UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:24-cv-24428-WILLIAMS/GOODMAN

D.S.,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

_____/

REPORT AND RECOMMENDATIONS ON MOTION TO DISMISS

In this maritime personal injury action, Defendant Carnival Corporation ("Defendant" or "Carnival") filed a motion to dismiss Plaintiff D.S.'s ("Plaintiff") Second Amended Complaint ("SAC"). [ECF No. 45]. Plaintiff filed a response in opposition, and Defendant filed a reply. [ECF Nos. 63; 69]. United States District Judge Kathleen M Williams referred the motion to the Undersigned. [ECF No. 57].

For the reasons stated below, the Undersigned **respectfully recommends** that the District Court **grant** Defendant's motion, in part, and dismiss Count II **without prejudice**. However, in the absence of extraordinary circumstances, the Undersigned will not permit Plaintiff to submit another version of Count II after she submits a Third Amended

Complaint ("TAC") (assuming that she does file a TAC).

I. Background

Plaintiff's SAC against Defendant is for damages related to physical injuries she allegedly sustained after falling down a flight of stairs aboard the Carnival *Radiance* as a result of being overserved alcohol. [ECF No. 45]. These physical injuries include: a concussion; headaches; a possible traumatic brain injury; back injuries; tailbone injuries; bruising; pain; and extreme mental anguish. *Id*. at ¶ 16.

She also alleges that due to Defendant's misrepresentation to her about the contents of video from closed circuit television ("CCTV") surveillance, she lost the ability to sue for sexual assault. *Id*. at ¶ 57. Plaintiff contends that the misrepresentation (*i.e*., a Carnival employee falsely told her at 2:50 a.m. that he or she had reviewed the CCTV and it showed her during the entire duration of the relevant time but did not show anything harmful happening to her from 11:45 p.m. to 12:20 a.m.) caused her to not request a rape kit. This, in turn, allegedly prevented her from "being able to know if she had been sexually assaulted." *Id*. at ¶¶ 14–15.

Plaintiff filed her Complaint [ECF No. 1] and Defendant filed a motion to dismiss [ECF No. 12]. The next day, presumably in response to the motion, Plaintiff voluntarily filed her First Amended Complaint. [ECF No. 13 ("FAC")]. Defendant filed a motion to

dismiss the FAC, which the Court granted in part. [ECF Nos. 15; 43].[1] The Court's Order on Defendant's motion to dismiss the FAC permitted Plaintiff to file an amended complaint "[i]f [she] believes she can address the deficiencies outlined in the [R&R][.]" [ECF No. 43, p. 2]. Plaintiff filed her SAC soon after. [ECF No. 45].

Defendant filed a motion to dismiss Plaintiff's SAC because it says Plaintiff failed to: (1) plead that a crew member knew or should have known that his or her misrepresentation was false; (2) plausibly allege inducement; and (3) sufficiently plead that she justifiably suffered a detriment as a result of the alleged misrepresentation. [ECF No. 46]. Defendant's motion requests the Court to dismiss Count II *with* prejudice. *Id*.

Plaintiff's SAC contains two counts: Over-Service of Alcohol by Carnival's Employees (Vicarious Liability), and Negligent Misrepresentation by a Carnival Employee (Vicarious Liability). In her core allegations, she alleges that:

> 13. D.S.'s incident began on or about January 5, 2024, and continued through January 6, 2024, while she was a fare paying passenger on CARNIVAL'[s] vessel, the *Radiance*.
>
> 14. On or about January 5, 2024, between approximately 2:58 p.m. and 11:37 p.m., CARNIVAL crew[ ]members at the Blue Iguana Tequila, at the Serenity Bar, at the Red Frog Rum Bar, at the *Radiance* Casino Bar, at the Winners Luck Bar, and at "Bar @ Sportsquare," served D.S. approximately fourteen alcoholic beverages continually within a span of approximately

[1] The Court adopted the Undersigned's Report and Recommendations ("R&R") on Defendant's Motion to Dismiss the FAC. [ECF Nos. 35; 43]. In my R&R, I found that Plaintiff failed to: sufficiently allege causation with regards to Count I; and sufficiently allege an intentional misrepresentation of fact with regards to Count II. [ECF No. 35]. Additionally, I recommended that Judge Williams strike Plaintiff's prayer for relief because the FAC failed to sufficiently allege the necessary elements. *Id*.

eight hours and thirty-nine minutes. She was swaying, stammering, slurring her speech, had alcohol on her breath, and was acting belligerent while she was in plain view of the crew[ ]members serving her these alcoholic beverages, and was visibly intoxicated such that each of CARNIVAL's crew[ ]members should not have continued to serve alcohol to her while she was exhibiting these visible signs of intoxication, and each of these crew[ ]members were negligent for continuing to serve her alcoholic beverages in her intoxicated state. Due to her intoxicated state that was caused by this over-service of alcohol, between approximately January 5, 2024, at 11:45 p.m.[,] and January 6, 2024, at 12:20 a.m., D.S. stumbled while attempting to walk down a set of stairs, and suffered a severe fall down these stairs, which was observed by another passenger who happened to be nearby when she fell.

15. The "subject incident" above is D.S.' fall down the subject stairs, which was caused by her intoxicated state and by CARNIVAL'S crew[ ] members' over serving alcohol when they knew or should have known that she was in an intoxicated state. Her ability to appreciate her surroundings, to walk in a safe and stable fashion, and to watch her step was severely diminished due to her intoxicated state, which CARNIVAL'S crew[ ] members knew or should have known for the reasons previously disclosed, and this caused her to fall down the subject stairs. As described above, her intoxicated state was caused by the overservice of alcohol by CARNIVAL's crew[ ]members.

16. As a result, D.S. sustained severe injuries, including, but not limited to, a concussion, headaches, a possible traumatic brain injury, back injuries, tailbone injuries, bruising, pain, suffering, extreme mental anguish, and other injuries.

17. CARNIVAL's crew[ ]members onboard the *Radiance*, including the staff that over-served alcohol to D.S. and medical staff were in regular full-time employment of CARNIVAL and/or the ship, as salaried crew[ ]members.

***

48. On January 6, 2024, at 2:50 a.m., after D.S. was brought to the security office on the ship, a ship security officer, who was a CARNIVAL crew[ ]

member, negligently misrepresented to D.S. that she could be seen on CCTV for the entire duration of time discussed above, and that nothing harmful happened to her during this time. However, this representation was false, as D.S. had fallen down the stairs as previously described, and this crew[ ]member knew or should have known that this representation was false since D.S. had bruises on her body that were clearly visible to this crew[ ]member, and which were clearly from a fall. As a result, D.S. declined to have a rape kit administered, thereby preventing her from being able to know if she had been sexually assaulted. In fact, there are a number of gaps of time not shown on CCTV, including a large gap of time between approximately January 5, 2024, at 11:45 p.m. and January 6, 2024, at 12:20 a.m., and as a result, D.S. has been unable to know whether she suffered a sexual assault during the unaccounted-for period of time, which she suspected had happened to her and which she had a concern had happened to her, and which she communicated to the medical center's staff and security officer, causing her extreme mental anguish and causing her to lose the ability to pursue a sexual assault claim.

49. As the owner of a ship in navigable waters, CARNIVAL owed to all who are on board the [s]hip the duty of exercising reasonable care under the circumstances of matters related to the subject incident. This duty applies to the representations that CARNIVAL's crew[ ]member made to D.S. that she could be seen on CCTV for the entire duration of time discussed previously, and that nothing harmful had happened to her during this duration of time.

50. In fact, CARNIVAL's crew[ ]member knew that there were a number of gaps of time not shown on CCTV, including a large gap of time between approximately January 5, 2024, at 11:45 p.m. and January 6, 2024, at 12:20 a.m. Moreover, CARNIVAL's crew[ ]member knew that his representation that nothing harmful had happened to her was clearly false, as D.S. had fallen down the stairs as previously described, and D.S. had bruises on her body that were clearly visible to this crew[ ]member, and which were clearly from a fall.

51. As a result, D.S. has been unable to know whether she had in fact been a victim of sexual assault, as she suspected had happened to her, during the unaccounted-for period, causing her pain, suffering, extreme mental anguish, and other injuries.

52. As a direct and proximate cause of the reliance upon the **intentional**[2] misrepresentations by CARNIVAL's crew[ ]member, D.S. declined to have a rape kit administered.

53. The crew[ ]member that made these misrepresentations to D.S., as discussed previously, was an agent of CARNIVAL for the following reasons:

a. All of CARNIVAL's crew[ ]members, including the subject crew[ ]member, were the staff and/or employees of CARNIVAL, or were CARNIVAL'[s] agents, apparent agents, and/or servants; and/or

b. These staff, employees, and/or agents were subject to the right of control by CARNIVAL; and/or

c. These staff, employees, and/or agents were acting within the scope of their employment or agency; and/or

d. CARNIVAL acknowledged that these staff, employees, and/or agents would act on CARNIVAL'[s] behalf, and they accepted the undertaking.

54. CARNIVAL is vicariously liable for its crew[ ]member's misrepresentations.

55. This crew[ ]member's breaches were the cause in-fact of D.S.'s great bodily harm in that, but for CARNIVAL's crew[ ]member's breach, D.S.'s incident and injuries would not have occurred.

56. This crew[ ]member's breach proximately caused D.S. great harm in that the injuries that occurred was [sic] a foreseeable result of the crew[ ]member's breach.

57. As a result of this crew[ ]member's misrepresentations, D.S. has lost

[2] This allegation is inconsistent with a claim for negligent misrepresentation, which is the title of the count. As we will soon discuss, the elements for intentional misrepresentation and negligent misrepresentation are different. *In re Harris*, 3 F.4th 1339, 1349–50 (11th Cir. 2021) (outlining differences on the showing a plaintiff must make about defendant's knowledge that the misrepresentation was false).

> the ability to sue CARNIVAL for sexual assault, suffered severe damages resulting in mental anguish, lost wages, lost earning capacity, and loss of ability to pursue a sexual assault claim.
>
> 58. The losses are permanent and/or continuing in nature.
>
> 59. D.S. has suffered these losses in the past and will continue to suffer such loses [sic] in the future.

[ECF No. 45, ¶¶ 13–17; 48–59 (emphasis and footnote added).].

II. Legal Standard

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must take as true all well-pleaded facts in the plaintiff's complaint and all reasonable inferences drawn from those facts. *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994). To state a claim for relief, a pleading must contain: "(1) a short and plain statement of the grounds for the court's jurisdiction[;] . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought[.]" Fed. R. Civ. P. 8(a). Thus, "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)).

III. Analysis

"Personal-injury claims by cruise ship passengers, complaining of injuries suffered at sea, are within the admiralty jurisdiction of the district courts." *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1365 (11th Cir. 2018) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88, 111 S. Ct. 1522, 1524, 113 L. Ed. 2d 622 (1991)). "Maritime law governs actions

arising from alleged torts committed aboard a ship sailing in navigable waters." *Guevara v. NCL (Bah.) Ltd.*, 920 F.3d 710, 720 (citing *Keefe v. Bah. Cruise Line, Inc.*, 867 F.2d 1318, 1320–21 (11th Cir. 1989)).

"In analyzing a maritime tort case, [courts] rely on general principles of negligence law." *Van Deventer v. NCL Corp. Ltd.*, No. 23-CV-23584, 2024 WL 836796, at *4 (S.D. Fla. Feb. 28, 2024) (quoting *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012)). "To prevail on a negligence claim, a plaintiff must show that[:] '(1) the defendant had a duty to protect the plaintiff from a particular injury[;] (2) the defendant breached that duty[;] (3) the breach actually and proximately caused the plaintiff's injury[;] and (4) the plaintiff suffered actual harm.'" *Guevara*, 920 F.3d at 720 (quoting *Chaparro*, 693 F.3d at 1336).

The duty of care owed by an owner of a ship in navigable waters while its passengers are on board the vessel is a duty of exercising reasonable care under the circumstances. *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). This standard "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of [a] risk-creating condition, at least where, as here, the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). *See generally Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021) ("[A] passenger cannot succeed on a

maritime negligence claim against a shipowner unless that shipowner had actual or constructive notice of a risk-creating condition.").

But a cruise passenger plaintiff need **not** establish actual or constructive notice by the cruise ship operator of a risk-creating condition when the claim is based on *vicarious* liability (*i.e.*, negligence by specific cruise ship crew members, employees, or other agents, acting within the scope of their employment). *Yusko*, 4 F.4th at 1169–70.

Here, the SAC's allegations are solely based on vicarious liability. Therefore, in order to proceed under these vicarious liability claims, Plaintiff **does not need to** plead or establish actual or constructive notice.

Defendant makes arguments related to only Count II (and is not seeking to dismiss Count I).

Count II: Negligent Misrepresentation by Carnival's Crew, Staff, Employees, and/or Agents, Based on Vicarious Liability

Defendant argues that Count II should be dismissed because Plaintiff failed to: adequately plead that an employee misrepresented or omitted a material fact; include a plausible allegation of inducement; and sufficiently allege how she suffered a detriment as a result of the intentional misrepresentation. [ECF No. 46].

Defendant argues that Plaintiff failed to meet the elements necessary to plead negligent misrepresentation. The Eleventh Circuit has explained that:

> Under Florida law, a negligent misrepresentation claim does not require the defendant's knowledge that the misrepresentation was false. A plaintiff can prevail on a lesser showing—that the defendant made the

> misrepresentation "without knowledge of its truth or falsity" or that the defendant "should have known the representation was false." *Osorio v. State Farm Bank, F.S.B.*, 746 F.3d 1242, 1259 (11th Cir. 2014) (setting out the elements of a negligent representation claim under Florida law).[3]

In re Harris, 3 F.4th 1339, 1350 (11th Cir. 2021).[4]

Carnival contends that Plaintiff failed to meet any of the elements because her "allegations are conclusory and insufficiently supported." [ECF No. 46, p. 4]. Plaintiff disagrees and contends that the SAC meets the necessary elements because:

> 1) D.S. has alleged what statement was made, namely that she could be seen on the CCTV and that nothing harmful happened to her[;] 2) D.S. also alleged the time, place, and person who made the statement, namely a ship security officer at the ship's security office on January 6, 2024, at 2:50 a.m.[;] 3) D.S. also alleged how the statement misled her, namely that it misled her to believe that nothing bad happened to her, causing her to decline being tested with a rape kit. Finally, D.S. alleged what CARNIVAL gained from this misrepresentation, namely that this prevented her from being able to sue CARNIVAL for sexual assault.

[ECF No. 63, p. 3]. Plaintiff additionally states that she amended the FAC's intentional misrepresentation count to a *negligent* misrepresentation count, and that, as a result, she is not obligated to allege the knowledge element. *Id*.

Defendant contends that even with a negligent misrepresentation theory, Plaintiff is still obligated to allege that the "crew member knew that their alleged

---

[3] For a fraudulent misrepresentation (*i.e.*, intentional) claim, however, a plaintiff must show "the representor's knowledge that the representation is false." *Id*. at 1349.

[4] General admiralty law does not provide for a misrepresentation cause of action, therefore the Court must look to state law. *Smith v. Carnival Corp.*, 584 F. Supp. 2d 1343, 1351 (S.D. Fla. 2008).

misrepresentation was false, made the misrepresentation without knowledge of its truth or falsity, or that they should have known the misrepresentation was false." [ECF No. 69, pp. 2–3].

The Undersigned agrees.

As noted, *In re Harris* establishes that, under Florida law, a lesser showing of knowledge applies for a negligent misrepresentation claim, as opposed to an intentional misrepresentation claim. 3 F.4th at 1350.

The SAC alleges that the crew member's "representation was false, as D.S. had fallen down the stairs as previously described, and this crew[ ]member knew or should have known that this representation was false **since D.S. had bruises on her body that were clearly visible to this crew[ ]member, and which were clearly from a fall.**" [ECF No. 45, ¶ 48 (emphasis added)]. This language mirrors the language Plaintiff used in her FAC, which I found to be insufficient:

> Here, the FAC does not meet any of [the necessary standards for knowledge] because Plaintiff's allegations are merely conclusory and insufficiently supported. For example, she wants the Court to assume that because she was bruised, which she describes as "clearly visible", that this crew member must have seen them and therefore intentionally made misrepresentations to Plaintiff. However, she fails to create a bridge between her assumption and her conclusion. This "inferential leap" is "too great" for this Court to follow. *Holland*, 50 F.4th at 1096 (holding that "the inferential leap from Holland's premise -- that the staircase is highly visible and well-trodden -- to his conclusion -- that the hazard existed for a sufficient length of time – [was] too great.").

[ECF No. 35, p. 22].[5]

As previously stated, Plaintiff's repeated allegation that her bruises were "clearly visible" and "from a fall" creates an inferential leap that is "too great" for this Court to follow because the SAC fails to include any allegations supporting **why** her bruises were clearly visible and from a fall.

In response to Defendant's argument, Plaintiff argues that she adequately pled that the misrepresenting crew member had or should have had knowledge of the misrepresentation because "Carnival knows that D.S.'s bruising was visible, since its own shipboard medical records state that there was bruising." [ECF No. 63, p. 3]. Plaintiff then tries to support this argument by improperly including screenshots of Defendant's medical records. [ECF No. 63, p. 4]. The Undersigned is barred from considering that evidence because "[w]hen considering a motion to dismiss, all facts set forth in the plaintiff's complaint 'are to be accepted as true and **the court limits its consideration to the pleadings and exhibits attached thereto.**'" *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000) (quoting *GSW, Inc. v. Long Cnty.*, 999 F.2d 1508, 1510 (11th Cir.

[5] The Undersigned notes that this section of that R&R included a footnote which provided Plaintiff with guidance as to what kind of allegations she should consider, including in order to support the knowledge element. [ECF No. 35, p. 22 n.3 ("Were the bruises on her arms and was she wearing a sleeveless outfit? Were they on her thighs or calves (and was she wearing shorts or a short skirt?); Did she need to ask for ice or first aid to help with the bruises? Did she talk to the crew[ ]member about her bruises? None of these details are in the FAC.")]. Plaintiff did not include any allegations related to these considerations in her SAC.

1993)). Plaintiff did not include the medical records evidence she now relies upon in her SAC. Therefore, it will not be considered.[6]

Defendant then contends that Plaintiff failed to plausibly allege inducement or that she suffered a justifiable detriment as a result of the alleged misrepresentation. It states that Plaintiff's reliance on the alleged misrepresentations was unjustified (therefore barring her from suffering a detriment) and that her allegations are implausible. [ECF No. 46, pp. 7–8].

Plaintiff argues that she properly alleged how the misrepresentation, which induced her to decline having a rape kit administered, left her with the detriment of being "unable to know whether she had in fact been a victim of sexual assault" [ECF No. 63, p. 4 (quoting ECF No. 45, ¶ 51)]. However, Plaintiff did not address Defendant's argument that she did not suffer a detriment because her reliance was *unjustified*, and, as a result, has waived any argument as to that point. Failure to respond to an argument may result in waiver. *See Five for Ent. S.A. v. Rodriguez*, No. 11-24142-CIV, 2013 WL 4433420, at *14 (S.D. Fla. Aug. 15, 2013) ("A failure to address issues in response to a motion is grounds for finding that the claims have been abandoned."); *Altare v. Vertical Reality MFG, Inc.*,

[6] However, even if the Undersigned considered the evidence, the result would be the same because, as Defendant highlights, "the medical personnel's knowledge is wholly different and independent of the misrepresenting-crew member's knowledge." [ECF No. 69, p. 4].

No. 19-CV-21496, 2020 WL 209272, at *2 (S.D. Fla. Jan. 14, 2020) ("Plaintiff did not respond to this argument and, consequently, the Court deems any response waived.").

Determining whether a misrepresentation induced a party to act turns on whether a sufficient causal relationship is established between the misstatement and the representee's subsequent act. *See Ostreyko v. B.C. Morton Org., Inc.*, 310 So. 2d 316, 318 (Fla. 3d DCA 1975) ("From our examination of the record, we believe the court could have determined properly that Mrs. Hamel's mistaken belief was not prompted by a misrepresentation by the defendant, **nor could she reasonably rely upon such an alleged representation**." (emphasis added)). Here, Plaintiff alleges that she declined having a rape kit administered because of the crew member's representations that the CCTV did not reveal that anything bad happened to her.

The Undersigned does not find that Plaintiff's reliance, as alleged in the SAC, was reasonable or justifiable. If she **knew** she had fallen down the stairs (as she alleges), and that this fall left her with "clearly visible" bruises, then how could she believe a crew member telling her that the CCTV did not demonstrate that **anything harmful** happened to her? Given that she fell and was bruised, the CCTV should likely have captured the fall (unless the CCTV cameras were not pointed in the direction of her fall, the cameras malfunctioned, the recording aspect did not work or the "bad" event was somehow deleted).

Moreover, Plaintiff did not need to ascertain what the CCTV showed because, at a minimum, she *herself* knew that she had fallen and that she was visibly bruised. Additionally, the SAC includes a flaw that was previously highlighted in my earlier R&R: she alleges that the misrepresentation was "the cause-in-fact of D.S.'s great bodily harm in that, but for CARNIVAL crew[ ]member's breach, **D.S.'s incident** and damages would not have occurred." [ECF No. 45, ¶ 55 (emphasis added)].

Unlike the FAC, the SAC explicitly defines "incident" to mean **Plaintiff's fall down the stairs.** *Id*. at ¶ 15. My R&R informed Plaintiff that the FAC's allegations related to reliance and that the injuries were too vague and conclusory because "[h]ow could the alleged misrepresentation have *caused* her fall, when she fell *before* she spoke with the crew member? How could the crew member's misrepresentation actually cause her **physical** injuries? How was she injured when the crew member offered to administer a rape kit?" [ECF No. 35, p. 23].

Justifiable reliance is a necessary element in a negligent misrepresentation claim. *Gilchrist Timber Co. v. ITT Rayonier, Inc.*, 696 So. 2d 334, 337 (Fla. 1997)); *Butler v. Yusem*, 44 So. 3d 102, 105 (Fla. 2010). Justifiable reliance holds a plaintiff "responsible for 'investigating information that a reasonable person in the position of the recipient [of the alleged erroneous information] would be expected to investigate,'" and, the plaintiff "cannot 'hide behind the unintentional negligence of the misrepresenter when the

recipient is likewise negligent in failing to discover the error.'" *Butler*, 44 So. 3d at 105 (quoting *Gilchrist Timber Co.*, 696 So. 2d at 337).

Therefore, not only was Plaintiff's reliance on the alleged misrepresentation unreasonable, but, as pled, it is not plausible that this alleged misrepresentation **caused** her physical injuries. Any detriment she suffered based on her unreasonable reliance on the crew member's alleged misrepresentation should not be held against Defendant when evaluating Plaintiff's fall down the stairs (*i.e.*, the incident, as defined in the SAC).

At bottom, the Undersigned agrees with Defendant that Plaintiff failed to meet all of the necessary elements for establishing a negligent misrepresentation claim. *See In re Harris*, 3 F.4th at 1349. Based on Plaintiff's failure to remedy the errors explicitly mentioned in the R&R and sufficiently allege a negligent misrepresentation claim, the Court should **grant** Defendant's motion to dismiss Count II.

IV. Conclusion

For the above-mentioned reasons, the Undersigned **respectfully recommends** that the District Court **grant** Defendant's Motion to Dismiss Count II **without prejudice**.

The last sentence of the previous R&R's conclusion states, "[i]f Plaintiff files a second amended complaint, **then any conclusions that form the basis for her claims must be supported by specific, applicable, non-conclusory factual allegations**." *Id.* at 31 (citing Fed. R. Civ. P. 11(b)) (emphasis added). As illustrated above, the SAC did not include the necessary support. Plaintiff's failure to sufficiently amend the SAC, coupled

with her failure to file any objections to my previous R&R (therefore waiving any objections to my findings), places her on thin legal ice.

Although the Undersigned is adopting a flexible approach and **respectfully recommending** that Plaintiff be permitted one final chance to frame a negligent misrepresentation claim in a TAC, I'm also recommending that she should be prevented from filing a fourth amended complaint if her TAC misses the mark again.

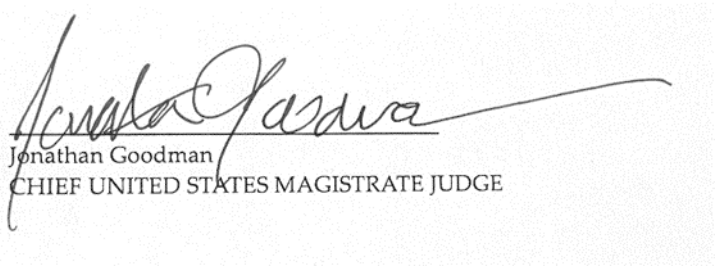
Plaintiff and her counsel should assess the wisdom of filing another version of the negligent misrepresentation claim, however, and that evaluation should be consistent with their obligations under Federal Rule of Civil Procedure 11. If Plaintiff and her counsel decide to pursue this one last opportunity, then they should also correct inconsistencies, such as the simultaneous description of the claim as being both negligent and intentional.

V. Objections

The parties will have 14 days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with Judge Williams. Each party may file a response to the other party's objection within 14 days of the objection. Failure to timely file objections shall bar the parties from a *de novo* determination by Judge Williams of an issue covered in the 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 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 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, May 27, 2025.



Copies furnished to:
The Honorable Kathleen M. Williams
All Counsel of Record