UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-24578-Civ-WILLIAMS

LAURENCE ADAMS,

Plaintiff,

v.

CARNIVAL CORPORATION, CARNIVAL PLC,
and RF ADVENTURE ST. MAARTEN NV,

Defendants.
_____/

REPORT AND RECOMMENDATION ON DEFENDANTS'
MOTIONS TO DISMISS

This matter is before the Court on Carnival Corporation and Carnival PLC's (collectively, "Carnival") motion to dismiss [D.E. 28] and RF Adventure St. Maarten NV's ("RF Adventure," and together with Carnival, "Defendants") motion to dismiss [D.E. 35] Laurence Adam's ("Plaintiff") amended complaint. Plaintiff responded to Carnival's motion on January 13, 2020 [D.E. 31] and RF Adventure's motion on February 26, 2020 [37] to which Carnival replied on January 27, 2020 [D.E. 34] and RF Adventure replied on March 4, 2020. [D.E. 39]. The Honorable Judge Kathleen M. Williams referred both motions to the undersigned on February 18, 2020. [D.E. 36]. The matter is now fully briefed and ripe for disposition. After careful consideration of the motions, responses, replies, relevant authority, and for the reasons discussed below, Carnival's motion to dismiss should be **GRANTED in part**

and DENIED in part and RF Adventure's motion to dismiss should be **GRANTED in part and DENIED in part**. To the extent the pleading deficiencies identified herein are subject to cure, Plaintiff should be given leave to file a second amended complaint.

I. FACTUAL BACKGROUND

This action arises from injuries Plaintiff allegedly sustained while zip-lining in St. Maarten on November 14, 2018. At the time, Plaintiff was on cruise operated by Carnival. The zip-lining accident occurred while Plaintiff was participating in a shore excursion at the Rockland Estate eco-park, which was sold through Carnival. While zip-lining, Plaintiff alleges he was injured when the brakes failed, which caused Plaintiff's head to hit the zip-lining equipment. Plaintiff submits that before he zip-lined, RF Adventure staff failed to provide him with a helmet and adequate safety directions, and the zip-line had malfunctioning brakes and was not properly maintained or inspected.

Plaintiff alleges that he relied on Carnival's representations that it co-owned or co-operated the Rockland Estate eco-park and the excursion before purchasing the shore excursion. He also relied on the representation that the excursion would be "easy," compared to other zip-lining excursions located in the eco-park marketed as "extreme" or "difficult." Such alleged misrepresentations were included in promotional materials made available by Carnival through its website. The amended complaint specifically states that Carnival "co-owned, co-maintained and/or jointly controlled the Rockland Estate eco-park, including but not limited to, the [zip-lining

excursion], and Carnival "sponsored, recommended, marketed, sold, co-operated and/or managed" the excursion in a way that mislead passengers into believing that the excursion was actually operated by Carnival.

In fact Carnival and RF Adventure entered into a contract to provide the zip-lining excursion to Carnival's passengers, including Plaintiff. Such contract has a provision that RF Adventure and Carnival are not joint ventures and that the contract is not intended to benefit any third-parties.

Plaintiff filed this lawsuit, alleging the following nine causes of action arising from his injuries: (1) misleading advertising in violation of Florida Statute Section 817.41 against Carnival and RF Adventure; (2) negligent misrepresentation against Carnival; (3) negligent selection and/or retention against Carnival; (4) negligent failure to warn against Carnival; (5) negligence against Carnival; (6) negligence against RF Adventure; (7) negligence against Defendants[1] based on apparent agency or agency by estoppel; (8) negligence against Defendants based on a joint venture between Carnival and RF Adventure; and (9) third-party beneficiary. Defendants move to dismiss all causes of action except Count VI, negligence against RF Adventure.

II. LEGAL STANDARD

In ruling on a defendant's motion to dismiss, a court takes the allegations in the complaint as true and construes the allegations "in the light most favorable to the

[1] In Plaintiff's reply to RF Adventure's response, he acknowledges that Count VII of action should only be against Carnival.

plaintiff[ ]." *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309 (11th Cir. 2008) (citing *Hoffman–Pugh v. Ramsey*, 312 F.3d 1222, 1225 (11th Cir. 2002)). "When considering a motion to dismiss, all facts set forth in [a 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. 1993)). A motion to dismiss under Rule 12(b)(6) "is granted only when the movant demonstrates that the complaint has failed to include 'enough facts to state a claim to relief that is plausible on its face.'" *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

"While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the grounds of his entitle[ment] to relief requires more than labels and conclusions . . . ." *Twombly*, 550 U.S. at 555 (internal citations and quotations omitted) (alteration in original). "To survive a motion to dismiss, a complaint must contain sufficient factual matter." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). A complaint does not suffice "if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *Id.* (quoting *Twombly*, 550 U.S. at 557 (alteration in original). Factual content gives a claim facial plausibility. *Id.* "[A] court's duty to liberally construe a plaintiff's complaint in the face of a motion to dismiss is not the equivalent of a duty to re-write it for [a plaintiff]." *Peterson v. Atlanta Hous. Auth.*, 998 F.2d 904, 912 (11th Cir. 1993).

Additionally, where a cause of action sounds in fraud, Federal Rule of Civil Procedure 9(b) must be satisfied to the more relaxed standard of Rule 8. *See U.S. ex. rel. Clausen v. Lab. Corp. of Am., Inc.*, 290 F.3d 1301, 1309-10 (11th Cir. 2002); *Gayou v. Celebrity Cruises, Inc.*, 2012 WL 2049431, at *3 (S.D. Fla. June 5, 2012). Rule 9(b) provides that "[i]n allegations of fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake" but that "[m]alice, intent, knowledge, and other conditions of a person's mind shall be averred generally." Fed. R. Civ. P. 9(b). Rule 9(b) is satisfied if a plaintiff pleads:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001) (quoting *Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1371 (11th Cir. 1997)).

Further, passenger suits against a cruise line alleging torts are subject to federal maritime law. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). And Maritime law applies to accidents that allegedly arise at an onshore excursion during a cruise. *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1392 (S.D. Fla. 2014).

III. ANALYSIS

Carnival argues Plaintiff's (1) misleading advertising claims fail the heightened pleading standard of Rule 9(b) and fail to state the elements of a claim under Federal Rule of Civil Procedure 8; (2) negligence claims fail to allege enough

facts to show that Carnival was on notice of the dangerous condition, (3) apparent agency claim must be dismissed as a matter of law because of a disclaimer on its website that RF Adventure was an independent contractor, (4) joint venture claim fails as a matter of law because of a provision in a contract between RF Adventure and Carnival that states they are not joint venturers, and (5) third party beneficiary claim fails because of a provision in the aforementioned contract that the parties had no intent to benefit third-parties. We address each argument in turn.

A. Counts I, II – Misleading Advertising and Negligent Misrepresentation

Both claims are grounded on identical allegations. Plaintiff claims that Carnival made and disseminated false and misleading advertisements regarding the zip-lining excursion, and RF Adventure contributed to these advertisements. Plaintiff alleges that Carnival made five separate misleading statements in the advertisements: (1) the zip-lining excursion is co-owned and/or co-operated by Carnival, (2) the excursion is safe, (3) the excursion is easy, (4) RF Adventure's insurance would cover Plaintiff's injuries, and (5) RF Adventure is subject to personal jurisdiction in Florida. In response, Defendants argue that Plaintiff has failed to plead factual material to satisfy the pleading requirements of Rule 9(b) and failed to allege all the elements of the two fraud claims under Rule 8. RF Adventure further argues that the claim against it fails because it did not disseminate the misleading statements, and in the alternative, Plaintiff fails to plead particular facts under Rule 9(b) that it contributed to the alleged misleading advertisements.

Florida Statute Section 817.41 forbids misleading advertisements: "a particularized form of fraud." *Rollins, Inc. v. Butland,* 951 So.2d 860, 877 (Fla. 2d DCA 2006). "[T]o maintain a civil action for violation of the statute [a plaintiff must] prove each of the elements of common law fraud in the inducement, including reliance and detriment, in order to recover damages." *Joseph v. Liberty Nat'l Bank,* 873 So.2d 384, 388 (Fla. 5th DCA 2004).

Claims arising under Florida Statute Section 817.41 and Florida common law negligence misrepresentation must allege:

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

Ceithaml v. Celebrity Cruises, Inc., 207 F. Supp. 3d 1345, 1352-53 (S.D. Fla. 2016) (citing *Holguin v. Celebrity Cruises, Inc.*, 2010 WL 1837808, at *1 (S.D. Fla. May 4, 2010)).

Both claims here, as allegations grounded in fraud, are subject to the heightened pleading standard of Rule 9(b). *See Gayou*, 2012 WL 2049431, at *6 (applying Rule 9(b) to misleading advertising and negligent misrepresentation causes of action) (citing *Weitz v. Celebrity Cruises, Inc.,* 2010 WL 1882127, at *1 (S.D. Fla. May 11, 2010). This requires Plaintiff to establish the 'who, what, when, where, and how' of the fraud." *Ceithaml*, 207 F. Supp. 3d at 1353 (citing *Garfield v. NDC Health Corp.*, 466 F. 3d 1255, 1262 (11th Cir. 2006)). Defendants move to dismiss these fraud claims because Plaintiff only provides unspecific, vague allegations such as

referencing Carnival's promotional material, brochures and/or website and does not identify the time and place these statements were made. The Court disagrees.

Plaintiff satisfies Rule 9(b) by providing (1) excerpts of the exact alleged misleading statements in his amended complaint, (2) the sources of the allegedly misleading statements (Carnival's website), and (3) where and when Plaintiff read these statements (between June and October 2018, while Plaintiff was planning his trip). By doing so, Plaintiff has preliminarily satisfied the essential elements of the false advertising claim.

But Defendants primarily rely on two cases in arguing that Plaintiff has failed to satisfy the heightened requirements of Rule 9(b): *Doria v. Royal Caribbean Cruises, Ltd.*, 19-cv-20179-KMW (D.E. 13) (S.D. Fla. June 20, 2019) and *Serra-Cruz v. Carnival*, 18-cv-23033-UU (D.E. 30) (S.D. Fla. Feb 12, 2017). Significantly, the plaintiffs in each of *Doria* and *Serra-Cruz* later amended their fraud causes of action with more specificity, and each of those fraud claims then survived a subsequent motion to dismiss. *See Doria v. Royal Caribbean Cruises, Ltd.*, 393 F. Supp. 3d 1141 (S.D. Fla. Aug. 26, 2019) (denying motion to dismiss the amended complaint) *Serra-Cruz v. Carnival Corp.*, 18-cv-23033-UU (D.E. 59) (S.D. Fla. Sep. 19, 2019) (denying motion to dismiss the second amended complaint because the plaintiff provided screen shots of the exact misleading statements). These cases are thus not as helpful to Defendants' position as they make them out to be. The relevant facts in those amended complaints are substantially similar to this amended complaint, yet Defendants failed to provide any argument distinguishing those subsequent motions

to dismiss. Moreover, because Plaintiff provides screenshots of the alleged misstatements from Carnival's website, Carnival knows of "the precise misconduct with which they are charged." *See Durham v. Bus. Mgmt. Assoc.,* 847 F.2d 1505, 1511 (11th Cir.1988) (explaining the purpose behind Rule 9(b)) (internal quotation marks and citation omitted).

Consequently, Plaintiff's amended complaint provides Defendants with the respective sources of the alleged misrepresentations and facts supporting Plaintiff's frauds claims. Having determined that Plaintiff has met the heightened pleading standard of Rule 9(b), we next discuss the elements of the five alleged misrepresentations.

The first alleged misleading statement that Carnival made is that Carnival co-owned and/or co-operated the zip-lining excursion, when in reality, it is allegedly RF Adventure's excursion. For example, the statements on Carnival's website use language such as "our excursions" and "Carnival's excursions." And that Carnival "take[s] care of all the details and wait[s] for all Carnival excursions to return before departing," that Carnival "hand selected the best local providers at every port of call," and recommended that passengers not engage in non-Carnival excursions or tours, particularly as Carnival's excursion providers are "required to carry insurance." Carnival's website also contained passenger reviews for each excursion, but Carnival controlled the content of these reviews by deleting or altering reviews that contain complaints or mention safety concerns. Further, Carnival posted a press release on its website, a few months before Plaintiff's alleged accident, regarding the Rockland

Estate eco-park's grand opening, noting its zip-line excursions, that it was financed by Carnival, and that Carnival executives were in attendance.

Notwithstanding all these non-speculative details, Defendants contend that Plaintiff could not have reasonably relied on any of the statements that suggest Carnival co-owned and/or co-operated the excursion when Carnival's website states the following: "[t]he shore excursions sold by Carnival are owned and operated by independent contractors over whom Carnival exercises no control." As a result, Defendants argue, both the misleading advertising and negligent misrepresentation claims must fail as a matter of law.

This disclaimer alone is not enough to dismiss the claims as a matter of law, however, because an entity is not an "independent contractor" just because that is what someone calls it. *See Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1237-38 (11th Cir. 2014) (declining to determine, at the motion to dismiss stage, if an onboard doctor was an independent contractor of a cruise line operator when the plaintiff's passenger ticket stated that medical personnel were independent contractors) (citing *Cantor v. Cochran*, 184 So.2d 173, 174 (Fla. 1996) ("[independent contractor] status depends not on the statements of the parties but upon all the circumstances of their dealings with each other.").

Defendants contend that *Franza* is an "irrelevant red herring" but provides no explanation of why that is the case. *Franza* is clearly on point in rebutting Defendants' argument that an independent contractor disclaimer alone blows up Plaintiff's misrepresentation claims at the motion to dismiss stage. Therefore, the

Court must still look at all the circumstances when determining if RF Adventure is an independent contractor. *Id.*

Plaintiff has pled numerous facts, listed above, that Carnival allegedly co-owned and/or co-operated RF Adventure. Because we can infer that these facts favor the Plaintiff, his fraud claims regarding Carnival's alleged co-ownership and/or co-operation of RF Adventure should survive the pleading stage. *See State Farm Mut. Auto. Ins. Co. v. Performance Orthopedics & Neurosurgery, LLC*, 315 F. Supp. 3d 1291, 1303 (S.D. Fla. 2018) ("As to the alleged . . . misrepresentations, this is a highly factual inquiry that is generally left for the finder of fact."). We next discuss Carnival's alleged misrepresentations that the zip-lining excursion was "safe" and "easy".

Carnival first contends that a misrepresentation that an excursion is "safe" cannot form the foundation of a negligent misrepresentation claim, and that Plaintiff did not plead facts that the excursion was not "easy." First, there is persuasive case law that holds that an alleged misrepresentation about an excursion being "safe" can give rise to a cognizable negligent misrepresentation claim. *See Serra-Cruz*, 18-cv-23033-UU (D.E. 59, at 2) (denying motion to dismiss negligent misrepresentation and misleading advertisement claims for "safety" when "Carnival's website did not mention any required level of experience to participate and described it as [m]oderate with an easy-to handle all-terrain vehicle (ATV) . . . [and] Carnival classified other similar ATV excursions as extreme or difficult) (internal quotations omitted); *Gayou*, 2012 WL 2049431, at *8 (denying motion to dismiss negligent misrepresentation

claim regarding "safety" when cruise operator "touted and promoted the zip-lining excursion's safety").

Second, the Court can infer that the zip-lining excursion was not "easy" as a brief orientation did not prepare Plaintiff for maneuvering an alleged brake failure. And two other zip-lining excursions were considered "extreme" and "difficult" but were located in the same location as the excursion at issue here. *See Roe v. Aware Woman Ctr. for Choice, Inc.,* 253 F.3d 678, 683 (11th Cir. 2001) ("Rule 8(a) requires only a short and plain statement of the claim showing that the pleader is entitled to relief. It does not require that a plaintiff specifically plead every element of a cause of action.) (internal quotations omitted). Accordingly, under the pleading standard of Rule 8, Plaintiff's Counts I and II against Carnival related to the excursion being "safe" and "easy" should not be dismissed.

Next, Plaintiff alleges Carnival misrepresented that shore excursion providers are insured and would be subject to personal jurisdiction in the United States and/or Florida. Defendants argue that Plaintiff has not alleged anywhere in his amended complaint that the subject shore excursion provider is not insured or not subject to personal jurisdiction. Defendant is technically correct, but this is misleading. Plaintiff is not explicitly pleading that RF Adventure's does not have insurance, but instead that his injuries are not covered by RF Adventure's insurance: "when such insurance may not cover claims outside of the providers' area of operation and/or may contain other limitations, such as the amount and types of claims covered." As we must grant all reasonable inferences in Plaintiff's favor, we can infer at this early

stage that Plaintiff assumed that Carnival's alleged representation that RF Adventure had insurance meant that such insurance would cover potential injuries Plaintiff suffered during the excursion. Why else would a Carnival passenger care if an excursion operator had insurance?

For personal jurisdiction, Plaintiff alleges that Carnival claimed that RF Adventure would be subject to personal jurisdiction, but RF Adventure is challenging that jurisdiction in this Court. An alleged judicial challenge to personal jurisdiction by RF Adventure is obviously contrary to Carnival representing that RF Adventure is subject to personal jurisdiction in this Court. Therefore, the Court should not dismiss Plaintiff's negligent misrepresentation and misleading advertisement claims against Carnival related to insurance and personal jurisdiction without further factual development. It may turn out, of course, that Plaintiff actually never considered the import of these representations or actually relied on them in making the decision to purchase the excursion. If not, a misrepresentation claim may fail. But it is too soon to make that judgment.

Lastly, we consider the misleading advertisement claim against RF Adventure. As an initial matter, the Court does not decide if a party can be liable for only contributing to misleading advertisements under Florida Statute Section 817.41, which RF Adventure argues is not the case. This is a moot point as Plaintiff has *not* alleged particular facts of how RF Adventure contributed to the misleading advertisements, which is required under Rule 9(b). Plaintiff only proffers conclusory statements that RF Adventure's "input and/or suggestions and/or recommendations

contributed to Carnival's alleged misleading statements." These generic and conclusory allegations are in stark contrast to the detailed allegations that are included with respect to Carnival. The contrast is telling. Thus, the Court should dismiss Count I as against RF Adventure as it lacks factual allegations under rule 9(b).

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

Carnival next argues that Plaintiff's three negligence claims should be dismissed because Plaintiff did not allege facts that a dangerous condition existed, and if it did, Carnival was not on notice of the dangerous condition. In the negligence counts, Plaintiff alleges that Carnival breached its duty because it knew or should have known of the dangerous condition relating to the zip-lining excursion.

In establishing a dangerous condition existed, Plaintiff alleges the following facts:

> "[t]he subject excursion was not competently operated by properly trained and/or supervised persons and/or it was unreasonably hazardous for reasons that include, but were not limited to: (1) the lack of helmets; (2) the inadequate instructions, safety guidelines and/or explanations; (3) the inadequate maintenance, inspection and/or testing of the zip line brakes; and/or (4) the malfunctioning zip line brakes."

[D.E. 24].

To show Carnival had notice of the dangerous condition, Plaintiff alleges the zip-lining excursion took place at the Rockland Estate eco-park in St. Maarten; and Carnival and RF Adventure co-owned, co-operated, co-maintained and/or jointly controlled the Rockland Estate eco-park, including but not limited to, the subject

excursion. Such joint ownership/control is evidenced by the alleged misleading statements on Carnival's website discussed *supra* and an article published on Carnival's letterhead, explaining that the Rockland Estate eco-park was "finance[ed] by Carnival, "built" by RF Adventure, and that Carnival attended the grand opening of the eco-park a few months before Plaintiff's alleged accident. *Id.* Plaintiff then alleges that Carnival should have known of the dangerous condition because of Carnival's initial approval process of the zip-lining excursion and/or its annual inspection:

> "once an excursion is approved and accepted by Carnival, Carnival sends excursion operators standards, policies, and/or procedures that the operators must adhere to while Carnival is offering their excursions to its passengers. Additionally, the excursion operators are subject to yearly inspections and/or approval by Carnival, wherein Carnival is supposed to conduct site inspections of the excursion as well as the location, equipment, and operations of the excursion. The yearly inspections and/or approval process also requires excursion operators to submit yearly "bids" and/or reports to Carnival, wherein the operators disclose the details of incidents that occurred during the excursion involving cruise line passengers (among other information)."

Id.

To state a claim of negligence under federal maritime law, a plaintiff must allege four elements: "(1) a legal duty on the defendant to protect the plaintiff from particular injuries; (2) the defendant's breach of that duty; (3) the plaintiff's injury being actually and proximately caused by the breach; and (4) the plaintiff suffering actual harm from the injury." *Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352, 1357 (S.D. Fla. 2016) (internal quotation marks and citation omitted).

A cruise line operator owes its passengers a duty of reasonable care under the circumstances. *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1332 (11th Cir. 1989). A cruise line's duty of reasonable care includes a "duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1046 (11th Cir. 2019) (internal quotation marks and citation omitted). To demonstrate a breach of this duty, a plaintiff must prove that: (1) a dangerous condition existed that caused the claimed injury; and (2) a defendant had actual or constructive notice of the dangerous condition. *Adams v. Carnival Corp.*, 2009 WL 4907547, at *3 (S.D. Fla. Sept. 29, 2009) (citing *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65-66 (11th Cir. 1988)); *see also Keefe*, 867 F.2d at 1322. The duty to warn only extends to dangers "which the carrier knows, or reasonably should have known" to exist. *See id.* (quoting *Wolf v. Celebrity Cruises Inc.*, 683 F. App'x 786, 794 (11th Cir. 2017)).

Carnival's primary argument is that it was not on notice of the dangerous condition because there were no prior incidents involving the exact zip-lining excursion at issue here. We cannot say that for sure, of course, because no discovery has been undertaken on this score. Carnival's denial is not enough. But even if it were, Plaintiff can establish Carnival had notice of the dangerous condition in other ways. The Court notes that the zip-lining excursion appears to have opened in April 2018 and Plaintiff's accident occurred in November 2018, so there was not ample time for other accidents to occur prior to Plaintiff's alleged accident anyway.

Carnival next argues that the fact that Carnival helped finance the Rockland Estate eco-park does not establish that Carnival owns the eco-park or has anything to do with its operation. This fact alone does not establish co-ownership, but many companies do take ownership stakes in start-up companies they finance or at least obtain strong inspection rights to protect their investments, and this fact combined with the other facts alleged by Plaintiff shows it is plausible that Carnival may co-own and/or co-operate the zip-lining excursion.

Plaintiff argues that alleging co-ownership/co-control of the zip-lining excursion is enough to establish that Carnival had notice of the dangerous condition. We do not go that far. Plaintiff relies on one case in making this argument, *Twyman v. Carnival Corp.*, 410 F. Supp. 3d 1311, 1321 (S.D. Fla. 2019). In *Twyman*, there was a "Cruise Center" that the cruise line operator admitted to owning and controlling, and an independent jet-ski excursion company operated from the Cruise Center. *Id.* at 1315. However, the *Twyman* plaintiff alleged additional facts that established that the cruise line operator had notice of the dangerous condition at the jet-ski excursion, i.e., the cruise ship operator had crewmembers stationed at the jet-ski excursion, conducted inspections of the Cruise Center, and directed its passengers to use the jet-ski excursion and promoted no other jet-ski excursion. *Id.* at 1321.

Even though alleging co-ownership/co-control of a shore excursion is not enough in our view to establish notice of a dangerous condition, Plaintiff's allegation of co-ownership/co-control coupled with Carnival's internal procedures to do initial and annual inspections of its shore excursions and Carnival selling the zip-lining

excursion through its website is sufficient at the pleading stage. These facts give rise to the reasonable inference that given Carnival's monitoring of the safety of its excursion providers, it knew or should have known that RF Adventure did not provide passengers with helmets and adequate instructions and the zip-line brakes were faulty. Again, the facts in the whole record may cut in Defendants' favor at summary judgment. But we cannot reach that conclusion at this stage.

Other cases in this District have found similar allegations sufficient to survive a motion to dismiss. *See e.g., Kennedy v. Carnival Corp.*, 2019 WL 2254918, at *19 (S.D. Fla. March 6, 2019) ("[P]laintiffs sufficiently alleged that the defendant had actual notice of the dangerous condition through their familiarity with the excursions through their sales relationship, inspections and continued partnership.") (report and recommendation adopted, 2019 WL 2254962 (S.D. Fla. March 21, 2019)); *Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352, 1358 (S.D. Fla. 2016) (finding plaintiff adequately pleaded failure to warn claim because "[p]laintiff's allegation that Carnival should have become of aware of the risk-creating condition during inspections of the Excursion Entities is sufficient regarding Carnival's actual or constructive notice of the risk-creating condition"); *Steffan v. Carnival Corp.*, 2017 WL 7796726, at *3 (S.D. Fla. May 22, 2017) (allegation that Carnival represented that it conducted regular inspections and audits of its tour providers' operations sufficient to plead a claim of failure to warn); *Bonck v. Carnival Corp.*, 2019 WL 4866292, at *3 (S.D. Fla. June 25, 2019) (report and recommendation adopted, 2019 WL 4291346 (S.D. Fla. Sept. 11, 2019)).

The Court thus concludes that Plaintiff has alleged enough supporting facts to "nudge [her] claim[ ] across the line from conceivable to plausible." *Twombly*, 550 U.S. at 570. Accordingly, we recommend that the Court deny Carnival's motion to dismiss Counts III, IV, and V.

C. <u>Count VII - Apparent Agency</u>

Plaintiff next claims that Carnival is vicariously liable for the alleged negligence of RF Adventure as RF Adventure was the apparent agent of Carnival.

To plead a negligence claim premised upon apparent agency, a plaintiff must allege: (1) the principal made some sort of manifestation causing a third party to believe that the agent had authority to act for the benefit of the principal; (2) that such belief was reasonable; and (3) that the plaintiff reasonably acted on such benefits to his detriment. *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371 (S.D. Fla. 2005); *Smith-Russo v. NCL (Bahamas) Ltd.*, 2017 WL 5565613, at *12 (S.D. Fla. July 26, 2017).

Plaintiff's allegations contain enough facts to support Plaintiff's claim. For instance, Plaintiff alleges that Carnival manifested to its passengers that RF Adventure was its agent by marketing the excursion through Carnival's website, by calling it "our" excursion and recommending to Plaintiff to not engage in excursions not sold through Carnival, and promoted the fact that it financed RF Adventure and attended its ribbon cutting ceremony.

Carnival again makes the argument that the disclaimer on its website that all shore excursions are operated by independent contractors requires us to dismiss

Plaintiff's apparent agency claim as a matter of law. For the same reasons as discussed before, this argument is unavailing as this stage of litigation. *See Franza*, 772 at 1235-36 ("[T]he existence of an agency relationship is a question of fact under the general maritime law."). In support of Carnival's counter-argument, it only cites to cases that were later overruled by *Franza* or cases that were decided at summary judgment, after a complete factual record regarding apparent agency was developed. *See Kennedy*, 385 F. Supp. 3d at 1337 ("Defendant cites *Wajnstat v. Oceania Cruises, Inc.* . . . and *Hajtman v. NCL (Bahamas) Ltd.* . . . as support for the contention that Plaintiff's alleged belief in the existence of an agency relationship is unreasonable as a matter of law based on the ticket and website language. However, both cases were abrogated by *Franza* . . .). Plaintiff's apparent agency claim against Carnival should therefore survive a motion to dismiss.

Plaintiff also brings a claim of apparent agency against RF Adventure. Plaintiff, however, alleges no facts of how Carnival is an apparent agent of RF Adventure, and he admits in his response that he only meant to bring a claim against Carnival. Thus, the apparent agency claim against RF Adventure should be dismissed.

D. <u>Count VIII – Joint Venture</u>

Plaintiff's penultimate claim is that Carnival and RF Adventure engaged in a joint venture to operate the zip-lining excursion; therefore, making each company liable for each other's negligence and misleading advertisements.

A claim for joint venture liability requires a party to plead: (1) a "community of interest in the performance of a common purpose;" (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in any losses which may be sustained. *Brown v. Carnival Corp.*, 202 F. Supp. 3d 1312, 1318-19 (S.D. Fla. 2016) (quoting *Fojtasek v. NCL (Bahamas) Ltd.*, 613 F. Supp. 2d 1351, 1357 (S.D. Fla. 2009)).

Plaintiff argues that there was a joint venture agreement between Defendants that establishes their joint venture relationship. Defendants argue that an agreement between Carnival and RF Adventure does exist, but the agreement expressly states that RF Adventure and Carnival are not joint venturers; thus, Plaintiff cannot establish that the parties intended to create a joint venture.

The defendants in *Ash v. Royal Caribbean Cruises Ltd.*, 2014 WL 6682514, at *8 (S.D. Fla. Nov. 25, 2014) made a similar argument as Defendants here. There, the excursion agreement included a specific provision stating the arrangement should not be construed as a joint venture between the cruise line operator and the excursion operator. *Id.* The *Ash* Court wrote that the excursion operation agreement is not necessarily central to a plaintiff's negligence-liability-by-way-of-joint-venture theory. *Id.* A joint venture, like a partnership, can be created by express or implied contract,

and two parties could create a joint venture notwithstanding a prior written contract foreclosing such a possibility. *Id.* Thus, while the excursion agreement here specifically states that it does not constitute a joint venture, a subsequent course of conduct may have created such a joint venture agreement. *Id.*

We agree with *Ash*. A joint venture can be created by an implied contract, *Williams v. Obstfeld*, 314 F.3d 1270, 1275-76 (11th Cir. 2002), and creation of such a venture can be inferred from the parties' conduct. *Pinnacle Port Cmty. Ass'n v. Orenstein*, 872 F.2d 1536, 1539 (11th Cir. 1989). Although the alleged excursion operator agreement may provide that RF Adventure did not create a joint venture relationship between it and Carnival, Plaintiff alleges that the parties' subsequent conduct contradicts these terms to the point where it cannot be said that each are independent entities.

Those allegations include the fact that Carnival exercises day-to-day control of RF Adventure's operation, sells the excursion directly to its passengers, controls the marketing of the excursion, provides labor to the excursion, collects a fee from passengers for utilizing the zip-lining excursion that is split with RF Adventure, maintains an ownership interest in the excursion, and shares in the losses when it has to provide refunds to its passengers. *Cf. Brown*, 202 F. Supp. 3d at 1341 (granting motion to dismiss joint venture claim because "[t]here are no factual allegations to support Plaintiff's contention that Carnival and the Defendant Tour Operators had any interest in a common purpose, had joint control or right to control, had a right to share in the profits, or a duty to share in any losses."). These factors

were enough to allow the joint venture theory to proceed beyond the motion to dismiss stage in *Ash*, and we agree that it would be the more prudent course here. *See Ash*, 2014 WL 6682514, at *8; *Gentry v. Carnival Corp.*, 2011 WL 4737062, at *7 (S.D. Fla. Oct. 5, 2011) (denying cruise line's motion to dismiss joint venture claim under similar circumstances).

Carnival argues that the opinion of Judge Williams in *Doria* requires us to dismiss the joint venture claim. However, Judge Williams noted that the plaintiff in *Doria* only provided bare conclusory allegations that a joint venture existed. Here, Plaintiff has clearly provided more. We therefore recommend that Plaintiff's Count VIII should move forward.

E. Count IX – Third-Party Beneficiary

In Plaintiff's final claim, he alleges Carnival breached a third-party beneficiary contract that was intended to benefit Carnival's passengers, including him. To plead a breach of a third-party beneficiary contract, Plaintiff must allege (1) the existence of a contract to which a Plaintiff is not a party, (2) an intent, either expressed by the parties, or in the provisions of the contract, that the contract primarily and directly benefit Plaintiff', (3) breach of that contract by one of the parties; and (4) damages to Plaintiff: resulting from the breach. *Lapidus v. NCL Am. LLC*, 924 F. Supp. 2d 1352, 1360-61 (S.D. Fla. 2012). For a third party to have a legally enforceable right under the contract, the benefit to the third party must be the "direct and primary object of the contracting parties." *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 982 (11th Cir. 2005). The third parties do not need to be specifically named in the contract to qualify

as intended beneficiaries, as "long as the contract refers to a well-defined class of readily identifiable persons that it intends to benefit." *Belik v. Carlson Travel Group, Inc.*, 864 F. Supp. 2d 1302, 1312 (S.D. Fla. 2011) (internal citations omitted). However, the parties' intent to benefit the third party must be specific and must be clearly expressed in the contract in order to endow the third-party beneficiary with a legally enforceable right, and an incidental benefit to a third party is insufficient to sustain a claim. *Bochese*, 405 F.3d at 982.

In his amended complaint, Plaintiff alleges that the terms of an agreement to operate the zip-lining excursion between Carnival and RF Adventure demonstrate their intent to benefit Carnival's passengers, including Plaintiff. On the other hand, Carnival argues that this is disproven by the terms of such agreement. Carnival cites the agreement, which directly addresses the question of third-party beneficiaries: "[e]ach party represents and warrants to the other party that . . . its execution and performance under this Agreement will not result in a breach of any obligation to any third party or infringe or otherwise violate any third party's rights."

In *Zapata v. Carnival*, there was an identical third-party beneficiary clause. 2013 WL1296298, at *5. The court there dismissed the third-party beneficiary claim, finding that the contract "expressly disclaims any intent to benefit Plaintiff." *Id.*, *see also Gayou*, 2012 WL 2049431, at *11 (dismissing a claim for third-party beneficiary where the contract's terms expressly disclaimed any intent to benefit third parties); *Doria.*, 19-cv-20179-KMW (D.E. 13, at 15); *Moreno v. Carnival Corp.*, 2020 WL 128481, at *3 (S.D. Fla. Jan. 10, 2020).

We agree with the reasoning and analysis in *Zapala* and *Gayou* and find that the terms of the excursion operation agreement expressly disclaim any intent for the contract to benefit Plaintiff. Therefore, Plaintiff's third-party beneficiary claim should be dismissed.

IV. CONCLUSION

For the foregoing reasons, we **RECOMMEND** as follows:

1. Carnival's Motion to Dismiss Counts I and II against it should be **DENIED**;
2. RF Adventure's Motion to Dismiss Count I against it should be **GRANTED**;
3. Carnival's Motion to Dismiss Counts III, IV, and V should be **DENIED**;
4. Carnival's Motion to Dismiss Count VII against it should be **DENIED**;
5. RF Adventure's Motion to Dismiss Count VII against it should be **GRANTED**;
6. Defendants' Motions to Dismiss Count VIII should be **DENIED**; and
7. Defendants' Motion to Dismiss Count IX should be **GRANTED.**

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have fourteen days (14) days from the date the Stay entered in the case is vacated or expires, within which to file written objections, if any, with the Honorable Judge Kathleen M. Williams. The Court finds good cause based on the existing exigent circumstances involving the national health emergency to grant additional time for the filing of objections as per Rue 4(b). Failure to timely file objections shall bar the

parties from *de novo* determination by the District Judge of any factual or legal issue covered in the Report *and* shall bar the parties from challenging on appeal the District Judge's Order based on any unobjected-to factual or legal conclusions included in the Report. 28 U.S.C. § 636(b)(1); 11th Cir. Rule 3-1; *see, e.g., Patton v. Rowell,* 2017 WL 443634 (11th Cir. Feb. 2, 2017); *Cooley v. Comm'r of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 31st day of March, 2020.

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