UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 1:19-cv-20179-KMW

ENID PORRATA DORIA,

Plaintiff,

vs.

ROYAL CARIBBEAN CRUISES, LTD., et al.

Defendant.

_____/

ORDER

THIS MATTER is before the Court on Defendant Royal Caribbean Cruises Ltd.'s ("Royal Caribbean") Motion to Dismiss (DE 9). Plaintiff Enid Porrata Doria ("Doria") filed a response in opposition (DE 10), and Royal Caribbean filed a reply (DE 11). For the reasons set forth below, Defendant's Motion to Dismiss (DE 9) is **GRANTED**.

I. BACKGROUND

On April 5, 2018 Doria was a passenger aboard Royal Caribbean's *Harmony of the Seas* when he purchased an ATV excursion experience in Cozumel, Mexico, operated by Renta Safari Sa De CV ("Renta") from Royal Caribbean. (DE 1 at 8). That day, while participating in the ATV excursion, he suffered injuries when he crashed his ATV into a tree. (DE 1 at 9). Doria submits that while on the excursion, Renta staff failed to provide adequate direction to participants, and that Royal Caribbean misrepresented that the excursion would occur on "dirt roads" when it actually took place over "rough terrain." (DE 1 at 9).

Doria alleges that, in purchasing the excursion, he relied on Royal Caribbean's representations that the excursion would be safe. (DE 1 at 7). Such representations included promotional materials made available by Royal Caribbean through their website, brochures, presentations, and staff at the cruse ship's shore excursion desk, indicating the shore excursions were "operated by Royal Caribbean and/or safe." (DE 1 at 6-7).

Accordingly, Doria filed this lawsuit alleging the following eight causes of action arising from his injuries: (1) misleading advertising in violation of Florida Statute Section 817.41 against both defendants; (2) negligent misrepresentation against Royal Caribbean; (3) negligence against Royal Caribbean; (4) negligence against Renta; (5) negligence against defendants based on apparent agency or agency by estoppel; (6) negligence against defendants based on joint venture between Royal Caribbean and Renta; (7) third-party beneficiary against both defendants; and (8) breach of fiduciary duty against both defendants.

Royal Caribbean moved to dismiss Counts I through III, and Counts V through VIII for failure to state a claim. (DE 9).

II. LEGAL STANDARD

To survive a Rule 12(b)(6) motion to dismiss, a plaintiff must plead sufficient facts to state a claim that is "plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). The purpose of this requirement is "to give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The Court's consideration is limited to the allegations presented. *See GSW, Inc. v. Long Cty.*, 999 F.2d 1508, 1510 (11th Cir. 1993). All factual allegations are accepted as true and all reasonable inferences are drawn in the plaintiff's favor. *See Speaker v. U.S. Dep't of Health & Human Servs. Ctrs. for Disease*

Control & Prevention, 623 F.3d 1371, 1379 (11th Cir. 2010); *see also Roberts v. Fla. Power & Light Co.*, 146 F.3d 1305, 1307 (11th Cir. 1998). Nevertheless, while a plaintiff need not provide "detailed factual allegations," the allegations must consist of more than "a formulaic recitation of the elements of a cause of action." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). "Additionally, 'conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal.'" *U.S. ex rel. Keeler v. Eisai, Inc.*, 568 F. App'x 783, 792-93 (11th Cir. 2014) (*quoting Davila v. Delta Air Lines, Inc.*, 326 F.3d 1183, 1185 (11th Cir. 2003)). The "[f]actual allegations must be enough to raise a right of relief above the speculative level." *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295 (11th Cir. 2007) (quoting *Twombly*, 550 U.S. at 545).

In addition to the requirements of *Twombly*, *Iqbal*, and Federal Rules of Civil Procedure 8(a) and 12(b)(6), claims sounding in fraud are subject to the pleading standards of Federal Rule of Civil Procedure 9(b). *See U.S. ex. rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309-10 (11th Cir. 2002); *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-CIV, 2012 WL 2049431, at *3 (S.D. Fla. June 5, 2012). Rule 9(b)(6) provides that "[i]n allegations of fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake" but that "[m]alice, intent, knowledge, and other conditions of a person's mind shall be averred generally." Fed. R. Civ. P. 9(b). Rule 9(b) is satisfied if the plaintiff pleads "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in

which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.*, 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997)).

Further, when an injury is alleged to have occurred "upon a ship in navigable waters," federal maritime law applies. *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984) (citing *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 628 (1959)). Passenger suits against a cruise line alleging torts are subject to general maritime law. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). Maritime law also applies to alleged incidents that occur during the course of the cruise at offshore excursions or other ports-of-call since the "necessary precursors . . . occurred while the ship was on navigable waters." *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901 (11th Cir. 2004).

III. ANALYSIS

A. Count I – Misleading Advertising in Violation of Florida Statute Section 817.41 and Count II – Negligent Misrepresentation

Doria alleges that Royal Caribbean made and disseminated false or misleading materials regarding the safety of the ATV excursion. (DE 1). Claims arising under Florida Statute Section 817.41 and Florida common law negligent misrepresentation must allege:

> (1) misrepresentation of a material fact; (2) that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known its falsity; (3) that the representor intended that the misrepresentation induce another to act on it; and (4) that injury resulted to the party acting in justifiable reliance on the misrepresentation.

Ceithaml v. Celebrity Cruises, Inc., 207 F. Supp. 3d 1345, 1352-3 (S.D. Fla. 2016) (citing *Holguin v. Celebrity Cruises, Inc.*, No. 10-20212-CIV, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010)); *see also Smith v. Mellon Bank*, 957 F. 2d 856, 858 (11th Cir. 1992) ("In order to prove a violation of Section 817.41, Florida law requires the plaintiff to prove reliance on the alleged misleading advertising, as well as each of the other elements of the common law tort of fraud in the inducement.").

As an allegation of fraud, negligent misrepresentation is subject to the heightened pleading standard of Rule 9(b) which requires a plaintiff to establish "the 'who, what, when, where, and how' of the fraud." *Ceithaml,* 207 F. Supp. 3d at 1353 (citing *Garfield v. NDC Health Corp.*, 466 F. 3d 1255, 1262 (11th Cir. 2006)); *see Ziemba*, 256 F. 3d at 1202 ("Rule 9(b)'s heightened pleading standard requires that the complaint set forth . . . precisely what statements were made in what documents or oral representations."); *see also Gayou*, No. 11-23359-Civ-SCOLA, 2012 WL 2049431, at *7 (dismissing an allegation of misleading advertisement and negligent misrepresentation because the complaint was not temporally precise).

In its Motion, Royal Caribbean argues that Doria has failed to meet the Rule 9(b) standard. (DE 9 at 2). In support of this contention, Royal Caribbean cites Judge Ungaro's recent decision in *Serra-Cruz v. Carnival Corp.* No. 1:18-cv-23033-UU, (DE 30 at 7) (S.D. Fla. Feb. 12, 2019). There, Judge Ungaro applied the Rule 9(b) standard to claims of negligent misrepresentation under Florida common law and Florida Statute Section 817.41 where the facts were substantially similar to those in this case. *Id.* The plaintiff in *Serra-Cruz* alleged Carnival made misleading statements as to the safety of an ATV excursion sold on its cruise ship. *Id.* at 11. In her complaint the plaintiff provided quotes

from "Carnival's promotional material, brochures and/or website" describing the excursion. *Id.* at 8. Because the plaintiff referred to the sources of the materials "in the collective as 'Carnival's promotional material'" rather than naming the sources with particularity, Judge Ungaro ruled that the allegations in the complaint were insufficient to satisfy the Rule 9(b) standard *Id.* at 9.

Doria concedes that the heightened pleading standard of Rule 9(b) is applicable to Counts I and II, but argues that he has pleaded his factual allegations with sufficient particularity to satisfy the heightened standard. (DE 10 at 2). However, like the plaintiff in *Serra-Cruz*, Doria's pleading fails to provide the sources of the allegedly misleading materials. In response to Royal Caribbean's Motion, Doria points to paragraphs eighteen through twenty-three of the Complaint. (DE 10 at 2). There, Doria—like the plaintiff in *Serra-Cruz*—lists the sources of the allegedly misleading materials in the collective: "the information and/or material [Royal Caribbean] made available and/or distributed to the Plaintiff . . . ." (DE 1 at 6). Doria also contends that the particularity standard is satisfied by the allegations in paragraph twenty-eight of the Complaint where he states merely that Royal Caribbean represented its excursions as "guided" and on "dirt roads." (DE 10 at 2; DE 1 at 8–9). These allegations fail to provide the Court—and the Defendants—with the respective sources of these representations or facts supporting his claim that these representations were actually made to Doria.

Therefore, Doria has not met the heightened pleading standard of Rule 9(b). *See Ceithaml*, 207 F. Supp. 3d at 1353. And because Counts I and II are pleaded with identical factual allegations, Count II similarly does not meet the heightened pleading standard for the reasons stated above. *See Serra-Cruz*, No. 1:18-cv-23033-UU, at 7 (dismissing

counts of misleading advisement and negligent misrepresentation for failure to meet the Ruel 9(b) standard where both counts were identically pleaded). Because neither Count I nor Count II are sufficiently pleaded under the Rule 9(b) standard, the Court need not address the merits of these claims at this stage. Accordingly, Counts I and II are dismissed without prejudice with leave to amend.

B. Count III – Negligence Against Royal Caribbean

Doria's third Count alleges Royal Caribbean was negligent in promoting the ATV excursion and not warning passengers of its alleged dangers. To state a claim for negligence against a shipowner, a plaintiff "must show: (1) that defendant owed plaintiff a duty; (2) that defendant breached that duty; (3) that this breach was the proximate cause of plaintiff's injury; and (4) that plaintiff suffered damages." *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006) (citing *Hasenfus v. Secord*, 962 F.2d 1556, 1559-60 (11th Cir. 1992)); *see also Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) ("In analyzing a maritime tort case, we rely on general principles of negligence law.") (quoting *Daigle v. Point Landing, Inc.*, 616 F.2d 825, 827 (5th Cir.1980)).

Pursuant to federal maritime law, the duty of care that cruise operators owe passengers is ordinary reasonable care under the circumstances, "which requires, as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition." *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). A facet of the duty of reasonable care is the cruise ship operator's "duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Serra-Cruz*, No. 1:18-cv-23033-UU, at 14 (quoting *Chaparro,* 694 F.3d at 1336). The duty to warn only extends to dangers "which

the carrier knows, or reasonably should have known" to exist. *See id.* (quoting *Wolf v. Celebrity Cruises Inc.*, 683 F. App'x 786, 794 (11th Cir. 2017)).

Doria alleges Royal Caribbean's duty to warn was triggered when it received notice of the excursion's allegedly unsafe conditions through its "initial approval process and/or its yearly inspections of the subject excursion" and "other cruise ship passengers being injured on ATV excursions." (DE 1 at 9). Royal Caribbean argues that Doria has failed to allege facts showing Royal Caribbean knew of the dangers of the ATV excursion. (DE 9 at 8).

The reasoning and analysis in *Serra-Cruz* is again applicable here. There, the plaintiff also alleged that Carnival breached its duty by not warning of the ATV excursion's allegedly dangerous conditions. *See* No. 1:18-cv-23033-UU, at 15. To show Carnival had notice of the dangerous conditions, the plaintiff in *Serra-Cruz* pointed to "Carnival's initial approval process . . . Carnival's yearly inspections . . . [and] prior incidents involving Carnival passengers injured on ATV excursions." *See id.* The court dismissed plaintiff's negligence claim, finding that the plaintiff failed to sufficiently plead notice by not specifying which yearly inspection, prior incidents, or factors in the approval process put Carnival on notice. *Id.* at 16.

Like the plaintiff in *Serra-Cruz*, Doria does not allege which inspection put Royal Caribbean on notice or whether the allegedly dangerous condition of the terrain was present at the time of the initial approval process. (DE 1 at 9). Further, Doria does not provide allegations regarding which ATV accident should have put Royal Caribbean on notice; instead, Doria alleges only that "other cruise ship passengers" were injured. (DE

1 at 9).[1] Doria's Complaint is pled with even less specificity than that dismissed in *Serra-Cruz*. While the *Serra-Cruz* complaint pointed to accidents involving other Carnival passengers, No. 1:18-cv-23033-UU, at 15, Doria refers only to "other cruise ship passengers". (DE 1 at 9). Doria does not state whether these other ATV accidents involved passengers from Royal Caribbean, occurred on the "rough terrain" of Cozumel, or were operated by Renta in Cozumel. (DE 1 at 9).

This Court agrees with Royal Caribbean that Doria has failed to plead sufficient facts alleging that Royal Caribbean had actual or constructive notice of the dangerous conditions of the ATV excursion. Although Doria recites a long list of conclusory statements, the Complaint fails to articulate a triggered duty to warn on the part of Royal Caribbean.[2] (DE 1 at 19-23). Therefore, this Court need not consider the remaining elements of Doria's negligence claim at this stage. Count III is dismissed without prejudice with leave to amend.

C. Count V – Negligence Based on Apparent Agency or Agency by Estoppel

Next, Doria claims Royal Caribbean is liable for the negligence of the Excursion Entities under a theory of apparent agency. In response, Royal Caribbean attaches Doria's cruise ticket contract, his shore excursion ticket, and the Tour Operator Agreement ("TOA") between Royal Caribbean and Renta to its Motion. Royal Caribbean argues these documents discredit Doria's claim for negligence under an apparent agency theory. (DE 9 at 11). However, consideration of these releases would be improper at the

[1] Doria references three other matters, but gives no citations or any factual detail. (DE 1 at 9).
[2] While the Court notes that many details of the ATV excursion's prior condition and Royal Caribbean's knowledge of those prior excursions may not be adduced prior to discovery, the Complaint in its current iteration nevertheless fails to meet the *Keefe* standard of alleging actual or constructive notice. *See Keefe* 867 F.2d 1318 at1322 (11th Cir. 1989).

motion to dismiss stage as the release of liability is more properly considered an affirmative defense.[3] *See* Fed. R. Civ. P. 8(c)(1). Therefore, the Court will not consider Royal Caribbean's exhibits and will look only to the four corners of the Complaint for purposes of deciding Royal Caribbean's Motion to Dismiss Count V.

Royal Caribbean argues that Count V should be dismissed because it is a theory of liability which is dependent on the sufficiency of the underlying negligence claim. (DE 9 at 10). After carefully reviewing the parties' briefing and relevant caselaw, the Court agrees with Royal Caribbean that, because Doria's underlying negligence claim is dismissed without prejudice, his claim for negligence based on apparent agency must also be dismissed without prejudice. *Brown v. Carnival Corp. et al.*, 202 F. Supp. 3d 1332, 1340 (S.D. Fla. 2016) (dismissing "apparent agency" claim where court already found that plaintiff failed to state a plausible negligence claim); *Zapata*, 2013 WL 1296298, at *5 ("I already have determined that the insufficiency of Plaintiff's factual allegations warranted the dismissal without prejudice of Plaintiff's negligence claim. Accordingly, Plaintiff's apparent agency claim must be dismissed without prejudice as well.").

However, the Court finds that, were Doria's underlying negligence claim sufficiently pleaded, his claim for apparent agency would be factually supported at the motion to dismiss stage. Allegations supporting Doria's claim include: (1) Royal Caribbean making all "arrangements for the subject excursion without effectively disclosing that the subject excursion was being run by another entity;" (2) marketing "the subject excursion using its

[3] Generally, a court may not consider anything beyond the face of the complaint and any documents attached thereto in deciding a motion to dismiss. *See Financial Sec. Assurance, Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1284 (11th Cir. 2007). There is an exception to this rule, however, where the plaintiff refers to a document in its complaint, the document is central to the plaintiff's claim, its contents are not in dispute, and the defendant attaches the document to its motion to dismiss. *Id.* Although the Complaint references Royal Caribbean's website (DE 1 at 27) (which contains the passenger ticket contract), the Court will not consider these documents at this stage of the litigation.

company logo;" (3) recommending that passengers "not engage in excursions . . . not sold through" Royal Caribbean; (4) maintaining a "shore excursion desk" where it sold and provided information for excursions; (5) collecting Doria's fee; and (6) issuing Doria a receipt for his fee. (DE 1 at 27-28). Several other courts in this District have found similar factual allegations sufficient to support a negligence claim under an apparent agency theory of liability. *See, e.g.*, *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1396-97 (S.D. Fla. 2014); *Gayou*, 2012 WL 2049431, at *8-9; *Zapata*, 2013 WL 1296298, at *5; *Lapidus v. NCL America LLC, et al.*, No. 12-21183, 2012 WL 2193055, at *5 (S.D. Fla. Jun. 14, 2012); *Gibson v. NCL (Bahamas) Ltd. et al.*, No 11-24343-CIV, 2012 WL 1952667, at *7 (S.D. Fla. May 30, 2012). Nevertheless, because the underlying negligence claim is insufficiently pleaded, Count V is dismissed without prejudice with leave to renew in an amended complaint.

D. Count VI – Negligence Against Defendants Based on Joint Venture

In Count VI, Doria alleges Royal Caribbean was vicariously liable for Renta's negligence based on a joint venture theory. The Eleventh Circuit recognizes several "signposts" or "likely indicia" that suggest the existence of a joint venture such that one defendant may be held vicariously liable for the negligent acts of a joint venture partner. *Fulcher's Point Pride Seafood, Inc. v. M/V Theodora Maria*, 935 F.2d 208, 211 (11th Cir. 1991). These include (1) the intention of the parties to create a joint venture; (2) joint control or right of control; (3) joint proprietary interest in the subject matter of the joint venture; (4) the right of all venturers to share in the profits; and (5) the duty of both to share in the losses. *See Hung Kang Huang v. Carnival Corp.*, 909 F. Supp. 2d 1356, 1361 (S.D. Fla. 2012) (citing *Skeen v. Carnival Corp.*, No. 08-22618-CIV, 2009 WL

1117432, at *3 (S.D. Fla. April 24, 2009)), *abrogated on other grounds*, *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 150 n.18 (11th Cir. 2014). Of these factors, the Eleventh Circuit in *Fulcher* noted that "[t]he parties' intentions are important" in determining whether a joint venture exists. 935 F.2d at 211 (quoting *Sasportes v. M/V SOL DE COPACABANA*, 581 F.2d 1204 (5th Cir. 1978)).

Royal Caribbean contends that its TOA[4] with Renta undermines Doria's joint venture allegation:

> Operator's relationship with Cruise Line during the Term of this Agreement shall be that of an independent contractor. Operator shall not represent that it has any power, right or authority to bind Cruise Line or to assume or create any obligation or responsibility, express or implied, on behalf of Cruise Line or in the Cruise Line's name. Nothing related in this Agreement shall be construed as constituting Operator and Cruise Line as partners, or as treating the relationships of employer and employee, franchisor and franchisee, master and servant or principal and agent or joint venture between the Parties hereto.

(DE 9 at 14).

[4] Royal Caribbean attached its standard TOA with Renta to its Motion to Dismiss. (DE 9 at 14). This agreement was made central to Doria's Complaint by his assertion that Royal Caribbean and Renta "entered into an agreement." (DE 1 at 30). Thus, the Court may consider this undisputed document, central to and referenced in the Complaint, without converting Royal Caribbean's Motion to Dismiss into a motion for summary judgment. *See, e.g., Zapata*, 2013 WL 1296298, at *4 (reviewing a TOA for a joint venture claim where the plaintiff made the agreement central to their complaint); *Day v. Taylor*, 400 F.3d 1272, 1276 (11th Cir. 2005) ("Our prior decisions also make clear that a document need not be physically attached to a pleading to be incorporated by reference into it; if the document's contents are alleged in a complaint and no party questions those contents, we may consider such a document provided it meets the centrality requirement imposed in *Horsley*."); *Horsley v. Feldt*, 304 F.3d 1125, 1134 (11th Cir. 2002) (a court may consider documents central to the plaintiffs' claim and undisputed under the incorporation by reference doctrine without converting the motion into summary judgment); *Gross v. White*, 340 Fed. App'x. 527, 534 (11th Cir. 2009) (finding no error in the district court's consideration of a document referenced in the second amended complaint but attached only to the plaintiff's opposition to a motion to dismiss); *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("Where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal.").

This Court previously dismissed a negligence claim based on allegations of a joint venture in *Ceithaml*. 207 F. Supp. 3d at 1353. There, the TOA presented nearly identical language, releasing Carnival from any purported joint venture with shore excursions companies. *Id.* at 1354. This Court held that such a contract unambiguously showed no intention on the part of Carnival to enter into a joint venture with excursion companies.[5] *Id.*

Although Doria maintains that his pleading satisfies each element of a joint venture, the Court finds Doria's bare allegation—that Renta and Royal Caribbean "'shared a common purpose' which was to 'operate the subject excursion'"—to be factually insufficient to show the intent to enter into a joint venture. (DE 10 at 14). *See Zapata*, 2013 WL 1296298, at *6; *Skeen*, 2009 WL 1117432, at *3 (dismissing joint venture claim where "Plaintiff fail[ed] to assert that the parties intended to enter into a joint venture"). This is true especially in light of the express language of the TOA, which negates any such intent on the part of Defendants. Thus, because Doria has failed to allege the existence of a joint venture, and because the terms of the TOA unambiguously foreclose any argument that Royal Caribbean intended to enter into a joint venture with Renta, Count VI of the Complaint is dismissed with prejudice. *See Zapata*, 2013 WL 1296298, at *6 (dismissing a joint venture claim with prejudice where a TOA's "unambiguous provisions" directly contradicted the plaintiff's allegations).

E. Count VII – Third-Party Beneficiary

[5] In *Ceithaml*, this Court relied on *Zapata v. Royal Caribbean Cruises, Ltd.*, No. 12-21897-CIV, 2013 WL 1296298, at *6 (S.D. Fla. Mar. 27, 2013), which held that an identical contractual provision negated an allegation of intent between the cruise line and excursion company to enter into a joint venture.

In Count VII, Doria alleges Royal Caribbean breached a third-party beneficiary contract. To plead a breach of a third-party beneficiary contract, Plaintiff must allege (1) the existence of a contract to which Plaintiff is not a party; (2) an intent, either expressed by the parties, or in the provisions of the contract, that the contract primarily and directly benefit Plaintiff; (3) breach of that contract by one of the parties; and (4) damages to Plaintiff resulting from the breach. *Lapidus*, 924 F. Supp.2d at 1360-61. For a third party to have a legally enforceable right under the contract, the benefit to the third party must be the "direct and primary object of the contracting parties." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 982 (11th Cir. 2005). The third parties do not need to be specifically named in the contract to qualify as intended beneficiaries, as "long as the contract refers to a well-defined class of readily identifiable persons that it intends to benefit." *Belik v. Carlson Travel Group, Inc.*, 864 F. Supp.2d 1302, 1312 (S.D. Fla. 2011) (internal citations omitted). However, the parties' intent to benefit the third party "must be specific and must be clearly expressed in the contract in order to endow the third-party beneficiary with a legally enforceable right," and an "incidental" benefit to a third party is insufficient to sustain a claim. *Bochese*, 405 F.3d at 982.

In his Complaint, Doria alleges that the terms of an agreement between Royal Caribbean and Renta demonstrate their intent to "benefit [Royal Caribbean] passengers, including the plaintiff. . . ." (DE 1 at 32). On the other hand, Royal Caribbean argues that the element of intent is disproven by the TOA. (DE 9 at 17). Royal Caribbean cites section 12.10 of the Agreement, which directly addresses the question of third-party beneficiaries: "this Agreement shall not be deemed to provide third parties with any remedy, claim, right or action or other right." (DE 9 at 17).

In *Zapata v. Royal Caribbean Cruises*, Judge Cooke faced similar allegations and an identical third-party beneficiary clause. 2013 WL1296298, at *5. The court dismissed the third-party beneficiary claim with prejudice, finding that the contract "expressly disclaims any intent to benefit Plaintiff." *Id.*; *see also Gayou*, 2012 WL 2034931, at *11 (dismissing a claim for third-party beneficiary claim where the contract's terms "expressly disclaimed" any intent to benefit third parties). This Court agrees with the reasoning and analysis in *Zapata* and *Gayou*, and finds that the TOA expressly disclaims any intent for the contract to benefit Doria. Therefore, Doria's third-party beneficiary claim, Count VII, is dismissed with prejudice.

F. Count VIII – Breach of Fiduciary Duty Against Royal Caribbean

Finally, Doria brings a claim against Royal Caribbean for breach of fiduciary duty. Royal Caribbean argues that to impose a fiduciary duty on a ship owner would require applying a heightened standard of care. (DE 9 at 18). Doria alleges that Royal Caribbean had fiduciary duties such as selecting and offering safe excursions to passengers and making arrangements with excursion providers for the benefit of passengers. (DE 1 at 37). Royal Caribbean moves to dismiss this Count on the basis that imposing such a fiduciary duty on a cruise ship operator would go beyond the typical duty for cruise ships of "reasonable care under the circumstances." (DE 9 at 18) (citing *Kermarec*, 79 S. Ct. at 410).

"To state a claim for breach of fiduciary duty in Florida, the plaintiff must show: (i) the existence of a fiduciary duty; (ii) the defendant breached that duty; and (ii) the defendant's breach proximately caused the plaintiff's damages." *Lindquist v. Linxian*, No.

11-23876-CIV, 2012 WL 3811800, at *4 (S.D. Fla. Sept. 4, 2012) (citing *Gracey v. Eaker,* 837 So. 2d 348, 353 (Fla. 2002)).

The court in *Serra-Cruz* dealt with a substantially similar allegation and dismissed the claim with prejudice. *See* No. 1:18-cv-23033-UU, at 23. There, the court held that "maritime law does not impose a fiduciary duty upon ship-owners." *Id.* Additionally, Judge Ungaro noted that "no court in this Circuit . . . has ever held a cruise line to owe a fiduciary duty to its passengers." *Id.* at 24. Furthermore, other common carriers, such as airlines, "do not owe a fiduciary duty to [their] passengers.". *Id.* (citing *Karkomi v. Am. Airlines, Inc.* 717 F. Supp. 1340, 1343 (N.D. Ill. 1989)).[6] Assigning to Royal Caribbean a fiduciary duty to its passengers would ascribe a heightened standard of care beyond the well-established "reasonable care under the circumstances." *Id.* at 23. Therefore, Doria's claim for breach of fiduciary duty fails as a matter of law. *See Serra-Cruz*, No. 1:18-cv-23033-UU, at 23-4. Accordingly, Count VIII is dismissed with prejudice.

IV. CONCLUSION

For the reasons set forth above, it is **ORDERED AND ADJUDGED** that Defendant's Motion to Dismiss (DE 9) is **GRANTED IN PART**. The Court finds Plaintiff's allegations in Counts I, II, III, and V are **DISMISSED WITHOUT PREJUDICE**, and Counts VI, VII, and VIII are **DISMISSED WITH PREJUDICE** under Federal Rule of Civil

[6] Doria contends that Royal Caribbean owes a fiduciary duty to its passengers because, by selling and booking excursions, it acted as a travel agent, thereby adopting the fiduciary duties and liabilities of a travel agent. (DE 10 at 20). To support this contention, Doria cites an Illinois state case, *United Airlines, Inc. v. Lerner*, 87 Ill. App. 801 (Ill. App. Ct. 1980). In *Lerner*, the plaintiff sued the airline that sold him his ski vacation travel package, because he was not warned that avalanches at the destination may cause road closures which impeded access to his lodging. *Id.* The court found that, although the airline may be considered a travel agent, it was not liable for breaching a fiduciary duty by failing to warn of "possible hindrances" to his vacation. *Id.* at 802. This Court need not decide whether Royal Caribbean was a travel agent, but notes that if it were, it would not be liable for breaching a fiduciary duty by not disclosing potential dangers involved with the ATV excursion. In any case, the Court finds that *Lerner* is neither helpful nor persuasive in ruling on Royal Caribbean's Motion to Dismiss Count VIII.

Procedure 12(b)(6). Plaintiffs shall file an amended complaint within 21 days of the date of this order.

DONE AND ORDERED in Chambers in Miami, Florida, this 17 day of June, 2019.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE