UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-81021-CV-MIDDLEBROOKS/Matthewman

U.S. EQUAL EMPLOYMENT
OPPORTUNITY COMMISSION,

Plaintiff,

and

STACEY MALO,

Intervenor Plaintiff,

v.

NICE SYSTEMS, INC.

Defendant.
_____/

ORDER ON MOTION FOR SUMMARY JUDGMENT

THIS CAUSE comes before the Court upon Defendant NICE Systems, Inc.'s Motion for Final Summary Judgment. (DE 87). The Motion is fully briefed. (DE 119; DE 131). For the reasons set forth below, the Motion is granted in part and denied in part.

BACKGROUND

In this lawsuit, the EEOC and Intervenor Plaintiff Stacey E. Malo ("Malo") assert pregnancy discrimination, retaliation, and constructive discharge in violation of Title VII of the Civil Rights Act of 1964, as amended by the Pregnancy Discrimination Act of 1978. (DE 1).

For purposes of this Order, I have distilled only the most relevant facts from this voluminous record. The most relevant facts are summarized below. Facts of particular importance to my legal determinations are discussed in greater detail in the analysis section.[1]

From August 2015 to March 2018, Malo worked for Defendant NICE Systems, Inc. as a Sales Executive on a team tasked with selling NICE's Incentive Compensation Management ("ICM") software. (DE 92, Defendant's Statement of Material Facts ("SOMF") ¶¶ 1, 115; DE 120, Plaintiffs' Response to Defendant's Statement of Material Facts ("Response SOMF") ¶¶ 1, 115). In April 2017, Malo advised her direct supervisor, Chip Harder ("Harder"), that she was pregnant. (DE 92, SOMF ¶ 28; DE 120, Response SOMF ¶ 28).

As a general overview, Plaintiffs assert that Defendant discriminated against Malo on the basis of her pregnancy by undertaking four actions: (1) transferring certain existing sales accounts to a newly hired employee on the ICM team instead of to Malo even though she had previously worked on at least one of those accounts; (2) refusing to assign a new sales lead in Malo's territory to Malo; (3) invoking the "windfall" provision of Malo's employment contract to cap the amount of commission she could receive on an audit/settlement with Nationwide, a deal that Malo contributed to before she went on maternity leave; and (4) upon her return from maternity leave,

[1] I note that the evidentiary record in this case is sprawling, and I have found Plaintiffs' factual submissions to be especially unwieldy. For instance, Plaintiffs' "Additional Facts" consist of 103 paragraphs, with the majority of paragraphs containing multiple factual assertions. This has made it difficult for the Court to parse through each fact and determine what is in dispute and what is not. In light of the simultaneous breadth and minutia of the facts presented in this case, which relate to multiple employment decisions made over a period of months, multiple interactions had by various employees of Defendant, and multiple internal employment-related policies, I have summarized only some of the facts in this Order and construed them in Plaintiffs' favor as is required at summary judgment.

reassigning Malo's Canada territory to a male colleague, Allen Paige ("Paige") and assigning to her the UNIT territory. (DE 120, Plaintiffs' Additional Facts ¶¶ 132–62).

With respect to the Nationwide audit/settlement, Malo's 2017 Incentive Plan includes the following provision:

> The Regional/Division President shall have the authority, in his/her absolute discretion to identify any potential sale as a "Windfall" and limit, cap, or eliminate any Incentive or Bonus that might otherwise be earned in connection with the Booking of such sale (a "Designated Sale"). In identifying a Designated Sale, the Regional/Division President will consider whether the occurrence or magnitude of the potential sale is likely to be influenced by factors substantially outside the actions of any of the Companies or any Individual Participant. Affected Participants will be notified of such cases prior to the Booking of a Designated Sale.

(DE 92, SOMF ¶ 76; DE 120, Response SOMF ¶ 76). Yaron Hertz ("Hertz"), NICE's President of the Americas, made the decision to exercise the windfall provision against Malo and another employee who had worked on the Nationwide deal, John Stewart. (DE 92, SOMF ¶ 77; DE 120, Response SOMF ¶ 77).

During her time at NICE, Malo complained of the discriminatory treatment to the Director of Human Resources, Liz Almeida ("Almeida"), the Vice President of Solution Sales, Joyce Holupka ("Holupka"), and the Regional Vice President, Wendy Olek. (DE 120, Plaintiffs' Additional Facts ¶¶ 136, 183, 217). Malo also requested transfer to a different department at NICE, but Defendant was not able to accommodate that request. (DE 120, Plaintiffs' Additional Facts ¶¶ 175, 220). On March 2, 2018, Malo resigned. DE 92, SOMF ¶ 115; DE 120, Response SOMF ¶ 115).

LEGAL STANDARD

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R.

Civ. P. 56(a). A disputed fact is "material" if it "might affect the outcome of the suit under the governing law." *Talavera v. Shah*, 638 F.3d 303, 308 (D.C. Cir. 2011) (quoting *Anderson v. Liberty Lobby, Inc*., 477 U.S. 242, 248 (1986)). A dispute over a material fact is "genuine" if it could lead a reasonable jury to return a verdict in favor of the nonmoving party. *See Scott v. Harris*, 550 U.S. 372, 380 (2007). "Credibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge at summary judgment. Thus, [the court] do[es] not determine the truth of the matter, but instead decide[s] only whether there is a genuine issue for trial." *Barnett v. PA Consulting Group, Inc*., 715 F.3d 354, 358 (D.C. Cir. 2013) (quoting *Pardo-Kronemann v. Donovan*, 601 F.3d 599, 604 (D.C. Cir. 2010)).

Under the summary judgment standard, the moving party bears the "initial responsibility of informing the district court of the basis for [its] motion, and identifying those portions of the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits which [it] believe[s] demonstrate the absence of a genuine issue of material fact." *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). In response, the nonmoving party must "go beyond the pleadings and by [its] own affidavits, or depositions, answers to interrogatories, and admissions on file, 'designate' specific facts showing that there is a genuine issue for trial." *Id.* at 324 (internal citations omitted). If a party against whom a motion is filed fails to "establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment for the movant is warranted. *Celotex Corp.*, 477 U.S. at 322. If a party against whom a motion is filed does not bear the burden of proof at trial, the nonmovant is entitled to summary judgment if the evidence cannot support one or more elements of the

burdened party's claim. The party moving for summary judgment bears the burden of establishing that there is insufficient evidence to support the non-moving party's case/defense. *Id.* at 325.

DISCUSSION

I. Disparate Treatment Discrimination

Title VII of the Civil Rights Act of 1964 prohibits employment discrimination based on race, color, religion, sex, or national origin.[2] 42 U.S.C. § 2000e-2. The Pregnancy Discrimination Act of 1978 amended Title VII to define the terms "because of sex" or "on the basis of sex" to include "because of or on the basis of pregnancy, childbirth, or related medical conditions." *Id.* § 2000e(k). "[W]omen affected by pregnancy, childbirth, or related medical conditions shall be treated the same for all employment-related purposes . . . as other persons not so affected but similar in their ability or inability to work . . . ." *Id.* The Eleventh Circuit employs the same analysis in pregnancy discrimination lawsuits as it applies in other Title VII sex discrimination cases. *Armindo v. Padlocker, Inc.*, 209 F.3d 1319, 1320 (11th Cir. 2000) (citing *Armstrong v. Flowers Hosp., Inc.*, 33 F.3d 1308, 1312–13 (11th Cir. 1994)).

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[2] Title 42, United States Code, section 2000e-2(a) provides that:

> It shall be an unlawful employment practice for an employer—
>
> > (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or
> >
> > (2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

To establish a Title VII disparate treatment discrimination claim, a plaintiff must prove that the discrimination she suffered constitutes an "adverse employment action" and that the defendant acted with discriminatory intent. *Hyde v. K.B. Home, Inc.*, 355 F. App'x 266, 268 (11th Cir. 2009); *Lewis v. City of Union City*, 918 F.3d 1213, 1220–21 (11th Cir. 2019). Deprivation of income or an income-earning opportunity that an employee otherwise could have attained but for the discriminatory treatment can amount to an adverse employment action. *See, e.g.*, *Bass v. Bd. of Cty. Comm'rs*, 256 F.3d 1095, 1118 (11th Cir. 2001), *overruled in part on other grounds by Crawford v. Carroll*, 529 F.3d 961 (11th Cir. 2008), *overruled in part on other grounds by Pearson v. Callahan*, 555 U.S. 223 (2009).

An employee may prove discriminatory intent by either direct or circumstantial evidence. *Jefferson v. Sewon Am., Inc.*, 891 F.3d 911, 921 (11th Cir. 2018). If an employee sets forth direct evidence of discriminatory intent, courts need not, and should not, apply the *McDonnell Douglas* burden shifting framework at the summary judgment stage to determine whether the circumstantial evidence in the case raises a jury question as to discriminatory intent.[3] *Burns v. Gadsden State Cmty. Coll.*, 908 F.2d 1512, 1514 (11th Cir. 1990). "Direct evidence is 'evidence, which if believed, proves [the] existence of [a] fact in issue without inference or presumption.'" *Burrell v. Bd. of Trustees of Georgia Mil. Coll.*, 125 F.3d 1390, 1393 (11th Cir. 1997) (quoting *Rollins v. TechSouth, Inc.,* 833 F.2d 1525, 1528 n.6 (11th Cir.1987)) (internal quotation marks omitted). Direct evidence of sex discrimination is sufficient to create a jury question as to whether the defendant discriminated against the plaintiff on the basis of her gender and thus whether the

[3] Because I conclude, as explained below, that this case involves direct evidence of discriminatory intent, I also need not analyze the copious circumstantial evidence under a "convincing mosaic" theory. *Lewis v. City of Union City*, 918 F.3d 1213, 1220–21 (11th Cir. 2019).

defendant's alternative explanation for its actions is pretextual. *Burns*, 908 F.2d at 1514. When direct evidence of a discriminatory motive is presented, the burden shifts to the defendant to prove by a preponderance of the evidence that the defendant would have acted in the same manner in the absence of the discriminatory motive. *E.E.O.C. v. Alton Packaging Corp.*, 901 F.2d 920, 924 (11th Cir. 1990). Thus, where there is direct evidence of discriminatory intent, entry of summary judgment is generally improper unless there is no genuine issue of fact that the employer would have made the same employment decision without the discriminatory motive. *Id.*

Here, in August 2017, Malo was working to develop a General Motors ("GM")/Onstar lead ("GM Lead"), a lead that fell within her sales territory. (DE 120, Plaintiffs' Additional Facts ¶ 138). On August 9, 2017, Harder assigned the GM Lead to Paige. (*Id.*). On August 17, 2017, Paige and Malo informed Harder that the GM Lead fell within Malo's assigned territory, and on August 18, 2017, when Paige asked Harder how they should handle the GM Lead in light of Malo's potential maternity leave, Harder directed Paige to keep working the opportunity. (*Id.*). On August 24, 28, and September 1, 2017, Malo requested that Harder assign the GM Lead to her. (*Id.* ¶ 140). On September 1, 2017, Harder advised Malo that he needed to assess whether she "will have the bandwidth to work this opportunity with everything else that is going on" and that he needed to check with human resources on how to handle "this type of situation." (*Id.* ¶ 140). During his deposition, Harder testified that he did not know of anything that Malo had "going on" at that time other than her pregnancy. (*Id.*; DE 126-9 67:22–24). On September 18, 2017, Harder emailed Almeida regarding Malo demanding assignment of a new lead, and Almeida advised him that he needed to assign sales leads in Malo's territory to Malo while she was still working. (*Id.* ¶ 143). Immediately thereafter, Harder failed to assign the lead to Malo. (*Id.*). Despite requesting the lead for approximately a month and a half prior to her maternity leave, Harder did not assign the GM

Lead to Malo until February 23, 2018, almost two months after she returned from leave. (*Id.*). By that time, the deal was dead. (*Id.*). Based on the record evidence of the handling of the GM Lead, which I note Defendant disputes in part in its Response to Plaintiffs' Additional Facts (DE 135 ¶¶ 138–44), a reasonable jury could find that the loss of this income-producing opportunity constituted an adverse employment action, especially where, as here, a substantial portion of the employee's remuneration derives from sales commission.

I note that although the temporary reassignment of an employee's responsibilities to another employee in anticipation of FMLA leave does not, on its own, amount to an adverse employment action, *Hyde v. K.B. Home, Inc.*, 355 F. App'x 266, 270 (11th Cir. 2009), here, having Paige work the GM Lead resulted in more than just a reallocation of Malo's responsibilities; it also deprived Malo of a potentially income-producing opportunity. Thus, viewing the facts in the light most favorable to Plaintiffs, a reasonable jury could find that Harder's substantial delay in assigning the lead to Malo amounted to an adverse employment action.

This case also presents direct evidence of intentional discrimination. In late August 2017, while on an ICM team conference call, Harder announced that he would not be assigning Malo new sales leads because of her "condition," in reference to her pregnancy. (DE 120, Plaintiffs' Additional Facts ¶ 136).[4] This constitutes direct evidence of Harder's intention to base a disadvantageous decision regarding Malo's employment upon an impermissible factor. Moreover, I find that there exist genuine issues of fact regarding whether Harder would have initially refused

[4] Harder testified at his deposition that he did not recall making that statement. (DE 135, Defendant's Response to Additional Facts ¶ 136). However, because Defendant is the movant, I must construe all disputed facts in the light most favorable to Plaintiffs. In so doing, I take Malo's statement as true.

to assign Malo the GM Lead had he not been taking her pregnancy into consideration. Therefore, Defendant is not entitled to summary judgment on Plaintiffs' discrimination claim (Count I).

II. Retaliation

Title VII prohibits an employer from retaliating against an employee "because [s]he has opposed any practice made an unlawful employment practice . . . or because [s]he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a). To establish a claim for retaliation under Title VII, a plaintiff must prove that: (1) she participated in an activity protected by Title VII; (2) she suffered from an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination; and (3) there is a causal connection between the participation in the protected activity and the action. *Crawford*, 529 F.3d at 970; *Monaghan v. Wordplay US, Inc.*, 955 F.3d 855, 861 (11th Cir. 2020). "Protected activity" may include formal as well as informal complaints; the key inquiry is whether the employee had a "good faith, reasonable belief that the employer was engaged in unlawful employment practices." *Herron-Williams v. Alabama State Univ.*, 805 F. App'x 622, 631–32 (11th Cir. 2020). As to causation, temporal proximity by itself can establish this element; the events, however, must be "very close." *Thomas v. Cooper Lighting, Inc.,* 506 F.3d 1361, 1364 (11th Cir. 2007) (internal quotation marks omitted).

Where, as here, there is no direct evidence of retaliation, a plaintiff may establish a *prima face* case of retaliation by using circumstantial evidence, and such claims are evaluated under the same burden shifting framework applied in substantive discrimination cases. *Herron-Williams v. Alabama State Univ.*, 805 F. App'x 622, 631 (11th Cir. 2020). If the plaintiff establishes a *prima facie* case of retaliation, then the burden shifts to the defendant to articulate legitimate, non-retaliatory reasons for its actions. *Furcron v. Mail Ctrs. Plus, LLC*, 843 F.3d 1295, 1310 (11th Cir.

2016). Once the defendant has articulated such reasons, the plaintiff has the burden to demonstrate that those reasons are pretextual. *Id.*

Here, Plaintiffs maintain that Defendant retaliated against Malo by paying her less commission on the Nationwide deal than she was entitled to and by taking away a favorable territory (Canada) and assigning her an unfavorable territory (UNIT) upon her return from maternity leave. Defendant does not dispute that Malo engaged in protected activity when she reported the discriminatory treatment to Defendant's employees (Harder, Almeida, Holupka, and Olek) on several occasions. Defendant, however, argues that Plaintiffs fail to establish the second and third prongs of a *prima facie* retaliation claim—that she suffered from an action that might well have dissuaded a reasonable worker from making or supporting a charge of discrimination and that there exists a causal connection between the participation in the protected activity and the action.

As to the second prong of the *prima facie* case, Defendant asserts that the windfall decision and the territory reassignment decision do not amount to adverse employment actions. However, construing the facts in the light most favorable to Plaintiffs, I conclude that a reasonable jury could find that Defendant's decision to cap Malo's commission on the Nationwide deal, resulting in a nearly $300,000 loss of commission, and Defendant's decision to reassign Malo's Canada territory to Paige and assign the UNIT territory to Malo, which resulted in $0 in UNIT bookings in 2018, amounted to actions that may very well have dissuaded a reasonable worker from lodging complaints of discrimination. Indeed, no reasonable worker would desire to sustain a loss in pay in excess of $300,000.

As to the third prong—causation between the protected activity and the employer's action— and focused on the windfall decision, Defendant argues that no reasonable jury could find

a causal connection between Malo's complaints of discrimination and Hertz's decision to exercise the windfall provision because Hertz had no knowledge that Malo had lodged such complaints. (DE 87 at 21). Plaintiffs do not dispute Hertz's lack of knowledge regarding Malo's complaints but instead argue that under a "cat's paw" theory, a causal connection may be inferred where the ultimate decisionmaker does not undertake an independent investigation and receives information from a biased source that is aware of the complaints of discrimination. (DE 119 at 28–29); *see Crawford*, 529 F.3d at 979. Because Harder provided the information to the legal department about Malo's involvement in the Nationwide deal, and the legal department then relayed that information to Hertz to aid him in deciding whether to exercise the windfall provision with respect to Malo, construing this fact in the light most favorable to Malo, a reasonable jury could find that Malo's complaints about Harder's allegedly discriminatory treatment caused Harder to downplay Malo's involvement in the Nationwide deal, which in turn, may have caused Hertz to invoke the windfall provision in the manner that he did. In short, the record evidence, viewed in a light most favorable to Plaintiffs, supports a *prima facie* case of retaliation. Accordingly, summary judgment in Defendant's favor as to Count II is improper. And as a result, the burden shifts to Defendant to set forth legitimate, non-retaliatory reasons for its conduct. If it can do so, then to survive summary judgment, Plaintiffs must rebut the purported nondiscriminatory reasons with specific record evidence which creates a jury question as to pretext.

A defendant's burden in proffering a legitimate, non-discriminatory reason for its allegedly retaliatory conduct is "exceedingly light." *Mohammed v. Jacksonville Hospitalists, P.A.*, 712 F. App'x 872, 878 (11th Cir. 2017). Here, with respect to Hertz's decision to invoke the windfall provision to limit the commission Malo would receive on the Nationwide settlement, Defendant represents that Hertz made the decision based on (1) the unique nature of the dispute as an audit

and settlement (as opposed to a traditional sale); and (2) the limited contribution made by Malo relative to others involved in the settlement. (DE 87 at 23). Because Defendant has met its low burden of setting forth facially legitimate, non-retaliatory reasons for exercising its discretion to invoke the windfall provision, the burden shifts to Plaintiffs to establish that the proffered reasons are pretextual. *Furcron*, 843 F.3d at 1310.

"[W]eaknesses, implausibilities, inconsistencies, incoherencies, or contradictions" permit findings or pretext and discrimination. *Keene v. Prine*, 477 Fed. App'x 575, 583 (11th Cir. 2012). Here, Plaintiffs offer multiple reasons why Defendant's explanations for deciding to exercise the windfall provision are pretextual. (DE 119 at 23–24). Of note, Plaintiffs present evidence that Defendant's reasons have changed over time. First, immediately after the decision, Defendant represented to Malo that the decision was made because Malo did not originate the deal. (DE 120, Plaintiffs' Additional Facts ¶ 182). Second, before the EEOC, Defendant explained that it based its decision solely on Malo's minimal participation in the deal. (*Id.* ¶ 182). Third, in this litigation, Defendant has offered the above-mentioned, two-fold explanation—the uniqueness of the audit/settlement and Malo's limited participation in the deal. (DE 87 at 23). Moreover, as to the uniqueness explanation, Plaintiffs have put forth evidence demonstrating that Hertz, the ultimate decisionmaker, did not believe that the Nationwide deal was that different from another sales-based deal (Quickenloans) where he chose not to invoke the windfall provision with respect to an employee working on that deal that has the same position title as Malo. (DE 120, Plaintiffs' Additional Facts ¶¶ 192, 199–200). These evolving explanations and Hertz's deposition testimony, which can be interpreted to call into question just how different the Nationwide deal was from other similar deals where Hertz could have invoked the windfall provision but chose not to, could

lead a reasonable jury to disbelieve the legitimacy of Defendant's proffered reasons. As such, I conclude that summary judgment on Plaintiffs' retaliation claim would be improper.

III. Constructive Discharge

To establish a claim for constructive discharge, a plaintiff must demonstrate that her employer deliberately imposed conditions that were "'so intolerable that a reasonable person in [the employee's position] would have been compelled to resign.'" *Fitz v. Pugmire Lincoln–Mercury, Inc.,* 348 F.3d 974, 977 (11th Cir. 2003) (quoting *Poole v. Country Club of Columbus, Inc.,* 129 F.3d 551, 553 (11th Cir.1997)) (alteration in original). Establishing a constructive discharge claim is a more onerous task in terms of demonstrating the severity and pervasiveness of the discrimination than establishing a hostile work environment claim. *See Bryant v. Jones*, 575 F.3d 1281, 1298 (11th Cir. 2009). The Eleventh Circuit has recognized the viability of such a claim where there has been "shocking evidence of an overt and unabashed pattern of discrimination." *Id.* (describing how the defendant was abusive to the plaintiff on several occasions, including one during which the defendant appeared poised to physically assault the plaintiff). Critical to a constructive discharge claim is sufficient evidence that the employee notified the employer of the discriminatory conduct and that the employee afforded the employer an adequate amount of time to remedy the wrongdoing before resigning. *See Garner v. Wal-Mart Stores, Inc.*, 807 F.2d 1536, 1539 (11th Cir. 1987).

Defendant argues that, on this evidentiary record, no reasonable jury could find that Malo's work environment deteriorated to the point of becoming "intolerable." (DE 12 at 18). Having considered the entire factual record in this case in detail, I agree and conclude that no reasonable jury could find that the alleged discriminatory and retaliatory conduct coalesced to create an intolerable work environment such that Malo had no choice but to resign. Viewing the totality of

the evidence in Plaintiffs' favor, it appears that Plaintiffs' best theory for establishing the constructive discharge claim is that from the time that Malo disclosed to Harder that she was pregnant, Harder took steps to siphon off income-producing opportunities from Malo's sales pipeline until her commission prospects were so diminished that she would have no choice but to resign. However, even this scenario is not enough to meet the intolerable work environment standard. Indeed, on this record, a reasonable jury may be able to find, *inter alia*, that Defendant foreclosed Malo from certain opportunities because of her pregnancy or that it reduced her commission on the Nationwide deal because she complained about what she perceived as pregnancy discrimination. However, again, such possibilities do not amount to an intolerable work environment, especially when other countervailing evidence in this record shows that Defendant actually made exceptions to its policies to accommodate Malo. Most notably in my view, Defendant made an exception to its policy that sales executives who go on FMLA leave do not receive commission on deals that close while they are out and thus paid Malo commission on the deals that closed during her maternity leave. (DE 92, Defendant's Statement of Material Facts ¶¶ 26–30). Plaintiffs "dispute" Defendant's statement that Defendant made this exception to its leave of absence policy by citing to exhibits that actually support that Defendant made that exception. (*See* DE 120, Plaintiff's Response to Defendant's Statement of Material Facts ¶ 30). For these reasons, I find that Defendant's conduct did not rise to a level of severity and pervasiveness necessary to sustain a constructive discharge claim. Therefore, Defendant is entitled to judgment on this Count.

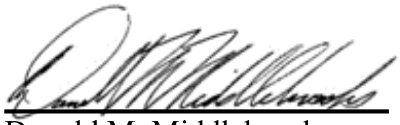
CONCLUSION

Accordingly, it is **ORDERED AND ADJUDGED** that:

(1) Defendant NICE Systems, Inc.'s Motion for Final Summary Judgment (DE 87) is **DENIED IN PART AND GRANTED IN PART**.

(2) Final judgment as to Count III will be entered by way of separate order pursuant to Federal Rule of Civil Procedure 54(b).

SIGNED in Chambers at West Palm Beach, Florida, this 4th day of August, 2021.



Donald M. Middlebrooks
United States District Judge

cc: Counsel of Record