001)). The evidence of disparate treatment in this case may have caused the jury to reasonably infer that defendants' claims that Gonzalez's lackluster performance resulted in the "elimination" of her Level 17 position were in fact pretextual and not worthy of credence.

Second, the court finds that defendants' relentless denials that Gonzalez was "demoted" despite evidence

[6] See Docket No. 125 at p. 111.

to the contrary support the premise that they had something to hide. In order to give rise to an inference of pretext, the First Circuit has consistently held that "[w]eaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in [defendant's] proffer can do the trick ...." Collazo-Rosado v. Univ. of Puerto Rico, 765 F.3d 86, 93 (1st Cir. 2014) (internal citations and quotation marks omitted). For example, Human Resources Director Adames denied that Plaintiff was "demoted" on at least three occasions during trial, see Docket No. 125 at pp. 50, 56, 65, despite being shown the defendants' Answer to the Complaint admitting Plaintiff's allegations that she was demoted. See id. at p. 71; Dockets No. 1, 13 at ¶¶ 93-96. On several occasions, co-defendant Kim Perez also refused to testify that Plaintiff was "demoted," instead opting to insist that Gonzalez's position was "eliminated" or that she was "transferred" to a Level 15 position. See Docket 123 at p. 11; Docket No. 155 at pp. 110-11; Docket No. 153 at pp. 3-4. This despite being shown a document from Elizabeth Rios ("Rios"), an employee of Abbott's Talent Acquisition group, that stated that Gonzalez had been demoted on March of 2013. See Docket No. 153 at pp. 4-5. But the nail on that coffin was hammered down by Abbott's Senior Talent Acquisition Manager, Taisgali Mendez ("Mendez"), who testified that the document in question was prepared by a careful and competent employee under her supervision, namely, Rios; that it stated that Plaintiff suffered a "demotion" on March 18, 2013; and, that Abbott's Human Resources Department provided the information contained in this document. See Docket No. 148 at pp. 10-12. In other words, Adames and Kim Perez were both contradicted by

both their own co-worker and the documentary evidence.

As it stems from the testimonies on record, Adames and Kim Perez were members of Abbott's top management team and were both closely involved with the decision-making processes that brought this case to court. The demeanor of both of these witnesses during these particular lines of questions was evasive and haughty, as well as stubborn in the face of business documents. "[T]the jury could well have found [their] testimony at trial evasive, in conflict with other evidence, and lacking credibility." United States v. Nichols, 820 F.2d 508, 512 (1st Cir. 1987). "The jury can conclude that an employer who fabricates a false explanation has something to hide; that 'something' may well be discriminatory intent." Aka v. Washington Hosp. Ctr., 156 F.3d 1284, 1293 (D.C. Cir. 1998). "If the jury can infer that the employer's explanation is not only a mistaken one in terms of the facts, but a lie, that should provide even stronger evidence of discrimination." Id.; see also St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) ("The factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination."). In light of the foregoing, it is no wonder why the jury disregarded defendants' theory.

In the alternative, defendants state that "even if the March 2013 **adjustment** constitutes an adverse action, it was **part of the November 2010 restructuring** that resulted in the elimination of Plaintiff's Level 18 HCP Institutional Sales Manager position, which she accepted and is time-barred." Docket No.

163 at p. 4 (emphasis ours). In response, Plaintiff pointed out in her opposition that this so-called "readjustment," "was never mentioned during trial." See Docket No. 170 at p. 7 n. 18. And because it is a theory raised for the first time in their Rule 50(b) motion, Plaintiff argues it must be deemed waived. See id. The court agrees.

In contrast to what defendants posit in their post-judgment Rule 50(b) motion, the court notes that during their first Rule 50(a), counsel for defendants stated: "[f]irst of all, we gotta make clear that everything that happened **before January 1, 2013**, this Court has already ruled that is time barred." Docket No. 155 at p. 6 (emphasis ours). The so-called "adjustment" to Plaintiff's position took place in March of 2013, two months *after* the cut-off date defendants' counsel deemed was "clear." That is one reason the court finds that defendants' time-barred argument holds no water.

The court also finds that this argument is unavailing for the reasons Plaintiff state. During defendants' second Rule 50(a) motion at the close of evidence, defendants' counsel simply stated that Plaintiff failed to prove that the elimination of her HCP Institutional Marketing Manager position in March of 2013 "was pretextual," and, essentially, that the functions of her position were eliminated at Plaintiff's request. See Docket No. 152 at p. 6. The record shows that prior to the renewed Rule 50(b) motion, defendants never argued that the "adjustment" of March of 2013 was "part of" the Reorganization, or that this claim was time barred.

"A Rule 50(b) motion for judgment as a matter of law is 'bounded by the movant's earlier Rule 50(a)

motion.'" Cox v. Massachusetts Dep't of Correction, No. CV 13-10379-FDS, 2018 WL 1586019, at *3 (D. Mass. Mar. 31, 2018) (citing Parker v. Gerrish, 547 F.3d 1, 12 (1st Cir. 2008). "The movant cannot use such a motion as a vehicle to introduce a legal theory not distinctly articulated in its close-of-evidence motion for a directed verdict." Monteagudo v. Asociacion de Empleados del Estado Libre Asociado de Puerto Rico, 554 F.3d 164, 171 (1st Cir. 2009) (citing Correa v. Hosp. San Francisco, 69 F.3d 1184, 1196 (1st Cir.1995)). See also Costa-Urena v. Segarra, 590 F.3d 18, 26 n.4 (1st Cir. 2009) ("It is well-established that arguments not made in a motion for judgment as a matter of law under Rule 50(a) cannot then be advanced in a renewed motion for judgment as a matter of law under Rule 50(b)."). Pursuant to the relevant caselaw, the court must find that defendants waived this argument as grounds for judgment under Rule 50(b).[7]

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[7] In their reply, defendants justify their omission complaining that the undersigned cut them short, reason for which they "cannot be faulted for any alleged failure to provide more details since the Court foreclosed the opportunity to make their arguments with any specificity." Docket No. 177 at p. 3 n.1. In support of their argument, defendants cite Blockel v. J.C. Penny Co., Inc., 337 F.3d 17, 25 (1st Cir. 2003). In Blockel, the First Circuit held that defendant did not waive its arguments due to lack of specificity in its Rule 50(a) motion brought at close of evidence because the motion was cut short by the district judge's pronouncement that motion was considered filed and denied. However, the exchange between counsel and the court was literally four lines. Id. at 25 n.2. Here, defendants argued their Rule 50(a) motions at the close of Plaintiff's case in chief and at the close of evidence. In stark contrast to Blockel, their arguments are compiled in a combined total of fourteen pages of transcript. See Docket No. 155 at pp. 4-13; Docket No. 152 at pp. 4-8. Therefore, this court

At any rate, the record belies defendants' new legal theory insofar as the Company's Human Resources Director, Adames, testified that the elimination of Gonzalez's HCP Institutional Manager (Level 17) position was not the result of a reorganization:

> Q. And the elimination of the position 17, okay, in March 2013, was not as a result of a reorganization; would that be correct?
>
> A. No.

Testimony of Luz Miriam Adames, Docket No. 125 at p. 58.

After careful review of the motion, the record and the applicable caselaw, the court agrees with Plaintiff that defendants did not meet their burden in showing that the evidence presented at trial, taken in the light most favorable to Gonzalez, is so overwhelmingly inconsistent with the verdict that no reasonable jury could come to the conclusion that defendants discriminated against Plaintiff based on her age when she was demoted in March of 2013. The Rule 50(b) motion is

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finds that the case they cite in support of their argument is clearly inapposite because the facts are not even remotely analogous. Nonetheless, the court finds Blockel relevant for its holding that "it is incumbent upon a party to enunciate the specific basis for a motion for judgment as a matter of law." Blockel, 337 F.3d at 25. Defendants' failure to thoroughly argue their Rule 50(a) motion can only be attributed to their three attorneys. "[A] client is bound by the mistakes of his chosen counsel." Rosado-Rios v. Vazquez-Collazo, No. 14-1820 (PG), 2016 WL 2733122, at *4 (D.P.R. May 10, 2016) (citing Miranda-Lopez v. Figueroa-Sancha, 943 F. Supp. 2d 276, 279 (D.P.R. 2013)). "This case is a shining example of the oft-stated precept that '[t]he law ministers to the vigilant not to those who sleep upon perceptible rights.'" Alamo-Hornedo v. Puig, 745 F.3d 578, 582-83 (1st Cir. 2014) (citing Puleio v. Vose, 830 F.2d 1197, 1203 (1st Cir. 1987)).

thus **DENIED** as to the age discrimination (demotion) claim.

2. Retaliation Claims

Plaintiff filed retaliation claims under both ADEA and Law No. 115. In their Rule 50(b) motion, defendants argue that no reasonable jury could have found that defendants retaliated against Plaintiff for engaging in protected conduct.

"In addition to prohibiting age discrimination, the ADEA also protects individuals who invoke the statute's protections." Ramirez Rodriguez v. Boehringer Ingelheim Pharmaceuticals, Inc., 425 F.3d 67, 84 (1st Cir.2005) (citing 29 U.S.C. § 623(d)). "Puerto Rico's anti-retaliation statute – Law 115 – is largely 'symmetrical in scope,' and has 'parallel evidentiary mechanisms,' to the anti-retaliation provisions in ... ADEA." Rivera-Rivera v. Medina & Medina, Inc., 898 F.3d 77, 97 (1st Cir. 2018) (internal citations omitted). "Law 115 also prohibits retaliation for seeking benefits with the State Insurance Fund." Rios v. Municipality of Guaynabo, No. CV 14-1703 (MEL), 2017 WL 3412083, at *3 n.5 (D.P.R. Aug. 9, 2017) (citing Santana-Colon v. Houghton Mifflin Harcout Pub. Co., 81 F. Supp. 3d 129, 136 (D.P.R. 2014)).

Plaintiff's retaliation claims stem from events that followed her demotion. In March of 2013, when Perez and Adames notified Plaintiff of the downgrade in the position she occupied, Plaintiff asked Kim Perez if she could be named *Senior* Product Manager (Level 16) instead of Product Manager (Level 15). According to Plaintiff, Perez responded that no such position was available at the time. See Docket No. 129 at p. 21. Plaintiff testified that she did not agree with Perez's

response because "Senior" titles are simply tied to an employee's years of experience. See id. at p. 21. On the other hand, Kim Perez's position was that the upgrade to "Senior" was based on qualifications and experience; and in addition, the senior manager had to supervise other employees. See Docket No. 153 at p. 8.

After receiving these news, the Company doctor referred Gonzalez to the SIF, where she was placed on rest from March 19, 2013 to July 10, 2013. See Docket No. 130 at pp. 8-9. Shortly after reporting to the SIF, Abbott sent Plaintiff a certified letter dated April 1st, 2013, informing her that if she did not report to work by April 8th, the Company would terminate her employment. See Docket No. 125 at pp. 66-67; Docket No. 130 at pp. 8-9. Out of fear that she would lose her job, Plaintiff returned to work before the mandated rest period was over. See Docket No. 130 at pp. 8-9.

On September 3, 2013, Kim Perez met with Gonzalez to discuss her midyear review. After a lengthy explanation of the report, Gonzalez testified that she understood that she was "on track" in terms of covering the expectations of her position up to that date. See id. at pp. 11-12. Approximately a month later, on October 15, 2013, Gonzalez's attorneys sent a letter to Kim Perez notifying her that Plaintiff would sue her for age discrimination. See Docket No. 123 at pp. 13-14; Plaintiff's Exhibit 8. Matt Harris ("Harris"), Abbott's General Manager in Puerto Rico and the Caribbean at the time,[8] also received a copy of the letter. See Docket No. 153 at p. 20. On October 29,

[8] See *Matt Harris Testimony*, Docket No. 153 at pp. 38-39.

2013, Plaintiff then filed an administrative claim of age discrimination before the Anti-Discrimination Unit ("ADU") at the Department of Labor. See Docket No. 130 at p. 30. On October 31, 2013, Gonzalez also sent Kim Perez an email complaining about being sidelined from some meetings and not having access to presentations. See Docket No. 123 at pp. 18-19; Plaintiff's Exhibit 10.

Pursuant to the Company's policies, every employee complaint must be investigated. See Docket No. 126 at p. 15. In fact, pursuant to this policy, the Company had investigated an internal complaint for workplace harassment that Gonzalez had lodged against Kim Perez in 2011. See id. at p. 15. Despite the policy, Adames testified that an investigation was not conducted at Abbott subsequent to Gonzalez's age discrimination claim at the ADU. See id. at pp. 14, 17. Kim Perez did not order an investigation of Plaintiff's complaints either. See Docket No. 123 at pp. 16, 20. In contrast, Harris testified that Abbott's Legal department in Chicago investigated Plaintiff's claims. See Docket No. 153 at p. 41. Harris sent a letter to Gonzalez on November 20, 2013 – just twenty (20) days after the administrative claim was filed – categorically denying that Abbott had engaged in any discriminatory or retaliatory practices. See id. at pp. 63-66; Plaintiff's Exhibit 11. Yet, Harris admitted that he was not part of this investigation and was unaware of its conclusions (of fact and law). See Docket No. 153 at pp. 63-66.

Two weeks after filing her administrative claim at the ADU, Plaintiff found out through a colleague at Abbott that a Senior Product Manager position had become available. See Docket No. 130 at pp. 30-31. On November 18, 2013, Plaintiff sent a letter to Harris

informing him of her interest in the position and stating the Kim Perez's failure to inform her of this vacancy constituted retaliation against her for having complained of discrimination. See Plaintiff's Exhibit 30. Harris responded on November 20, 2013, that the position would be posted soon so both internal and external candidates could apply. See Docket No. 130 at pp. 31-32.

According to Kim Perez, the position had not been approved by Corporate until November of 2013. See Docket No. 155 at p. 93. However, it was Mendez's testimony that Harris had already asked her to post the Senior Product Manager position on LinkedIn back in August 28, 2013, and that the hiring manager for that position was Kim Perez. See Docket No. 148 at p. 15. Mendez also testified that Harris sent her the requisition to post the Senior Product Manager on November 22, 2013, six (6) days after Plaintiff emailed Harris. See id. at p. 17. In the email Harris sent Mendez, he also stated: "[i]t seems like we have a **good external candidate slate**, and I would like to have all interviews completed by December 20th." Docket No. 153 at p. 24 (emphasis ours); Plaintiff's Exhibit 12. According to Mendez, she understood that they had a good group of external candidates for the position from the resumes they had received. See Docket No. 148 at pp. 19-20. However, it was Plaintiff's testimony that Harris' email was not aligned with the Company's policy to give preference to Abbott employees when filling vacancies. See Docket No. 130 at p. 45. According to the testimonies heard, the Company's policy was to offer promotions to qualified Abbott employees before external candidates. See *Adames*, Docket No. 125 at pp. 37-38;

Gonzalez, Docket No. 130 at p. 32; *Harris*, Docket No. 153 at p. 7.

Mendez also testified that she became aware of Gonzalez's claim of age discrimination during conversations about the selection process that she had with Kim Perez as the position's hiring manager. See Docket No. 148 at pp. 17-18. Mendez agreed that this information was irrelevant for purposes of the recruitment process. See id. at pp. 18-19. Likewise, Adames also admitted that she discussed Gonzalez's age discrimination claim with Perez during the month of December when the selection process was taking place. See Docket No. 125 at p. 99. Adames also discussed Gonzalez's age discrimination claim with Harris and Mendez between October and December of 2013. See Docket No. 126 at p. 25. Nevertheless, Adames admitted that she knew that an employee's intention to sue the Company for discrimination and/or retaliation cannot be taken into account when considering said employee as a candidate for promotion. See id. at p. 12.

On December 9, 2013, Harris, Perez, Adames and Mendez held a meeting to discuss the selection process for the Senior Product Manager position. Although they discussed the interview guide they would use for the process, Adames' notes of the meeting contain no mention of the business case presentation they would eventually required from the finalists. See Docket No. 148 at pp. 22-23; Docket No. 125 at p. 105. It also stems from the notes of this meeting that its attendees decided to set up a meeting with Abbott's lawyers, even though it was not standard operating procedure to meet with attorneys when a position had to be filled. See Docket No. 125 at pp. 105-106.

Kim Perez and Mendez interviewed Plaintiff for the Senior Product Manager position on or about December 18, 2013. See Docket No. 130 at p. 46. The finalists for the Senior Product Manager position were Gonzalez and two external candidates, Sandra Figueroa and Glorimar Molina. See Docket No. 125 at p. 100. Gonzalez became one of three finalists out of 114 applicants. See Docket No. 123 at p. 26. During the course of this process, Kim Perez testified that she never considered recusing herself from the selection process even though Plaintiff, an applicant and a finalist, had recently filed charges of age discrimination against her. See id. at p. 21. Although Plaintiff – an internal candidate – was a finalist for the position, Adames testified that there was no one "ready now" at Abbott between August 28, 2013 to December 20, 2013 for the Senior Product Manager position. See Docket No. 126 at p. 27.

After the interviews, the finalists were informed that they had to make a presentation to a panel of judges on the following day, that is, on December 19, 2013. See id. at p. 28. The panel consisted of Mendez, Harris, Kim Perez and Mayra Graulau, a Human Resources Manager at Abbott. See id. at pp. 25-26. To that effect, Plaintiff testified that it was the first time in thirty (30) years at Abbott that the Company required presentations from finalists for a position. See Docket No. 130 at pp. 46-47. According to Kim Perez, it was Mendez's idea to include a presentation stage in the selection process in order to find the best candidate. See Docket No. 155 at p. 96. It was a technique that was previously used in Latin America, one of the regions under Mendez's responsibility. See id. at p. 96.

Upon notification of this unprecedented requirement, Plaintiff testified that she understood that she did not have a real opportunity to obtain the promotion. According to Gonzalez, the process had become a sham intended for her to believe she was actually being considered, especially when most of the panel judges were already aware of her presentation skills. See Docket No. 130 at pp. 48-49. Gonzalez testified that she felt humiliated in front of the other two (2) candidates that had no experience at Abbott, whereas she had demonstrated her skills for thirty (30) years. As a result, she told the judges that "she was uncomfortable with the process" and that she was "withdrawing from the presentation process." Id. at p. 50. Adames, however, understood that Gonzalez was withdrawing from the whole application process. See Docket No. 126 at p. 31.

On December 19, 2013, Mendez wrote Gonzalez an email confirming her withdrawal from the selection process. See Docket No. 130 at p. 51. The following day, Plaintiff responded expressing her continued interest in the position and explaining her reasons for feeling uncomfortable with the presentation portion of the evaluation. See id. at pp. 51-52. On that same day, Mendez replied that they had already chosen another candidate. See id. at p. 52. On December 19, 2013, the day of the presentations, Glorimar Molina[9] was selected for the position of Senior Product Manager and she was so notified on December 20, 2013. See Docket No. 125 at p. 107. The Company then shut

[9] In 2015, Glorimar Molina was thirty-three (33) years old and Plaintiff was fifty-five (55) years of age. See Docket No. 126 at p. 3. A significant twenty-two (22) year difference.

down for the Holidays on December 20, 2013 until January 7, 2014, and Plaintiff went on vacation. See Docket No 153 at p. 75; Docket No. 130 at p. 52. Accordingly, Plaintiff's job performance evaluation period for the year 2013 must have ended on December 20th, the day after the presentations took place. See Docket No. 123 at p. 22.

Upon return from the Holidays in January of 2014, Plaintiff applied to the Regional Sales Manager (Level 18) position that was posted. See Docket No. 130 at p. 54. Harris was the hiring manager for this vacancy. See Docket No. 153 at p. 44. A month later, on February 27, 2014, Plaintiff received her performance evaluation for the year 2013, in which she received a rating of "Partially Achieved" expectations or "PA." See Docket No. 126 at p. 19. It is a Company practice that if an Abbott employee obtains a PA in his/her job performance evaluation, the employee is ineligible for promotion. See Docket No. 153 at p. 46. To that effect, the jury heard Adames testify that if an employee does not achieve expectations during the Company's employee evaluation process, several repercussions may ensue. These include the following: (1) the employee may not receive salary increases; (2) the employee may require an improvement plan; (3) the employee's incentive bonus and merit increase may be impacted; and, (4) the employee cannot be considered for promotion according to Company "policy." Docket No. 125 at pp. 17-20, 72-73. Indeed, Plaintiff believed that she received a PA rating in her evaluation so that she would not qualify for promotion in 2014. See Docket No. 130 at p. 56.

Despite having received a Partially Achieved rating for her performance in 2013, Adames testified that Gonzalez was "considered" for the Regional Sales

Manager (Level 18) position that she applied to in January of 2014. See Docket No. 125 at p. 73. Then upon further questioning, Adames changed her tune and stated that Gonzalez was "evaluated" for said position. See id. at p. 74. The court then questioned Adames on the subject, to which she answered that Gonzalez had just "submitted her name for the position." Id. at p. 75. Subsequently, Adames testified that Gonzalez was not considered for the Regional Sales Manager position (Level 18) posted in January of 2014 because Plaintiff failed to meet the minimum expectations of several key job competencies during the "last three years," per an email Harris sent to Gonzalez. See id. at p. 77; Docket No. 153 at p. 52. Despite Adames' testimony, in the Answers to Interrogatories that Abbott submitted during the course of discovery in this case and that Adames signed (Docket No. 125 at p. 42), Gonzalez and Francisco Vargas ("Vargas") were listed as employees who were "considered" for the position of Regional Sales Manager despite the fact that both had obtained a PA rating in their 2013 performance evaluations. See Docket No. 125 at pp. 77-78.

The court notes, however, Plaintiff was a finalist for promotion just one month before applying to the Regional Sales Manager position, for which she was deemed unqualified. At the time Plaintiff became a finalist for the Senior Product Manager position in December of 2013, Kim Perez already knew that Gonzalez's performance warranted a PA rating. See Docket No. 153 at p. 28. But Kim Perez insisted that she did not take Gonzalez's 2013 performance into account during the selection process for the Senior Product Manager position because the Company's "recruiting policy" requires that only the prior year's

performance rating be taken into account, see Docket No. 123 at p. 23; Docket No. 155 at pp. 95-96, and Gonzalez had obtained an Achieved Expectations rating in 2012. See Docket No. 155 at pp. 62-63. In fact, Kim Perez testified that she did not share her concerns regarding Plaintiff's current performance with the other members of the selection committee. See Docket No. 123 at p. 23.

Plaintiff disagreed with her evaluation rating and in March of 2014, she requested that the Human Resources department perform an investigation of her results. See Docket No. 130 at pp. 56, 61. Gonzalez also requested to meet with Kim Perez and Harris to discuss her evaluation, and in order to challenge it, she asked that her emails from 2013 be reinstated in her account. See id. at pp. 58-60. According to Plaintiff, the emails contained evidence that she had achieved the goals of her position and completed her assigned projects. See id. at pp. 59-60. However, the Human Resources department responded that the emails could not be retrieved because they had already been deleted. See id. at p. 60.

Plaintiff filed a claim of retaliation before the Equal Employment Opportunity Commission ("EEOC"),[10] and while Plaintiff was attempting to challenge her evaluation, Glamary Perez[11] was appointed to the Regional Sales Manager position. See Docket No. 125 at p. 78. Plaintiff was not interviewed for said post. See Docket No. 130 at p. 54. Although

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[10] See Docket No. 153 at p. 41.

[11] In 2015, Glamary Perez was forty-one (41) years old and Plaintiff was fifty-five (55) years of age. See Docket No. 126 at pp. 3-4. That is a significant fourteen (14) year difference.

the process began as a competitive one, the Company decided to directly appoint Glamary Perez to the position. See Docket No. 126 at p. 4. Consequently, on March 11, 2014, Gonzalez sent an email to Harris requesting that she be appointed Senior District Manager,[12] which was the position Glamary Perez would leave vacant upon promotion. See Docket No. 125 at pp. 78-79; Docket No. 130 at p. 62; Plaintiff's Exhibit 20. On March 19, 2014, Harris denied her request responding that she had consistently failed to meet Abbott's minimum expectations in several areas for the last three years. See Docket No. 130 at p. 67; Docket No. 153 at p. 46; Plaintiff's Exhibit 21. Instead, Harris offered Vickybel Rosario[13] the position of Senior District Manager left vacant by Glamary Perez. See Docket No. 125 at p. 79.

In his email response of March 19th, Harris never told Plaintiff that the Senior District Manager position had already been filled. See Docket No. 153 at pp. 94-95. However, there is evidence on record that by March 4, 2014, a week before Gonzalez's email to Harris, the latter had written an email to Mendez and Adames stating that he wanted to discuss the "backfill succession caused by Glamary's promotion," that is, the "Vicky move," which he thought should to be taken care of before actually announcing Glamary Perez's promotion. See id. at pp. 95-98; Plaintiff's Exhibit 19. Hence, the Senior District Manager vacancy was

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[12] Plaintiff had previously occupied the position of District Manager (Level 16) for several years, see Docket No. 129 at p. 8, Docket No. 130 at pp. 53-54; and, she had achieved expectations as an employee in that position, see Docket No. 125 at p. 79.

[13] In 2015, Vickybel Rosario was forty-three (43) years old and Plaintiff was fifty-five (55) years of age. See Docket No. 126 at pp. 3, 5. That is a significant twelve (12) year difference.

never posted, and Plaintiff could never apply to it. See Docket No. 130 at p. 67.

In March of 2014, Rocio Oliver, one of the other employees affected by the Reorganization, was offered the position of Senior District Manager (Level 16) for which she did not have to compete. See Docket No. 126 at pp. 48, 50, 59. In addition, Dennis Torres, the other employee affected by the Reorganization, was promoted to Distribution Manager (Level 16) on March 17, 2014. See id. at pp. 52, 60-61; Docket No. 153 at p. 102. Plaintiff, who was their supervisor before the Reorganization, remained at her Level 15 position.

In April of 2014, the Company finalized a document called the Talent Management Review ("TMR") to be sent to corporate. See Docket No. 153 at p. 122; Plaintiff's Exhibit 39. The TMR "is a formal process used to discuss leadership capabilities, strengths and gaps, create an action plan to ensure talent needed will be available to achieve business long range plans. It is the process of identifying and developing individuals with the potential to compete for defined leadership role." Docket No. 153 at p. 112. Harris and his immediate staff, including Kim Perez, prepared the TMR. See id. at p. 113. In the document, Gonzalez had no developmental actions listed; the TMR just said "N/A" or "not available." See id. at p. 122; Plaintiff's Exhibit 39. Moreover, the document reflected that there was no promotion timing for Gonzalez or potential next moves. See Docket No. 153 at p. 123; Docket No. 125 at pp. 32, 38; Plaintiff's Exhibit 39. According to Adames, this information was not included for Plaintiff because she had obtained a PA in her performance evaluation for 2013. See Docket No. 125 at p. 40. However, Francisco

Vargas,[14] another Abbott employee who obtained a PA for his performance in 2013, had promotion timing and potential next moves listed for him in the TMR. See Docket No. 125 at pp. 40-41. In addition, William Palermo, another employee that needed to improve his performance, also had developmental actions listed in the TMR. See Docket No. 153 at pp. 132-133.

According to Harris, it was typical for every employee to have developmental actions in the TMR. See id. at p. 118. Later on in his testimony though, he testified that the developmental actions for employees holding Level 15 positions are not included in the TMR. See Docket No. 152 at p. 120. However, Francisco Vargas and Wilma Diaz,[15] who were also in Level 15 positions, had developmental actions and/or potential next moves listed for them in the TMR. See Docket No. 153 at pp. 128-129.

Finally, in May of 2014, Kim Perez became the General Manager at Abbott upon Harris' departure. See Docket No. 130 at p. 68. Marisabel Aponte then became Plaintiff's supervisor in July of 2014. See id. at p. 68. Gonzalez obtained an AE in her performance evaluation for the years 2014 and 2015 under Aponte's supervision. See id. at pp. 69-70.

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[14] In 2015, Francisco Vargas was forty-three (43) years old and Plaintiff was fifty-five (55) years of age. See Docket No. 153 at pp. 101-102. That is a significant twelve (12) year difference.

[15] In 2015, Wilma Diaz was fifty-six (56) years old and had held a Level 15 position for the last twelve years, that is, since 2004. See Docket No. 153 at p. 103.

a. Failure to Promote

Senior Product Manager Position

In their motion for judgment as a matter of law, defendants argue that Plaintiff was not promoted for the Senior Product Manager position because, unlike the other candidates, she failed to give the presentation that was required and voluntarily withdrew from the selection process. See Docket No. 163 at pp. 12-14. In her opposition, Plaintiff argues that the evidence justified the jury's finding that her withdrawal from the presentation "was reasonable in light of the context in which it took place." Docket No. 170 at p. 27. According to Plaintiff, the following factors contributed to this context: (1) the search for external candidates before making a vacancy announcement internally; (2) deviation from Company policy of favoring qualified internal candidates; (3) Harris' satisfaction with the "external candidate slate" before she was interviewed for the position; (4) panel of judges consisting of potential targets of litigation by Gonzalez; (5) selection committee's discussions about Plaintiff's intention to sue during selection process; (6) discussion of selection process with attorneys; (7) requiring a case presentation for the first time; (8) not investigating her 2013 claims of discrimination and retaliation pursuant to Company policy; and, (9) Kim Perez's incredible assertions that she did not consider Plaintiff's 2013 performance during selection process. See id.

The circumstances that comprise the overall factual picture of this case and enabled to jury to reach its verdict will now be discussed.

As set forth *supra*, before becoming a finalist for the Senior Product Manager position in December of 2013, Plaintiff had asked Kim Perez in March to be appointed to this position. At the time, Perez responded that such position was unavailable, not that Plaintiff wasn't qualified for it. Only five (5) months later, a vacancy for this position was posted on LinkedIn in August of 2013. Yet, Plaintiff found out through a colleague that the Company was looking *externally* to fill a vacancy for the position she was interested in because Kim Perez did not tell her anything about it when they met to discuss Plaintiff's midyear review in September of 2013. See Docket No. 130 at p. 39. Plaintiff confronted Harris via letter with this information claiming that the failure to inform her of this opening constituted retaliation since at the time, she had already filed her age discrimination claims at the ADU. Harris responded that the Company had not engaged in discrimination or retaliation against her even though he testified not knowing the results of the investigation the Company's legal department was conducting. Therefore, his statements in his response letter were premature and unsupported, to say the least.

And with regards to this investigation, Harris' testimony to that effect was contradicted by Mendez, who testified that the Human Resources department did not conduct an investigation of Gonzalez's claims. Kim Perez also testified during trial that she did not order an investigation of Plaintiff's claims against her, which also evinces a deviation from the Company's policy of investigating *all* employee complaints. The First Circuit recognizes that "pretext can be demonstrated through a showing that an employer has deviated inexplicably from one of its standard

business practices." Kouvchinov v. Parametric Tech. Corp., 537 F.3d 62, 68 (1st Cir. 2008). The jury in this case may have reasonably found this omission to be evidence of pretext.

After receiving Gonzalez's letter, Harris finally ordered the vacancy be announced internally. His email request to Mendez at Human Resources stated that he was already pleased with the "external candidate slate." At the time of this email though, he had not yet reviewed Plaintiff's application or that of any other Abbott employee. In other words, the battle was lost even before it was fought.

During defendants' case in chief, Harris tried to explain the timing of the internal announcement asserting that he had only obtained "budgetary approval" for the position in November of 2013. See Docket No. 153 at p. 43. However, the jury could have reasonably disbelieved him and found that the intention to announce the position internally never existed until Plaintiff complained about the omission. "[T]he irregular timing could have suggested to the jury that a cover-up was afoot." Muñoz v. Sociedad Española De Auxilio Mutuo y Beneficiencia De Puerto Rico, 671 F.3d 49, 57 (1st Cir. 2012). Viewing the facts in the light most favorable to the verdict, the jury plausibly inferred that the Senior Product Manager had not been announced to prevent Plaintiff from applying in retaliation for complaining of age discrimination. The court is not permitted to second-guess the jury's assessment.

To cinch the matter, the jury also heard testimony that the members of the selection committee spoke about Plaintiff's discrimination claim among themselves during the hiring process despite

admitting that this information should be irrelevant for promotion purposes. Notwithstanding, they decided to meet with the Company's attorneys before interviewing the candidates, which Adames acknowledged was out of the ordinary. The jury could also have found that the timing of this legal consultation was suggestive of the fact that Plaintiff's claim against defendants was an important consideration in the selection process.

Subsequently, Plaintiff was interviewed by both Mendez and Kim Perez. The latter's testimony with regards to this process may have been received with skepticism by the jury members. First of all, although Kim Perez was the object of Plaintiff's discrimination claims, she testified that she did not recuse herself from the selection committee because she was the hiring manager for the position. Second, Kim Perez testified that she did not consider what she thought was Plaintiff's "deficient" job performance during the current year because according to Company policy, she could only take into account the employee's performance during the prior year. The jury in this case could have found Kim Perez's assertions under oath to be hard to believe deeming it an almost unsurmountable task to both remain impartial, as well as put aside Plaintiff's subpar performance during the most recent months. Yet, she claimed being able to do both.

"[P]roof that the defendant's explanation is unworthy of credence is ... one form of circumstantial evidence that is probative of intentional discrimination." Acevedo-Parrilla v. Novartis Ex-Lax, Inc., 696 F.3d 128, 141 (1st Cir. 2012) (citing Williams v. Raytheon Co., 220 F.3d 16, 19 (1st Cir. 2000)). "An explanation is unworthy of credence when is [sic]

suffers from 'weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions ...' such that a factfinder could 'infer that the employer did not act for the asserted non-discriminatory reasons.'" Hubbard v. Tyco Integrated Cable Sys., Inc., 985 F.Supp.2d 207, 228–29 (D.N.H. 2013) (citing Santiago-Ramos v. Centennial P.R. Wireless Corp., 217 F.3d 46, 56 (1st Cir. 2000)). A reasonable jury could have easily determined that her explanations for remaining in the selection committee and for her approach to the evaluation process were simply implausible, and thus, a pretext for retaliation.

During the course of the selection process, Plaintiff became a finalist along with two other external candidates and was asked to make a case presentation before a panel of judges. To Gonzalez, an Abbott employee for over three decades, this additional requirement was unheard of. What is more, Plaintiff testified that most panel judges had seen her make presentations during the course of her employment as Product Manager. Therefore, they were familiar with her skills. See Docket No. 130 at p. 49. Plaintiff also knew that at least two of the judges, namely, Harris and Kim Perez, were aware of her formal claims of discrimination. Feeling uncomfortable and humiliated, Plaintiff decided to withdraw from the presentation phase of the selection process because she believed the process was a sham.

It is uncontested that the request for a business case presentation was a departure from the ordinary selection process. This may have led the jury to conclude that defendants' real objective was to evaluate the *external* candidates' presentation skills because those were unknown to the judges. Such a conclusion supports Plaintiff's inference that she was

not being truly considered for promotion. As a result, a reasonable jury could have found that her withdrawal from the presentation phase of the selection process was warranted since the overwhelming circumstantial evidence showed that her effort and continued participation would have been futile, a finding that is not unheard of in the universe of holdings in employment cases of several other courts. See Miller v. Gruenberg, No. 1:16-CV-856, 2017 WL 1227935, at *6–7 (E.D. Va. Mar. 31, 2017), aff'd as modified, 699 F. App'x 204 (4th Cir. 2017), cert. denied, 138 S. Ct. 2579 (2018) (withdrawal of job application does not bar a plaintiff's discrimination claim of non-selection where there is evidence the plaintiff was coerced into withdrawing from application process); Simpson v. Beaver Dam Cmty. Hosps., Inc., 780 F.3d 784 (7th Cir. 2015) (physician's withdrawal of his application did not bar his race discrimination claims against hospital where chief of staff's warning indicated that it would have been futile for physician to maintain his application); Qu v. Bd. of Regents of Univ. of Minnesota, No. CIV. 08-1843 RHK/JSM, 2009 WL 2900334, at *7 (D. Minn. Sept. 2, 2009)(the withdrawal of an employment application might not undermine a plaintiff's prima facie case if his application would have been futile); Lowery v. Circuit City Stores, Inc., 158 F.3d 742, 762–63 (4th Cir.1998), rev'd on other grounds, 527 U.S. 1031 (1999) (finding that voluntary withdrawal does not show prima facie case of discrimination where there is no indication "it was futile to apply or that [the employer] prevented her from applying"). Pursuant to the foregoing, a reasonable jury could have found that defendants' purported non-retaliatory reason for not selecting her was pretextual.

Defendants' alternative argument in support of their decision not to promote Plaintiff for the Senior Product Manager position is that Glorimar Molina, one of the external candidates, was more qualified than Gonzalez. See Docket No. 163 at pp. 12-14. In their motion, defendants contend that Molina had a degree in business administration and a master's degree in marketing, versus Plaintiff, who did not have any formal education in business administration or any post graduate degrees. See id. at p. 13. In addition, they claim that Molina had more relevant work experience, particularly in the Caribbean market. Id. In her opposition, Plaintiff first argues that she should have been *offered* the position pursuant to the Company's policy of favoring qualified internal employees when filling vacancies. In that respect, Plaintiff argues that defendants deviated once again from established policies in retaliation for having engaged in protected conduct, and instead, selected Glorimar Molina, who is substantially younger than Gonzalez by twenty-two (22) years. See Docket No. 170 at pp. 12-13.

"When an employer claims to have hired or promoted one person over another on the basis of qualifications, the question is not which of the aspirants was better qualified, but, rather, whether the employer's stated reasons for selecting one over the other were pretextual." Rathbun v. Autozone, Inc., 361 F.3d 62, 74 (1st Cir. 2004). "In line with the business judgment rule, '[c]ourts may not sit as super personnel departments, assessing the merits—or even the rationality—of employers' nondiscriminatory business decisions.'" Deslauriers v. Napolitano, 738 F.Supp.2d 162, 179 (D. Me. 2010) (citing Mesnick v. General Elec. Co., 950 F.2d 816, 825 (1st Cir.1991)).

"Qualifications are notoriously hard to judge and ... more must be shown than that the employer made an unwise personnel decision by promoting 'X' ahead of 'Y.'" Rathbun, 361 F.3d at 74. Nevertheless, "there may be situations in which the difference in qualifications is so stark as to support an inference of pretext." Id. at 75. "Or, perhaps, there may be situations in which a great number of individual employment decisions, each of which arguably can be justified as a business judgment, may in cumulation present so one-sided a picture as to raise an inference of pretext." Id.

With regards to the candidates' differences in education, the court notes that Plaintiff's degrees, or lack thereof, had not previously prevented Abbott from promoting her to a **Level 18** position, in which she supervised twenty-eight employees, including other supervisors. Considering this information, the jury may have reasonably afforded little credit to this purported non-retaliatory reason for not having selected Plaintiff for a Level 16 position. The jury may have also discounted defendants' grounds for their choice because Molina only had eleven years of total work experience *vis-à-vis* Plaintiff, who had almost thirty years of experience at Abbott. Therefore, this case is definitely not one in which the successful applicant's qualifications are so obviously superior to those of Plaintiff as to undermine the legitimacy of her claims. And in combination with both the age difference and the suspicious circumstances surrounding the selection process that were previously-discussed, the jury may have hardly been persuaded by defendants' assertions that Molina possessed superior qualifications. See St. Mary's Honor Ctr. v. Hicks, 509 U.S. 502, 511 (1993) ("The

factfinder's disbelief of the reasons put forward by the defendant (particularly if disbelief is accompanied by a suspicion of mendacity) may, together with the elements of the prima facie case, suffice to show intentional discrimination.").

Defendants' "choice between the three candidates was highly discretionary but: 'Discretion may be exercised in ways which are discriminatory or retaliatory.'" Deslauriers v. Chertoff, No. CIV. 07-184-B-W, 2009 WL 1032854, at *31 (D. Me. Apr. 16, 2009), aff'd, 640 F. Supp. 2d 104 (D. Me. 2009) (citing DeCaire v. Mukasey, 530 F.3d 1, 20 (1st Cir. 2008)). Moreover, "the temporal proximity between the [administrative] complaint and the decision not to select [plaintiff] is a significant consideration." Chertoff, 2009 WL 1032854 at *31 (citations omitted). See also Mesnick, 950 F.2d at 828 (finding that evidence of temporal proximity of an employee's protected activity to an employer's adverse action, *inter alia*, is one source of circumstantial evidence that, theoretically, can demonstrate retaliation). In sum, the totality of the circumstances in this case may have led a reasonable jury to conclude that defendants' non-retaliatory reasons to not promote Gonzalez to the Senior Product Manager position were merely a pretext for retaliation after complaining of age discrimination.

Regional Sales Manager and Senior District Manager

Defendants also argue that Plaintiff was not qualified for the Regional Sales Manager and the Senior District Manager positions for which she was not selected in early 2014. See Docket No. 163 at pp. 15-17. According to defendants, Plaintiff was rendered ineligible for promotion because of the "Partially

Achieved" expectations rating she received in her evaluation. Moreover, defendants argued that Plaintiff lacked the relevant experience for the job both in the Caribbean region and with the distributors sector. In contrast, Glamary Perez, the selected candidate, had a master's degree in business administration and an excellent track record in sales at Abbott.

In her opposition, Plaintiff notes the inconsistencies regarding whether or not she was "considered" for the position. See Docket No. 170 at p. 16. On the one hand, there is evidence on record, such as Abbott's Answers to Interrogatories, that Plaintiff was "considered" for the Regional Sales Manager position despite having received a PA rating. However, Adames' explanations shifted at trial having first testified that Gonzalez was considered and eventually denying it. In addition, Plaintiff also points out that Abbott suddenly aborted the competitive selection process for the position and appointed Glamary Perez, who was fourteen (14) years younger than Gonzalez and had less experience than her.

After learning of Glamary Perez's promotion, Plaintiff requested to be promoted to the position Glamary would leave vacant, but once again, Plaintiff was denied. According to defendants in their motion, the Company offered Vickybel Rosario the position because she was more qualified than Plaintiff, had been identified as a key talent in the TMR process and unlike Plaintiff, had excellent evaluations. See Docket No. 163 at p. 17. In response, Plaintiff argues that she was not promoted to this position in retaliation for having engaged in protected conduct, and points to the events that are temporally proximate to this selection process as evidence of pretext.

First of all, Gonzalez points out that the Company never informed her that Glamary Perez was selected to the Regional Sales Manager position. After finding out on her own, she sent an email to Harris on March 11, 2014 asking if she could be offered Glamary Perez's Senior District Manager position, which would become vacant. See Docket No. 130 at p. 62; Plaintiff's Exhibit 20. On March 19, 2014, Harris responded that she was not qualified for promotion having obtained an unsatisfactory rating in her most recent evaluation and informed her that for the last three years she had demonstrated "several key job competency issues that require significant improvement." Plaintiff's Exhibit 21. Defendants rely on this document to ground their claim that Plaintiff failed to meet expectations. However, Plaintiff rightfully indicates that Harris' assertions therein are mistaken because in at least one of those three years, namely, in 2012, she had obtained an Achieved Expectations rating in her performance evaluation.

Gonzalez also points out that pursuant to the documentary evidence on record, another much younger Abbott employee, namely, Vickybel Rosario, had already been preselected for the Senior District Manager position at the time of Harris' email response. On March 4, 2014, Harris had written an email to Mendez and Adames requesting to "get aligned" on the matter of the "backfill succession caused by Glamary's promotion" before making any public announcements. See Plaintiff's Exhibit 19. According to this email, Vickybel Rosario, who is twelve (12) years younger than Plaintiff, would be *offered* the position Glamary left vacant before announcing Glamary's promotion. Harris sent this email fifteen (15) days before responding to Plaintiff.

However, Harris stayed mum about these personnel moves in his response to Plaintiff.

As can be gleaned from the record, Plaintiff was given an unsatisfactory performance evaluation a month after being selected as a finalist for promotion at the end of 2013. This precluded her from qualifying for promotion in 2014. According to defendants' theory, Gonzalez went on vacation on December 20th, 2013, and when she returned from the Holidays, she was suddenly not a qualified candidate for promotion and had several competency issues that needed immediate improvement, as per Harris' email. And while Plaintiff was attempting to challenge her 2013 performance evaluation to no avail, the Company swiftly and surreptitiously preselected two much younger employees to fill two vacancies that Gonzalez was interested in without having these candidates engage in a competitive process. And although preselection alone does not violate ADEA when it's based on qualifications, courts have found that "preselection is relevant to the employer's motivations and 'operates to discredit the employer's proffered explanation for its employment decision.'" Napolitano, 738 F.Supp.2d at 181–82 (citing Goostree v. State of Tennessee, 796 F.2d 854, 861 (6th Cir.1986)). See also Ham v. Washington Suburban Sanitary Comm'n, 158 Fed.Appx. 457, 470 (4th Cir.2005) (stating that preselection can support a finding of pretext in conjunction with other evidence); Coble v. Hot Springs Sch. Dist. No. 6, 682 F.2d 721, 728–29 (8th Cir.1982) (finding that evidence of preselection discredited the school district's proffered legitimate explanation)).

"[T]he significance of any given act of retaliation will often depend upon the particular circumstances. Context matters." Burlington N. & Santa Fe Ry. Co. v.

White, 548 U.S. 53, 69 (2006). From the evidence as a whole, the jury in this case could have reasonably and sensibly found that defendants' explanations were less than forthcoming. The cumulative effect of defendants' irregularities in the promotional processes, deviations from established policies, shifting explanations, stealthy personnel moves, contradictions and inconsistencies weighed heavily in the minds of the jury. See Santiago-Ramos, 217 F.3d at 56 (finding a plaintiff can establish pretext by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted non-discriminatory reasons). All told, the evidence presented at trial was enough to support the jury's finding of retaliation.

Other circumstantial evidence points in a similar direction. For one, not only were defendants selecting substantially younger candidates for vacancies and promotions, but there is also proof that in March of 2014, the other two employees affected by the Reorganization, Oliver and Torres, were promoted to Level 16 positions while Gonzalez, their former supervisor, remained at a Level 15 position. A reasonable jury could conclude from this evidence that these employees were similarly-situated in the face of the Reorganization but were treated differently because of their age or because neither had filed complaints of age discrimination against Kim Perez and the Company. See Docket No. 153 at p. 6.

The record also reflects that the two employees that were over 50 years of age (Wilma Diaz and Gonzalez) were stuck at Level 15 positions, whereas substantially younger employees were being selected

or promoted without having to apply or compete for positions. A plaintiff may show that the employer's reason is a pretext for discrimination with evidence of "statistical evidence showing disparate treatment by the employer of members of the protected class." Mesnick, 950 F.2d at 824. Pursuant to the foregoing, the jury also had sufficient statistical evidence to infer pretext.

Finally, during trial, the Plaintiff stressed the fact that the Company's Talent Management Review document for 2014 had neither "promotion timing" or "potential moves" or "developmental actions" listed for her. See Plaintiff's Exhibit 39. A cursory review of this document shows that this lack of information was a departure from the usual practice. Moreover, the reasons Adames and Harris gave for this lack of information were all proven to be inconsistent, if not false.

From the evidence presented at trial, the court finds that defendants cannot properly argue that there was a complete absence of evidence to support the verdict. On the contrary, the evidence from which the jury could have reasonably concluded that defendants retaliated against the Plaintiff by failing to promote her was overwhelming. Defendants' motion for judgment as a matter of law is thus **DENIED**.

b. "Partially Achieved" Performance Evaluation

Defendants argue that they did not retaliate against Plaintiff by giving her an unwarranted "Partially Achieved" or PA rating in her 2013 performance evaluation. See Docket No. 163 at pp. 14-15. First, they contend that Plaintiff herself admitted

that she did not meet deadlines and needed improvement in her communication skills.[16] See id. Second, defendants set forth that pursuant to the applicable law, the only relevant inquiry is whether Abbott *believed* that Plaintiff was performing below expectations, not whether she *actually* was underperforming or whether Plaintiff subjectively thought she was not. See id.

In response to this argument, Plaintiff pointed out to portions of her trial testimony where she explained how Kim Perez excluded her from meetings and kept important information from her that was essential to the performance of her duties. See Docket No. 170 at p. 13; Docket No. 130 at pp. 42-45. The record reflects that Kim Perez and Plaintiff often had differing explanations for events that transpired during the course of their working relationship as supervisor and subordinate. Nevertheless, a reasonable jury could have deemed Plaintiff's account more credible than Kim Perez's and concluded that the latter sabotaged Plaintiff's ability to achieve expectations in retaliation for Plaintiff having filed claims of age discrimination against her.

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[16] In support of this argument, defendants refer to the jury trial transcript where Plaintiff supposedly admitted having "no evidence" that Kim Perez gave her "bad evaluations to discriminate or retaliate against her." See Docket No. 163 at p. 15 (citing Docket No. 130 at p. 106). According to defendants, this admission warrants "the dismissal of all the claims." See Docket No. 163 at p. 15. However, the court found no such content in the cited material. "The court will not do counsel's work," Diaz–Morales v. Rubio–Paredes, 170 F.Supp.3d 276, 289 (D.P.R. 2016), and ferret the extensive record of this case to find this so-called "admission."

Some inconsistencies also stem from the way Plaintiff's supervisors handled her purported performance shortcomings. The first has to do with the implementation of the Company's Performance Improvement Plan ("PIP"). Adames testified that a PIP is usually recommended when an employee obtains a PA in his/her evaluation for **two** consecutive years,[17] and Harris' email stated that Gonzalez had been displaying competency issues for **three** consecutive years.[18] Despite supposedly displaying sub-par performance for three years, Kim Perez did not mention placing Plaintiff in an improvement plan during her 2013 mid-year review in September of 2013. See Docket No. 130 at pp. 38-39. On the contrary, Plaintiff testified that after this mid-year evaluation, she believed she was "on track" to receiving an "AE" ("Achieved Expectations") in her final performance evaluation. But after her formal claim of age discrimination at the ADU just a month later, everything took a "downward turn." See Docket No. 170 at pp. 14-16.

The fact remains though, that Gonzalez was *never* placed on a PIP,[19] and according to Plaintiff, neither Harris or Kim Perez devised a plan to enable her to improve her performance.[20] On the other hand, the defendants' position is that they did not deviate from Company policy with regards to their performance evaluations of Gonzalez. According to defendants, they did not place her on a PIP because she did not fail to meet expectations for two consecutive years after

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[17] See Docket No. 125 at pp. 90-92.

[18] See Docket No. 153 at p. 52.

[19] See Docket No. 125 at p. 92.

[20] See Docket No. 130 at p. 68.

having obtained a "satisfactory evaluation" in her 2012 performance review. See Docket No. 163 at pp. 21-22. However, this *post hoc* explanation is not aligned with Harris' statements in his March 2014 email to Plaintiff.

As to the corrective measures taken to help Plaintiff improve, defendants contend that in 2012 they created an "action plan" for Plaintiff to achieve goals "in the areas where she was having difficulties." See id. at p. 22. In support of this statement, defendants refer to her 2012 performance evaluation, which defendants admitted in the previous paragraph was "satisfactory" and precluded the implementation of a PIP. Id. at p. 21. That is, defendants' use of Gonzalez's 2012 performance evaluation is twofold and ambiguous. On the one hand, Gonzalez's 2012 performance evaluation states she achieved expectations and prevented the implementation of a PIP, but this document is also the source of a corrective program devised to aid her improve her consistently deficient performance. Defendants cannot have the cake and eat it too. A reasonable jury could plausibly not believe defendants' knotty theory.

The second inconsistency in the record has to do with defendants' communications with Plaintiff regarding her performance shortcomings. First, when Plaintiff emailed Harris in November of 2013 stating her interest in the Senior Product Manager position, Harris never mentioned the competency issues that would hinder her possibilities for a promotion. See Docket No. 130 at p. 37. This was just four (4) months before the email he sent her about her ineptitude for promotion. Second, Kim Perez admitted that for the most part, she communicates with her team through emails because that is her management style. See

Docket No. 123 at p. 11; Docket No. 155 at p. 58. In fact, Plaintiff had complained back in 2011 that Kim Perez sent a lot of emails. See Docket No. 123 at pp. 10-11. But other than Harris' email of March of 2014, defendants did not produce one email from Kim Perez in which she admonished or corrected or reprimanded Plaintiff for her subpar performance, which defendants now contend is the real reason for Plaintiff's negative evaluation and stasis in a Level 15 position. "The absence of such evidence is a factor that the jury reasonably could consider in deciding this issue." Trainor v. HEI Hosp., LLC, 699 F.3d 19, 28–29 (1st Cir. 2012) (citing Benders v. Bellows & Bellows, 515 F.3d 757, 763–64 (7th Cir.2008)) (defendant not entitled to judgment as a matter of law where defendant was unable to produce memorandum, email, or other internal writing substantiating its non-retaliatory reason for terminating the plaintiff in the midst of negotiations). Plaintiff's formal claim of discrimination and retaliation preceded the documentary evidence defendants produced to prove Plaintiff's performance shortcomings, and given the sequence of events, the jury could have reasonably inferred that the negative performance review was retaliatory.

Another discrepancy is apparent when one juxtaposes defendants' claim that Plaintiff had competency issues for three consecutive years versus the fact that Plaintiff was a finalist for promotion at the very end of 2013, when Kim Perez already knew that she had partially achieved expectations. And although Kim Perez denied considering what she deemed was Plaintiff's deficient 2013 performance in the selection process for the Senior Product Manager position, as stated *supra*, a jury could have simply

rejected this testimony as inherently implausible or unbelievable. But having picked Plaintiff as a finalist out of 114 applicants despite her poor performance is inconsistent with defendants' goal to pick the "best candidate" for the position. In this regard, the court finds that this incongruency credits Plaintiff's theory that her selection as a finalist was a sham intended to deceive her into thinking she was genuinely being considered for promotion, only to have her chances for advancement shattered with a negative performance evaluation shortly thereafter. See Santiago-Ramos, 217 F.3d at 56 (finding a plaintiff can establish pretext by showing weaknesses, implausibilities, inconsistencies, incoherencies, or contradictions in the employer's proffered legitimate reasons such that a factfinder could infer that the employer did not act for the asserted nondiscriminatory reasons).

All told, the court finds that the jury in this case could have reasonably found that defendants deviated from the Company's performance evaluation policy and that the shifting explanations they offered were incongruous. Deviations from established Company policy have been recognized as evidence of pretext. See Dunn v. Trustees of Boston Univ., 761 F.3d 63, 73 (1st Cir. 2014) ("[T]his court has recognized that deviation from established policy or practice may be evidence of pretext."). The overall factual picture in this case could have sensibly led a juror to disbelieve defendants' contention that their decision to give Plaintiff a negative performance review was based purely on a poor performance record. On the contrary, the evidence supported the jury's conclusion that the performance issues that Kim Perez and Harris pointed out to Plaintiff in 2014 in her final evaluation and in *one* email, respectively, were a pretext to cover

up their real motive: retaliation for having complained of age discrimination.

In light of the foregoing, the court finds that Plaintiff presented enough evidence of pretext for a jury to reasonably conclude that Plaintiff's negative performance evaluation was unwarranted and resulted from defendants' desire to retaliate against Plaintiff for having filed claims of age discrimination and retaliation. Accordingly, defendants' motion for judgment as a matter of law is **DENIED** on these grounds.

c. SIF Letter

Pursuant to Article 5(a) of the Workers' Compensation Act, better known as the State Insurance Fund Corporation Law, Law No. 45, P.R. Laws Ann. tit. 11, § 7, an employee "who suffers a work-related injury or accident and reports to the Fund for treatment, has an absolute right to reinstatement to her position once she is discharged from the Fund (i.e., from medical treatment), provided she seeks reinstatement within twelve months of her injury or accident." Rivera-Flores v. Puerto Rico Tel. Co., 64 F.3d 742, 750 (1st Cir. 1995). See also Martinez v. EagleGlob. Logistics (CEVA), No. CIV. 09-02265 PG, 2011 WL 3843918, at *20 (D.P.R. Aug. 26, 2011) ("The Supreme Court of Puerto Rico has found that Article 5(a) has two components: (1) the obligation to keep the injured employee's job available for one year and, (2) the obligation to reinstate him after the SIF discharges him, so long as the employee seeks reinstatement within the one year reserve period and he meets the three statutory conditions.") (citing Grillasca–Pietri v. Portorican American Broadcasting Co., Inc., 233 F. Supp. 2d 258, 265 (D.P.R.2002)). "[T]he Puerto Rico Supreme Court has held that

seeking SIF benefits qualifies as protected activity under Law 115." Santana-Colon v. Houghton Mifflin Harcout Pub. Co., 81 F. Supp. 3d 129, 136 (D.P.R. 2014) (citing Feliciano Martes v. Sheraton, 182 P.R. Dec. 368, 395 (2011)).

Defendants argue that the SIF exhaustion notice did not constitute retaliation because a threat is not an adverse employment action "under ADEA" and because they had a legitimate non-retaliatory reason for notifying her that she had exhausted her reserve period. See Docket No. 163 at pp. 10-11. In response, Plaintiff's opposing argument is twofold. First, she argues that the SIFC Law does not "mandate termination of the employee" after the one-year reserve period expires and a reasonable jury could have deemed the letter as an act of retaliation in violation of Law No. 115 because it contained a threat of termination.[21] See Docket No. 170 at p. 9 n.21. Second, Plaintiff purports that defendants are precluded from moving for judgment as a matter of law on this issue because they did not raise it in their Rule 50(a) motions. See id. at p. 4 n.8. In their reply, defendants justify this omission complaining that the judge cut them short during their oral arguments

[21] "An employee establishes a prima facie case under Law 115 by proving that (1) he engaged in one of the protected activities set forth in the ... Act and (2) he was subsequently discharged, **threatened** or suffered discrimination at work." MVM Inc. v. Rodriguez, 568 F. Supp. 2d 158, 176–77 (D.P.R. 2008) (emphasis ours) (citing P.R. Laws Ann. tit. 29 § 194a(a); Irizarry v. Johnson & Johnson, 150 P.R. Dec. 155, 164 (2000)). See also Figueroa v. J.C. Penney Puerto Rico, Inc., No. CIV. 07-1258 JAG, 2010 WL 4861497, at *8 (D.P.R. Nov. 29, 2010) ("Employees must establish that a protected activity was carried out and that termination, threats or discrimination were suffered.").

pursuant to Rule 50(a).[22] See Docket No. 177 at p. 3 n.1.

After carefully reviewing defendants' Rule 50(a) motions, the court agrees with Plaintiff in both of her arguments. In their preverdict motions, defendants failed to advance their sufficiency of the evidence argument regarding Plaintiff's Law No. 115 retaliation claim for having reported to the SIF. As previously set forth, a renewed motion for judgment as a matter of law pursuant to Rule 50(b) "is bounded by the movant's earlier Rule 50(a) motion. ... As a result, the movant cannot use such a motion as a vehicle to introduce a legal theory not distinctly articulated in its Rule 50(a) motion." Cornwell Entm't, Inc. v. Anchin, Block & Anchin, LLP, 830 F.3d 18, 25 (1st Cir. 2016) (citing Parker v. Gerrish, 547 F.3d 1, 12 (1st Cir. 2008)) (internal citations and quotation marks omitted). The court holds that defendants are procedurally barred from seeking judgment as a matter of law on this issue. In addition, this particular retaliation claim was filed pursuant to Law No. 115,[23] not ADEA, as defendants argued in their Rule 50(b) motion. Defendants simply missed the mark, and thus, their motion for judgment as matter of law as to Plaintiff's Law No. 115 retaliation claim for having reported to the SIF is **DENIED**.

3. Willful Violation

Defendants argue that "[t]he evidence presented at trial also does not support a finding of willful violations of federal law." Docket No. 163 at p. 23.

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[22] As previously discussed, this court has already held that this argument lacks merit. See *supra* note 7.

[23] See *"Fifth Cause of Action" in Complaint*, Docket No. 1 at p. 19.

According to them, there was no evidence showing "knowing or reckless disregard of Plaintiff's ADEA rights," id., and the jury's finding to that effect is unsupported "given the lack of strength of her prima facie case and the absence of pretext." Id. In response, Plaintiff stated that Abbott waived or forfeited its challenge to the sufficiency of the evidence related to the issue of "willfulness" because it did not raise it in its Rule 50(a) motions, allowed the court to charge the jury on the issue, and failed to object its inclusion in the verdict form. See Docket No. 170 at p. 5. In their reply, defendants justify their omission by complaining that the judge cut them short during their Rule 50(a) motions before the case was submitted to the jury.[24] See Docket No. 177 at p. 3 n.1. Defendants add that Plaintiff also failed to object to the waiver.[25] See id. at p. 3.

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[24] As previously discussed, this court has already held that this argument lacks merit. See *supra* note 7.

[25] In their reply (Docket No. 177), defendants argue that Plaintiff's failure to object to defendants' waiver of this argument at the Rule 50(a) stage also precludes them from objecting in their Rule 50(b) opposition memoranda. See Docket No. 177. In support of their position, defendants cite U.S. v. Taylor, 54 F.3d 967, 972 (1st Cir. 1995) and include an explanatory parenthetical that states as follows: "(party's pre-verdict oral Rule 50(a) motion did not contain facts and law that entitled it to judgment whereas its post-verdict written Rule 50(a) motion did; because opposing party failed to object when initially made orally, opposing party waived right to object on specificity grounds)." Docket No. 177 at p. 3. But Taylor is a bank robbery criminal case that obviously does not include a discussion of Rule 50 of the Federal Rules of **Civil** Procedure. In addition, the "raise-or-waive rule" discussion it includes is in the context of an attorney's duty to object to an "improper occurrence" or an erroneous ruling by the trial judge." Taylor, 54 F.3d at 972. Simply put, the defendants' "explanatory

Plaintiff's Second Cause of Action in her complaint was precisely "Willful Violation Under ADEA." Docket No. 1 at pp. 17-18. After carefully reviewing defendants' Rule 50(a) motions, the court agrees with Plaintiff that defendants failed to advance their sufficiency of the evidence argument in regard to this claim in their preverdict motions. As previously set forth, a movant cannot file a Rule 50(b) motion at the post-trial stage introducing a legal theory not distinctly articulated in the Rule 50(a) motion. See Costa-Urena, 590 F.3d at 26 ("It is well-established that arguments not made in a motion for judgment as a matter of law under Rule 50(a) cannot then be advanced in a renewed motion for judgment as a matter of law under Rule 50(b)."). The court holds that, as a result, defendants are procedurally barred from seeking judgment as a matter of law on the issue of willfulness, and their motion is **DENIED** on those grounds.

4. Back Pay and Compensatory Damages

Defendants finally argue that Plaintiff failed to present evidence from which a jury could award back pay and compensatory damages. See Docket No. 163 at pp.23-24. Therein, defendants incorporate their discussion in their Motion for New Trial. See Docket No. 164. Accordingly, the court will defer the

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parenthetical" does not explain any of Taylor's holdings and can only be regarded as an exercise of wishful thinking or fictional creativity on the part of defendants' counsel. Defendants would have this court find that opposing counsel is required to raise an objection in the face of a moving counsel's careless silence or omission. But defendants' logic puts the cart before the horse. At any rate, the undersigned will not deem defendants' counsel mis-quotation as an attempt to intentionally mislead the Court.

discussion of this argument to the opinion adjudging said motion.

III. CONCLUSION

The court finds that defendants that have failed to meet their burden in showing that the evidence in the record, taken in the light most favorable to Gonzalez, is so overwhelmingly inconsistent with the verdict that no reasonable jury could come to the same conclusion. Although the issue of backpay is **HELD IN ABEYANCE**, the rest of their renewed motion for judgment as a matter of law pursuant to Rule 50(b) is hereby **DENIED**.

IT IS SO ORDERED.

In San Juan, Puerto Rico, October 30, 2018.

S/ JUAN M. PÉREZ-GIMÉNEZ
JUAN M. PÉREZ-GIMÉNE
SENIOR U.S. DISTRICT JUDGE