UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:20-cv-20692-KMM

NICOLE WOODLEY, *et al.*,

Plaintiffs,

v.

ROYAL CARIBBEAN CRUISES, LTD., *et al.*,

Defendants.
_____/

ORDER ON MOTION TO DISMISS

THIS CAUSE came before the Court upon Defendant Royal Caribbean Cruises LTD.'s ("RCCL") Motion to Dismiss Plaintiffs' Complaint. ("Mot.") (ECF No. 11). Plaintiffs filed a response in opposition. ("Resp.") (ECF No. 21). RCCL filed a reply. ("Reply") (ECF No. 26). The Motion is now ripe for review.

I. BACKGROUND[1]

This is a wrongful death action arising under 28 U.S.C. § 1333 brought by Nicole Woodley ("Woodley"), Clarice Lee ("Lee"), minors K.W., M.W. and C.W., Jr. (the "Minors"), and Barrington L. Sibblis, as personal representative of the Estate of Barbara Sibblis (the "Decedent") (collectively, "Plaintiffs") against RCCL and Out Island Charters NV ("OIC") (collectively with RCCL, "Defendants"). *See generally* Compl. Woodley, Lee, the Minors and the Decedent (collectively, "Passenger Plaintiffs") were passengers on RCCL's cruise ship, the Adventure of the Seas (the "Vessel") during an eight (8) night Caribbean cruise between February 16, 2019 and

[1] The following background facts are taken from the Complaint for Maritime Wrongful Death and Personal Injury Damages with Demand for Jury Trial ("Compl.") (ECF No. 1) and are accepted as true for purposes of ruling on this Motion to Dismiss. *Fernandez v. Tricam Indus., Inc.*, No. 09-22089-CIV-MOORE/SIMONTON, 2009 WL 10668267, at *1 (S.D. Fla. Oct. 21, 2009).

February 24, 2019. *Id.* ¶¶ 1, 72. On February 20, 2019, while on the Vessel, Passenger Plaintiffs purchased from RCCL admission to the Golden Eagle Shore Excursion ("Excursion") operated by OIC. *Id.* ¶¶ 2–3. An RCCL employee recommended the Excursion to Passenger Plaintiffs "as easy and perfect for the young and older ages of their group." *Id.* ¶ 79. An RCCL document described the Excursion as follows:

> Catamaran Sail: Enjoy the tropical breeze as your vessel speeds across the sparkling sea as fast as 20 knots. Beach and Snorkeling: The boat anchors offshore a beautiful spot where you can swim, sun and snorkel. Lunch and Drinks: Your friendly crew will serve baguette sandwiches and ice-cold beverages on the return to port. (SM08) Notes: Guests may need to wade or swim in the water to access the beach. Nudity may be observed at the beach. Minimum Age: 4 years Maximum Weight: 250 lbs.

Id. ¶ 80. No other description or warning was provided. *Id.* ¶ 81. Passenger Plaintiffs purchased the Excursion based on the recommendation and description provided by the RCCL employee. *Id.* ¶ 86.

Passenger Plaintiffs disembarked the Vessel and boarded a catamaran as part of the Excursion. *Id.* ¶ 89. After sailing around the island, the catamaran anchored in deep water offshore from the beach. *Id.* ¶¶ 89–90. Passenger Plaintiffs were provided "foam noodles" to help them swim from the catamaran to the beach. *Id.* ¶ 90. Because of the wind and sea conditions, Passenger Plaintiffs "feared for their safety and struggled to get to the beach. *Id.* ¶ 99. Woodley, Lee, and the Minors successfully reached the beach. *Id.* ¶ 100. The Decedent was found floating face down, non-responsive, in the ocean. *Id.* ¶ 101. After unsuccessful attempts to revive the Decedent, she was pronounced dead on the beach. *Id.* ¶¶ 102–03. Woodley, Lee, and the Minors "suffered shock, fear, horror and emotional distress in their own struggle to safely get to the beach, in witnessing unsuccessful attempts to revive [the Decedent], and in witnessing her dead body." *Id.* ¶ 105.

The Excursion is the subject of a contract between RCCL and OIC. *Id.* ¶ 37. Cruise passengers can book and pay for OIC excursions online prior to their cruise and during the cruise

at designated OIC outposts on RCCL's ships. *Id.* ¶¶ 42–43. RCCL "maintains a department" at its headquarters to promote and manage the OIC charters it sells to cruise passengers. *Id.* ¶ 44. OIC and RCCL are parties to a written contract entitled Tour Operator Manual and Agreement and/or a business enterprise and/or course of dealing (the "Agreement") "to co-venture the marketing, selling and provision of recreational shore excursions, for the benefit of [RCCL's] cruise passengers." *Id.* ¶ 48.

On February 17, 2020, Plaintiffs filed the Complaint alleging claims against RCCL for (1) Negligence, Carelessness, Wantonness, and Recklessness (Count I); (2) Negligent Selection and Retention (Count II); (3) Negligent Misrepresentation (Count III); (4) Vicarious Liability – Actual Agency (Count IV); (5) Vicarious Liability – Ostensible Agency (Apparent Agency) (Count V); (6) Vicarious Liability – Joint Venture/Joint Enterprise (Count VI); (7) Negligent Infliction of Emotional Distress ("NIED") (Counts X and XI); and (8) Breach of Contract (Count XII). *See generally id.* RCCL now moves to dismiss Plaintiffs' Complaint arguing that Plaintiffs have failed to state a claim upon which relief can be granted. *See generally* Mot.

II. LEGAL STANDARD

A court may dismiss a complaint for failing to state a claim upon which relief can be granted. Fed. R. Civ. P. 12(b)(6). "To survive a motion to dismiss, 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) (citation and internal quotation marks omitted). This requirement "give[s] the defendant fair notice of what the claim is and the grounds upon which it rests." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citation and alterations omitted). The court takes the plaintiff's factual allegations as true and construes them in the light most favorable to the plaintiff. *Pielage v. McConnell*, 516 F.3d 1282, 1284 (11th Cir. 2008).

A complaint must contain enough facts to plausibly allege the required elements. *Watts v. Fla. Int'l Univ.*, 495 F.3d 1289, 1295–96 (11th Cir. 2007). A pleading that offers "a formulaic recitation of the elements of a cause of action will not do." *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555). "[C]onclusory allegations, unwarranted deductions of facts or legal conclusions masquerading as facts will not prevent dismissal." *Oxford Asset Mgmt., Ltd. v. Jaharis*, 297 F.3d 1182, 1188 (11th Cir. 2002).

III. DISCUSSION

RCCL moves to dismiss the Complaint on several grounds. First, RCCL argues that the Complaint should be dismissed in its entirety as it is an impermissible shotgun pleading. Second, RCCL moves to dismiss Plaintiffs' negligence claim on the basis that it improperly seeks to impose heightened duties of care on RCCL and does not sufficiently allege that RCCL was on notice of a dangerous condition. Third, RCCL moves to dismiss Plaintiffs' negligent selection and retention claim as speculative and conclusory. Fourth, RCCL moves to dismiss Plaintiffs' negligent misrepresentation claim because it is not pleaded with particularity under Federal Rule of Civil Procedure 9(b) and Plaintiffs' have otherwise failed to allege the misrepresentation of a material fact. Fifth, RCCL moves to dismiss Plaintiffs' apparent agency theory of vicarious liability because of the same tour agreement language. Sixth, RCCL moves to dismiss Plaintiffs' joint venture theory of vicarious liability upon the same grounds. Seventh, RCCL moves to dismiss Plaintiffs' NIED claim because Plaintiffs failed to allege that they were in the zone of danger or suffered physical manifestations of their distress.[2] The Court addresses each argument in turn.

[2] RCCL also argues that Plaintiffs fail to state a claim for an actual agency theory of vicarious liability or breach of contract. Mot. at 12, 18. Plaintiffs concede that the "weight of authority in this District" conforms to RCCL's arguments on both claims. Resp. at 18. Accordingly, Plaintiffs' claims for Vicarious Liability by way of Actual Agency and Breach of Contract are dismissed.

A. The Complaint is Not an Impermissible Shotgun Pleading

RCCL argues that the Complaint "is a classic shotgun pleading as it begins each count with a preamble, re-alleging and incorporating by reference" all of the general factual allegations. Mot. at 3. Plaintiffs respond that while the counts in the complaint incorporate the general factual allegations, they do not "incorporate[] or adopt[] the allegations of *preceding counts.*" Resp. at 3.

The pleading requirements of the Federal Rules of Civil Procedure require that a complaint "give the defendant fair notice of what the claim is and the grounds upon which it rests." *Twombly*, 550 U.S. at 555. The allegations in a complaint "must be simple, concise, and direct." Fed. R. Civ. P. 8(d)(1). A "shotgun pleading"—one in which "it is virtually impossible to know which allegations of fact are intended to support which claim(s) for relief"—does not comply with the standards of Rules 8(a) and 10(b). *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir. 1996); *see also Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001).

The Court of Appeals for the Eleventh Circuit has described impermissible shotgun pleadings at length:

> Though the groupings cannot be too finely drawn, we have identified four rough types or categories of shotgun pleadings. The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type, at least as far as our published opinions on the subject reflect, is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without

See A.M.S. v. Carnival Corp., No. 06-22091-CIV-GRAHAM, 2007 WL 9705997, at *3 (S.D. Fla. Jan. 23, 2007).

> specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

Weiland v. Palm Beach Cty. Sheriff's Office, 792 F.3d 1313, 1321–23 (11th Cir. 2015) (citation omitted). "The unifying characteristic of all types of shotgun pleadings is that they fail to one degree or another, and in one way or another, to give the defendants adequate notice of the claims against them and the grounds upon which each claim rests." *Id.* at 1323.

Here, Plaintiffs allege twelve (12) counts, each of which incorporate paragraphs 1–136. *See, e.g.*, Compl. ¶ 137. Paragraphs 1–136 contain general factual allegations that either relate to one or more of Plaintiffs' counts or establish the Court's jurisdiction. *See id.* ¶¶ 1–136. Although each of these factual paragraphs are incorporated into each count regardless of their applicability to the particular count, the Eleventh Circuit has drawn a bright line of distinction between the typical shotgun pleading—"where each count adopts the allegations of *all preceding counts*, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint"—and pleadings like the Complaint. *Weiland*, 792 F.3d at 1321, 1324 (emphasis added).

Here, "[t]he allegations of each count are not rolled into every successive count. . . . [T]his is not a situation where a failure to more precisely parcel out and identify the facts relevant to each claim materially increased the burden of understanding the factual allegations underlying each count." *Id.* at 1324. The incorporation of all factual allegations into each count has not made it "virtually impossible" for RCCL to determine which facts apply to which counts. In fact, RCCL does not argue that it had any difficulty in discerning which facts applied to which count, and its distinct arguments to dismiss each count confirm that there was no such difficulty. *See Anderson*, 77 F.3d at 1366. Accordingly, RCCL's argument is unpersuasive.

B. Plaintiffs Plead Improperly Heightened Duties in their Claim for Negligence

RCCL argues that Plaintiffs have failed to state a claim for negligence. Specifically, RCCL argues that (1) Plaintiffs improperly impose a heightened duty on RCCL beyond the duty to warn of dangers where passengers are reasonably expected to visit; (2) Plaintiffs fail to allege that RCCL was on notice of a dangerous condition on the Excursion, and therefore RCCL had no duty to protect passengers from the Excursion; and (3) Plaintiffs make further speculative allegations that they will prove further acts and omissions of negligence at trial. Mot. at 4–7. Plaintiffs respond that (1) Plaintiffs do not impose a heightened duty on RCCL, and indeed it did fail to warn Plaintiffs of a danger where they were expected to visit; and (2) Plaintiffs have pled that RCCL was on notice of similar incidents and, thus, aware of the danger on the Excursion. Resp. at 4–8.

A claim of negligence in a maritime case requires the following allegations: "(1) [T]he 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." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012). "[A] cruise line owes its passengers a duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Id.* (citing *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 251 (Fla. Dist. Ct. App. 1985)); *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1395 (S.D. Fla. 2014). "Thus, where cruise ship passengers are invitees or expected visitors at offshore locations, a ship operator's duty of care is limited to the duty to warn." *Aronson*, 30 F. Supp. 3d at 1395; *Munday v. Carnival Corp.*, No. 16-CV-24841-KMW, 2017 WL 5591640, at *2 (S.D. Fla. July 18, 2017).

Here, the Parties agree that the duty of care as it relates to cruise passenger injuries suffered off the vessel does not extend beyond the duty to warn. Mot. at 4; Resp. at 4. Plaintiffs allege a number of negligent acts for a breach of the duty to warn: the failure "to accurately inform cruise

ship passengers, including [Passenger Plaintiffs,] of the dangers and undue risks associated with the [Excursion]" and the failure "to warn passengers, including [Passenger Plaintiffs] that the [Excursion] involved deep water swimming with strong ocean currents and/or other dangers without life vests or other reasonable flotation device." Compl. ¶ 143(p), (y). However, the Complaint does appear to allege several negligent acts that would require heightened duties of care. *See id*. ¶ 143(a)–(o), (q)–(x) (including such acts and omissions as "[f]ailing to provide an excursion with proper equipment and personnel; [and] [f]ailing to select reasonably safe shore excursions to sponsor; Failing to promote, market, and sell reasonably safe shore excursions to its passengers," among others). Thus, RCCL argues that Plaintiffs' negligence claim should be dismissed on the basis that most of the allegations require a duty beyond the duty which RCCL owes to Plaintiffs. Mot. at 5.

Courts in this district take two distinct approaches to complaints that include a count of negligence based on breaches of the duty to warn *and* inappropriate heightened duties. One approach is to allow the count to survive dismissal, declining to strike individual claims that reached beyond the duty to warn "in line-item fashion." *Thompson v. Carnival Corp.*, 174 F. Supp. 3d 1327, 1342 (S.D. Fla. 2016) (collecting cases). The other approach is to strike negligence counts that impose heightened duties. *Id.* (collecting cases). In *Thompson*, the Court took the latter approach to avoid "render[ing] cruise line operators like Carnival the all-purpose insurers of their passengers' safety." Here, the Court cannot allow Plaintiffs' twenty-three (23) improper negligence allegations to survive dismissal because they properly alleged negligence in just two (2) instances. By dismissing the claim, the Court ensures that issues that reach discovery are tailored narrowly to those claims that Plaintiffs can permissibly recover on, and not overwhelmed by the numerous improper allegations. *Compare Kennedy v. Carnival Corp.*, No. 18-20829-Civ-

WILLIAMS/TORRES, 2018 WL 4410223, at *3 (S.D. Fla. July 24, 2018) (granting motion to dismiss where the plaintiff alleged breaches of "thirty-nine separate duties of care, but almost none of them [were] premised on duties recognized under general maritime law"), *with Kennedy v. Carnival Corp.*, 385 F. Supp. 3d 1302, 1334 (denying motion to dismiss where the same plaintiff, in an amended complaint, alleged that the defendant "breached twenty-six duties of care with nineteen premised on the failure to warn," and holding that the plaintiff had "presented sufficient allegations to establish a claim for negligence even though some of the allegations are misplaced"). Furthermore, Plaintiffs implicitly concede that RCCL is not responsible for the breaches alleged in paragraphs 143(a)–(o) and (q)–(x). Resp. at 4–5. As such, RCCL's argument for dismissal on these grounds is persuasive.

To the extent that Plaintiffs do impose the proper duty in a maritime negligence case, RCCL also argues that the Complaint contains only "threadbare allegations that recite no facts suggesting how [RCCL] knew or should have known of any specific dangerous condition" on the Excursion. Mot. at 6. Plaintiffs point to two allegations regarding RCCL's knowledge of the dangerous conditions that refer to an "incident suffered by other participants" and "other passengers' reviews" of the Excursion. Resp. at 6 (citing Compl. ¶¶ 113, 115). No other facts relating to other passengers' experience with the Excursion are alleged. *See generally* Compl.

A prerequisite to the imposition of liability for a shipowner's breach of a duty to warn its passengers is that the "carrier must have had 'actual or constructive notice of the risk-creating condition.'" *Wolf v. Celebrity Cruises, Inc.*, 683 F. App'x 786, 794 (11th Cir. 2017) (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). Further, "[a] cruise line must warn passengers only of those dangers that the cruise line knows or reasonably should have known, and which are not apparent and obvious to the passenger." *Gayou v. Celebrity Cruises,*

Inc., No. 11-23359-Civ, 2012 WL 2049431, at *5 (S.D. Fla. June 5, 2012) (internal quotation marks and citation omitted).

Here, the Court is persuaded by RCCL's argument that Plaintiffs do not allege facts sufficient to plausibly suggest that RCCL had *actual* notice of dangerous conditions on the Excursion. Plaintiffs do not allege what the alleged "incident" suffered by other passengers entailed, nor do they allege whether "reviews" by passengers who have gone on the Excursion even reference the same dangerous conditions that Passenger Plaintiffs experienced. *See generally* Compl. However, Plaintiffs have alleged more specific facts supporting the allegation that RCCL *should have known* of the dangerous condition. Specifically, Plaintiffs allege that (1) RCCL has a department that oversees, supervises, and monitors off-vessel products such as the Excursion, and (2) RCCL "inspects the operations of its tour providers, such as [OIC]." *Id.* ¶¶ 44, 130. That RCCL had employees supervising contractors like OIC and inspecting its operations is sufficient to plausibly claim that RCCL had constructive notice of the dangerous condition. *See Kennedy*, 385 F. Supp. 3d at 1331 (holding that the defendant had sufficiently alleged constructive knowledge of the dangerous condition by alleging that the defendant should have learned of the condition of the excursion during inspections). Thus, RCCL's argument on this point is not persuasive.

Lastly, RCCL argues that the claim it breached its duty to Plaintiffs through "[o]ther acts and/or omissions of negligence that will be proven at trial" is speculative and conclusory. Mot. at 7; Compl. ¶ 143(z). Plaintiffs offers no response on this point. *See generally* Compl. In any event,

the Court agrees with RCCL. *See Thompson*, 174 F. Supp. 3d at 1341. Accordingly, Plaintiffs' claim for Negligence is dismissed without prejudice.[3]

C. Plaintiffs have Not Sufficiently Pled Negligent Selection and Retention

RCCL argues that Plaintiffs fail to establish how RCCL knew or should have known that OIC was unfit to operate the Excursion safely. Mot. at 8. Plaintiffs respond that because RCCL dedicated a department to managing OIC excursions, RCCL knew or should have known of OIC's incompetence. Resp. at 8.

To plead a *prima facie* claim for negligent hiring or retention, a plaintiff must demonstrate (1) the incompetence or unfitness of the contractor; (2) the defendant's knowledge of the contractor's incompetence or unfitness; and (3) that the contractor's incompetence or unfitness proximately caused the plaintiff's injuries. *Chimene v. Royal Caribbean Cruises, LTD.*, No: 16-23775-CV-MORENO/TURNOFF, 2017 WL 8794706, at *6 (S.D. Fla. Nov. 14, 2017) (citing *Smolnikar v. Royal Caribbean Cruises, Ltd.*, 787 F. Supp. 2d 1308, 1323 (S.D. Fla. 2011)).

However, "negligent selection or hiring and negligent retention are separate and distinct causes of action." *Ferretti v. NCL (Bahamas) Ltd.*, No. 17-cv-20202-GAYLES/OTAZO-REYES, 2018 WL 3093547, *2 (S.D. Fla. June 22, 2018). "The only difference between negligent selection and negligent retention claims is 'the time at which the [cruise line] is charged with knowledge of the [contractor's] unfitness.'" *Smolnikar*, 787 F. Supp. 2d at 1318 n.7 (quoting *Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. Dist. Ct. App. 1986)). With negligent hiring, the inquiry relevant to the question of a defendant's knowledge of their contractor's incompetence is whether the defendant

[3] RCCL makes passing arguments for the dismissal of Plaintiffs' agency theories of vicarious liability and NIED claim on the grounds that those claims require a sufficiently pled negligence claim. Mot. at 11, 13, 16. Although the Court dismisses Plaintiffs' negligence claim, it does not do so because Plaintiffs failed to properly plead negligence, but because Plaintiffs improperly imposed heightened duties of care along with the appropriate duty to warn. Accordingly, these arguments are inapposite.

"diligently inquired" into the fitness of the contractor. *Id.* at 1319. However, with negligent retention, liability hinges on whether the defendant was aware or should have been aware of such unfitness "during the course of the contractor's employment." *Id.* at 1318 n.7.

Here, Plaintiffs have insufficiently alleged facts supporting the second element of both negligent selection and negligent retention. Plaintiffs alleged that RCCL failed "to conduct an adequate and proper investigation" of OIC, but do not specify whether that failure to investigate took place prior to the hiring of OIC. Compl. ¶ 160; *Smolnikar*, 787 F. Supp. 2d at 1319. This allegation, and others like it in the Complaint, "are temporally ambiguous," leaving the Court "unable to determine whether Plaintiff[s] [are] alleging that RCCL failed to investigate [OIC's] policies before [OIC] was hired or after." *Ferreti*, 2018 WL 3093547, at *2 (dismissing claim for negligent selection or hiring).

For the purposes of negligent retention, as discussed above, Plaintiffs allege that RCCL has a team of employees dedicated to overseeing contractors like OIC that inspect OIC's operations. *See* Compl. ¶¶ 44, 130. However, contrary to Plaintiffs' argument that the allegations demonstrating RCCL's knowledge of the dangerous condition "also establish [RCCL's] knowledge of [OIC]'s incompetence," the notice standard to support a duty to warn is different from negligent retention. Resp. at 8. While the allegation that RCCL conducted inspections of OIC's operations does support a duty to warn claim, it is insufficient for the purposes of negligent retention. *See Kennedy*, 385 F. Supp. 3d at 1335–1336 ("Simply having participated in site inspections of the excursion operator . . . is not enough."). In this context, Plaintiffs' claims are "little more than boilerplate and entirely conclusory." *Brown v. Carnival Corp.*, 2015 F. Supp. 3d 1312, 1318 (S.D. Fla. 2016). Accordingly, Plaintiffs' claims for negligent retention and selection are dismissed without prejudice.

D. Plaintiffs Have Pled a Claim for Negligent Misrepresentation Upon Which Relief Can be Granted

RCCL argues that Plaintiffs fail to state a claim for Negligent Misrepresentation. Specifically, RCCL argues that Plaintiffs (1) fail to plead with particularity what facts RCCL misrepresented; and (2) fail to sufficiently plead that RCCL made any false statements. Mot. at 10. Plaintiffs respond that they met the particularity standard by pleading that a RCCL employee told the Passenger Plaintiffs that the Excursion was easy and appropriate for their range of ages but failed to inform them of the risks. Resp. at 10.

To state a claim for negligent misrepresentation, a plaintiff 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 of 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). Claims for negligent misrepresentation are subject to the heightened pleading standards of Rule 9(b) of the Federal Rules of Civil Procedure. *Id.* Rule 9(b) requires that a complaint set forth:

> (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). To satisfy Rule 9(b) in a negligent misrepresentation claim, "the Complaint must set forth particular allegations about the 'who, what, when, where, and how' of the fraud." *Ceithaml*, 207 F. Supp. 3d at 1353 (quoting *Garfield v. NDC Health Corp.*, 466 F.3d 1255, 1262 (11th Cir. 2006)).

Here, Plaintiffs allege that RCCL made false statements and omissions in relation to their negligent misrepresentation claim with particularity. Specifically, Plaintiffs alleged that (1) on

February 20, 2019, an employee of RCCL stationed at the shore excursion desk "identified the [E]xcursion as easy and perfect for the young and older ages of their group"; (2) an RCCL "document" states that the minimum age for the Excursion is four years old; and (3) RCCL did not inform Passenger Plaintiffs that (i) they would not be provided with life jackets, (ii) they could encounter strong ocean currents, (iii) they should be "strong swimmer[s]" to make it from the catamaran to the beach; or (iv) the Excursion was not operated by RCCL. Compl. ¶¶ 76–84. These allegations include (1) the content of the misrepresentations; (2) the identity, to the extent possible prior to discovery, of the sources of such alleged misrepresentations (a shore excursion desk employee and a document advertising the Excursion supplied by RCCL); (3) when the misrepresentations and omissions were made (February 20, 2019); and (4) where the misrepresentations and omissions were made (at the shore excursion desk aboard the Vessel).

These allegations are sufficient to meet the Rule 9(b) particularity standard for negligent misrepresentation. *See Doria v. Royal Caribbean Cruises, Ltd.*, 393 F. Supp. 3d 1141, 1145 (S.D. Fla. 2019) (denying motion to dismiss negligent misrepresentation claim where the complaint provided "(1) the exact statements that are alleged to be misleading or false; (2) the sources of the allegedly misleading materials; (3) and where and when the allegedly misleading or false statements were made"). Accordingly, RCCL's argument for dismissal on these grounds is unpersuasive.

Likewise, Plaintiffs have pled facts that indicate the alleged misrepresentations were actually false. In the Motion, RCCL "cherry-picks" those allegations that are not supported by sufficient facts—*i.e.* that RCCL "misrepresented that they select 'reputable' tour operators and that their shore excursions are safe. Mot. at 11. Plaintiffs better bolstered allegations relating to RCCL's specific statements about the appropriateness of the Excursion for the youngest and oldest

of Passenger Plaintiffs are supported by facts indicating that the statements were false. *See, e.g.*, Compl. ¶ 92, 98 (alleging that OIC did not provide life vests for the passengers despite "wind and sea conditions that made it very difficult" to swim from the catamaran to the shore). Therefore, Plaintiffs' claim for negligent misrepresentation survives dismissal.

E. RCCL's Argument that Plaintiffs have not Pled Apparent Agency is Not Persuasive

RCCL argues that because Plaintiffs received an express disclaimer in both the Excursion brochure and admittance ticket that the relationship between RCCL and OIC was one of independent contractors, Plaintiffs' claim that they reasonably believed there to be an agency relationship between RCCL and OIC is without merit. Mot. 13–14. Plaintiffs respond that the existence of an agency relationship is a question of fact that cannot be decided at the motion to dismiss stage. Resp. at 13.

To state a *prima facie* claim for apparent agency, a plaintiff must allege facts showing: (1) a representation by the principal to the plaintiff, which (2) causes the plaintiff to reasonably believe that an alleged agent is authorized to act on behalf of the principal, and which (3) "induces the plaintiff's detrimental, justifiable reliance upon the appearance of agency." *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1252 (11th Cir. 2014) (citing *Borg-Warner Leasing v. Doyle Electric Company, Inc.*, 733 F.2d 833, 836 (11th Cir. 1984)). Because the question of whether an agency relationship exists is a question of fact, whether a plaintiff reasonably believes that an agency relationship exists is also a question of fact "which cannot be decided on a motion to dismiss." *Gentry v. Carnival Corp.*, No. 11-21580-CIV, 2011 WL 4737062, at *4 (S.D. Fla. Oct. 5, 2011) (citing *Archer v. Trans/American Srvs., Ltd.*, 834 F.2d 1570, 1573 (11th Cir. 1988)).

Notwithstanding the issue of whether such an inquiry is appropriate at the motion to dismiss stage, RCCL urges the Court to look to the "Shore Excursion Guide" and the "Shore

Excursion ticket," both of which are referred to in the Complaint and attached to the Motion as exhibits. *See* Mot. at 14; ("Brochure") (ECF No. 11-4); ("Ticket") (ECF No. 11-5).

Although the Court is generally limited to consideration of the Complaint at the motion to dismiss stage, the Court may consider documents (1) referred to in the Complaint, (2) central to the dispute, (3) whose contents are not disputed, and (4) attached to the Motion. *See Aronson*, 30 F. Supp. 3d at 1397.

While the Ticket is mentioned only in passing in the Complaint, the Brochure is likely "central" to Plaintiffs' claim that RCCL negligently misrepresented the safety of the excursion. *See, e.g.*, Compl. ¶ 80. Accordingly, while this document *would likely* be available to the Court for consideration, the Court declines to consider it due to the incomplete presentation of the Brochure. Specifically, RCCL attached only an "excerpt" of the Brochure to the Motion, three pages of an 83-page document. Mot. at 14; Brochure. The page that RCCL provides containing the language that purportedly renders Plaintiffs' belief unreasonable is found on the 82nd page. Resp. at 12. Therefore, the incomplete presentation of the material may be misleading because the relevant portion may appear to be more prevalent to the reader when presented in an excerpt rather than in the context of the brochure as a whole. As such, the Court declines to consider the Excerpt. *See Ware v. Associated Milk Prod., Inc.*, 614 F.2d 413, 414–15 (5th Cir. 1980) (finding that a district court has discretion to decline to consider matters outside the pleadings on a motion to dismiss where the materials appear incomplete or inconclusive).

Moreover, the cases cited by RCCL for the proposition that such express disclaimers bar a claim of vicarious liability via apparent agency are either inapposite or have since been abrogated. Mot. at 13. Specifically, the court in *Hajtman v. NCL (Bahamas) Ltd.* dismissed a claim that a medical professional was an apparent agent of a shipowner due to the "long standing maritime

principle that carriers and shipowners are not vicariously liable for the acts of their medical staff" and, thus, is inapposite 526 F. Supp. 2d 1324, 1328–29 (S.D. Fla. 2017). Furthermore, *Hajtman* and *Peterson v. Celebrity Cruises, Inc.*, 753 F. Supp. 2d 1245 (S.D. Fla. 2010), which RCCL cites in its Reply, were both abrogated by *Franza*, in which the Eleventh Circuit invalidated that same "long standing maritime principle" by finding the defendant vicariously liable for the negligence of its medical staff. 772 F.3d at 1252. Lastly, *Wolf v. Celebrity Cruises, Inc.* was an appeal of a summary judgment proceeding, a fact that RCCL concedes. 683 F. App'x 786, 790 (11th Cir. 2017); Reply at 8. The standards set out in these cases do not apply here.

Accordingly, RCCL's arguments that Plaintiffs could not, as a matter of law, have reasonably believed there to be an agency relationship between RCCL and OIC are unavailing. The Court therefore declines to consider this factual question at the motion to dismiss stage.

F. Plaintiffs' Theory of Joint Venture is Explicitly Disclaimed by the Agreement

RCCL argues that (1) Plaintiffs have no factual basis upon which to allege that the relationship between RCCL and OIC is a joint venture and their allegation is directly controverted by express language in the Agreement, and (2) Plaintiffs' allegations that RCCL and OIC shared profits and losses from the Excursion were conclusory. Mot. at 15–16. Plaintiffs respond that (1) RCCL asks the Court to impermissibly make a factual determination as to whether a joint venture actually exists between RCCL and OIC, and (2) Plaintiffs have alleged facts sufficient to support the allegations that profits and losses were shared. Resp. at 14–15.

In considering whether a claim for vicarious liability by way of joint venture has been alleged, the Court must consider the following "checklist of elements": (1) the intention of the parties; (2) joint control or joint right of control; (3) joint proprietary interests in the venture; and

(4) whether both parties share in the profits and responsibility for losses. *Garfeh v. Carnival Corp.*, 309 F. Supp. 3d 1317, 1325–26 (S.D. Fla. 2018).

RCCL attaches the Tour Operator Agreement to its Motion. *See* ("TOA") (ECF No. 11-3). Plaintiffs referred to this document in the Complaint—previously defined as "the Agreement"—and do not dispute its credibility. *See generally* Compl.; Resp. RCCL argues that the TOA's language expressly disclaims a joint venture relationship between RCCL and OIC. Mot. at 15; TOA § 9. Whether the Court may consider this document at this time thus hinges on whether the document is "central" to Plaintiffs' claim. *See Aronson*, 30 F. Supp. 3d at 1397.

The court in *Pucci v. Carnival Corp.* discussed the lack of consensus among courts within our district as to whether a tour operator agreement is central to a joint venture theory of vicarious liability. 146 F. Supp. 3d 1281, 1292 (S.D. Fla. 2015). The differentiation arises out of whether, as alleged, the cruise line and the tour operator could have formed the joint venture implicitly through a *separate* agreement. *Id.* In particular, the court compared the approach in *Zapata v. Royal Caribbean Cruises, Ltd.*, No. 12-21897-Civ., 2013 WL 1296298 (S.D. Fla. Mar. 27, 2013) (finding that a tour operator agreement disclaiming any joint venture was central to the plaintiff's vicarious liability claim and dismissing the claim based on the agreement's language) with the approach in *Ash v. Royal Caribbean Cruises Ltd.*, No. 13-20619-CIV, 2014 WL 6682514 (S.D. Fla. Nov. 25, 2014) (finding that the tour operator agreement was not central to the plaintiffs' claim despite largely identical language because the plaintiffs did not specifically mention the tour operator agreement in their complaint, and a joint venture could have come about by some other means). *Id.* In *Pucci*, the Court found that its facts were more like *Ash* than *Zapata* because the complaint "refer[ed] to 'an agreement' entered into by Carnival and [the excursion operator] *either* through a formal contract *or* 'their subsequent and ongoing course of conduct.'" *Id.* Accordingly,

the Court did not consider the defendant's attached agreement and declined to dismiss the plaintiffs' joint venture theory. *Id.* at 1292–93.

Here, Plaintiffs refer to the TOA explicitly and allege that the joint venture originated *from* the document. Compl. ¶ 48 ("[OIC] entered into a written contract with [RCCL] entitled Tour Operator Manual and Agreement and/or a business enterprise and/or course of dealing (collectively referred to herein as 'tour operator agreement') to co-venture the marketing, selling and provision of recreational shore excursions.").[4] Thus, while the Court acknowledges that a joint venture can be created through implication, Plaintiffs have alleged that it was created by the Agreement, which the Parties agree is RCCL's TOA. *See Celestino*, No. 22056-CV-WILLIAMS/TORRES, 2018 WL 6620114, at *6 (S.D. Fla. Oct. 15, 2018) (applying the Court's approach in *Ash* because the plaintiff "allege[d] that the parties' subsequent conduct contradicts the[] terms [of the tour operator agreement]"). And the TOA expressly disclaims a joint venture. *See* TOA ("[n]othing related in this Agreement shall be construed as constituting Operator and Cruise Line as partners, or as treating the relationships of employer and employee, franchisor and franchisee, master and servant or principal and agent or joint venture between the Parties hereto."). Therefore, Plaintiffs' claim for a joint venture theory of vicarious liability is dismissed.

G. Plaintiffs have Alleged Facts Sufficient to Support a Claim of NIED

RCCL argues that Plaintiffs have failed to plead a claim for NIED. Specifically, RCCL argues that (1) Woodley, Lee, and the Minors were not in the zone of danger because Plaintiffs failed to allege that the Decedent's death "was caused by an actual or near accident which also placed them at risk of harm," and (2) Plaintiffs have not alleged that Woodley, Lee, and the Minors

[4] While the Court can envision a different interpretation of this language because of the words "and/or course of dealing," the Complaint goes on to allege that the tour operator agreement "was drafted by [RCCL]'s legal department in Florida [and] became fully executed, after [RCCL] sign[ed] it in Florida." *Id.* ¶ 58. Clearly, Plaintiffs were referring to a specific, written agreement.

suffered physical manifestations of the distress caused by the incident. Plaintiffs respond that Woodley, Lee, and the Minors (1) were in the same dangerous waters where the Decedent died and feared for their own lives, and (2) suffered depression, post-traumatic stress, insomnia, and nightmares. Resp. at 16–18.

A claim for NIED requires a showing of "mental or emotional harm (such as fright or anxiety) that is caused by the negligence of another and that is not directly brought about by a physical injury, but that may manifest itself in physical symptoms." *Chaparro*, 693 F.3d at 1337–38 (quoting *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 544 (1994)). Under federal maritime law, to plead NIED, a plaintiff must allege to have been within the zone of danger, meaning that he or she must have been immediately at risk of physical harm caused by the defendant's negligence. *Id.* at 1338 (citations omitted). The requirement that the plaintiff has been threatened with physical impact bars allegations of merely bearing witness to a traumatic event. *Martins v. Royal Caribbean Cruises Ltd.*, 174 F. Supp. 3d 1345, 1355 (S.D. Fla. 2016).

Plaintiffs contend that Woodley, Lee, and the Minors faced a similar danger as the plaintiff in *Twyman v. Carnival Corp*, 401 F. Supp. 3d 1311 (S.D. Fla. 2019). Resp. at 17. In that case, a father and son rode jet skis as part of a cruise excursion. 401 F. Supp. 3d at 1316. The son collided with another cruise passenger's jet ski and was injured to the point of non-responsiveness. *Id.* The father immediately jumped off his own jet ski into the water and attempted to rescue his son by lifting him onto one of the jet skis and bringing him to shore. *Id.* Paramedics later arrived with a defibrillator but did not know how to operate the device. *Id.* Subsequently, the son died. *Id.* The Court found that the father was in the zone of danger because the plaintiffs had alleged that the father (1) "was in the immediate area and entered the water" after the collision; (2) feared the

immediate risk of being hit by jet skis or other vessels; and (3) feared the immediate risk of drowning while lifting his son's body onto the jet ski. *Id.* at 1325.

Plaintiffs' argument that they were similarly in the zone of danger is persuasive. They swam through the same stretch of water, struggled through the same dangerous swimming conditions that ultimately led to the Decedent's death, and feared for their own safety because of those conditions. Comp. ¶¶ 98–99. RCCL makes no attempt to distinguish the facts from those in *Twyman*. *See generally* Reply. Accordingly, RCCL's argument on the zone of danger is unpersuasive.

RCCL further argues that Plaintiffs have not sufficiently alleged that they have suffered a physical manifestation caused by their emotional distress. Mot. at 18. Specifically, RCCL contends that Plaintiffs' depression, post-traumatic stress, insomnia and nightmares are "emotional" rather than physical. *Id.* RCCL cites to no authority to support this proposition. Plaintiffs cite to *Crusan v. Carnival Corp.*, where the court found that physical manifestations of the fright and anxiety that the plaintiffs suffered, including "insomnia, depression, rapid heartbeat, and vomiting" were sufficient to support a claim for NIED at the motion to dismiss stage. 13-cv-20592-KMW/Simonton, 2015 WL 13743473, at *3 (S.D. Fla. Feb. 24, 2015). *Crusan* is not truly analogous to the facts before this Court, because rapid heartbeat and vomiting could not reasonably be considered borderline examples of physical manifestations. *See id.* However, Plaintiffs also cite to cases where evidence of psychological manifestations of distress were sufficient to create questions of material fact for the purposes of summary judgment. Resp. at 18 (citing *Gerhart v. Carnival Corp.*, No. 1:14-cv-22413-UU, 2015 WL 12533127 (S.D. Fla. Feb. 13, 2015) and *Terry v. Carnival Corp.*, 3 F. Supp. 3d 1363, 1370 (S.D. Fla. 2014)). Thus, allegations of psychological

manifestations of distress are sufficient to defeat a motion to dismiss. Accordingly, the Court declines to dismiss Plaintiffs' NIED claim.

In conclusion, the Court grants the Motion as to Plaintiffs' claims for Negligence (Count I), Negligent Selection and Retention (Count II), Actual Agency and Joint Venture theories of Vicarious Liability (Counts IV and VI), and Breach of Contract (Count XII). The Motion is denied as to Negligent Misrepresentation (Count III), Apparent Agency theory of Vicarious Liability (Count V), and Negligent Infliction of Emotional Distress (Counts X and XI).

IV. CONCLUSION

UPON CONSIDERATION of the Motion, the pertinent portions of the record, and being otherwise fully advised in the premises, it is hereby ORDERED AND ADJUDGED that RCCL's Motion to Dismiss Plaintiffs' Complaint (ECF No. 11) is GRANTED IN PART and DENIED IN PART. Accordingly, Counts I, II, IV, VI and XII are DISMISSED. It is further ORDERED that, pursuant to Rule 15(a)(2) of the Federal Rules of Civil Procedure, Plaintiffs are granted leave to file an amended complaint on or before twenty (20) days from the date of this Order.

DONE AND ORDERED in Chambers at Miami, Florida, this 14th day of July, 2020.

K. MICHAEL MOORE
CHIEF UNITED STATES DISTRICT JUDGE

c: All counsel of record