**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

**CASE NO.: 1:21-cv-21668-GAYLES/TORRES**

**SUSAN RAE, as Personal Representative of the Estate of Gregory Azeltine, deceased**,

Plaintiff,

v.

**CELEBRITY CRUISES, INC., RED SAIL SPORTS CAYMAN, LTD., and XYZ CORPORATION**,

Defendants.
_____/

**ORDER**

**THIS CAUSE** comes before the Court upon Defendant Celebrity Cruises, Inc.'s ("Celebrity") Motion to Dismiss Plaintiff's Complaint and, Alternatively, Motion to Strike (the "Motion") [ECF No. 9]. The Court has reviewed the Motion and the record and is otherwise fully advised. For the reasons set forth below, the Motion is granted in part and denied in part.

**BACKGROUND**[1]

This action arises from an incident that occurred on January 3, 2019, while Plaintiff and her husband, Gregory Azeltine ("Decedent"), participated in a shore excursion in the Cayman Islands (the "Excursion") as passengers on the *Celebrity Equinox*, a vessel owned and operated by Celebrity. Red Sail Sports Cayman, Ltd. ("Red Sail") and XYZ Corporation (collectively, the "Excursion Entities") owned and operated the Excursion. But Celebrity represented to Plaintiff that the Excursion Entities were Celebrity's tour operators.

[1] As the Court is proceeding on a Motion to Dismiss, it takes Plaintiff's allegations in the Complaint and Demand for Jury Trial (the "Complaint"), [ECF No. 1], as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997).

As part of the cruise ship experience, Celebrity promotes and offers shore excursions to its passengers. Celebrity maintains specific departments and employees to oversee the promotion and sale of excursions, monitor excursions, and assist the tour operators in performing excursions. Celebrity (1) screened the companies it selected to provide excursions, including Red Sail; (2) entered into an agreement with Red Sail for Plaintiff to participate in the Excursion; (3) promoted Red Sail; (4) sent the approved companies—like Red Sail—policies for them to adhere to and conducted yearly inspections; (5) profited from the excursions; and (6) represented to its passengers that "it owned, operated, controlled and took care of all details aspects of the excursions[.]" [ECF No. 1 at 10–11].

To promote the various excursions, including the Excursion, Celebrity represented to its passengers, including Decedent, that the excursions are "Celebrity Shore Excursions" that are "meticulously crafted" and "planned by insured partners who adhere to the highest safety standards in the industry." *Id.* at 8. Celebrity also advised its passengers, including Decedent, that they should not participate in excursions that were not selected and sold by Celebrity. To participate in the Excursion, passengers were required to reserve and pay for it through Celebrity. Prior to boarding the vessel, Plaintiff and Decedent reviewed Celebrity's promotional literature about the excursions and purchased the Excursion once onboard the vessel. Plaintiff's tickets for the Excursion contained Celebrity's name and logo.

The Excursion included a stop for snorkeling. During the Excursion, there were only three tour guides for a group of about seventy people. The tour guides did not provide sufficient instructions to the participants on how to properly snorkel, nor did they perform an in-water safety evaluation of Decedent. Decedent was not paired with anyone for snorkeling but rather was left to snorkel alone and was separated from the other snorkelers. While participating in the Excursion,

Decedent "was spotted floating with his life jacke[t] on and inflated at the time." *Id.* at 13. Decedent had "lost his life." *Id.*

On April 30, 2021, Plaintiff Susan Rae, as personal representative of the Estate of Decedent, filed this six-count action against Celebrity and the Excursion Entities. [ECF No. 1]. Plaintiff brings the following counts against Celebrity: (1) negligence (Count I); (2) negligent hiring and/or retention (Count III); (3) negligence based on apparent agency or agency by estoppel (Count IV); (4) negligence based on joint venture between Celebrity and the Excursion Entities (Count V); and (5) third-party beneficiary (Count VI). In response, Celebrity filed the instant Motion arguing that Plaintiff fails to state a claim and seeks non-permissible damages.

## LEGAL STANDARD

To survive a motion to dismiss brought pursuant to Federal Rule of Civil Procedure 12(b)(6), a claim "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)). This means the complaint must contain "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The pleadings are construed broadly, *Levine v. World Fin. Network Nat'l Bank*, 437 F.3d 1118, 1120 (11th Cir. 2006), and the allegations in the complaint are viewed in the light most favorable to the plaintiff, *Hawthorne v. Mac Adjustment, Inc.*, 140 F.3d 1367, 1370 (11th Cir. 1998). On a motion to dismiss, the court need not determine whether the plaintiff "will ultimately prevail . . . but whether [her] complaint [is] sufficient to cross the federal court's threshold." *Skinner v. Switzer,* 562 U.S. 521, 530 (2011).

## DISCUSSION

### I. Count I – Negligence

Celebrity raises two arguments as to why Plaintiff's negligence claim must be dismissed. First, Celebrity claims that Plaintiff seeks to impose heightened, non-existent duties of care against it. Second, Celebrity claims that Plaintiff fails to show that Celebrity had notice of the dangerous condition that caused Decedent's death. The Court addresses each argument in turn.

**A. Duty**

As a cruise ship operator, Celebrity owes its passengers a duty of "reasonable care under the circumstances." *Pucci v. Carnival Corp.*, 146 F. Supp. 3d 1281, 1286 (S.D. Fla. 2015) (citation omitted). Celebrity argues that Plaintiff's negligence claim should be dismissed because a significant portion of the allegations—42 alleged breaches of duty—are based on duties that Celebrity does not owe to passengers under the applicable law. For example, Plaintiff alleges that Celebrity breached its duty of care by failing to "accurately describe the subject shore excursion as a snorkeling excursion[,]" "accurately determine the physical limitations that should be associated with the subject shore excursion[,]" "adequately inspect and/or monitor" various aspects of the subject shore excursion, and "promulgate and/or enforce adequate standards, policies, or procedures" for the Excursion Entities to abide by. [ECF No. 1 at 14–16]. Celebrity argues that the only duty it owes to passengers on shore excursions is to warn of known dangers.

As noted in *Thompson v. Carnival Corp.*, on which Celebrity relies, courts within the Southern District of Florida have reached different conclusions regarding whether a cruise operator owes a passenger on a shore excursion additional duties beyond the duty to warn. *See Thompson*, 174 F. Supp. 3d 1327, 1342 (S.D. Fla. 2016) (citing competing cases). For example, the court in *Pucci* rejected the notion that the duty to warn was the only duty owed to a passenger while off the ship. *Pucci*, 146 F. Supp. 3d at 1287 n.4. The *Pucci* court found that while the duty to warn is generally the most relevant duty regarding shore excursions, "a cruise ship might have additional obligations

under the 'reasonable care' standard, if, for example, there is an agency relationship between the cruise ship and the excursion operator." *Id.* (citation omitted). The Eleventh Circuit has not dispositively addressed this issue. However, in *Wolf v. Celebrity Cruises, Inc.*, also relied on by Celebrity, the Eleventh Circuit stated that the "duty to exercise 'reasonable care under the circumstances' . . . *includes* 'a duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit.'" 683 F. App'x 786, 794 (11th Cir. 2017) (emphasis added) (citations omitted). The *Wolf* court did not state that the duty to warn was the only duty owed to a passenger while on shore.

Here, Plaintiff alleges multiple theories of liability against Celebrity. Thus, the determination of what duties Celebrity owed to Plaintiff will depend on which theories of liability Plaintiff is ultimately able to prove. *Nielsen v. MSC Crociere, S.A.*, No. 10-CIV-62548, 2011 WL 12882693, at *6 (S.D. Fla. June 24, 2011) (declining to dismiss a negligence claim against a cruise ship company arising from a shore excursion where the plaintiff claimed the company owed numerous duties due to its relationship with the excursion operator, and noting "which alleged duties may ultimately apply to [d]efendants will depend on which theories of liability (*i.e.,* partnership, agency—actual or apparent, common carrier liability) that [p]laintiff is able to prove"). Therefore, the Court declines, at this stage, to dismiss the additional duties Plaintiff identifies in "line-item fashion." *Pucci*, 146 F. Supp. 3d at 1287; *Ferretti v. NCL (Bahamas) Ltd.*, No. 17-CV-20202, 2018 WL 1449201, at *2–3 (S.D. Fla. Mar. 22, 2018).

**B. Notice of the Hazardous Condition**

Irrespective of what ultimate duties Celebrity owed to the Decedent, the standard of reasonable care "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition[.]" *Thompson*, 174 F. Supp. 3d at 1340 (citing

*Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)). Plaintiff alleges that the Excursion had an insufficient amount of staffing, that its staff did not provide sufficient instructions regarding snorkeling, that its staff failed to perform an in-water evaluation of Decedent, and that its staff did not properly supervise participants, including Decedent, while snorkeling. [ECF No. 1 at 13]. To establish notice of these dangerous conditions, Plaintiff alleges that (1) Celebrity had an initial approval process of the Excursion Entities and/or the Excursion that included a Celebrity representative's participation in the Excursion; (2) upon approval of the Excursion Entities, Celebrity provided Red Sail with policies that it must adhere to while operating the Excursion to Celebrity's passengers; and (3) Celebrity conducted yearly inspections of the Excursion Entities and/or the Excursion, which includes site visits and reports submitted by Red Sail regarding incidents and other information. *Id.* at 10 & 19. Plaintiff also alleges that Celebrity was the owner or co-owner and/or controlled the Excursion. *Id.* at 9 & 11. "Other cases in this District have found similar allegations sufficient to survive a motion to dismiss." *Adams v. Carnival Corp.*, 482 F. Supp. 3d 1256, 1269 (S.D. Fla. 2020) (collecting cases). At this stage of the case, the Court finds that Plaintiff has sufficiently alleged notice. Therefore, Celebrity's Motion as to Count I is denied.

## II. Count III – Negligent Hiring and/or Retention

As to Count III, Celebrity argues that Plaintiff fails to allege that it had notice that the excursion operator was unfit or incompetent. To state a claim for negligent hiring or retention of an independent contractor, a plaintiff must allege that: "(1) the contractor was incompetent or unfit to perform the work; (2) the employer knew or reasonably should have known of the particular incompetence or unfitness; and (3) the incompetence or unfitness was a proximate cause of the plaintiff's injury." *Wolf*, 683 F. App'x at 796; *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1318 (S.D. Fla. 2011). Negligent hiring and negligent retention are "separate and

distinct causes of action." *Woodley v. Royal Caribbean Cruises, Ltd.*, 472 F. Supp. 3d 1194, 1205 (S.D. Fla. 2020) (citation omitted). The difference is "the time at which the [cruise line] is charged with knowledge of the [contractor's] unfitness." *Id.* (internal quotations and citation omitted). In negligent hiring cases, "the inquiry relevant to the question of a defendant's knowledge of their contractor's incompetence is whether the defendant 'diligently inquired' into the fitness of the contractor." *Id.* (citation omitted). In negligent retention cases, "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.* (citation omitted).

For the same reasons previously discussed for Plaintiff's negligence claim, the Court finds that Plaintiff has adequately alleged knowledge on the part of Celebrity at this stage of the litigation. *See Adams*, 482 F. Supp. 3d at 1267–69 (denying dismissal of negligent selection and/or retention claims where the plaintiff's allegations sufficiently pled notice due to Carnival's monitoring of the excursion during initial and annual inspections). Thus, Celebrity's Motion as to Count III is denied.

## III. Counts IV and V – Apparent Agency, Agency by Estoppel, and Joint Venture

Celebrity's sole argument as to Counts IV and V of the Complaint is that these counts should be dismissed because the underlying negligence claim against it is deficiently pled.[2] Celebrity relies on the arguments the Court previously addressed. Because the Court finds that Plaintiff's negligence claim against Celebrity survives, Celebrity's Motion as to Counts IV and V is denied.

[2] As an initial matter, apparent agency and agency by estoppel are theories of liability, not independent causes of action. *See Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-Civ, 2012 WL 2049431, at *8 n.4 (S.D. Fla. June 5, 2012); *Barabe v. Apax Partners Eur. Managers, Ltd.*, 359 F. App'x 82, 84 (11th Cir. 2009) (holding that there is no cause of action for "agency"). Nevertheless, Plaintiff's apparent agency and agency by estoppel claims may be construed as vicarious liability claims.

## IV. Count VI – Third-Party Beneficiary

In Count VI, Plaintiff asserts a claim as a third-party beneficiary to a contract between Celebrity and the Excursion Entities. To state a third-party beneficiary claim, Plaintiff must allege: "(1) the existence of a contract to which 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." *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1398 (S.D. Fla. 2014). The intent to benefit a third party "must be specific and must be clearly expressed in the contract[.]" *Id.* (citation omitted). "[I]ncidental or consequential benefit" is insufficient to state a claim. *Id.* (citation omitted).

Here, Plaintiff alleges that Defendants entered into a contract to provide excursions to Celebrity passengers with the intent to "primarily and directly benefit" the passengers. [ECF No. 1 at 41]. Plaintiff claims that this is demonstrated through contractual provisions that (1) explicitly state the contract's purpose was to provide excursions to passengers; (2) prohibit dangerous activities on the excursions, require the excursions be safe, and require the Excursion Entities maintain insurance; and (3) allow Celebrity to determine pricing and refunds for the Excursion. *Id.* However, these facts fail to demonstrate that Defendants clearly and expressly intended for their contract to benefit the passengers. *See Steffan v. Carnival Corp.*, No. 16-25295-CIV, 2017 WL 7796726, at *6 (S.D. Fla. May 22, 2017) (dismissing third-party beneficiary claim with similar provisions because they "are insufficient to support the plausible, factual allegation the contract directly and primarily benefits" a cruise passenger); *Thompson*, 174 F. Supp. 3d at 1344–45 (dismissing third-party beneficiary claim where the contract required the maintenance of insurance and exercise of reasonable care during the excursion as similar allegations "have been soundly

rejected"); *Aronson*, 30 F. Supp. 3d at 1398 ("To the extent that Plaintiff alleges that Wrave and Celebrity contracted to ensure the safety of Celebrity's passengers, this is far too generalized to support a third-party beneficiary claim.").[3] Thus, Celebrity's Motion is granted as to Count VI.

**V. Plaintiff's Claim for Damages**

Celebrity argues that the Court should strike Plaintiff's claims for non-pecuniary damages because the Death on the High Seas Act ("DOHSA") applies to Plaintiff's claims and, thus, bars claims for non-pecuniary damages as a remedy. "When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States," DOHSA applies and preempts all other remedies. 46 U.S.C. § 30302; *see Nichols v. Carnival Corp.*, No. 19-CV-20836, 2019 WL 11556754, at *4 (S.D. Fla. June 21, 2019). And "DOHSA precludes the award of any non-pecuniary damages." *Nichols*, 2019 WL 11556754, at *4; *see also* 46 U.S.C. § 30303. Whether DOHSA is applicable to a plaintiff's claim is determined by the location where the negligence occurred. *Id.* "If a complaint makes clear that the plaintiff's injuries occurred outside U.S. territorial waters, then the determination of whether DOHSA applies should be made at the motion to dismiss stage." *Id.*

Here, the subject incident occurred in the waters off the Cayman Islands during a cruise ship snorkeling excursion. Thus, DOHSA applies, and non-pecuniary damages are unavailable to Plaintiff. Therefore, Plaintiff's request for non-pecuniary damages shall therefore be stricken.

**CONCLUSION**

Based on the foregoing, it is **ORDERED AND ADJUDGED** as follows:

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[3] Celebrity argues that the Tour Operator Agreement between it and the Excursion Entities expressly indicates that the contract does not benefit third parties. Plaintiff argues that the Court should not consider this document at the motion to dismiss stage. The Court declines to address this argument because it did not rely on any of Celebrity's exhibits to reach its conclusion.

1. Defendant Celebrity Cruises, Inc.'s Motion to Dismiss Plaintiff's Complaint and, Alternatively, Motion to Strike, [ECF No. 9], is **GRANTED in part** and **DENIED in part**.

2. The Motion is **GRANTED** as to Count VI. Count VI is **DISMISSED without prejudice**.

3. The Motion is **DENIED** as to Counts I, III, IV and V of the Complaint.

4. Plaintiff's claims for non-pecuniary damages are **STRICKEN**.

**DONE AND ORDERED** in Chambers at Miami, Florida this 27th day of March, 2022.

DARRIN P. GAYLES
UNITED STATES DISTRICT JUDGE