UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
Case No. 19-20398-CIV-WILLIAMS

MARY KREYER,

Plaintiff,

vs.

CARNIVAL CORP.,

Defendant.

_____/

ORDER

THIS MATTER is before the Court on Defendant Carnival Corporation's ("Carnival" or "Defendant") motion to dismiss for failure to state a claim (DE 22), to which Plaintiff Mary Kreyer ("Kreyer" or "Plaintiff") filed a response in opposition (DE 28), and to which Carnival filed a reply (DE 33). For the reasons set forth below, Carnival's motion to dismiss (DE 22) is **GRANTED IN PART AND DENIED IN PART**.

I. BACKGROUND

Plaintiff, who was a passenger on a Carnival Corporation ("Carnival") cruise ship in February 2018, brought this suit for negligence arising from injuries she allegedly sustained during a shore excursion operated by Chukka Caribbean Adventures (TCI) Ltd. ("Chukka") (DE 15 at 11). Plaintiff alleges that while she was barefoot on Chukka's catamaran, she slipped and fell on the deck, causing her to sustain severe injuries. *Id.* at 11-12. On July 8, 2019, Plaintiff filed an amended complaint against Carnival and Chukka. (DE 15).

Kreyer's amended complaint alleges the following nine causes of action arising from her injuries: (1) misleading advertising in violation of Florida Statute Section 817.41

against both defendants; (2) negligent misrepresentation against Carnival; (3) negligent selection and/or retention against Carnival; (4) negligent failure to warn against Carnival; (5) negligence against Carnival; (6) negligence against Chukka; (7) negligence against defendants based on apparent agency or agency by estoppel; (8) negligence against defendants based on joint venture between Carnival and Chukka; and (9) third-party beneficiary against both defendants. In response, Carnival filed a motion to dismiss Counts 1-5 and 7-9 for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). (DE 22).[1]

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

[1] Although Carnival states in the Introduction to its motion to dismiss that it is seeking to dismiss all Counts against it, including Count VII for negligence based on apparent agency or agency by estoppel, the motion to dismiss contains no substantive argument as to why this claim should be dismissed. (DE 22 at 1-2). Accordingly, to the extent Carnival seeks to have Count VII dismissed without any supporting case law or briefing, the motion to dismiss Count VII is **DENIED**.

"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

Kreyer alleges that Carnival made and disseminated false or misleading materials regarding the safety of the catamaran excursion, the ability of passengers to wear footwear while onboard the catamaran, and the level of supervision that would be provided by the tour guides. (DE 15 at 15). 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 to dismiss, Carnival argues that Kreyer has failed to meet the Rule 9(b) standard. (DE 22 at 4). In support of this contention, Carnival 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.

Kreyer concedes that the heightened pleading standard of Rule 9(b) is applicable to Counts I and II, but argues that she has pleaded her factual allegations with sufficient particularity to satisfy the heightened standard. (DE 28 at 4). Having reviewed the specific allegations in the amended complaint, the Court finds that, unlike the plaintiff in *Serra-Cruz*, Kreyer's pleading provides the sources of the allegedly misleading materials. Specifically, Kreyer's amended complaint sets forth: (1) the exact statements that are alleged to be misleading or false; (2) the sources of the allegedly misleading materials (Carnival's website and shore excursion brochure); (3) and where and when the allegedly misleading or false statements were made. Consequently, the allegations in the amended complaint provide the Defendants with the respective sources of the representations and facts supporting Kreyer's claim that negligent representations were actually made to her. Therefore, the Court finds that Kreyer has met the heightened pleading standard of Rule 9(b). *See Ceithaml*, 207 F. Supp. 3d at 1353. Carnival's motion to dismiss Counts I and II of the amended complaint is denied.

B. Counts III, IV and V – Negligent Selection and/or Retention, Negligent Failure to Warn, and Negligence Against Carnival

Kreyer's third, fourth, and fifth Counts allege Carnival was negligent in (1) promoting the catamaran excursion and not warning passengers of its alleged dangers; (2) implying that the excursion was reasonably safe under the circumstances; (3) censoring and altering comments on Carnival's publicly available websites related to safety concerns and similar prior incidents; (4) failing to adequately monitor and supervise Chukka to ensure that excursions were reasonably safe for passengers; and (5) selecting

and hiring Chukka as an excursion operator. 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)).

First, Kreyer alleges Carnival had a duty to reasonable select and retain excursion operators to ensure the safety of passengers. Kreyer also alleges Carnival had a duty to warn passengers about the inherent dangers of the catamaran excursion, including the fact that shoes would not be allowed to be worn on deck. Kreyer alleges Carnival's duty to warn was triggered when it received notice of the excursion's allegedly unsafe

conditions through its "initial approval process of the Excursion Entities and/or the excursion," "yearly inspections of the Excursion Entities and/or the excursion," and "prior incidents involving Carnival passengers injured on the Excursion Entities' excursions and/or snorkeling excursions." (DE 15 at 27). In the amended complaint, Kreyer provides sufficient factual detail regarding alleged prior incidents that occurred with either Carnival and/or Chukka involving excursions. Kreyer alleges that these prior incidents involving Chukka's excursions should have put Carnival on notice that the catamaran excursion was unreasonably dangerous. *Id.* at 12.

Thus, the Court finds that, at this stage of the case, Kreyer has pled sufficient facts in the amended complaint alleging Carnival had actual or constructive notice of the dangerous conditions of the catamaran excursion. The Court also finds that the amended complaint pleads facts sufficient to support the remaining elements of Kreyer's negligence claims, including that Carnival breached its duty by failing to warn Kreyer that the catamaran excursion was dangerous, selecting Chukka as an excursion operator despite the fact that the excursion was unreasonably dangerous, and offering an unreasonably dangerous excursion to passengers such as Kreyer. Moreover, Kreyer's amended complaint adequately pleads causation and damages as to the negligence claims set forth in Counts III, IV, and V. Thus, Carnival's motion to dismiss Counts III, IV, and V of the amended complaint is denied.

C. Count VIII – Negligence Against Defendants Based on Joint Venture

In Count VIII, Kreyer alleges Carnival was vicariously liable for Chukka'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)).

Carnival contends that its Standard Shore Excursion Independent Contractor Agreement ("Agreement")[2] with Chukka undermines Kreyer's joint venture allegation:

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[2] Carnival attached its Agreement with Chukka to its Motion to Dismiss. (DE 22, Ex. D). This agreement was made central to Kreyer's amended complaint through the assertion that Carnival and Chukka "entered into an agreement." (DE 15 at 40). Thus, the Court may consider this undisputed document, central to and referenced in the amended complaint, without converting Carnival's Motion to Dismiss into a motion for summary judgment. *See, e.g., Zapata*, 2013 WL 1296298, at *4 (reviewing an excursion operator agreement for a joint venture claim where the plaintiff made the agreement central to the 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 F. 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.").

> [Chukka's] relationship with CARNIVAL during the term of this agreement shall be that of Independent Contractor. [Chukka] shall not have, and shall not represent that it has, any power, right or authority to bind CARNIVAL or to assume or create any obligation or responsibility, express or implied, on behalf of CARNIVAL or in the CARNIVAL's name. Nothing related in this agreement shall be construed as constituting [Chukka] and CARNIVAL as partners, or as treating the relationship of employer and employee, franchisor and franchisee, master and servant or principal and agent or joint venturers [sic] between the parties hereto.

(DE 22, Ex. D at 17).

This Court previously dismissed a negligence claim based on allegations of a joint venture in *Ceithaml*. 207 F. Supp. 3d at 1353. There, the excursion operator agreement 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.[3] *Id.*

Although Kreyer maintains that her pleading satisfies each element of a claim for joint venture, the Court finds Kreyer's bare allegation—that Carnival and Chukka "'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 15 at 40). *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 Agreement between Chukka and Carnival, which negates any such intent on the part of Defendants. Thus, because

[3] 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.

Kreyer has failed to allege the existence of a joint venture, and because the terms of the Agreement unambiguously foreclose any argument that Carnival intended to enter into a joint venture with Chukka, Count VIII of the amended complaint is dismissed with prejudice. *See Zapata*, 2013 WL 1296298, at *6 (dismissing a joint venture claim with prejudice where an excursion operator agreement's "unambiguous provisions" directly contradicted the plaintiff's allegations); *see also Doria v. Royal Caribbean Cruises, Ltd.*, No. 1:19-cv-20179-KMW (DE 13) (S.D. Fla. June 20, 2019) (same).

D. Count IX – Third-Party Beneficiary

In Count IX, Kreyer alleges Carnival 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 the amended complaint, Kreyer alleges that the terms of an agreement between Carnival and Chukka demonstrate their intent to "benefit Carnival passengers, including the Plaintiff. . . ." (DE 15 at 42). On the other hand, Carnival argues that the element of intent is disproved by the Agreement itself. (DE 22 at 19). Carnival cites a provision of the Agreement that directly addresses the question of third-party beneficiaries and states: "this Agreement will not result in a breach of any obligation to any third party or infringe or otherwise violate any third party's rights." *Id.*

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). In *Doria v. Royal Caribbean Cruises, Ltd.*, No. 1:19-cv-20179-KMW (DE 13) (S.D. Fla. June 20, 2019), this Court agreed with the reasoning and analysis in *Zapata* and *Gayou*, and found that the excursion operator agreement expressly disclaimed any intent for the contract to benefit Doria. Therefore, the Court dismissed with prejudice Doria's third-party beneficiary claim. Because the same analysis applies to the facts in this case, the Court finds that Kreyer, like Doria, has failed to state a third-party beneficiary claim. Moreover, because the Agreement between Carnival and Chukka "expressly disclaims any intent to benefit Plaintiff," the third-party beneficiary claim fails as a matter of law and this claim is dismissed with

prejudice. *See, e.g.*, *Gayou*, 2012 WL 2034931, at *11; *Zapata*, 2013 WL1296298, at *5; *Doria*, No. 1:19-cv-20179-KMW (DE 13) (S.D. Fla. June 20, 2019).

IV. CONCLUSION

For the reasons set forth above, it is **ORDERED AND ADJUDGED** that Carnival's motion to dismiss (DE 22) is **GRANTED IN PART AND DENIED IN PART**. Carnival's motion to dismiss Counts I, II, III, IV, and V is **DENIED**. Carnival's motion to dismiss Counts VIII and IX is **GRANTED** and Counts VIII and IX are **DISMISSED WITH PREJUDICE** under Federal Rule of Civil Procedure 12(b)(6). Plaintiff shall file a second amended complaint removing Counts VIII and IX within 7 days of the date of this Order and Carnival shall file an answer to the second amended complaint within 21 days of the date it is filed.

DONE AND ORDERED in Chambers in Miami, Florida, this 18 day of December, 2019.

KATHLEEN M. WILLIAMS
UNITED STATES DISTRICT JUDGE