

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 24-21095-CIV-WILLIAMS/D'ANGELO

MIRAGE YACHT, INC.,

Plaintiff,

vs.

A 2013 MARQUIS YACHTS
RECREATIONAL VESSEL,

Defendant.

OMNIBUS REPORT AND RECOMMENDATION GRANTING
MIRAGE YACHT'S MOTION TO DISMISS, DENYING KTM'S
MOTION TO VACATE, AND GRANTING NORSEMAN'S MOTION TO DISMISS

THIS CAUSE is before the Court on three Motions: (1) Plaintiff/Counter-Defendant Mirage Yacht, Inc.'s ("Mirage Yacht") Motion to Dismiss Counts One and Six of KTM Venture Group, Inc.'s ("KTM") Amended Counterclaims filed on June 3, 2024 (DE 23), (2) Third-Party Plaintiff KTM's Supplemental Rule E(4)(f) Motion to Vacate Attachment and 12(b)(1) Motion to Dismiss for Lack of Subject Matter Jurisdiction filed on August 12, 2024 (DE 37), and (3) Third-Party Defendant Norseman Shipbuilding and Boatyard, LLC's ("Norseman") Motion to Dismiss Third-Party Complaint filed on September 6, 2024 (DE 49).¹ KTM responded to Mirage Yacht's Motion to Dismiss on June 17, 2024 (DE 25), and Mirage Yacht filed its Reply on June 24, 2024 (DE 26). Mirage Yacht responded to KTM's Motion to Vacate Attachment and Motion to Dismiss on August 26, 2024 (DE 44), and KTM replied on September 3, 2024 (DE 47). KTM responded to Norseman's Motion to Dismiss on September 30, 2024 (DE 58), and Norseman replied on

¹ These Motions were referred to the undersigned Magistrate Judge for a Report and Recommendation on November 6, 2024 (DE 66).

October 7, 2024 (DE 59). The Court held a hearing on the Motions on January 21, 2025, at which it heard the arguments of the Parties (DE 81). Having considered the Parties' arguments, the relevant legal authorities, and the pertinent portions of the record, and being otherwise fully advised in the premises, it is respectfully recommended that Mirage Yacht's Motion to Dismiss be **GRANTED**, and KTM's request for leave to amend the Amended Counterclaims be **GRANTED**. It is further respectfully recommended that Norseman's Motion to Dismiss be **GRANTED**, and KTM's Motion to Vacate and Motion to Dismiss for Lack of Subject Matter Jurisdiction be **DENIED**.

I. FACTUAL BACKGROUND AND PROCEDURAL POSTURE

On March 20, 2024, Mirage Yacht filed a Verified Complaint, seeking to enforce a maritime lien for a 2013 63-foot Marquis Yachts recreational vessel with hull identification number MQYLS008B313 ("Vessel"), pursuant to Title 46, United States Code, Section 31342 (DE 1 ¶¶ 3-4). Mirage Yacht further alleges that the Vessel sustained damage from Hurricane Ian, and the Vessel's owner, Intervenor Defendant Jens Friedrich Karl Goetz ("Goetz"), authorized Mirage Yacht to recover the Vessel and transport it to Mirage Yacht's facility to provide "security, wharfage, and routine services for the safekeeping of the Vessel, including dockage and electricity" (*id.* ¶¶ 7, 8). Mirage Yacht claims it also replaced the Vessel's "battery and chargers, and removed soot from the Vessel's exhaust," which cost \$103,501.00 (*id.* ¶ 8). Later, on January 29, 2024, the Vessel was moved to Norseman's facility "for an emergency haul out," which is required when a boat is taking on water by lifting the boat out of the water, leading to storage costs in the amount of \$7,726.05 (*id.* ¶ 9, DE 44-1 ¶ 36). Mirage Yacht invoiced the Vessel's previous owner, Goetz, for \$113,910.85, consisting of materials and services to and for the Vessel that "has not been paid" (DE 1 ¶ 12).

As a result of the outstanding amount, Mirage Yacht brought its claim for the enforcement of a maritime lien against the Vessel (*id.* ¶¶ 24-34). Specifically, Mirage Yacht seeks a judgment for the expenses related to the Vessel and an order authorizing the sale of the Vessel, the proceeds from which will be used to satisfy the judgment (*id.* ¶ 34). On March 21, 2024, Mirage Yacht moved on an expedited basis for a warrant of arrest *in rem*, arguing that the Verified Complaint supports the warrant through a maritime lien on the Vessel (DE 3 at 1-2). Mirage Yacht argued that after repairs, “the Vessel will likely be launched and leave the facility whereupon there is a risk that the Vessel will leave the Southern District, and avoid arrest” (*id.*). On April 5, 2024, the Court granted Mirage Yacht’s Motion and issued a warrant for arrest (DE 8, 10). On April 8, 2024, the United States Marshals Service seized the Vessel pursuant to the warrant (DE 11).

KTM asserts that Goetz did not authorize Mirage Yacht, Norseman, or Third-Party Defendant Johnstons Marine Services LLC (“Johnstons”) to conduct any repairs (DE 22 ¶¶ 36-46).² KTM claims that the Vessel sustained fiberglass damage from Hurricane Ian, and as a result, Goetz paid an unspecified company for repairs. (*id.* ¶¶ 10-12). Goetz later decided to sell the Vessel (*id.*). In early 2023, a yacht broker at Worldwide Yacht found a potential buyer for Goetz—Mirage Yacht (*id.* ¶ 14). Goetz and Mirage Yacht signed a Purchase and Sale Agreement on April 21, 2023, whereby Mirage Yacht agreed to purchase the Vessel from Goetz for \$355,000, with a \$35,000 initial deposit due on April 24, 2023 and the remaining balance due five days later (*id.* ¶ 15). Goetz and Mirage Yacht subsequently amended the Purchase and Sale Agreement on May 1, 2023 and moved the closing date to May 11, 2023, when the final payment was due (*id.* ¶ 17). Nevertheless, Goetz permitted Mirage Yacht to take possession of the Vessel on April 24, 2023,

² On December 30, 2024, KTM and Johnstons filed a joint stipulation of dismissal with prejudice, dismissing Johnsons from this action (DE 76).

pending the receipt of final payment by May 11, 2023³ (*id.* ¶ 16). KTM alleges that Mirage Yacht did not make its payment by May 11, 2023, and instead of returning the Vessel to Goetz, Mirage Yacht stored the Vessel at its location without telling Goetz or obtaining his permission to do so, as part of a plan to “incur exorbitant expenses” and “obtain possession and title through foreclosure” (*id.* ¶¶ 20-24).

After the sale with Mirage Yacht fell through, Goetz sold the Vessel to KTM on February 17, 2024 (*id.* ¶¶ 24-27, 36). Before KTM purchased the Vessel, its authorized representative, Michael Mateja, inspected the Vessel at Norseman’s marina, where he learned that the Vessel was missing its portside pod, starboard propellers, bathroom sink and mirror, and was stripped of custom cabinetry (*id.* ¶¶ 28-32). KTM later learned that the Vessel’s missing pod was with Johnstons, who refused to return the pod to KTM (*id.* ¶¶ 44-46). Despite the missing parts and interior, KTM agreed to the sale with Goetz (*id.* ¶ 36). After obtaining title to the Vessel, KTM paid Norseman to fill the hole left from the pod removal and for its outstanding storage bill to regain custody of the Vessel (*id.* ¶¶ 39, 49). KTM also signed a Settlement Agreement with Norseman that included a release on April 4, 2024 (*id.* ¶ 50). KTM alleges that Norseman knew that Mirage Yacht planned to claim it held a lien on the Vessel (*id.* ¶ 51). Norseman supposedly did not inform KTM of Mirage Yacht’s plan, because if KTM knew, it would not have signed the Settlement Agreement (*id.* ¶¶ 50, 53-54). When KTM tried to take possession of the Vessel on April 8, 2024, Norseman refused to release it, because the “US Marshals arrested the boat on account of a lien held by Mirage [Yacht] that predated KTM’s purchase” (*id.* ¶ 55).

Based on these allegations, on May 13, 2024, KTM filed six counterclaims against Mirage Yacht, Norseman, and Johnstons related to the Vessel in its Amended Counterclaims and Third-

³ Mirage Yacht claims it took possession of the Vessel on May 1, 2023 (DE 44-1 ¶ 11).

Party Complaint (DE 22). In Count One, KTM brings a conversion claim against Mirage Yacht (*id.* ¶¶ 58-65). In Count Two, KTM brings an aiding and abetting conversion claim against Norseman (*id.* ¶¶ 66-78). In Counts Three and Four, KTM brings claims of aiding and abetting conversion and conversion against Johnstons (*id.* ¶¶ 79-95). In Count Five, KTM brings a fraud claim against Norseman (*id.* ¶¶ 96-106). In Count Six, KTM brings a claim against Mirage Yacht for violating the Florida Deceptive and Unfair Trade Practices Act (“FDUTPA”) (*id.* ¶¶ 107-110).

On June 3, 2024, Mirage Yacht moved to dismiss Counts One and Six of KTM’s Amended Counterclaims (DE 23). Mirage Yacht argues that KTM does not allege sufficient facts to state a claim for conversion in Count One and a violation of FDUTPA in Count Six. Mirage Yacht also asserts that KTM has no actual damages under FDUTPA (*id.*). On August 12, 2024, KTM filed its Supplemental Rule E(4)(F) Motion to Vacate Attachment and Motion to Dismiss for Lack of Subject Matter Jurisdiction under Rule 12(b)(1) of the Federal Rules of Civil Procedure (DE 37). KTM contends that Mirage Yacht does not have a valid maritime lien to support the Vessel’s arrest and that the Court lacks subject matter jurisdiction, because this action is properly brought pursuant to a breach of the Purchase and Sale Agreement between Mirage Yacht and Goetz (*id.* at 9, 17). On September 6, 2024, Norseman moved to dismiss KTM’s aiding and abetting conversion claim in Count Two and its fraud claim in Count Five for failure to state a claim (DE 49).⁴ Norseman also asserted KTM’s counterclaims are barred by the April 4, 2023 Settlement Agreement between KTM and Norseman (*id.*)

⁴ In its Motion to Dismiss, Norseman inadvertently referred to Count Four as the fraud claim and noted the mistake in its Reply (DE 59 at 2 n.1). Count Five is KTM’s counterclaim for fraud against Norseman (DE 22 ¶¶ 96–106).

II. LEGAL STANDARD

A. Motion to Dismiss for Lack of Subject Matter Jurisdiction Under Federal Rule of Civil Procedure 12(b)(1).

Federal courts are courts of limited jurisdiction that are “empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution” and entrusted to them by a jurisdictional grant authorized by Congress. *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 409 (11th Cir. 1999). “When a federal court acts outside its statutory subject-matter jurisdiction, it violates the fundamental constitutional precept of limited federal power.” *Id.* “A federal court not only has the power but also the obligation at any time to inquire into jurisdiction whenever the possibility that jurisdiction does not exist arises.” *Fitzgerald v. Seaboard Sys. R.R.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (citation omitted). Courts must first determine whether there is subject matter jurisdiction before addressing the substantive issues. *OFS Fitel, LLC v. Epstein, Becker & Green, P.C.*, 549 F.3d 1344, 1352 (11th Cir. 2008) (“We first consider our jurisdiction.”).

Dismissal under Federal Rule of Civil Procedure 12(b)(1) is appropriate if a plaintiff fails to show that the Court has subject-matter jurisdiction over the lawsuit. Rule 12(b)(1) motions to dismiss for lack of subject matter jurisdiction can be asserted on either facial or factual grounds. *Carmichael v. Kellogg, Brown & Root Servs., Inc.*, 572 F.3d 1271, 1279 (11th Cir. 2009). Facial challenges to subject matter jurisdiction are based solely on the allegations in the complaint. *McElmurray v. Consol. Gov’t of Augusta-Richmond Cnty.*, 501 F.3d 1244, 1251 (11th Cir. 2007). When considering such challenges, the Court must, as with a Rule 12(b)(6) motion, take the complaint’s allegations as true. *Lawrence v. Dunbar*, 919 F.2d 1525, 1529 (11th Cir. 1990). However, where a defendant raises a factual attack on subject matter jurisdiction, the district court may consider extrinsic evidence, such as deposition testimony and affidavits. *Id.* The party

invoking the Court's jurisdiction bears the burden of showing that the action falls within the Court's subject matter jurisdiction. *Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994).

B. Motion to Dismiss for Failure to State a Claim Under Federal Rule of Civil Procedure 12(b)(6).

To survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). To meet this “plausibility standard,” a plaintiff must “plead [] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.* The standard “does not require ‘detailed factual allegations,’ but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citation omitted). “The plausibility standard is not akin to a ‘probability requirement,’ but it asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* at 678 (citation omitted). On a motion to dismiss, “the court must accept all factual allegations in a complaint as true and take them in the light most favorable to plaintiff.” *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016).

III. DISCUSSION

In conjunction with its Motion to Vacate Attachment, KTM also brought a Motion to Dismiss for Lack of Subject Matter Jurisdiction pursuant to Federal Rule of Civil Procedure 12(b)(1). The undersigned addresses KTM's Motion to Dismiss first, because the Court is required to satisfy itself that it has subject matter jurisdiction over this action. *See Taylor*, 30 F.3d at 1366 (“[A] court must first determine whether it has proper subject matter jurisdiction before addressing the substantive issues.”). The undersigned then addresses the Motion to Vacate the Attachment and the remaining Motions to Dismiss filed by Mirage Yacht and Norseman.

A. KTM's Motion to Dismiss for Lack of Subject Matter Jurisdiction

i. The Purchase and Sale Agreement

KTM argues that Mirage Yacht's claim for a lien arises under the April 21, 2023 Purchase and Sale Agreement between Mirage Yacht and Goetz for the Vessel.⁵ Specifically, KTM claims that Goetz never authorized Mirage Yacht to repair or service the Vessel, so there is no valid maritime lien. Instead, the Purchase and Sale Agreement purportedly governs the dealings between Mirage Yacht, Goetz, and KTM by extension, but this Court does not have subject matter jurisdiction over an action based on the Purchase and Sale Agreement. Next, KTM argues that there is a forum selection clause in the Purchase and Sale Agreement that states "any claim related to the [Purchase and sale Agreement] will be brought in the courts of the state and county of the main office of the Selling Broker, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court" (DE 37 at 17). KTM explains that the selling broker's office is in Treasure Island, Florida, which is encompassed by Pinellas County (*id.*). Thus, according to KTM, any claim related to the Purchase and Sale Agreement must be brought there (*see id.* at 17-18).

In its response, Mirage Yacht contends that its claim arises under a maritime lien in admiralty, which confers subject matter jurisdiction on the Court under Title 28, United States Code, Section 1333 (DE 44 at 10). Mirage Yacht further argues that even if this action arises under the Purchase and Sale Agreement, KTM waived its forum selection argument by waiting

⁵ KTM attached the Purchase and Sale Agreement to its Amended Counterclaims and Third-Party Complaint as Exhibit A (DE 22-1), which allows the undersigned to consider it. *See Hoefling v. City of Miami*, 811 F.3d 1271, 1277 (11th Cir. 2016) ("A district court can generally consider exhibits attached to a complaint in ruling on a motion to dismiss, and if the allegations of the complaint about a particular exhibit conflict with the contents of the exhibit itself, the exhibit controls." (citation omitted)).

“nearly four months after filing its Claim of Owner on April 23, 2024” and admitted that this Court is the proper venue in its Answer (*id.* at 16).

In determining the Court’s subject matter jurisdiction, the United States Court of Appeals for the Eleventh Circuit has long held that a dispute arising from a contract for the sale of a vessel is not a maritime contract. *See Cooper v. Meridian Yachts, Ltd.*, 575 F.3d 1151, 1166 (11th Cir. 2009) (“[A] contract for the sale or construction of a ship is not within the federal courts’ admiralty jurisdiction.”). KTM relies on a recent Eleventh Circuit case to demonstrate that in this case, there is no admiralty jurisdiction, because the claims stem from the Purchase and Sale Agreement. *See generally Windspeed Enterprise Limited v. M/V Semi 1*, No. 22-12242, 2023 WL 3477365 (11th Cir. May 16, 2023). In *Windspeed*, the plaintiff attempted to buy two boats under a purchase and sale agreement. *Id.* at *1. The plaintiff was “responsible for. . . the cost of preparing and making ready the Vessels at the dock for transport (including any fuel, lubricants, stores, consumables, repairs, and other costs) and for transport to International Waters.” *Id.* (quotation omitted). After the plaintiff was unable to close on the boats, it filed an *in rem* complaint, contending that it had a maritime lien over the boats for providing necessities at the owner’s direction. *Id.* at *2. The boats were arrested, on account of the lien, but the arrests were later vacated, as the district court lacked subject matter jurisdiction. *Id.* The Eleventh Circuit explained that “a contract for the sale of a ship is not a maritime contract” and therefore, “are not cases within admiralty and maritime jurisdiction.” *Id.* The Eleventh Circuit affirmed the vacatur of the arrests and reasoned that the “heart of this case is a contract for the sale of the Vessels,” which did not give rise to a maritime lien and extinguished the federal court’s subject matter jurisdiction. *Id.* at *3.

But, KTM’s reliance on *Windspeed* is misplaced. According to Mirage Yacht, the April 21, 2023 Purchase and Sale Agreement did not include repairs, storage, or supplying necessities

to the Vessel; rather, the necessities for the Vessel were provided under separate authorization by Goetz. Mirage Yacht alleges that Goetz authorized Mirage Yacht to provide necessities for the Vessel, independently of the negotiations for the sale of the Vessel, since the Vessel was moored on Goetz's neighbor's property after the hurricane. Importantly, in *Windspeed*, the plaintiff's own verified complaint alleged that it provided necessities to the boats under the terms and conditions of the purchase and sale contract, not through any separate authorization. *Windspeed Enters. Ltd.*, 2023 WL 3477365 at *3. Even more, the contract in *Windspeed* contained specific provisions that discussed the responsibility of providing necessities for the vessels in conjunction with the sale. The April 21, 2023 Purchase and Sale Agreement, on the other hand, did not contain any provisions explicitly discussing specific necessities for the Vessel, such as fuel, dockage, and transport (*see generally* DE 37-1, Ex. B). Further, the plaintiff in *Windspeed* "offered no evidence that its provisions were separable from the [sales contract], especially considering the [sales contract's] repeated requirement that Windspeed bear the burden of getting the Vessels ready for sailing." *Windspeed Enters. Ltd.*, 2023 WL 3477365, at *4. Indeed, Mirage Yacht claims that the necessities provided to the Vessel are completely separable from the Purchase and Sale Agreement, which called for an "as-is" sale, as opposed to conditions precedent to the sale like the contract in *Windspeed*.

KTM counters that under the May 1, 2023 Amendment to the April 21, 2023 Purchase and Sale Agreement, Mirage Yacht had "possession of the Vessel and assume[d] all responsibilities and liabilities for [the] Vessel" (DE 37-1, Ex. D).⁶ According to KTM, the Amendment's language unequivocally shows that Goetz and Mirage Yacht contemplated that Mirage Yacht would provide

⁶ The May 1, 2023 Amendment was also attached to KTM's Amended Counterclaims and Third-Party Complaint as Exhibit B (DE 22-2).

all necessities under the Purchase and Sale Agreement, because it assumed “all responsibilities and liabilities for the Vessel.” However, the May 1, 2023 Amendment does not clearly demonstrate an agreement for Mirage Yacht to provide necessities, such as repairs, maintenance, dockage, and storage, where the Purchase and Sale Agreement was previously silent on these items. Moreover, the Purchase and Sale Agreement contained a “Survey Option,” allowing Mirage Yacht to take possession of the Vessel, so it could conduct a trial run and survey of the Vessel before closing. Mirage Yacht claims it took possession of the Vessel from Goetz the same day as the May 1, 2023 Amendment. It is plausible to read the May 1, 2023 Amendment as assigning responsibility and liability for the Vessel to Mirage Yacht while it exercises its Survey Option.

Nevertheless, even if the May 1, 2023 Amendment did reflect an agreement for Mirage Yacht to provide necessities for the Vessel as part of the sale, the Purchase and Sale Agreement terminated on May 11, 2023, when Mirage Yacht did not tender the final payment for the Vessel by the closing date.⁷ Although the Purchase and Sale Agreement lapsed, Mirage Yacht alleges it continued to retain possession of the Vessel based on its separate agreement with Goetz to provide security, wharfage, and routine services, like dockage and electricity. Mirage Yacht claims it provided these services to the Vessel at its facility until the end of January 2024, when the Vessel was moved to Norseman. From May 2023 to January 2024, there was no extension of the Purchase

⁷ During the January 21, 2025 hearing, KTM invited the Court to review a demand letter that Mirage Yacht sent to Goetz, arguing that the demand letter shows the Purchase and Sale Agreement did not terminate on May 11, 2023 but was extended by the conduct of the parties. The statements in the demand letter were seemingly made to resolve and compromise the claims subject to this litigation. Mirage Yacht objected to the Court considering the demand letter under Rule 408(a), which precludes “conduct or a statement made during compromise negotiations” “to prove or disprove the validity . . . of a disputed claim.” Fed. R. Evid. 408(a). KTM has not pointed to any persuasive cases showing it would be proper to consider the demand letter for the suggested purpose. Even if it were proper, it would not change the undersigned’s analysis as to whether Mirage Yacht’s allegations are sufficient to invoke the Court’s admiralty jurisdiction.

and Sale Agreement executed, and Goetz did not reclaim possession of the Vessel, which could be consistent with Mirage Yacht's allegations that Goetz authorized it to store and maintain the Vessel separately from the proposed sale. At this stage of the proceedings, though the facts are adamantly disputed, Mirage Yacht sufficiently alleges that any necessities and repairs it provided to the Vessel were pursuant to a wholly separate agreement from the Purchase and Sale Agreement, which was purely maritime in nature. *See Inbesa Am., Inc. v. M/V Anglia*, 134 F.3d 1035, 1037 (11th Cir. 1998) (noting services such as wharfage and dockage are traditionally maritime services); *C.f. Gaster Marine Recovery & Sales v. M/V The Restless I*, 33 F. Supp. 2d 1333, 1335 (S.D. Fla. 1998) (finding repair work pursuant to the parties' brokerage agreement to assist the sale of the vessel was not independent of and separate from the non-maritime contract and therefore, the district court lacked jurisdiction over the dispute).

Insofar as Mirage Yacht alleged that it had a separate agreement with Goetz to provide necessities and repairs to the Vessel, that agreement is maritime in nature and gives rise to admiralty jurisdiction. *See Inbesa Am.*, 134 F.3d at (explaining that "for a contract to fall within the federal admiralty jurisdiction, it must be wholly maritime in nature, or its non-maritime elements must be either insignificant or separable without prejudice to either party"); *see also Bd. of Comm'rs of Orleans Levee Dist. v. M/V BELLE OF ORLEANS*, 535 F.3d 1299, 1314 (11th Cir. 2008), *abrogated on other grounds by Lozman v. City of Riviera Beach, Fla.*, 568 U.S. 115 (2013) ("A contract that provides a vessel with 'necessaries' is commonly considered a maritime contract giving rise to a maritime lien.").⁸ Further, the Complaint seeks the enforcement of a maritime lien

⁸ "The term 'necessaries includes repairs, supplies, towage, and the use of a dry dock or marine railway.' Courts have also commonly interpreted 'necessaries' to include 'wharfage' or 'dockage,' the charge to which vessels are liable for the use of a dock or wharf." *Bd. of Comm'rs of Orleans Levee Dist.*, 535 F.3d at 1314.

pursuant to Title 46, United States Code, Section 31342, which invokes admiralty jurisdiction under Title 28, United States Code, Section 1333(1). See *Crimson Yachts v. Betty Lyn II Motor Yacht*, 603 F.3d 864, 868 (11th Cir. 2010) (“An in rem suit against a vessel is . . . distinctively an admiralty proceeding, and is hence within the exclusive province of the federal courts.” (citation and quotation omitted)). “Federal district courts obtain in rem jurisdiction over a vessel when a maritime lien attaches to it.” *Id.* (citing *Industria Nacional Del Papel, CA. v. M/V Albert F*, 730 F.2d 622, 625 (11th Cir. 1984)). Accordingly, the Court has admiralty jurisdiction over this action, where Mirage Yacht alleges it has a valid maritime lien based on agreement that was allegedly made and services were performed independently and distinguishably from the sale of the Vessel.

ii. Waiver of the Lien

KTM next claims that even if Mirage Yacht held a valid lien, it waived the lien on March 19, 2024, by sending KTM an offer to buy the Vessel and not mentioning the lien (*id.* at 16). “[W]aiver is ‘the voluntary, intentional relinquishment of a known right.’” *Witt v. Metro. Life Ins. Co.*, 772 F.3d 1269, 1279 (11th Cir. 2014) (citation omitted). “Waiver requires ‘(1) the existence[,] at the time of the waiver[, of] a right, privilege, advantage, or benefit which may be waived; (2) the actual or constructive knowledge thereof; and (3) an intention to relinquish such right, privilege, advantage, or benefit.’” *Id.* (citation omitted). “When waiver is implied from conduct, the acts, conduct, or circumstances relied upon to show waiver must make out a clear case.” *Matter of Garfinkle*, 672 F.2d 1340, 1347 (11th Cir. 1982). “Moreover, waiver is an affirmative defense; the party asserting that another party has waived a right has the burden of proof.” *Air Prods. & Chemicals, Inc. v. Louisiana Land & Expl. Co.*, 867 F.2d 1376, 1379 (11th Cir. 1989).

Here, KTM does not sufficiently allege that Mirage Yacht waived its maritime lien through its offer to buy the Vessel from KTM.⁹ The fact that Mirage Yacht considered buying the Vessel from KTM does not, by itself, establish Mirage Yacht's clear intention to forego the lien. *See Farrell Ocean Servs., Inc. v. United States*, 681 F.2d 91, 94 (1st Cir. 1982) ("The party entitled to the lien must have taken affirmative actions that manifest a clear intention to forego the lien."); *see also Gulf Trading & Transp. Co. v. Vessel Hoegh Shield*, 658 F.2d 363, 368 (5th Cir. 1981) ("We agree with Gulf that when the transaction is considered as a whole, nothing was purposely done by Gulf to waive the maritime lien that arose as a matter of statutory law upon the furnishing of bunker fuel to the Vessel in a United States port."). Moreover, although Mirage Yacht's representative allegedly contacted KTM about whether KTM would be willing to sell the Vessel, there are no allegations of any further discussion or representations. There are no allegations evidencing Mirage Yacht's intent to waive its pursuit of the lien, and KTM cannot point to any authority finding that by simply approaching KTM to gauge its interest in selling the Vessel, Mirage Yacht's conduct constituted such waiver. *See Point Landing, Inc. v. Alabama Dry Dock & Shipbuilding Co.*, 261 F.2d 861, 867 (5th Cir. 1958) ("The mere taking of a promissory note for the debt or a chattel mortgage on the vessel does not alone or together amount to a waiver"). In sum, KTM's argument that Mirage Yacht's conduct shows it waived the maritime lien on the Vessel is unconvincing.

iii. Improper Forum

Lastly, KTM argues that this Court does not have subject matter jurisdiction based on a forum selection clause in the Purchase and Sale Agreement, which requires any dispute to be

⁹ The email communications about the offer to purchase the Vessel are also attached to the Amended Counterclaims and Third-Party Complaint as Exhibit E (DE 22-5).

“brought in the courts of the state and county of the main office of the Selling Broker” (DE 27 at 17-18). The Purchase and Sale Agreement states:

Any proceeding relating to this Agreement will be brought in the courts of the state and county of the main office of the Selling Broker, and each of the parties irrevocably submits to the exclusive jurisdiction of each such court, waives any objection it may now or hereafter have to venue or to convenience of forum, and agrees not to bring any proceeding relating to this Agreement in any other court. The Additional Terms in the info box above shall be incorporated herein.

(DE 37-1, Ex. B ¶ 16). KTM points out an Eleventh Circuit case that held “[f]orum selection clauses are interpreted according to ordinary contract principles and may constitute waivers of the right to remove.” *Ocwen Orlando Holdings Corp. v. Harvard Prop. Tr., LLC*, 526 F.3d 1379, 1381 (11th Cir. 2008). “They are frequently categorized as either permissive or mandatory. ‘A permissive clause authorizes jurisdiction in a designated forum but does not prohibit litigation elsewhere. A mandatory clause, in contrast, dictates an exclusive forum for litigation under the contract.’” *Id.*; *see also Cornett v. Carrithers*, 465 F. App’x 841, 843 (11th Cir. 2012) (“[B]ecause the only court situated in Suwannee County, Florida is the Circuit Court for the Third Judicial Circuit, the MSA’s forum selection clause did in fact designate that court as the particular forum in which the parties must bring suit.”). KTM claims that the forum selection clause in the Purchase and Sale Agreement mandates that the Court dismiss Mirage Yacht’s Complaint.

In this case, the Court need not determine whether the forum selection clause in the Purchase and Sale Agreement is mandatory and therefore, requires that this action be brought in a different court. As discussed above, Mirage Yacht alleges that its lien does not arise from the Purchase and Sale Agreement, and any forum selection clause in that Agreement does not govern the instant action to enforce the lien. As such, it is respectfully recommended that KTM’s Motion to Dismiss

for Lack of Subject Matter Jurisdiction be **DENIED**, as well as KTM's claim for attorneys' fees and costs under Rule 54 of the Federal Rules of Civil Procedure.¹⁰

B. KTM's Supplemental Motion to Vacate Attachment

Relatedly, KTM asks the Court to vacate the attachment on the Vessel, because Mirage Yacht did not sufficiently allege facts supporting a maritime lien. For example, KTM argues that the repairs were not done at Goetz's direction (DE 37 at 10-11). In addition, KTM argues that even though there may be factual disputes over the necessity of the repairs to the Vessel, Mirage Yacht has not alleged facts showing that the cost of repairs was reasonable (*id.* at 10).

In its response, Mirage Yacht explains that Goetz authorized the necessities to the Vessel for purposes of recovery, maintenance, and storage, under an agreement that is separate and distinct from the Purchase and Sale Agreement (DE 44 at 10). Mirage Yacht also explains that it pled that the necessities were reasonable and done at the direction of the Vessel's owner. According to Mirage Yacht the reasonableness of the necessities and authorization from the Vessel's owner are factual disputes for resolution later in the litigation (*id.* at 11). Nevertheless, at this stage, Mirage Yacht contends that there is sufficient evidence to support the lien through the declaration of Mazyer ("Mike") Hatami, the president and owner of Mirage Yacht (*id.* at 12).

A maritime lien against a vessel is authorized by Section 31342, which states "a person has a maritime lien on the vessel by providing necessities to a vessel on the order of the owner or a

¹⁰ "Under Rule 54(d)(1) of the Federal Rules of Civil Procedure, the prevailing party should generally be allowed to recover certain statutorily enumerated costs." *Henderson v. Franklin*, 782 F. App'x 866, 874 (11th Cir. 2019). "This Court has explained that '[u]sually the litigant in whose favor judgment is rendered is the prevailing party for purposes of [R]ule 54(d).'" No judgement has been rendered at this stage of the litigation, and KTM is not currently a prevailing party. *See Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep't of Health & Hum. Res.*, 532 U.S. 598, 603 (2001) ("[A] 'prevailing party' is one who has been awarded some relief by the court."). Therefore, it is respectfully recommended that KTM's premature request for attorney's fees and costs in its Motion pursuant to Rule 54 be **DENIED WITHOUT PREJUDICE**.

person authorized by the owner.” 46 U.S.C. § 31342(a)(1) (1989). ““A maritime lien is a special property right in a ship given to a creditor by law as security for a debt or claim,’ and it attaches ‘the moment the debt arises.’” *Crimson Yachts*, 603 F.3d at 868 (11th Cir. 2010) (quoting *Dresdner Bank AG v. M/V Olympia Voyager*, 465 F.3d 1267, 1272 (11th Cir. 2006)). “Maritime liens differ from other common law liens in that a maritime lien is ‘not simply a security device to be foreclosed if the owner defaults; rather, a maritime lien converts the vessel itself into the obligor and allows injured parties to proceed against it directly,” which “is called an in rem proceeding.” *Id.* (quoting *Amstar Corp. v. S/S/ Alexandros T.*, 664 F.2d 904, 908-09 (4th Cir. 1981).

A party seeking to enforce a maritime lien can pursue a warrant to arrest the vessel. “Upon [the] filing [of] an in rem complaint, the clerk of court issues a warrant for the arrest of the res.” *Minott v. M/Y Brunello*, 891 F.3d 1277, 1284 (11th Cir. 2018) (citation and quotation omitted). “Following the arrest of a vessel, the owner or other person claiming a right to the vessel may, pursuant to Supplemental Admiralty Rule E(4)(f), seek for the court to conduct a hearing and ultimately vacate the arrest.” *S&S Diesel Marine Servs., Inc. v. M/V F-TROOP*, No. 11-CIV-60020, 2011 WL 1899402, at *8 (S.D. Fla. May 18, 2011). Supplemental Admiralty Rule E(4)(f) states, “whenever property is arrested or attached, any person claiming an interest in it shall be entitled to a prompt hearing at which the plaintiff shall be required to show why the arrest or attachment should not be vacated or other relief granted consistent with these rules.” Fed. R. Civ. P. Supp. R. E(4)(f). “The purpose of the Rule E(4)(f) hearing is to ‘afford due process to a shipowner whose vessel has been arrested without the benefit of a post-arrest hearing.’” *S&S Diesel Marine Servs.*, 2011 WL 1899402 at *8 (quotation omitted).

However, “[t]he post-arrest hearing is not intended to resolve definitively the dispute between the parties, but only to make a preliminary determination whether there were reasonable

grounds for issuing the arrest warrant, and if so, to fix an appropriate bond.”¹¹ *Id.* (citation omitted). The Eleventh Circuit has stated that the Supplemental Rule E(4)(f) hearing is not intended to be a trial on the merits. *See PDS Gaming Corp. v. M/V Ocean Jewell of St. Petersburg*, No. 07-CIV-10088, 2007 WL 2988798, at *1 (11th Cir. Oct. 15, 2007) (explaining that the district court “improperly turned the Supplemental Rule E(4)(f) hearing into a mini-trial”); *Int’l Ship Repair & Marine Servs., Inc. v. Barge B. 215*, 418 F. Supp. 3d 1051, 1055 (M.D. Fla. 2019) (“A lienholder’s burden at the post-arrest hearing is ‘not onerous.’” (citation omitted)). During the post-arrest hearing, “the plaintiff must shoulder the burden of showing why the arrest should not be vacated” and “must prove that the arrest or attachment was supported by ‘reasonable grounds.’” *S&S Diesel Marine Servs.*, 2011 WL 199402 at *9 (citation omitted). “[T]he plaintiff must show only by a preponderance of the evidence that it is entitled to a valid maritime lien.” *Id.*

“To establish a maritime lien on a vessel pursuant to . . . [a] § 31342 . . . *in rem* action, a plaintiff must prove: (1) it provided ‘necessaries’¹² (2) at a reasonable price (3) to the vessel (4) at the direction of the vessel’s owner or agent.” *Sweet Pea Marine, Ltd. v. APJ Marine, Inc.*, 411 F.3d 1242, 1249 (11th Cir. 2005) (citing *S.E.L. Maduro (Florida), Inc. v. M/V Antonio De Gastaneta*, 833 F.2d 1477, 1482 (11th Cir. 1987)). In deciding if a plaintiff satisfied its burden to show a valid maritime line, “a court may consider evidence at the post-arrest hearing that was not

¹¹ Neither KTM nor Mirage Yacht asked for a bond at the hearing on January 21, 2025, which would establish the security required to release the Vessel from arrest. *See 20th Century Fox Film Corp. v. M.V. Ship Agencies, Inc.*, 992 F. Supp. 1423, 1427 n.3 (M.D. Fla. 1997) (finding reasonable ground to arrest a vessel and noting that no party asked for a bond).

¹² “The statute defines ‘necessaries’ to ‘include[] repairs, supplies, towage, and the use of a dry dock or marine railway.’” *Windspeed Enter. Ltd.*, 2023 WL 3477365, at *3 (quoting 46 U.S.C. § 31301(4)). “[N]ecessaries ‘has been liberally construed to include what is reasonably needed in the ship’s business, such as goods or services that are useful to the vessel, keep her out of danger and enable her to perform her particular function.’” *Id.*

before it at the time of the original attachment in order to determine whether reasonable grounds existed for the arrest of the vessel.” *S&S Diesel Marine Servs.*, 2011 WL 199402, at *9.

Mirage Yacht set forth the following facts through the Verified Complaint, the Declaration of Mike Hatami, and an invoice attached to the Complaint. As explained above, Hatami asserts that “Goetz agreed with [Mirage Yacht] and authorized [Mirage Yacht] to recover the Vessel from its position of peril, transport the Vessel to [Mirage Yacht’s] facility in Miami, Florida, and provide necessary repairs, maintenance, and storage for the Vessel starting on May 1, 2023” (DE 44-1 ¶ 10). Mirage Yacht also provided an invoice, detailing the services it provided to the Vessel (DE 1 ¶ 8 (citing Ex. 1)). Those services included towing the Vessel from Cape Coral to Miami, installation of new batteries and a battery charger, steam cleaning of the engine and removing soot, repair of the broken exhaust, cleaning and removing debris from the Vessel, captain’s and mate’s services for the tow aboard the Vessel, storage per day, electricity, towing the Vessel to Norseman, and storage at Norseman (DE 44-1 ¶¶ 26-37). Hatami explains that Mirage Yacht’s charges of \$111,227.05 for all storage, towing, and maintenance from May 1, 2023 to February 19, 2024 “are fair and reasonable in the community based upon local industry practice” (*id.* ¶¶ 22, 37). Hatami reaches this conclusion as he is “familiar with the usual customary charges for dockage, storage, maintenance, towing and marine services in the Miami area” (*id.* ¶ 25).

Naturally, KTM disputes Mirage Yacht’s assertions in support of the lien. KTM instead points to the Declaration from Goetz submitted with KTM’s Motion, stating that “[he] never authorized any work to be performed on the Vessel by Mirage Yacht” (DE 37-1 ¶ 25). Goetz further explains that he did not “ever authorize or direct the performance of any alleged services or repairs. I was never contacted or advised regarding any alleged charges for storage of the Vessel

by Mirage Yacht or Norseman, nor did I ever authorize or direct same” (*id.* ¶ 22). KTM also disputes whether the services Mirage Yacht provided were done so at a reasonable price.

Notwithstanding the clear factual disputes between the accounts of Goetz, KTM, and Mirage Yacht, the purpose of the post-arrest hearing is not to adjudicate the facts.¹³ The Court must only determine if there are reasonable grounds for the arrest. *S&S Diesel Marine Servs., Inc.*, 2011 WL 1899402, at *8 (“The post-arrest hearing is not intended to resolve definitively the dispute between the parties, but only to make a preliminary determination whether there were reasonable grounds for issuing the arrest warrant, and if so, to fix an appropriate bond” (citation omitted)). KTM does not argue that Mirage Yacht did not provide necessities to the Vessel, as required by the first and third elements. Rather, KTM maintains that Goetz never authorized Mirage Yacht to repair or store the Vessel and that Mirage Yacht’s services were not provided at a reasonable price.

With respect to whether Goetz authorized necessities for the Vessel, it is undisputed that Goetz allowed Mirage Yacht to take possession of the Vessel in late April or early May 2023, and Mirage Yacht maintained possession of it for several months after the Purchase and Sale Agreement terminated. Mirage Yacht claims its continued possession of the Vessel was pursuant to the verbal agreement to provide necessities (DE 44-1 ¶ 10). On the other hand, Goetz claims

¹³ In addition to the disagreement about whether Goetz authorized Mirage Yacht to provide necessities to the Vessel under a separate agreement, Goetz, KTM, and Mirage Yacht also dispute whether the Vessel needed an emergency haul out because it was taking on water and whether the fixtures inside the Vessel are missing. For example, Michael Mateja, an authorized representative of KTM, explains in his declaration that “by visually inspecting the engine department I can easily tell if there. . . [was] water intrusion in a boat,” and that he “saw no evidence of water intrusion” (DE 54-1 ¶¶ 13-14). Additionally, Mateja says that the Vessel was missing its furnishings, cabinets, and pieces from the bathroom (DE 37-2 ¶ 15). Meanwhile, Hatami explains that the “propellers, cabinetry, bathroom sink, and/or mirror . . . remain[ed] on board the Vessel as they were when MIRAGE took possession of the Vessel on May 1, 2023” (DE 44-1 ¶ 19).

he allowed Mirage Yacht to take possession under the Survey Option of the Purchase and Sale Agreement (DE 37-1 ¶13) After the Purchase and Sale Agreement terminated on May 11, 2023, Goetz explains that he did not seek to regain possession of the Vessel because he “remained under the impression that Mirage Yacht would eventually make the final payment and close on the sale of the Vessel since it retained possession of the Vessel, never returned the Vessel to me, and never notified me that it did not intend to close on the sale” (*id.* ¶ 20). What is clear is that Mirage Yacht never brought the Vessel back to Goetz, even though Goetz and Mirage Yacht had not closed on the sale of the Vessel by May 11, 2023, as required by the Purchase and Sale Agreement. And, Goetz does not claim he demanded as much. Indeed, the Vessel was in Mirage Yacht’s possession for at least eight months after the Purchase and Sale Agreement terminated. When Goetz found out the Vessel was in Miami without his permission, he did not state what, if any, efforts he made to get it back; instead, he sold it. At this stage, the Court need only find “reasonable grounds” to support the lien. *George v. A 2005 DONZI Motor Yacht, Hull Identification No. DNFA008A505*, No. 09-CIV-81145, 2009 WL 3417707, at *1 (S.D. Fla. Oct. 22, 2009) (citation and quotation omitted). Considering the declaration of Hatami stating Goetz authorized Mirage Yacht to provide necessaries to the Vessel, Goetz’s inaction in reclaiming the Vessel for approximately eight months after the Purchase and Sale Agreement expired, even in light of his explanation, and the absence of any clause in the Purchase and Sale Agreement specifically addressing various types of necessaries, Mirage Yacht has shown by a preponderance of the evidence that it had authorization from Goetz to provide repairs and services the Vessel.

Moreover, KTM has not provided any evidence to contradict Hatami’s statements that the necessaries Mirage Yacht provided to the Vessel were reasonable based upon the local industry practice. KTM did not offer contradictory invoices or testimony. In sum, given the minimal

burden at this stage of the proceedings, Mirage Yacht has shown there were reasonable grounds for the arrest of the Vessel. It is respectfully recommended that KTM's Motion to Vacate, and its claim for attorneys' fees under Local Admiralty and Maritime Rule C(7) be **DENIED**.¹⁴

C. Mirage Yacht's Motion to Dismiss KTM's Amended Counterclaims

i. KTM's Conversion Claim in Count One

In its Motion to Dismiss, Mirage Yacht seeks dismissal of KTM's conversion claim for two reasons. First, Mirage Yacht argues that "a claim for conversion fails as a matter of law where a party exercises its lien rights over property," and Mirage Yacht alleges it has a valid maritime lien over the Vessel (DE 23 at 4-5, 7). Second, Mirage Yacht argues that KTM failed to plead sufficient facts showing an act of dominion over the Vessel, or an unauthorized act, that deprived KTM of the Vessel for an indefinite time (*id.* at 9). KTM counters that it disputes the validity of Mirage Yacht's maritime lien, and it has sufficiently alleged conversion, by asserting facts that show Mirage Yacht has no valid maritime lien (DE 25 at 6-7).

A party cannot bring the common law tort of conversion for a wrongful attachment of a vessel under maritime law. The Eleventh Circuit has "held in the context of a party seeking to recover on wrongful attachment and conversion theories (the latter of which does not require bad faith), the proper cause of action in such cases is wrongful attachment, not some other cause of action taken from the common law." *Indus. Mar. Carriers, LLC v. Dantzer, Inc.*, 611 F. App'x 600, 604 (11th Cir. 2015) (citing *Furness Withy (Chartering), Inc., Panama v. World Energy Sys. Assocs., Inc.*, 854 F.2d 410, 412 (11th Cir. 1988)). The Eleventh Circuit declined to "draw on the

¹⁴ Under Local Rule for Admiralty and Maritime C(7), "if the Court orders the arrest to be vacated, the Court shall award attorney's fees, costs, and other expenses incurred by any party as a result of the arrest." S.D. Fla. L. R. C(7). It is respectfully recommended that KTM's premature request for attorney's fees and costs in its Motion pursuant to Rule C(7) be **DENIED WITHOUT PREJUDICE**.

common law of conversion” in awarding damages from a wrongful attachment, because a claim for wrongful attachment requires bad faith, unlike conversion. *Furness Withy (Chartering), Inc.*, 854 F.2d 410 at 412. Since the Eleventh Circuit has foreclosed a conversion claim in place of a claim for wrongful attachment, it is respectfully recommended that Mirage Yacht’s Motion to Dismiss Count One of KTM’s Amended Counterclaims be **GRANTED**.¹⁵

ii. KTM’s FDUTPA Claim in Count Six

Mirage Yacht argues that “KTM lacks standing to bring the FDUTPA claim [in Count Six] because it was not injured in a market transaction between the parties” (DE 23 at 11). Mirage Yacht explains that it only had a contractual relationship with Goetz, the Vessel’s previous owner, not KTM (DE 23 at 11). Therefore, because there is no privity between KTM and Mirage Yacht, KTM cannot properly bring a FDUTPA claim against Mirage Yacht. In addition, Mirage Yacht argues that KTM has not claimed “actual damages,” because it failed to allege that there was any difference in the Vessel’s market value from when it was delivered and when it should have been delivered under the parties’ contract (*id.*). KTM argues that there is no requirement to be in privity to bring a FDUTPA claim, which is not limited to consumers (DE 25 at 12). KTM contends that it sufficiently plead actual damages in a market transaction by alleging initial injuries to the Vessel’s previous owner, which continued to KTM after it purchased the Vessel (*id.* at 9, 11-12).

FDUTPA provides that “[u]nfair methods of competition, unconscionable acts or practices, and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.” FLA. STAT. § 501.204(1) (2017). “The Florida Legislature has

¹⁵ In conjunction with its Motion to Dismiss, Mirage Yacht seeks to strike KTM’s claim for attorneys’ fees in its conversion claim in Count One (DE 23 at 12). Because the undersigned respectfully recommends that KTM’s conversion claim be dismissed, Mirage Yacht’s Motion to Strike should be **DENIED AS MOOT**.

authorized private causes of action to enforce the Act.” *C&C Int’l Computers & Consultants, Inc. v. Dell Mktg. L.P.*, No. 11-CIV-60734, 2011 WL 13217489, at *1 (S.D. Fla. Nov. 7, 2011) (citing FLA. STAT. §§ 501.211(1), (2) (2001)). “To establish a FDUPTA violation, a plaintiff must prove three elements: (1) a deceptive act or unfair practice; (2) causation; and (3) actual damages.” *Id.* (citing *Bookworld Trade, Inc. v. Daughters of St. Paul, Inc.*, 532 F. Supp. 2d 1350, 1364 (M.D. Fla. 2007)). “Although FDUPTA does not define the terms unfair or deceptive acts, courts have held that [a] deceptive practice is one that is likely to mislead consumers, and an unfair practice is one that offends established public policy or is immoral, unethical, oppressive, unscrupulous or substantially injurious [sic] to consumers.” *Id.* (quotation and citation omitted). “A plaintiff need not be a consumer to assert a FDUTPA claim.” *Ounjian v. Globoforce, Inc.*, 89 F.4th 852, 860 (11th Cir. 2023). Furthermore,

‘The actual damages required’ for a FDUTPA claim have been defined as ‘the difference in the market value of the product or service in the condition in which it was delivered and its market value in the condition in which it should have been delivered according to the contract of the parties.’

Id. (quoting *Smith v. 2001 S. Dixie Highway, Inc.*, 872 So. 2d 992, 994 (Fla. Dist. Ct. App. 2004)). “‘Florida courts have allowed diminished value to serve as actual damages’ recoverable in a FDUTPA claim.” *Smith v. Wm. Wrigley Jr. Co.*, 663 F. Supp. 2d 1336, 1339 (S.D. Fla. 2009) (citing *Collins v. DaimlerChrysler Corp.*, 894 So. 2d 988, 990 (Fla. Dist. Ct. App. 2004)).

The Amended Counterclaims do not allege sufficient facts to support actual damages under FDUTPA. KTM alleges that it purchased the Vessel from Goetz on February 17, 2024 (DE 22 ¶¶ 36). Before purchasing the Vessel, KTM conducted two inspections where it learned that the Vessel was missing its portside pods, starboard propellers, custom cabinetry, and bathroom sink and mirror (*id.* ¶¶ 28, 30-32). Despite the alleged missing parts and interior, and knowing they were missing, KTM still purchased the Vessel. In other words, KTM’s allegations do not

demonstrate that the Vessel lost any value since KTM purchased it on February 17, 2024. In fact, by its own allegations, KTM bought the Vessel at a diminished market value, knowing it in advance of the purchase.¹⁶ Nor are there any allegations in the Amended Counterclaims that show the Vessel's value decreased further after KTM purchased it. *See JustTech, LLC v. Kaseya US LLC*, No. 22-CIV-22454, 2023 WL 5529845, at *10 (S.D. Fla. Aug. 28, 2023) (dismissing a FDUTPA claim as the plaintiff failed to allege actual damages); *ADT LLC v. Vivint, Inc.*, No. 17-CIV-80432, 2017 WL 5640725, at *5 (S.D. Fla. Aug. 3, 2017) (“Because ADT fails to allege actual damages under FDUTPA, Vivint’s Motion to Dismiss ADT’s claim for monetary damages under Count III is granted.”).

KTM claims that it “has been denied actual possession of [the Vessel,] . . . lost an excess of \$100,000.00 as a result of [Mirage Yacht’s] unconscionable acts or practices, and unfair or deceptive acts or practices and stands to lose an additional \$620,000.00 in relation to the agreement with third-party partners if KTM does not obtain possession” (DE 22 ¶¶ 109-10). Yet, these are not actual damages under FDUTPA. *See Thomas v. Generac Power Sys. Inc.*, No. 21-12997, 2022 WL 4091735, at *3 (11th Cir. Sept. 7, 2022) (“A plaintiff may not recover consequential damages under the FDUTPA.” (citation omitted)); *Kia Motors Am. Corp. v. Butler*, 985 So. 2d 1133, 1140 (Fla. Dist. Ct. App. 2008) (“FDUPTA ‘actual damages’ do not include consequential damages, such as repair damages or resale damages.”). KTM failure to allege actual damages is fatal to its FDUTPA’s claim.

KTM also fails to allege any injury to consumers. “While a plaintiff need not be a consumer to pursue a claim under FDUTPA, Florida case law requires a plaintiff to prove harm to

¹⁶ In his declaration, Michael Mateja, an authorized representative of KTM, explains that he was aware of the alleged damage to the Vessel before KTM purchased it (DE 37-1 at 1-5).

a consumer or consumers.” *State Farm Mut. Auto. Ins. Co. v. At Home Auto Glass LLC*, No. 21-CIV-239, 2024 WL 4349246, at *4 (M.D. Fla. Sept. 30, 2024). “For purposes of the consumer harm requirement, then, ‘consumer’ simply means a purchaser and consumer of goods or services.” *Id.* at *5. KTM argues that Mirage Yacht’s deceptive and unfair practices, including breaching the Purchase and Sale Agreement, retaining possession of the Vessel, and fraudulently claiming a maritime lien, harmed Goetz – the alleged consumer (DE 22 ¶ 108). Yet, KTM’s own allegations, if taken as true, establish that Goetz could not be a consumer. KTM alleges that Goetz never contracted with Mirage Yacht to provide any services for the Vessel. And to the extent there was a contract between Goetz and Mirage Yacht to purchase the Vessel, Goetz was the seller, not the purchaser or seller of any goods or services. Simply put, the central dispute in this case is whether Goetz sought any services from Mirage Yacht. Goetz and KTM have taken the position that he did not. By KTM’s own allegations, Goetz is not a consumer under FDUTPA, and KTM has not alleged some other consumer injury. Since there are not sufficient allegations to show actual damages and consumer injury under FDUTPA, it is respectfully recommended that Mirage Yacht’s Motion to Dismiss Count Six of the Amended Counterclaims be **GRANTED**.¹⁷

iii. KTM’s Request for Leave to Amend

KTM requested leave to amend its Amended Counterclaims in response to Mirage Yacht’s Motion to Dismiss (DE 25 at 20). “Leave to amend a complaint ‘shall be freely given when justice so requires.’” *Cibran Enters., Inc. v. BP Prods. N. Am., Inc.*, 365 F. Supp. 2d 1241, 1251 (S.D. Fla. 2005) (quoting Fed. R. Civ. P. 15(a)). Here, by granting leave to amend, KTM can bring its

¹⁷ In conjunction with its Motion to Dismiss, Mirage Yacht moves to strike KTM’s claim for attorneys’ fees based on its FDUTPA claim in Count Six (DE 23 at 12-13). Because the undersigned respectfully recommends that KTM’s FDUTPA claim be dismissed, Mirage Yacht’s Motion to Strike should be **DENIED AS MOOT**.

claim against Mirage Yacht for wrongful attachment of the Vessel, instead of conversion, based on the facts already set forth in its Amended Counterclaims. *See Cala v. Med. & Fin. Mgmt., Inc.*, No. 16-CIV-14416, 2017 WL 7726703, at *1 (S.D. Fla. Feb. 24, 2017) (permitting leave to amend under Rule 15(a)(2) where justice so requires). Moreover, there is no prejudice to Mirage Yacht, as it is already on notice that KTM contests the validity of the lien and the facts on which KTM relies. There has been no undue delay or bad faith, and an amendment would not be futile where KTM can substitute the appropriate cause of action. Therefore, it is respectfully recommended that KTM's request for leave to amend the Amended Counterclaims be **GRANTED**.¹⁸

D. Norseman's Motion to Dismiss Counts Two and Five in KTM's Amended Counterclaims

KTM brings a claim of aiding and abetting conversion in Count Two and fraud in Count Five against Norseman. Norseman argues that KTM fails to allege sufficient facts to state claims for aiding and abetting conversion and fraud (DE 49). Norseman also argues that the April 4, 2023 Settlement Agreement it entered into with KTM bars all of KTM's claims (*id.*). KTM argues that the release provision in the Settlement Agreement does not bar its claims against Norseman because "[a]n agreement obtained through fraudulent inducement is legally unenforceable, and as such, the settlement agreement cannot be relied upon as a valid defense" (DE 58 at 6).¹⁹

At the January 21, 2025 hearing, KTM and Norseman agreed that the Court could consider the Settlement Agreement between KTM and Norseman, which is attached to KTM's Third-Party Complaint (DE 22-4) and Norseman's Motion to Dismiss (DE 49-1), and that the Settlement

¹⁸ During the January 21, 2025 hearing, KTM withdrew its request for sanctions against Mirage Yacht under Title 28, United States Code, Section 1927 in its Motion to Vacate Attachment and Motion to Dismiss (DE 37 at 22). Therefore, the undersigned does not address this request.

¹⁹ Notably, KTM does not request, or bring a claim, to rescind the Settlement Agreement with Norseman (*see generally* DE 22).

Agreement is authentic. Norseman and KTM entered into the Settlement Agreement at the time that KTM also paid Norseman's outstanding storage invoice, so KTM could take possession of the Vessel. The Settlement Agreement contains the following release:

b. RELEASE OF NORSEMAN. In consideration of the covenants, promises and conditions contained herein, KTM VENTURE GROUP, INC., KENNETH T. MATEJA, *in personam* and the 2013 63' Marquis Motor Yacht (HIN # MQYLS008B313), *in rem* for themselves and their representatives, agents, employees, attorneys, trustees, beneficiaries, affiliates, affiliated entities, predecessors, successors, insurers, administrators, heirs, executors and assigns, hereby release and discharge **NORSEMAN SHIPBUILDING AND BOAT YARD, LLC, CARLOS MARTELL and JOSE A. COSTA, III**, and its/their representatives, agents, employees, attorneys, trustees, beneficiaries, affiliates, affiliated entities, predecessors, successors, insurers, administrators, heirs, executors and assigns, from any and all legal, equitable, admiralty or other claims, counterclaims, liens, demands, setoffs, defenses, contracts, accounts, suits, debts, agreements, actions, causes of action, breaches of warranty, sums of money, reckoning, bonds, bills, specialties, covenants, promises, variances, trespasses, damages, liabilities, attorney's fees, expenses, costs, executions, judgments, findings, controversies and disputes, and any past, present or future duties, responsibilities, or obligations, whether known or unknown, direct or indirect, known or anticipated, from the beginning of the world to the Effective Date, other than any claims arising out of this Agreement. **For the avoidance of doubt, it is the Parties [sic] intent that KTM release each and every claim it has against NORSEMAN.** NORSEMAN's release to become effective upon the release of the vessel to KTM's care, custody and control, combined with NORSEMAN's execution of this Agreement.

To the fullest extent permitted by law, subsequent to the Effective Date of this Agreement, neither Party shall pursue or knowingly permit the prosecution, in any state, federal or foreign court, or before any local, state, federal or foreign administrative agency, or any other tribunal, of any charge, claim or action of any kind, nature and character whatsoever, known or unknown, against the other Party of any of the matters released pursuant to this Section 1. Excluded from *this mutual* covenant not to sue is an action by either Party to enforce the terms of this Agreement.

(DE 22-4 at 2, DE 49-1 at 2) (emphasis in original).

“A court considers only the complaint and the exhibits attached to the complaint. A complaint may be dismissed for failure to state a claim ‘when its allegations . . . show that an affirmative defense bars recovery on the claim.’” *Yamashita v. Merck & Co.*, No. 11-CIV-62473,

2013 WL 275536, at *1 (S.D. Fla. Jan. 24, 2013) (citation omitted). “If the complaint contains a claim that is facially subject to an affirmative defense, that claim may be dismissed under Rule 12(b)(6).” *LeFrere v. Quezada*, 582 F.3d 1260, 1263 (11th Cir. 2009). “Defendant may raise general release as a bar to this suit by a motion to dismiss because the defense’s existence can be judged on the face of an exhibit attached to the complaint.” *Yamashita*, 2013 WL 275536, at *1 (citing *Concordia v. Bendekovic*, 693 F.2d 1073, 1075 (11th Cir.1982)).

The Settlement Agreement provides that it is governed by general maritime law and supplemented by Florida law (DE 49-1 ¶ 5). In applying state law, a federal court is “bound to follow the decisions of a state’s highest court.” *Brown v. Nichols*, 8 F.3d 770, 773 (11th Cir. 1993) (citation and quotation omitted). The parties do not dispute that Florida applies. KTM argues that the Court cannot rely on the release in the Settlement Agreement, because it would not have signed the Settlement Agreement if it knew about the alleged scheme between Norseman and Mirage Yacht to place an unauthorized lien on the Vessel. In the end, KTM claims that Norseman fraudulently induced it into signing the Settlement Agreement, as “Norseman . . . had the duty to disclose Mirage Yacht’ plans to claim a lien[, which] . . . was triggered when Norseman drafted the statement, ‘[a] dispute developed between KTM and Mirage Yacht, Inc. to which [Norseman] is not a party’” (DE 22 ¶ 102 (quoting DE 22-4)).

In *Mazzoni Farms Inc. v. Dupont De Nemours and Co.*, the Eleventh Circuit considered “whether a release in a settlement agreement bars a claim that [the] defendant fraudulently induced plaintiffs to settle.” 166 F.3d 1162 (11th Cir. 1999), *certified question answered*, 761 So. 2d 306 (Fla. 2000). There, the plaintiffs and defendant entered into a settlement agreement that contained a release provision. *Id.* at 1163. After the settlement, the plaintiffs discovered information that led them to believe that the defendants fraudulently induced them to settle. *Id.* The plaintiffs filed

a new suit in state court, which was later removed to federal court, and the district court dismissed the plaintiffs' claims by reasoning that the settlement release barred the claims. *Id.* at 1163-64. On appeal, the Eleventh Circuit certified the question to the Florida Supreme Court, asking "if Florida law applies, does the release in these settlement agreements bar plaintiffs' fraudulent inducement claim." *Id.* at 1165 (emphasis removed). In answering the question in the negative, the Florida Supreme Court found that the release language was not sufficiently broad to encompass the plaintiffs' claims of fraudulent inducement. *Mazzoni Farms, Inc. v. E.I. DuPont De Nemours & Co.*, 761 So. 2d 306, 316 (Fla. 2000). However, the Florida Supreme Court did "not address whether fraudulent inducement claims would still be barred in a release that was more general in scope." *Id.* at 316 n.9.

Other federal and state courts have agreed that a broad release can extinguish claims of fraudulent inducement under Florida law. *See, e.g., Solidda Grp. v. Sharp Elecs. Corp.*, No. 12-CIV-21411, 2014 WL 12513585, at *4 (S.D. Fla. Mar. 3, 2014) (explaining that a settlement agreement barred claims of fraud); *Cerniglia v. Cerniglia*, 679 So. 2d 1160, 1164 (Fla. 1996) (explaining that a release in a marital settlement agreement barred subsequent claims based on fraud); *Spatz v. Microtel Inns & Suites Franchising Inc.*, No. 11-CIV-60509, 2012 WL 13005557, at *8 (S.D. Fla. Feb. 6, 2012) (explaining that a release provision barred claims of fraud and negligent misrepresentation). "[G]enerally, Florida courts enforce general releases to further the policy of encouraging settlements' and that 'enforcement [of releases] is premised upon the assumption that the released claims are those that were contemplated by the agreement.'" *Solidda Grp.*, 2014 WL 12513585, at *4 (S.D. Fla. Mar. 3, 2014) (quoting *Mazzoni Farms, Inc.*, 761 So. 2d at 314). Given this policy, courts will recognize a broad release's effect of extinguishing claims resulting from the alleged fraudulent inducement in entering into the release agreement.

The release provision in the Settlement Agreement between KTM and Norseman is extremely broad. KTM agreed to release Norseman from “past present or future,” “known or unknown, direct or indirect” “claims arising out of this Agreement” (DE 49-1 at 2). The release provision even explains that “it is the Parties [sic] intent that KTM release each and every claim it has against [Norseman]” (*id.*). The Parties clearly intended that any claims KTM may have had against Norseman would be included in the broad release, which encompassed “unknown” and “indirect” claims. *See Solidda Grp.*, 2014 WL 12513585, at *4-5 (finding that a broad release provision included claims of fraudulent inducement). Since KTM’s claims for aiding and abetting conversion and fraud fall under the broad release provision in the Settlement Agreement, which KTM conceded the Court can properly consider at the motion to dismiss stage, its claims against Norseman in the Third-Party Complaint are barred. *See Yamashita*, 2013 WL 275536, at *5 (dismissing a complaint pursuant to Rule 12(b)(6) where plaintiff’s claims were barred by the general release he executed).

Even if the Settlement Agreement does not bar KTM’s aiding and abetting conversion claim, which it does, KTM fails to state a cognizable claim. For aiding and abetting under Florida law, “a plaintiff must allege: (1) an underlying violation on the part of the primary wrongdoer; (2) knowledge of the underlying violation by the alleged aider and abetter; and (3) the rendering of substantial assistance in committing the wrongdoing by the alleged aider and abettor.” *Lawrence v. Bank of Am., N.A.*, 455 F. App’x 904, 906 (11th Cir. 2012). As discussed above, the Eleventh Circuit has precluded conversion claims for the wrongful attachment of a vessel. Because there is no conversion claim against Mirage Yacht, KTM cannot plead an underlying violation on the part of the primary wrong doer. Thus, KTM does not state a claim for aiding and abetting conversion against Norseman.

Similarly, even if the Settlement Agreement does not bar KTM's fraud claim, which it does, KTM again fails to state a cognizable claim. "[F]raud claims, have always been subject to Fed.R.Civ.P. 9(b)'s heightened pleading requirements, which require a complaint 'to state with particularity the circumstances constituting fraud.'" *Mizzaro v. Home Depot, Inc.*, 544 F.3d 1230, 1237 (11th Cir. 2008) (quoting Fed. R. Civ. P. 9(b)). Under Florida law, fraud requires: "(1) a false statement concerning a material fact; (2) the representor's knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation." *State Farm Mut. Auto. Ins. Co. v. Performance Orthopedics & Neurosurgery, LLC*, 278 F. Supp. 3d 1307, 1317 (S.D. Fla. 2017) (quoting *Butler v. Yusem*, 44 So.3d 102, 105 (Fla. 2010)). "In certain circumstances, '[f]raud also includes the intentional omission of a material fact.'" *Id.* (quoting *Ward v. Atl. Sec. Bank*, 777 So.2d 1144, 1146 (Fla. Dist. Ct. App. 2001)).

KTM alleges that Norseman "failed to disclose Mirage Yacht's intent to raise a claim that it held a lien [on the Vessel,]" and "KTM would not have paid Norseman . . . the demanded fees, nor would it have signed the waiver" if Norseman informed it of the same (DE 22 ¶¶ 103-04). KTM asserts that when "Norseman . . . told KTM that once the waiver was signed, KTM could regain custody of the [Vessel,]" coupled with its omission about Mirage Yacht's claim of a lien, Norseman made a fraudulent statement or omission to KTM, on which KTM relied and resulted in subsequent injury (*id.* ¶ 50). The fact that Mirage Yacht asserted a lien against the Vessel, by itself, in no way interfered with KTM's ability to recover the Vessel. The *arrest* of the Vessel authorized by the Court is what prevented KTM from taking possession of the Vessel. There are no allegations in the Third-Party Complaint that Norseman knew about an impending arrest of the Vessel before KTM and Norseman entered into the Settlement Agreement but told KTM it could

take the Vessel anyway if it paid Norseman money and signed a release. In other words, KTM does not allege any omission, or a false statement about a material fact, made by Norseman that satisfies the elements for fraud and the heightened pleading standing in Rule 9 of the Federal Rules of Civil Procedure. Without more, KTM does not state a claim for fraud against Norseman. Accordingly, it is respectfully recommended that Norseman's Motion to Dismiss Counts Two and Five of KTM's Third-Party Complaint be **GRANTED**.

IV. CONCLUSION

Based on the foregoing, it is respectfully recommended that Mirage Yacht's Motion to Dismiss (DE 23) Counts One and Six of KTM's Amended Counterclaims be **GRANTED** and that KTM be given leave to amend its Amended Counterclaims, as set forth above. It is further respectfully recommended that KTM's Motion to Vacate the Attachment and Motion to Dismiss for Lack of Subject Matter Jurisdiction (DE 37) be **DENIED**. Lastly, it is respectfully recommended that Norseman's Motion to Dismiss (DE 49) Counts Two and Five of KTM's Third-Party Complaint be **GRANTED**, and Defendant Norseman Shipbuilding and Boatyard, LLC be dismissed from this action.

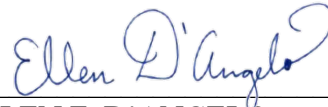
V. OBJECTIONS

The Parties will have **ten (10) days** from this Report and Recommendations to file written objections with the Honorable Kathleen M. Williams, United States District Judge.²⁰ Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in this Report and shall bar the Parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report, except upon grounds of plain error, if

²⁰ The undersigned has shortened the objection period to ten (10) days pursuant to Local Magistrate Judge Rule 4(b), as the Parties have thoroughly addressed the issues through extensive briefing and lengthy oral argument.

necessary, in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Chambers in Miami, Florida on this 12th day of February, 2025.



ELLEN F. D'ANGELO
UNITED STATES MAGISTRATE JUDGE

cc: All Counsel of Record