UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 18-24456-CV-WILLIAMS/TORRES

MAUNLAD TRANSPORTATION, INC.,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

REPORT AND RECOMMENDATION ON
DEFENDANT'S MOTION TO DISMISS

Before this Court is a Motion to Dismiss filed by Defendant CARNIVAL CORPORATION ("Defendant" or "Carnival") on April 24, 2019. [D.E. 27]. Plaintiff MAUNLAD TRANSPORTATION, INC. ("Plaintiff" or "Maunlad") responded in opposition to the Motion on May 8, 2019 [D.E. 31], and Carnival filed its Reply on May 29. [D.E. 39]. The Honorable Judge Kathleen M. Williams referred that Motion to the undersigned on September 26, 2019, and it is now ripe for disposition. Following our review of both parties' positions, in addition to the governing legal authorities, we hereby **RECOMMEND** the Motion be **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

Plaintiff initiated this action on October 25, 2018, and amended its Complaint on April 3, 2019. [D.E. 22]. The Complaint sets forth thirteen (13) separate causes of

action, each of which will be addressed in Section III of this Report. For purposes of our introduction, the entire course of events giving rise to the Complaint relates to several alleged agreements entered into by the parties that required Maunlad to recruit employees from the Philippines to work on Carnival ships.

Plaintiff specializes in the performance of background checks, employment evaluations, and the facilitation of medical examinations for Filipino crewmen hoping to obtain employment in the cruise industry. [D.E. 22, ¶ 7]. Maunlad's relationship with Carnival began back in 1998, when the parties entered into a service agreement that would pay Plaintiff to recruit crewmembers to work on Carnival vessels for a "finder's fee." In February of 2008, the terms of the contract required Carnival to pay Plaintiff between $200 and $600 for each crewmember recruited by Plaintiff and ultimately hired by Defendant, dependent on the role the seaman took upon employment. *Id.* at ¶ 21. The contract also required Carnival to pay $98 per crewmember to cover "administrative fees" incurred by Plaintiff during the recruitment process. *Id.* at ¶ 22.

The parties modified their agreement in September of 2008. The new contract reduced the amount owed to Plaintiff by Carnival for the administrative fees, and Defendant now only would be required to pay $90 in administrative fees per crewmember recruited. *Id.* at ¶ 23. The parties put this agreement into writing. *Id.*, Exhibit B. Plaintiff, however, alleges that in addition to the terms outlined in the contract, there were also oral modifications made by the parties following its execution. According to the Amended Complaint, one of those oral conditions allowed

Maunlad to forego invoicing Carnival for the $90 administrative fees it incurred during the course of the parties' relationship, unlike the finder's fees, which required invoices to be sent on a monthly basis. *Id*. at ¶¶ 25-26.

Around the time the parties signed the September 2008 agreement, Plaintiff alleges that the Philippines Overseas Employment Administration ("POEA") enacted a regulation that required foreign corporations to pay Filipino crewmembers a minimum monthly wage. *Id*. at ¶ 28-29. Carnival purportedly did not want to pay that wage, and so Plaintiff alleges Defendant urged Maunlad to lobby the POEA to obtain a waiver that exempted it from complying with the new regulation. *Id*. at ¶¶ 31-32. The parties did not sign any contract concerning Plaintiff's lobbying work. Maunlad was ultimately successful for its lobbying efforts, however, and the POEA exempted Carnival from complying with the minimum wage requirement. *Id*. at ¶ 36.

The parties once again renegotiated the governing contract in 2013. On September 24 of that year, the parties signed an agreement that reduced the amount Plaintiff would receive in administrative reimbursements, with Carnival paying Maunlad $40 per crewmember employed. *Id*., Exhibit C. The agreement contained the following provision:

> This Agreement is the sole and entire agreement of the parties with respect to the matters set forth herein. There are no prior or present agreements, representations or understandings, oral or written, which are binding upon either party, unless specifically included in this Agreement. No modification or change to this Agreement shall be valid or binding upon the parties unless in writing and executed by the party or parties intended to be bound by it.

Id., p. 1. The contract also required Plaintiff to send invoices to Carnival on a weekly basis, with payment due fifteen (15) days after receipt of those invoices. *Id.*, p. 3. [D.E. 22, ¶ 45]. Two months later, Carnival notified Plaintiff that the agreement would be terminated, to become effective in February of 2014. *Id.* at ¶ 52.

Maunlad is now claiming that Carnival has failed to pay any of the administrative fees owed to it since 2008, or for the lobbying services it undertook on the minimum wage issue. *Id.* at ¶¶ 57-58. According to the Complaint, Carnival currently owes Plaintiff more than $1.5 million, the total of which was never invoiced at Defendant's own request. *Id.* at ¶¶ 57-58. Plaintiff demanded payment for the unpaid fees on October 24, 2016, which Carnival rejected. *Id.* at ¶¶ 60-63. Maunlad then initiated suit on October 25, 2018. [D.E. 1].

Carnival filed a Motion to Dismiss the Amended Complaint on April 24, 2019. [D.E. 27]. The main argument advanced by Carnival is that Maunlad's claim is barred by the applicable statute of limitations. In the alternative, Carnival challenges the factual allegations asserted, arguing that Plaintiff fails to state a claim upon which relief can be granted. Carnival also asks that Plaintiff's demand for attorney's fees be stricken. Plaintiff responded in opposition to the Motion, arguing that the statute of limitations cannot bar the case from proceeding and that the allegations are sufficient to survive the motion to dismiss.

II. LEGAL STANDARD

Rule 12 of the Federal Rules of Civil Procedure allows a party to challenge a Complaint that fails to state a claim upon which relief can be granted. Fed. R. Civ. P.

12(b)(6). In ruling on such a challenge, we must assume the allegations in the complaint are true and construe those allegations in the light most favorable to the plaintiff. *Rivell v. Private Health Care Systems, Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008). A motion to dismiss should only be granted when the movant demonstrates that the complaint fails to include enough facts to state a claim to relief that is plausible on its face. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

A complaint "does not need detailed factual allegations," but "a plaintiff's obligation to provide the grounds of his [entitlement] to relief requires more than labels and conclusions[.]" *Id.* (citation omitted). The allegations must be "enough to raise a right to relief above the speculative level," *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1270 (11th Cir. 2009) (quotations and citation omitted), and "a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted). Thus, "unadorned, the-defendant-unlawfully-harmed me accusation[s]" are insufficient, as are "naked assertions devoid of further factual enhancement." *Ashcroft v. Iqbal*, 556 U.S. 662, 677-678 (2009) (quoting *Twombly*, 550 U.S. at 557)).

III. ANALYSIS

A. Breach of Contract (Written, Oral and Implied) – Counts I – III

Carnival raises three separate challenges to Plaintiff's breach of contract claims: (1) the statute of limitations bars the action from proceeding; (2) each count fails to state a claim upon which relief can be granted; and (3) the exhibits attached to the Amended Complaint contradict the allegations concerning the oral

modifications made to the agreement. For these reasons, Carnival argues the breach of contract claims must be dismissed.

We first turn to the statute of limitations. Under Florida law, a claim for breach of a written contract must be brought within five years, Fla. Stat. § 95.11(2)(b), while a claim for breach of an oral contract must be brought within four years. Fla. Stat. § 95.11(3)(k). In general, "whether a claim is barred by a statute of limitations should be raised as an affirmative defense in the answer rather than a motion to dismiss." *Spadaro v. City of Miramar*, 855 F. Supp. 2d 1317, 1328 (S.D. Fla. 2012) (citing *Cabral v. City of Miami Beach*, 76 So. 3d 324, 326 (Fla. 3d DCA 2011)). A party may, however, raise the statute of limitations at this stage "if facts on the face of the pleadings show that the statute [ ] bars the action." *Id.*; *see also Keira v. U.S. Postal Inspection Serv.*, 157 F. App'x 135, 136 (11th Cir. 2005) ("At the motion-to-dismiss stage, a complaint may be dismissed on the basis of a statute-of-limitations defense only if it appears beyond a doubt that Plaintiffs can prove no set of facts that toll the statute.").

The key point in time involves when Plaintiff's cause of action accrued. Florida law states that a cause of action "accrues when the last element constituting the cause of action occurs." Fla. Stat. § 95.031(1). Carnival argues that a plaintiff seeking to establish a claim for breach of contract must show duty, breach, and damages; that damages constitute the "last element" necessary to establish Plaintiff's claims here; and that the damages occurred in August of 2013, when Plaintiff stopped providing its services to Carnival. [D.E. 27, pp. 3-7]. Thus, according to Defendant's argument,

Maunlad needed to file its claim by August of 2017 (for the counts related to the breach of the oral contract) or August of 2018 (for the alleged breach of the written contract), yet failed to do so.

We disagree with this position. Defendant's argument incorrectly posits that breach of contract actions accrue when *damages* take place. Florida courts, however, consistently hold that a cause of action for breach of contract accrues – and the limitations period begins to run – at the time of the *breach*. *See, e.g.*, *Servicios de Almacen Fiscal Zona Franca Y Mandatos S.A. v. Ryder Intern., Inc.*, 264 F. App'x 878, 880 (11th Cir. 2008) ("[T]he date of accrual is the date of the first breach."); *Tech. Packaging, Inc. v. Hanchett*, 992 So. 2d 309, 313 (Fla. 2d DCA 2008); *BDI Const. Co. v. Hartford Fire Ins. Co.*, 995 So. 2d 576, 578 (Fla. 3d DCA 2008).

Here, after construing the allegations in the light most favorable to Plaintiff, we find that breach arguably did not take place until October 24, 2016, when Plaintiff demanded payment for the unpaid fees at issue. *See Mosher v. Anderson*, 817 So. 2d 812, 814 (Fla. 2002) (in Florida, "the limitations period for bringing an action on an oral loan payable upon demand begins to run only after…the debtor has refused to repay the loan *at the time the debtor demands repayment*) (emphasis added); *Mason v. Yarmus*, 483 So. 2d 832, 833 (Fla. 2d DCA 1986) ("There was no breach [ ] of the oral contract to pay the debt u*ntil the creditor had made demand for payment* and the debtor did not pay.") (emphasis added). Maunlad filed suit two years after it made its first demand for payment of the fees at issue on October 24, 2016, bringing these claims well within the limitations period.

We are unpersuaded by Carnival's reliance on *Chau Kieu Kguyen v. JP Morgan Chase Bank, N.A* to support its accrual argument. *See* 2012 WL 11966475, at *1 (S.D. Fla. Jan. 26, 2012). In that case, a plaintiff sued to recoup funds placed by her parents into a Saigon bank, despite the fact that all the deposits occurred prior to or during the course of the Vietnam War. *Id*. Defendant argued that the cause of action should be barred by the statute of limitations because the funds at issue were deposited prior to Saigon's fall to North Vietnamese forces in 1975. *Id*. Plaintiff, on the other hand, argued that accrual did not take place until she demanded payment many years later. *Id*. Judge Williams agreed with the defendant and determined that the claim had been time-barred, but in doing so relied on New York's statute of limitations – not Florida's. *Id*. Judge Williams also relied on cases from other jurisdictions that had previously dealt with this exact issue. *See id*. at *2 ("In cases with nearly identical facts, courts have uniformly held that the contract of deposit was broken on April 24, 1975 when the Saigon branch ceased to function. Plaintiff's cause of action accrued at that time."). Thus, the holding in *Chau Kieu Kguyen* is inapplicable and limited to the particular set of facts presented in that case.

To avoid such a finding, Carnival argues that Plaintiff's two-year delay in demanding payment is unreasonable. Once again, we disagree. It may be true that a factfinder might not be persuaded by Maunlad's justification for its delay in demanding the fees at issue, but the law simply requires that such a demand "be made in a reasonable time," which is "fixed in analogy to the statute of limitation." *Stoudenmire v. Fla. Loan Co.*, 117 So. 2d 500, 502 (Fla. 1st DCA 1960). Based on the

allegations, which are taken in the light most favorable to the Plaintiff, the demand fell squarely within the statute of limitations for both the oral and written portions of the contract. *Cf. Mattera v. Nusbaum*, 2019 WL 1116192, at *14 (S.D. Fla. Jan. 15, 2019) (demand sent seven years after execution of promissory note deemed unreasonable under the circumstances).[1] Moreover, Defendant fails to point to a single case where this issue was decided on a motion to dismiss. Because a "well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof of those facts is improbable," or that "a recovery is very remote and unlikely," *Twombly*, 550 U.S. at 556 (quotation omitted), we decline to state as a matter of law that the delay here was unreasonable.

Moving to Defendant's second argument, we likewise reject the contention that Plaintiff failed to plead facts sufficient to support its breach of contract claims. The elements of a claim for breach of both a written and oral contract are the same: (1) a valid contract exists; (2) a material breach occurs; and (3) resulting damages. *Technical Packaging, Inc. v. Hanchett*, 992 So. 2d 309, 313 (Fla. 2d DCA 2008); *Duffy v. M/Y Tiffany*, 2007 WL 9700993, at *2 (S.D. Fla. Oct. 18, 2007) ("[A]lthough oral contracts will be considered valid, they still must contain the same general elements of a contract under common law: offer, acceptance, consideration, and most importantly a meeting of the minds.") (quotation omitted).

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[1] This finding also undermines Defendant's claim that a cause of action would "only accrue whenever [a plaintiff] decides to demand payment (if ever)." [D.E. 27]. As stated in this Report, the law requires that a demand be made within a "reasonable" period of time, and a determination on this issue is improper without a full development of the record.

Here, the Amended Complaint alleges the existence of a valid contract – the 2008 and 2013 agreements.[2] Plaintiff further alleges that Carnival breached that contract when it failed to pay Maunlad for the administrative fees and lobbying services it undertook on Carnival's behalf. Finally, the Plaintiff alleges that it suffered damages in the amount of $1.5 million because of Defendant's failure to pay. Based on the allegations, we find that Plaintiff has stated a cause for breach of contract, and those allegations are more than enough to show Maunlad's right to relief is "plausible," not speculative. *Mazer*, 556 F.3d at 1270.

Third, we find Carnival's argument that the 2013 agreement contradicts the pleadings found in Maunlad's Amended Complaint to be equally unavailing. Carnival is correct that if there exists "an inconsistency between the general allegations of material facts in the amended complaint and the specific facts revealed by the exhibit," each have "the effect of neutralizing each allegation as against each other, thus rendering the pleading objectionable." *Harry Pepper & Assocs., Inc. v. Lasseter*, 247 So. 2d 736, 737 (Fla. 3d DCA 1971). But as Plaintiff points out, there are issues of fact related to whether the language of the merger clause at issue – which states that the contract is the entire agreement "with respect to the matters set forth herein" – deals with the parties' relationship *in its entirety* (inclusive of the lobbying and administrative efforts), or whether it simply pertains to the matters set forth in that

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[2] Any argument that the contracts for the lobbying and administrative fees are not valid because each cannot be supported by consideration is better made at a later time. As we discuss later in this Report, the doctrine of promissory estoppel allows the claim to proceed, even in the absence of allegations pertaining to consideration, and Plaintiff properly pled that count in the alternative to its breach of contract claims.

particular agreement. If the latter is true, the lobbying efforts would not be part of that contract and the merger clause would be inapplicable.

Faced with these allegations, we believe the best course of action is to allow the matter to proceed to discovery and deny the Motion to Dismiss on this issue. *See Quail Cruises Ship Mgmt., Ltd. v. Agencia de Viagens CVC Tur Limitada*, 847 F. Supp. 2d 1333, 1346 (S.D. Fla. 2012) ("While courts, in some instances, have held that include of a 'no other representations' or integration clause bars a claim as a matter of law, the circumstances of this case caution against [such] a determination [ ] at this stage of the litigation[.]").

B. Unjust Enrichment – Counts IV and V

Counts IV and V, however, should be dismissed as untimely. A claim for unjust enrichment must be filed within four years of accrual of the cause of action. *Flatirons Bank v. Alan W. Steinberg L.P.*, 233 So. 3d 1207, 1213 (Fla. 3d DCA 2017) (citing Fla. Stat. § 95.11(3)(k)). The statute of limitations for an unjust enrichment claim begins to run at the time the alleged benefit is conferred and received by the defendant. *Id.*; *see also Merle Wood & Assocs., Inc. v. Trinity Yachts, LLC*, 714 F.3d 1234, 1237 (11th Cir. 2013); *Coffee Pot Plaza Partnership v. Arrow Air Conditioning & Refrigeration, Inc.*, 412 So. 2d 883, 884 (Fla. 2d DCA 1982).

Here, the benefit conferred to Carnival by Plaintiff occurred at the outset of the parties' relationship in 2008, and continued through December 20, 2013, when Carnival notified Maunlad that it would be terminating the contract. [D.E. 22, ¶ 52].

Plaintiff did not initiate suit until October 25, 2018, more than four years after this accrual. It is therefore time-barred.

Indeed, the allegations in the Amended Complaint make clear that any benefit provided by Plaintiff stopped, at the latest, in February of 2014, when the termination of the agreement became effective. *Id*. Even if we were to use this later date to find the cause of action accrued at the termination date – and not, as the law requires, at the time Plaintiff conferred the alleged benefit – the claim would still be time-barred because Maunlad waited more than four years to file suit from that date. [D.E. 1]. The Amended Complaint also does not include any allegations that might allow us to find that Carnival made promises that it would reimburse Plaintiff for the unpaid fees after the termination of the agreement became effective, which undermines any claim that Defendant should be equitably estopped from relying on such a defense.[3]

Because Plaintiff failed to initiate suit within four years of the time in which it allegedly conferred the benefit at issue here, the unjust enrichment claims alleged in the Amended Complaint are time-barred. As such, Defendant's Motion with regard to Counts IV and V should be granted with prejudice.

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[3] Even if such promises *were* made, it would still not be enough to save Plaintiff's claim for unjust enrichment, as the Florida Supreme Court rejects application of the "delayed discovery" doctrine to extend the limitations period for unjust enrichment claims. *Flatirons Bank*, 233 So. 3d at 1213 (citing *Davis v. Monahan*, 832 So. 2d 708 (Fla. 2002) and *Brooks Tropicals, Inc. v. Acosta*, 959 So. 2d 288, 296 (Fla. 3d DCA 2007)). Thus, if Plaintiff – as it alleges – did not discover that Carnival had breached the agreement until it made demand of payment, it still would not matter for purposes of the statute of limitation.

C. Promissory Estoppel – Count VI and VII

Defendant also moves to dismiss Plaintiff's promissory estoppel claims, once again arguing (1) the claim is time-barred by the relevant statute of limitations, and (2) Maunlad failed to allege facts supporting this cause of action. For the reasons discussed below, we disagree and deny the Motion to Dismiss as to the promissory estoppel claims.

"The doctrine of promissory estoppel comes into play where the requisites of contract are not met, yet the promise should be enforced to avoid injustice." *Doe v. Univision Television Group, Inc.*, 717 So. 2d 63, 65 (Fla. 3d DCA 1998). To adequately plead a claim for promissory estoppel as a basis for recovery, a plaintiff must establish (1) that plaintiff detrimentally relied on a promise made by the defendant; (2) the defendant reasonably should have expected the promise to induce reliance in the form of action or forbearance on the part of the plaintiff or a third person; and (3) injustice can be avoided only through the enforcement of the promise against the defendant. *Senter v. JPMorgan Chase Bank, N.A.*, 810 F. Supp. 2d 1339, 1362 (S.D. Fla. 2011) (quoting *W.R. Grace & Co. v. Geodata Servs., Inc.*, 547 So. 2d 919, 924 (Fla. 1989)). Claims for promissory estoppel and breach of contract may be pled in the alternative. *Id.*

Florida law requires any promissory estoppel claim to be brought within four years of accrual. Fla. Stat. § 95.11(3)(k); *see also Ryder Intern., Inc.*, 264 F. App'x at 881 (finding plaintiff's promissory estoppel claim was subject to a four-year limitation period). A determination as to whether the statute of limitations bars a promissory

estoppel claim is "identical" to the analysis performed on a breach of contract action, "except the limitations period is one year shorter." *Ryder Intern., Inc.*, 264 F. App'x at 881.

As discussed above, Plaintiff's cause of action on the breach of contract claim – and therefore, the claim for promissory estoppel – accrued when Plaintiff demanded payment for the lobbying and administrative fees in 2016 and Carnival failed to pay. Since Plaintiff filed its claim within four years of that demand, the action is not time-barred, and so Counts VI and VII survive.

We also find that the Complaint sets forth enough facts to state a claim for promissory estoppel. The Amended Complaint alleges that Carnival asked Plaintiff to lobby the POEA in order to obtain favorable treatment, with the promise that Maunlad would be paid for its services. [D.E. 22, ¶¶ 32, 42, 48]. Plaintiff also alleges that it acted in reliance on those promises and lobbied the POEA as requested; that Plaintiff did so with the expectation that it would be paid for these services; and that Carnival understood that Plaintiff would conduct the lobbying projects in reliance on the purported promise Maunlad would be paid for its work. *Id.* at ¶¶ 43-45, 47. These allegations, if true, are sufficient to state a cause of action for promissory estoppel as an alternative to Plaintiff's breach of contract claim. *See Doe*, 717 So. 2d at 64; *Harris v. School Bd. of Duval County*, 921 So. 2d 725, 734 (Fla. 1st DCA 2006).

D. Quantum Meruit – Count VIII and IX

Plaintiff's causes of action seeking recovery under the theory of quantum merit, however, are time-barred. Once again, Section 95.11(3)(k) of the Florida Statute

controls. That section prescribes a four-year statute of limitations on any "legal or equitable action on a contract, obligation, or liability not founded on a written instrument." Fla. Stat. § 95.11(3)(k); *see also Moneyhun v. Vital Industries, Inc.*, 611 So. 2d 1316, 1320-21 (Fla. 1st DCA 1993). A cause of action for quantum meruit accrues when a plaintiff confers a benefit on the defendant. *Merle Wood & Assocs., Inc.*, 714 F.3d at 1237.

Here, and much like Plaintiff's unjust enrichment claims, the Amended Complaint alleges that Maunlad conferred the benefit of its services to Carnival between 2008 and 2013, or – at the latest – until February of 2014. *Id.* at 1239 ("Under Florida law, a benefit is conferred for purposes of quantum meruit when the plaintiff performs his services[.]"). Regardless of the timing, conferral of this benefit "triggered the statute of limitations," and Plaintiff failed to file its claim within four years of any of those dates, "even if it [was] uncertain when – or whether – the defendant [would] enjoy the ultimate value of those services." *Id.* As such, the quantum meruit claims should be dismissed. *See id.* (affirming trial court's ruling that plaintiff's quantum meruit claim was time-barred when conferral of benefit occurred more than four years prior to filing suit); *Moneyhun*, 611 So. 2d at 1321-22 (statute of limitations barred quantum meruit claim despite court's finding that breach of contract action was timely).

E. Breach of Fiduciary Duty – Count X

The breach of fiduciary duty claim should also be dismissed. "A cause of action for breach of fiduciary duty is founded on a fiduciary relationship." *Taylor Woodrow*

Homes Fla., Inc. v. 4/46-A Corp., 850 So. 2d 536, 540 (Fla. 5th DCA 2003). A fiduciary relationship exists and is "built upon the trust and confidence between the parties where confidence is reposed by the weaker party and a trust accepted by another." *Id.* (quoting *Doe v. Evans*, 814 So. 2d 370, 374 (Fla. 2002)). "To establish a fiduciary relationship, a party must allege some degree of dependency on one side and some degree of undertaking on the other side to advise, counsel, and protect a weaker party." *Watkins v. NCNB Nat. Bank of Fla., N.A.*, 622 So. 2d 1063, 1065 (Fla. 3d DCA 1993) (quoting *Bankest Imports, Inc. v. Isca Corp.*, 717 F. Supp. 1537, 1541 (S.D. Fla. 1989)).

Plaintiff alleges that Carnival "acquired influence over Maunlad" by advising it that Plaintiff did not need to send invoices for the fees at issue and when it promised to pay those fees at a later date. [D.E. 22, ¶ 119]. While this may be an allegation of misrepresentation on the part of Carnival, it cannot be said that Defendant breached any fiduciary duty. "It is the law of Florida that a cause of action for breach of fiduciary duty will not lie where the claim of breach is dependent upon the existence of a contractual relationship between the parties." *White Const. Co.*, 633 F. Supp. 2d at 1325 (citations omitted). "This is true because the duty is owed only as a result of the existence of the contract." *Id.* "When the parties are dealing at arm's length, a fiduciary relationship does not exist because there is no duty imposed on either party to protect or benefit the other." *Taylor Woodrow Homes*, 850 So. 2d at 541.

Here, there can be no fiduciary duty imposed on Carnival because the *entire dispute* relates to alleged contractual obligations, negotiated at arm's length and

purportedly breached by Defendant. *See Leedom Mgmt. Grp., Inc. v. Perlmutter*, 2012 WL 503904, at *6 (dismissing breach of fiduciary claim stemming from breach of alleged contractual relationship between the parties). There can be no breach when there is no duty, and there is no duty imposed on either party "to act for the benefit or protection of the other party" if the relationship comes about as the result of a contractual negotiation. *Lanz v. Resolution Trust Corp.*, 764 F. Supp. 176, 179 (S.D. Fla. 1991). Thus, the claim fails.

In light of these facts, we recommend that this count should be dismissed – albeit without prejudice. Plaintiff is correct that a fiduciary relationship may be "based on the specific factual circumstances surrounding the transaction and the relationship of the parties." *Capital Bank v. MVB, Inc.*, 644 So. 2d 515, 518 (Fla. 3d DCA 1994); *see also Taylor Woodrow Homes*, 850 So. 2d at 540 ("[T]he issue whether a fiduciary relationship exists will generally depend upon the specific facts and circumstances surrounding the relationship of the parties and the transaction in which they are involved."). Even though it appears this claim is fatally flawed, we believe Plaintiff should be given one more attempt to allege facts that might show that some "special relationship of trust" existed, beyond the one that arose as the result of a standard "arm's length" transaction, that could support Maunlad's claim that Carnival owed it some fiduciary duty. Given the nature of the dispute and Rule 11, we doubt that Plaintiff will take the opportunity.

F. Constructive Fraud – Count XI

We will likewise recommend dismissal of Count XI. "Constructive fraud exists where a duty arising from a confidential or fiduciary relationship has been abused, or where an unconscionable advantage has been taken." *Linville v. Ginn Real Estate Co., LLC*, 697 F. Supp. 2d 1302, 1309 (M.D. Fla. 2010) (citation omitted). "Florida courts have construed the term fiduciary or confidential relation as being very broad." *Id*.

Despite the broad interpretation of the term "fiduciary," this Count must be dismissed for the same reasons discussed above. "Constructive fraud will not lie where the parties are dealing at [arm's] length because there is no duty imposed on either party to protect or benefit the other." *2021 N. Le Mans, LLC v. Fifth Third Bank*, 2010 WL 1837726, at *3 (M.D. Fla. May 3, 2010) (citation and internal quotation marks omitted). There can be no fiduciary relationship alleged here because that relationship stems from a standard, arm's length contractual negotiation between the parties. It follows that neither party owed the other a duty "to advise, counsel, [or] protect the weaker party." *Id*.

Despite this finding, we once again recommend dismissal without prejudice so that Plaintiff may attempt to cure the factual shortcomings, even though it is difficult to see how this Count could be saved. Nevertheless, the Motion as to Count XI should be granted. *See Le Mans,* 2010 WL 1837726, at *3 (dismissing complaint for constructive fraud when plaintiff also failed to plead factual allegations supporting its claim for breach of fiduciary duty)

G. Declaratory Judgment – Counts XII and XIII

For the last two counts found within the Complaint, we agree with Defendant that declaratory judgment is inappropriate here and therefore recommend these claims be dismissed with prejudice. A court may declare the rights and other legal relations of any interested party in the case of an actual controversy within its jurisdiction. 28 U.S.C. § 2201. Likewise, Florida law provides for a declaration of rights or status where a party to an agreement is in doubt as to his or her rights. Fla. Stat. § 86.021 ("Any person claiming to be interested or who may be in doubt about his or her rights under a deed, will, [or] contract…may have determined any question of construction or validity arising under such…contract[.]"); *City of Hollywood v. Fla. Power & Light, Co.*, 624 So. 2d 285, 286 (Fla. 4th DCA 1993).

"The only relevant inquiry in a motion to dismiss a declaratory judgment action is whether or not the plaintiff is entitled to a declaration of rights." *Fernando Grinberg Trust Success Int. Properties, LLC v. Scottsdale Ins. Co.*, 2010 WL 2510662, at *1 (S.D. Fla. June 21, 2010) (citing *Gov't Emp. Ins. Co. v. Anta*, 379 So. 2d 1038, 1039 (Fla. 3d DCA 1980)). "[A] trial court should not entertain an action for declaratory judgment on issues which are properly raised in other counts of the pleadings and already before the court, through which the plaintiff will be able to secure full, adequate and complete relief." *Id.* (quoting *McIntosh v. Harbour Club Villas*, 468 So. 2d 1075, 1080-81 (Fla. 3d DCA 1985)).

In Counts XII and XIII, Plaintiff seeks a declaration of its rights pursuant to 28 U.S.C. § 2201 and Fla. Stat. § 86.021. In effect, Plaintiff is asking this Court to

declare which contract governs the dispute – the February 2008 Agreement, whereby Carnival would pay $98 in administrative fees per crewmember, or the September 2008 Agreement, whereby Plaintiff would receive $90 per crewmember.

If, as Plaintiff seemingly anticipates, Carnival argues that the September 2008 Agreement controls, Defendant would need to establish elements showing that that agreement was valid – i.e., offer, acceptance, consideration, and a "meeting of the minds" on the material terms. *See Legion Ins. Co. v. Moore*, 846 So. 2d 1183, 1187 (Fla. 4th DCA 2003) (declaratory relief inappropriate and dismissal of claim affirmed when essence of the case involved factual questions that would determine whether one party is liable to the other for conduct that already had occurred). Carnival's failure to do so would resolve the issue in its entirety, rendering the action for declaratory relief redundant. *See, e.g.*, *Grinberg*, 2010 WL 2510662, at *1 (dismissing complaint for declaratory relief because "[t]he determination of the breach of contract claim" would involve "the same factual dispute as the declaratory judgment claim[.]"); *Tamiami Condominium Warehouse Plaza Ass'n, Inc. v. Markel American Ins. Co.*, 2019 WL 4863378, at *3 (S.D. Fla. Oct. 2, 2019) (dismissing complaint for declaratory relief when plaintiff could "obtain full, adequate, and compete relief through its breach of contract claim, rendering its petition for declaratory relief redundant."). Thus, relief pursuant to 28 U.S.C. § 2201 is improper.

The same goes for Count XIII, brought pursuant to Florida Declaratory Judgment Act, and it must also be dismissed. The FDJA "is a procedural mechanism that confers subject matter jurisdiction on Florida's circuit and county courts," but

"does not confer any substantive rights" to parties. *Strubel v. Hartford Ins. Co. of the Midwest*, 2010 WL 745616, at *2 (M.D. Fla. Feb. 26, 2010) (construing claim under Florida's Declaratory Judgment Act as one instead arising under 28 U.S.C. § 2201). And as a court sitting in diversity, Florida's procedural rules are inapplicable. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 91-92 (1938). Thus, Plaintiff's state-law claim for declaratory relief is duplicative and inapplicable, and so it should also be dismissed.

H. Request for Attorney's Fees

As a final point, we reject Defendant's claim that Plaintiff's request for attorney's fees should be stricken pursuant to Rule 12(f) of the Federal Rules of Civil Procedure. A motion to strike is a drastic, disfavored remedy, and a court should not "exercise its discretion under the rule to strike a pleading unless the matter sought to be omitted has no possible relationship to the controversy." *Fla. Software Systems, Inc. v. Columbia/HCA Healthcare Corp.*, 1999 WL 781812, at *1 (M.D. Fla. Sept. 16, 1999). At this stage of the proceedings, we choose not to take such a drastic course of action on the pleadings. Should Defendant wish to raise this challenge after the pleading stage, it remains free to do so; but it remains inappropriate at such an early juncture, and so Carnival's request should be denied.

IV. CONCLUSION

We hereby **RECOMMEND** Defendant's Motion to Dismiss be **GRANTED in part** and **DENIED in part**, in accordance with the following:

1. The Motion as to Counts I – III, VI and VII be **DENIED**;

2. The Motion be **GRANTED** as to Counts IV, V, VIII, IX, XII and XIII, and that these counts dismissed **with prejudice**;

3. The Motion be **GRANTED** as to Counts X and XI, with these counts dismissed **without prejudice**;

4. The Motion to Strike Plaintiff's request for an award of attorney's fees be **DENIED**.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen (14) days from service of this Report and Recommendation within which to file written objections, if any, with the Honorable Judge Kathleen M. Williams. Failure to timely file objections shall bar the parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida this 25th day of November, 2019.

/s/ *Edwin G. Torres*
EDWIN G. TORRES
United States Magistrate Judge