UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 22-22780-Civ-GAYLES/TORRES

MARIE ROSENA GILLES-JEAN,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES, LTD.,
a Foreign Profit Corporation; and
DOLPHIN ENCOUNTERS, LTD.,
a Foreign Profit Corporation; and
ROBERT L. MEISTER as owner and
managing director of Dolphin Encounters Ltd.,

Defendants.

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REPORT AND RECOMMENDATION
ON DEFENDANTS' MOTIONS TO DISMISS

This matter is before the Court on Defendants, DOLPHIN ENCOUNTERS, LTD. ("Dolphin Encounters"), ROYAL CARIBBEAN CRUISES, LTD. ("Royal Caribbean"), and ROBERT L. MEISTER ("Mr. Meister") motions to dismiss the amended complaint [D.E. 15], pursuant to Rules 12(b)(2) and 12(b)(6) of the Federal Rules of Civil Procedure. [D.E. 19, 20, 58]. Marie Rosena Gilles-Jean ("Ms. Gilles-Jean" or "Plaintiff") filed timely responses to the Motions [D.E. 21, 22, 60], to which Defendants replied. [D.E. 29, 30, 61]. Therefore, the Motions are now ripe for disposition.[1] After careful consideration of the Motions, the pleadings, the relevant

[1] On April 17, 2023, the Honorable Darrin P. Gayles referred all pre-trial non-dispositive and dispositive matters to the undersigned for disposition. [D.E. 51].

authorities, and for the reasons discussed below, Defendants Dolphin's and Mr. Meister's motions to dismiss for lack of personal jurisdiction [D.E. 19 & 58] should be **GRANTED**, and Royal Caribbean's motion to dismiss [D.E. 20] should be **GRANTED in part** and **DENIED in part**.

I. BACKGROUND

This action stems from injuries that Plaintiff allegedly sustained in The Bahamas while participating in a shore excursion during a Royal Caribbean cruise ship voyage. Defendant Dolphin Encounters is a Bahamian entity that offers shore excursions to cruise ship passengers in Blue Lagoon Island, a private island that Dolphin owns and operates in The Bahamas. [D.E. 15 ¶¶ 3–5]. In connection with this business, Dolphin owns multiple Blue Lagoon Ferry Boats that are used to transport participating Royal Caribbean passengers, such a Plaintiff, to and from the cruise ship and Blue Lagoon Island. *Id.* ¶ 11. Mr. Meister is the alleged owner and managing director of Dolphin Encounters. *Id.* ¶ 4.

Ms. Gilles-Jean, a citizen of New York, claims that she suffered negligence-induced injuries while participating in Dolphin's excursion on October 30, 2021, while her cruise ship—*Freedom of the Seas*—was docked in Nassau, The Bahamas. *Id.* ¶¶ 40–41. Because the island where the excursion takes place is located approximately thirty minutes away from where *Freedom of the Seas* docks in Nassau, cruise ship passengers are transported to the island by ferry. *Id.* ¶¶ 43–44. To this end, the Blue Lagoon Island ferries, which are owned and operated by Dolphin Encounters,

approach a floating (and removable) dock that is attached to the cruise ship to embark and disembark excursion participants. *Id.* ¶¶ 46–48.

Plaintiff claims that she was injured while attempting to disembark the Blue Lagoon Ferry onto the floating dock that was attached to the *Freedom of the Seas*, after the island tour was over. *Id.* ¶¶ 40–41. According to the complaint, Dolphin crew members failed to properly dock the Blue Lagoon ferry to the floating dock, and they negligently disembarked excursion participants from the ferry. *Id.* ¶¶ 61–63. Specifically, Ms. Gilles-Jean claims that, as she was in the process of disembarking the ferry and stepping onto the floating platform to return to the cruise ship, a sudden drop in elevation by the ferry caused her left leg to become trapped in between the floating dock and the ferry's hull, resulting in injuries to her ankle and tibia. *Id.* ¶¶ 64–65.

Based on these facts, Plaintiff filed a fifteen-count amended complaint against three named defendants: Royal Caribbean, Dolphin Encounters, and Robert Meister.[2] The complaint pleads seven negligence related counts against Royal Caribbean (Counts I through VII), four negligence related counts against Dolphin Encounters (Counts VIII through XI), one count of third-party beneficiary breach of contract against both Royal Caribbean and Dolphin Encounters (Count XII), and three negligence related counts against Mr. Meister (Counts XIII through XV). *Id.* ¶¶ 73–292.

[2] As to Mr. Meister, the amended complaint states that he is being sued "in his officially [sic] capacity as the [o]wner and [m]anaging [d]irector of [Dolphin]." *Id.* ¶ 4.

All defendants have filed separate motions to dismiss the amended complaint. On the one hand, Defendants Dolphin and Mr. Meister submit that this accident, which involved a citizen of New York and a foreign entity that occurred in foreign waters, does not support the exercise of personal jurisdiction over them in Florida. They thus seek to dismiss those counts pursuant to Fed. R. Civ. P. 12(b)(2). [D.E. 19 & 58]. Royal Caribbean, on the other hand, claims that pleading deficiencies render the complaint subject to dismissal for failure to state a claim against it pursuant to Fed. R. Civ. P. 12(b)(6). [D.E. 20]. We address each of these arguments below.

II. APPLICABLE PRINCIPLES AND LAW

A. Personal Jurisdiction

"A plaintiff seeking to establish personal jurisdiction over a nonresident defendant 'bears the initial burden of alleging in the complaint sufficient facts to make out a prima facie case of jurisdiction.'" *Louis Vuitton Malletier, S.A. v. Mosseri*, 736 F.3d 1339, 1350 (11th Cir. 2013) (quoting *United Techs. Corp. v. Mazer*, 556 F.3d 1260, 1274 (11th Cir. 2009)). "Where, as here, the defendant submits affidavits to the contrary, the burden traditionally shifts back to the plaintiff to produce evidence supporting jurisdiction unless those affidavits contain only conclusory assertions that the defendant is not subject to jurisdiction." *Meier ex rel. Meier v. Sun Int'l Hotels, Ltd.*, 288 F.3d 1264, 1269 (11th Cir. 2002) (citations omitted). "Where the plaintiff's complaint and supporting evidence conflict with the defendant's affidavits, the court must construe all reasonable inferences in favor of the plaintiff." *Id.* (citations omitted)."

"A federal district court sitting in diversity may exercise personal jurisdiction to the extent authorized by the law of the state in which it sits and to the extent allowed under the Constitution." *Id.* (citations omitted). "A [non-resident] defendant can be subject to personal jurisdiction under Florida's long-arm statute in two ways: first, [Fla. Stat. §] 48.193(1)(a) lists acts that subject a defendant to specific personal jurisdiction—that is, jurisdiction over suits that arise out of or relate to a defendant's contacts with Florida, and, second, [Fla. Stat. §] 48.193(2) provides that Florida courts may exercise general personal jurisdiction—that is, jurisdiction over any claims against a defendant, whether or not they involve the defendant's activities in Florida—if the defendant engages in 'substantial and not isolated activity in Florida.'" *Wolf v. Celebrity Cruises, Inc.*, 683 F. App'x 786, 790 (11th Cir. 2017) (quotation marks and citation omitted).

B. 12(b)(6) Failure to State a Claim

A court will only grant a 12(b)(6) motion if the pleadings are insufficient to state a claim upon which relief could be granted. Fed. R. Civ. P. 12(b)(6). To determine the sufficiency of the allegations in a complaint, the Court applies the standard set forth by the Supreme Court in *Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007) and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009). "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*, 556 U.S. at 678 (quoting *Bell Atl. Corp.*, 550 U.S. at 570). Plausibility is determined by the pleading of "factual content that allows the court to draw the reasonable inference that the defendant is liable for

the misconduct alleged." *Id.* (citing *Bell Atl. Corp.*, 550 U.S. at 556). The Court will construe the complaint in the light most favorable to the Plaintiff and accept all factual allegations as true to the extent that they are not legal conclusions masquerading as allegations of fact. *See id.*; *Brooks v. Blue Cross Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) ("[F]or the purposes of the motion to dismiss, the complaint must be construed in a light most favorable to the plaintiff and the factual allegations taken as true.") (citing *SEC v. ESM Group, Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. ANALYSIS

A. Dolphin's and Meister's Motions to Dismiss [D.E. 19 & 58]

The amended complaint brings negligence related counts against both Dolphin (a Bahamian tour operator) and Mr. Meister (owner and manager of Dolphin) for the alleged injuries that Plaintiff, a New York citizen, suffered while participating in Dolphin's excursion in the Bahamas. Based on the facts described above and the allegations in her complaint, Plaintiff alleges four grounds for the exercise of personal jurisdiction against defendants: (i) general jurisdiction pursuant to Fla. Stat. § 48.193(2); (ii) specific jurisdiction pursuant to Fla. Stat. § 48.193(1)(a)(2) (tort provision); (iii) jurisdiction under Fla. Stat. §§ 685.101–685.102 (execution of contract with a Florida forum selection clause); and (iv) jurisdiction pursuant to Fed. R. Civ. P. 4(k)(2). [D.E. 15 ¶ 9].

Defendants Dolphin and Mr. Meister, on the other hand, dispute the existence of personal jurisdiction and move to dismiss all counts against them on that basis.

[D.E. 19 & 58]. First, Dolphin maintains that, under binding Eleventh Circuit precedent, the facts alleged in the complaint are insufficient to render Dolphin—a Bahamian excursion operator—at home in Florida for purposes of general jurisdiction. [D.E. 19 at 3–6]. Second, Dolphin argues that specific jurisdiction is lacking because Dolphin does not transact business in the state of Florida, and because Plaintiff's injury occurred in the Bahamas and is unconnected to any of the tour operator's alleged contacts with Florida. *Id*. at 7–8. Third, Dolphin alleges that Plaintiff's efforts to salvage jurisdiction fail because Plaintiff cannot impute the state contacts of a subsidiary to Dolphin, cannot enforce the forum selection clause of Dolphin's Tour Operator Agreement ("TOA") with Royal Caribbean, due process considerations prevent the exercise of jurisdiction, and Fed. R. Civ. P. 4(k)(2) does not apply where service of process is effectuated under the Hague Convention or where the complaint does not allege claims that arise under federal law. *Id*. at 9–13.

Relatedly, Mr. Meister submits that in suing him personally for his status as owner and managing director of Dolphin, Plaintiff improperly disregarded corporate distinctions and impermissible imputed to him the alleged tortious acts of Dolphin. [D.E. 58]. In support of their motions to dismiss, defendants attached declarations from Mr. Meister where he attests, among other things, that Dolphin has never been incorporated or licensed to do business in Florida; that Dolphin has always maintained its principal place of business in The Bahamas; that the company has never maintained an office or place of business in Florida; that its employees are non-U.S. citizens and reside in The Bahamas; and that Mr. Meister is not involved in the

training of personnel or the day to day operations of Dolphin in the Bahamas. [D.E. 19-1 & 58].

As we discuss below, we agree with these Defendants that Plaintiff's jurisdictional arguments are unpersuasive. Neither the facts alleged in the complaint nor the record on the motion allow for the exercise of personal jurisdiction over Dolphin or Mr. Meister. Accordingly, defendant's motions to dismiss should be **GRANTED**.

1. General Jurisdiction

Fla. Stat. § 48.193(2) allows Florida courts to exercise jurisdiction over a non-resident defendant "who engages in substantial and not isolated activity within this state . . . whether or not the claim arises from that activity." Here, the Amended Complaint fails to allege that Dolphin Encounters engaged in "substantial and not isolated" business activity within the State of Florida.

It is now settled that "only a limited set of affiliations with a forum will render a defendant amenable to" general jurisdiction. *Daimler AG v. Bauman*, 134 S. Ct. 746, 760 (2014). These limited set of affiliations does not include the scattered contacts that Plaintiff presents to defeat Dolphin Encounter's motion. Only in the "exceptional case" may "a corporation's operations in a forum other than its formal place of incorporation or principal place of business . . . be so substantial and of such a nature as to render the corporation at home in that State." *Id.* at 761

As a threshold matter, we note that Plaintiff's scattershot response is unpersuasive because it completely ignores the precedential weight of the Supreme Court's holding in *Daimler* and its progeny within our Circuit. Indeed, Plaintiff's

briefs completely ignore an extensive body of binding, and on-point, Eleventh Circuit authority that forecloses the exercise of personal jurisdiction over a foreign excursion operator under the facts of this case. *See Fraser v. Smith*, 594 F.3d 842, 846 (11th Cir. 2010) (holding that purchases, visits, and advertising in the state did not render Turks and Caicos tour operator subject to jurisdiction in Florida); *Carmouche v. Tamborlee Mgmt.*, 789 F.3d 1201, 1204 (11th Cir. 2015) (concluding that having insurance policies, bank accounts, addresses, and association membership in the state did not confer jurisdiction over Belizean shore excursion operator); *see also Wolf v. Celebrity Cruises*, 683 F. App'x 786, 791 (11th Cir. 2017) (unpublished) (ruling that state contacts of related corporate entity, in-state excursion marketing through cruise lines, and execution of TOAs with Florida-based cruise lines was not enough for general jurisdiction over Costa Rican tour operator).

Given this backdrop of governing authority that Plaintiff shuns, we hold that, even if taken as true, the Florida contacts alleged against Dolphin in the amended complaint are not "so substantial as to make this one those exceptional cases in which a foreign corporation is at home in a forum other than its place of incorporation or principal place of business." *Carmouche*, 789 F.3d at 1204. Indeed, Plaintiff's jurisdictional allegations are but slight variations of outdated arguments that have been repeatedly rejected by our court of appeals and also in this District. In this sense, the Eleventh Circuit's observation in *Wolf* applies with full force to this case:

> [Plaintiff's] jurisdictional allegations and evidentiary submissions are substantially similar to those we concluded were insufficient in *Carmouche*. In that case, we held that a shore excursion operator's connections with Florida—including a Florida bank account, two Florida

> addresses (one of which was a P.O. box), purchasing insurance from Florida companies, filing a financing statement with the Florida Secretary of State, joining a non-profit trade organization based in Florida, and consenting to jurisdiction in the Southern District of Florida for all lawsuits arising out of its agreements with a cruise line—were not so "continuous and systematic as to render it essentially at home there." 789 F.3d at 1204 (internal quotation marks and alterations omitted). Similarly, in *Fraser*, we concluded that a foreign tour operator's aggregate contacts, including a website accessible from Florida, advertisements in publications with circulation in the United States, the procurement of insurance through an agent in Florida, the purchase of about half of its boats in Florida, and employee trainings and promotions in Florida, did not confer general jurisdiction in Florida.

Wolf, 683 F. App'x at 791.

Here, too, Ms. Gilles-Jean's jurisdictional assertions miss the mark. In essence, Plaintiff's general jurisdiction argument is grounded on the allegations that Dolphin: (i) has an address in Fort Lauderdale; (ii) has a Florida-based subsidiary (Treasure Cay Services, Inc.); (iii) contracts with Florida-based companies (including Treasure, cruise lines, and a marketing firm); (iv) has one bank account in Florida; (v) obtains insurance in Florida; (vi) attends trade shows in Florida; (vii) derives a substantial portion of its revenues from Florida costumers; and (vii) has been a named defendant in other Southern District of Florida cases.[3] *See* [D.E. 22 at 2–11].

[3] Tellingly, none of the cases cited by Plaintiff has found that Dolphin is subject to personal jurisdiction in Florida. *See* [D.E. 22 at 5]. To the contrary, in *Bustamante*, this court recently concluded that virtually identical jurisdictional allegations against Dolphin fell short of the jurisdictional threshold in a personal injury suit and dismissed the case as to Dolphin for lack of personal jurisdiction. *See Bustamante v. Celebrity Cruises*, No. 1:22-CV-20330-JLK, 2022 WL 16727079, at *6–7 (S.D. Fla. Nov. 2, 2022) (finding that neither Florida's long-arm statute nor Fed. R. Civ. P. 4(k)(2) allowed for the exercise of jurisdiction over Dolphin Encounters in Florida).

For starters, we find that the declarations that defendants attached to their respective motions to dismiss properly rebut several of the conclusory allegations made in Plaintiff's complaint. *See* [D.E. 19-1 & 58-1]. For instance, any suggestion that Treasure Cay Services is an alter-ego of Dolphin Encounters, whose contacts with the state can be imputed to Dolphin, lacks any factual and evidentiary support. As the materials cited by Plaintiff herself indicate, and as Dolphin notes in reply, "[Treasure] maintains its own office, bookkeeping, financial statements, checking accounts, tax records and personnel employees, separate from Dolphin Encounters," and "provides administrative services to other companies, not just Dolphin." [D.E. 30 at 3]. A such, Plaintiff's reliance on the unverified statements of third-party websites, which seem to suggest that Dolphin and Treasure share one address in Florida, along with the fact that Dolphin contracts with Treasure for the provision of certain administrative services, falls significantly short of demonstrating the requisite level of control and influence needed to "establish that [Dolphin] 'so dominates' [Treasure] 'as to be its alter ego' or that [Dolphin] 'so dominates' any Florida company 'as to be its alter ego.'" *McCullough v. Royal Caribbean*, 268 F. Supp. 3d 1336, 1349 n.9 (S.D. Fla. 2017) (Gayles, J.).[4]

[4] By extension, this same reasoning applies to Plaintiff's conclusory allegations that piercing the corporate veil—as to impute to Mr. Meister the actions of Dolphin—is warranted in this case. In any event, and as further explained below, even if taken as true, Dolphin's alleged contacts with the state fail to support the exercise of personal jurisdiction over Dolphin. *See* [D.E. 61] (including supporting documents that contradict Plaintiff's groundless assertions suggesting direct ownership of the ferry by Mr. Meister). Accordingly, Mr. Meister's motion to dismiss for lack of personal jurisdiction [D.E. 58] ought to be GRANTED.

Moreover, the legal foundations upon which Plaintiff seems to couch her alter-ego jurisdictional argument are simply at odds with the state of the law following the Supreme Court's holding in *Daimler*. As is the case with most of her jurisdictional claims, here Plaintiff relies on outdated, pre-*Daimler* case law—namely, *Stubbs v. Wyndham Nassau Resort*, 447 F.3d 1357 (11th Cir. 2006) and *Meier v. Sun Int'l Hotels,* 288 F.3d 1264 (11th Cir. 2002)—for the proposition that Treasure's contacts with Florida render Dolphin subject to general jurisdiction in the state. *See* [D.E. 22 at 2, 9]. Yet, this same argument has been repeatedly rejected by this court and others in our Circuit as inconsistent with *Daimler*. *See*, *e.g.*, *Thompson v. Carnival*, 174 F. Supp. 3d 1327, 1336 (S.D. Fla. 2016) ("reliance on this line of cases to establish general jurisdiction on an agency theory is dubious given the decisions in *Daimler* and *Goodyear*"); *McCullough*, 268 F. Supp. 3d at 1348 (quoting *Thompson* and noting that similar allegations against foreign tour operators amounted to "'a tendentious gloss on precedent' that is 'more than a decade old, easily distinguishable, and do[es] not comport with the cabined conception of general jurisdiction that now exists post-*Daimler*'"). Accordingly, we are not persuaded that this case warrants the extreme measure of disregarding the corporate form as to allow Plaintiff to impute Treasure's contacts to Dolphin, or Dolphin's contacts to Mr. Meister in his capacity as owner of Dolphin.

Likewise, Mr. Meister's declarations categorically confirm that Dolphin has never conducted any business or maintained an office in Florida; that in the past three years Dolphin representatives have travel to Florida only four times for

meetings with cruise lines; that Dolphin has never maintained a mailing address in Florida; that Dolphin contracts with Treasure Cay for the purchasing of supplies that are used exclusively in The Bahamas (and none of which are related to Plaintiff's allegations); and that Dolphin has never insured any entity in Florida. [D.E. 19-1]. Based on our review of the declarations and the record, we find Dolphin's declaration sufficiently reliable and substantively rebut several of Plaintiff's jurisdictional allegations.

But even assuming that all of the factual allegations asserted in Plaintiff's complaint are true, Plaintiff's claim would still fall short of the high jurisdictional threshold applied by our Circuit Court and this District. As noted above, the Eleventh Circuit has deemed the following similar contacts as insufficient for general jurisdiction over a foreign excursion operator: (1) a contractual relationship with several Florida-based cruise lines; (2) a Florida bank account; (3) two Florida addresses; (4) purchase of insurance from Florida companies; (5) a financing statement with the Florida Secretary of State; (6) membership in the Florida Caribbean Cruise Association; and (7) consent to the jurisdiction of the Southern District of Florida in a TOA with the cruise line. *See Carmouche*, 789 F.3d at 1201, 1203.

Similarly, this District Court has repeatedly rejected jurisdictional claims against foreign excursion operators that have engaged in similar, or even more pronounced, contacts with the state of Florida. For instance, in *Aronson v. Celebrity*,, this court held that defendant's "contacts with Florida [were] not sufficiently

substantial or continuous to support a finding of [specific or general] jurisdiction" even though it: (1) marketed and advertised on Florida-based cruise lines' websites; (2) contracted with Florida-based cruise lines; (3) was paid from Florida banks; (4) travelled to Miami for trade shows; (5) were members of the Florida Caribbean Cruise Association; (6) submitted bids and tour proposals to Florida-based cruise lines; (7) purchased supplies and insurance in Florida; and (8) agreed to personal jurisdiction in Florida through its contracts with Florida-based cruise lines. *Aronson v. Celebrity*, 30 F. Supp. 3d 1379, 1386–87 (S.D. Fla. 2014). *See also Giuliani v. NCL (Bahamas) Ltd.*, 558 F. Supp. 3d 1230, 1242 (S.D. Fla. 2021) (Gayles, J.) (no general or specific jurisdiction over tour operator although the alleged state contacts included: "(1) maintaining at least one office in Florida; (2) reaching out to cruise lines in Florida and establishing long term business partnerships with them; (3) contracting with cruise lines in Florida to provide excursions to cruise line passengers; (4) entering into partnerships and/or joint ventures with cruise lines in Florida to provide excursions to cruise line passengers; (5) agreeing to insure and/or indemnify cruise lines in Florida; (6) deriving substantial revenues from business with cruise lines in Florida; and (7) having a registered agent in Florida."); *Moreno v. Carnival*, 488 F. Supp. 3d 1233, 1238 (S.D. Fla. 2020) (no jurisdiction over excursion operator who advertised, marketed, and sold excursion tickets through Carnival's website and app in Florida; maintaining a bank account in Florida; and receiving payment for its excursions in Florida, among other things); *Smith-Russo v. NCL (Bahamas) Ltd.*, No. 16-23821-CIV, 2017 WL 5565613, at *5 (S.D. Fla. July 26, 2017), *report and*

recommendation adopted, No. 16-23821-CIV, 2017 WL 5591639 (S.D. Fla. Aug. 22, 2017) (no jurisdiction over foreign excursion operator that maintain a Florida office and received and processed payments in Florida).

In sum, collectively considering Dolphin's direct and indirect contacts with Florida, the alleged activities do not rise to the level of "substantial and not isolated activities" that would confer general personal jurisdiction over it within the meaning of Florida's long-arm statute. *See Aronson*, 30 F. Supp. 3d at 1390. Therefore, the Court cannot exercise general personal jurisdiction over Dolphin.

2. Specific Jurisdiction

Turning to Plaintiff's specific jurisdiction claims, we find that her generic and vague invocations of jurisdiction under Fla. Stat. §§ 48.193(1)(a)(1), 48.193(1)(a)(2), and 685.101–685.102, are likewise unavailing.

"[S]pecific personal jurisdiction authorizes jurisdiction over causes of action arising from or related to the defendant's actions within Florida and concerns a nonresident defendant's contacts with Florida only as those contacts related to the plaintiff's cause of action." *Louis Vuitton*, 736 F.3d at 1352. *See also American Overseas Marine Corp. v. Patterson*, 632 So. 2d 1124, 1127 (Fla. 1st DCA 1994) (specific jurisdiction "is often referred to as 'connexity jurisdiction'").

In Florida, "[a] nonresident defendant may be subject to 'specific' personal jurisdiction under subsection 48.193(1) if the person commits any of the acts enumerated in the subsection." *Zapata v. Royal Caribbean Cruises, Ltd.*, Case No. 12-cv-21897, 2013 WL 1100028, at *2 (S.D. Fla. Mar. 15, 2013). This includes

"[o]perating, conducting, engaging in, or carrying on a business or business venture in this state or having an office or agency in this state." Fla. Stat. § 48.193(1)(a)(1).

Plaintiff alleges that Dolphin is subject to specific personal jurisdiction in Florida by engaging in a business relationship with Royal Caribbean for marketing and selling Plaintiff the excursion package through the cruise line; maintaining a bank account in Florida; and receiving payment for its excursions in Florida, among other things activities. [D.E. 15 & 22]. However, these allegations do not satisfy Florida's long-arm statute because Plaintiff's underlying cause of action for negligence does not "arise from" Dolphin Encounters' limited business activities within Florida.

To begin with, Plaintiff has not met her burden of establishing that Dolphin indeed conducted business in Florida for the purposes of Fla. Stat. § 48.193(1)(a)(1). *See Fraser v. Smith*, 594 F.3d at 846 (neither "purchases, visits, or advertising" in the state was enough to meet the definition of "conducting business" in Florida); *Ash v. Royal Caribbean Cruises*, 991 F. Supp. 2d 1214, 1218 (S.D. Fla. 2013) (the fact "that tickets to an excursion are sold in Florida through [Royal Caribbean] is insufficient to constitute '[o]perating, conducting, engaging in, or carrying on a business or business venture' as required by section 48.193(1)(a)").

But even assuming that Dolphin was conducting some business in Florida, Plaintiff's allegations fail to meet the conexity requirement. To state the obvious, there is no clear connection between Plaintiff's incident while attempting to disembark the Blue Lagoon ferry in the Bahamas (*i.e.*, getting her leg entangled

between the removable floating duck and the ferry's hull) and Dolphin's maintenance of a bank account in Florida, the processing of its payments in Florida, or the sale of the excursion tickets in Florida. *See Moreno*, 488 F. Supp. 3d 1233, 1238 (S.D. Fla. 2020) ("Plaintiff's underlying cause of action for negligence does not 'arise from'" excursion operator's advertising, marketing, or selling of excursion tickets in Florida; nor from maintaining bank account and receiving payments in Florida); *Lapidus v. NCL Am. LLC*, No. 12-21183-CIV, 2013 WL 646185, at *4 (S.D. Fla. Feb. 14, 2013) (finding that where plaintiff was injured on a foreign excursion, "there is no connexity between the sale of excursion tickets via a website administered in Florida and Plaintiff's claims that Defendants' negligence in Hawaii caused his injuries.").

For similar reasons, Plaintiff's argument that Dolphin is subject to specific jurisdiction under Fla. Stat. § 48.193(1)(a)(2) lacks legal merit. Indeed, Plaintiff's assertion of tort-based jurisdiction is purely conclusory given that neither the complaint nor the response alleges the required nexus between any of the purported state contacts and Plaintiff's injury. Again, there are no allegations linking any tortious act (or omission) by Dolphin in Florida and Plaintiff's alleged injury while stepping onto a floating dock in the Bahamas. Plaintiff, a New York citizen, does not allege that Dolphin breached any duty of care in Florida or that the effects of her injury were felt in Florida, nor does she offer evidence to rebut that "[n]one of the products that Dolphin obtained through Treasure Cay Services, Inc. [in Florida] [were] related [in any way] to the allegations in the Plaintiff's Complaint." [D.E. 19-1 ¶ 25].

Plaintiff's reliance on the fact that she saw advertisements for the Blue Lagoon tour immediately after purchasing her cruise ship ticket on Royal Caribbean's website is also misplaced. This is not a negligent advertising case; this is a case about the alleged negligent docking of a ferry boat to a floating platform and the alleged negligent disembarkation of passengers from the ferry (*i.e.*, by lightly holding their hands by the tips of their fingers) during an excursion in The Bahamas. Plaintiff has not cited a single act that Dolphin committed in Florida that was at all related to the injury that occurred in the waters off Nassau. Thus, there is no logical and necessary relationship between the injury and the forum to sustain specific jurisdiction under the long-arm statute. *See Wolf*, 683 F. App'x at 791 ("[Plaintiff] cannot assert specific jurisdiction based on any tort claims related to the incident that occurred in Costa Rica"); *Giuliani*, 558 F. Supp. 3d at 1237 ("Plaintiff does not—and cannot—allege that [excursion operator] committed the tortious acts in Florida . . . [b]ecause Plaintiff has not alleged that any tortious acts occurred in Florida and all her arguments must fail."); *Bustamante*, No. 1:22-CV-20330-JLK at *6 ("There is no connection between Plaintiff's incident in Blue Lagoon, Bahamas and Dolphin Encounters maintenance of a bank account in Florida, nor is there a connection between the sale of the excursion tickets in Florida and the alleged negligence that occurred in the Bahamas").

We are also unpersuaded by Plaintiff's argument that the consent to jurisdiction clause and the Florida forum selection provision found within Dolphin's and Royal Caribbean's Tour Operator Agreement (TOA) confer jurisdiction over

Dolphin pursuant to Fla. Stat. §§ 685.101–685.102 in this suit. Plaintiff does not contest that she is a signatory to the TOA. Instead, she submits that, as a cruise ship passenger in Royal Caribbean, she is a third-party beneficiary of the agreement and, as such, she is entitled to the benefits of the forum selection and consent to jurisdiction clauses contained therein. But we are unpersuaded by this flawed line of reasoning that has been consistently rejected in identical personal injury cases in this District. *See Serra-Cruz v. Carnival Corp.*, 400 F. Supp. 3d 1354, 1361 (S.D. Fla. 2019) ("courts have held that excursion contractor agreements similar to the Agreement here do not confer third-party beneficiary status upon plaintiff-guests."); *Johnson v. Royal Caribbean*, 474 F. Supp. 3d 1260 (S.D. Fla. 2020) ("a plaintiff may not use [a TOA's] consent to jurisdiction clause via a meritless third-party beneficiary claim to find jurisdiction over a foreign [excursion operator] in a personal injury case, especially where [] the [TOA] includes an express disclaimer of the existence of third-party beneficiaries.").

Here, too, the TOA between Dolphin and Royal Caribbean includes an express disclaimer of any third-party beneficiary, and Dolphin's declaration unequivocally denies ever entering into a TOA with the intent to benefit a non-signatory. [D.E. 19-1 at 5, 11] ("12.11 Third Party Beneficiary [—] Other than as expressly set forth herein, this Agreement shall not be deemed to provide third parties with any remedy, claim, right or action or other right."). Plaintiff has offered no authorities or evidence that leads us to ignore this clear and express disclaimer, which renders her claim unavailing. *See Giuliani*, 558 F. Supp. 3d at 1239 (Gayles, J.) (no third party

beneficiary status in excursion related personal injury case because (i) the plain language of the TOA expressly disclaimed third party benefits; (ii) tour operator's declaration denied any intent by the contracting parties to confer benefits on non-signatories; and (iii) any potential benefit reaching cruise line passengers was merely incidental); *Singh v. Royal Caribbean Cruises*, 576 F. Supp. 3d 1166, 1180 (S.D. Fla. 2021) (finding that identical TOA disclaimer barred third party beneficiary claim by Plaintiff).

But even if we were to ignore the plain text of the TOA disclaiming third party beneficiary status, Plaintiff's theory still fails because her cause of action does not arise out of the TOA. *See Wolf*, 683 F. App'x at 793 (holding that the court was without jurisdiction over the excursion operator in a personal injury case that asserted a third-party beneficiary claim "[b]ecause the alleged tortious activity occurred outside of Florida [and] there is no connexity between the [TOA] and Mr. Wolf's cause of action").

Plaintiff also alleges the Defendant breached the Agreement by failing to "offer reasonably safe excursions," an argument that is routinely rejected by courts in this District. *See, e.g.*, *Aronson*, 30 F. Supp. 3d 1379 at 1398 ("To the extent that Plaintiff alleges that Wrave and Carnival contracted to ensure the safety of Celebrity's passengers, this is far too generalized to support a third-party beneficiary claim."); *Lapidus*, 924 F. Supp. 2d 1352, 1361 (S.D. Fla. 2013).

In sum, the TOA's "consent to jurisdiction" provision is unenforceable by Plaintiff as a means to attach specific jurisdiction over the action. Moreover, given

that Plaintiff has not succeeded in demonstrating any other connection between her injuries and Dolphin's alleged contacts in Florida, the Court finds that it lacks specific personal jurisdiction over Dolphin under Fla. Stat. §§ 48.193(1)(a)(1), 48.193(1)(a)(2), or 685.101–685.102.[5]

3. Federal Rule of Civil Procedure (4)(k)

Plaintiff next turns to Federal Rule of Civil Procedure 4(k) as a way for this Court to exercise jurisdiction over Dolphin. Rule 4(k) applies "[w]here process is served pursuant to a federal statute authorizing nationwide or worldwide service . . . the relevant forum is the entire United States." Fed. R. Civ. P. 4(k)(1)(C). Here, Dolphin Encounters was not served pursuant to a federal statute that authorizes nationwide service of process. Instead, Plaintiff accomplished service on Dolphin Encounters through the Hague Convention. [D.E. 19-3].

"[T]he [Hauge] Convention does not authorize nationwide service—it is merely a mechanism for serving parties outside the United States in partnering countries." *Durham v. LG Chem*, No. 21-11814, 2022 WL 274498 at *2 (11th Cir. Jan. 31, 2022) (citing *Volkswagenwerk Aktiengesellschaft v. Schlunk*, 486 U.S. 694, 698 (1988)). "Accordingly, the Hague Convention does not give a district court personal jurisdiction over a party notwithstanding its lack of contacts with the forum state."

[5] Since the Court has found that Florida's long-arm statute provides no basis for exercising jurisdiction over Dolphin Encounters, the Court need not address the second inquiry: whether the exercise of jurisdiction comports with due process. *Moreno*, 488 F. Supp. 3d at 1239 (citing *Posner v. Essex Ins. Co., Ltd.*, 178 F.3d 1209, 1214 (11th Cir. 1999)). "A fundamental and longstanding principle of judicial restraint requires that courts avoid reaching constitutional questions in advance of the necessity of deciding them." *Santamorena v. Ga. Military Coll.*, 147 F.3d 1337, 1343 (11th Cir. 1998).

Id. (citing *DeJames v. Magnificence Carriers, Inc.*, 654 F.2d 280, 288 (3d Cir. 1981) and *Sloss Indus. Corp. v. Eurisol*, 488 F.3d 922, 925, 934 (11th Cir. 2007)). Thus, since Dolphin Encounters was served via the Hague Convention, Rule 4(k) does not confer jurisdiction.

Although Plaintiff's response chose not to address her Rule 4(k) allegations, our conclusion remains unchanged even when considering the merits of this jurisdictional claim. As noted above, the Court has already determined that it does not have personal jurisdiction over Dolphin Encounters based on the insufficiency of the in-state contacts alleged in the complaint. As noted in Dolphin's declaration, there are no other U.S. contacts that can be attributable to Dolphin outside of the state of Florida, and Plaintiff does not rebut this assertion. Accordingly, it follows that our long-arm statue and Rule 4(k) analysis are the same, and that the allegations in the amended complaint fail to support the exercise of jurisdiction over Dolphin under this basis.

B. Royal Caribbean's Motion to Dismiss [D.E. 20]

Next, we turn to Royal Caribbean's motion to dismiss for failure to state a claim pursuant to Fed. R. Civ. P 12(b)(6). The amended complaint alleges the following eight counts against Royal Caribbean: Failure to Provide a Reasonably Safe Means of Boarding and/or Leaving the Vessel (Count I); Failure to Provide a Reasonably Safe Excursion (Count II); Negligent Selection Hiring and Retention (Count III); Negligent Failure to Warn (Count IV); Negligent Training (Count V); Negligent Supervision

(Count VI); Negligent Operation (Count VII); and Breach of Third-Party Beneficiary Contract (Count XII). Royal Caribbean has moved to dismiss each of these counts.

1. Counts I, III, and IV: Failure to Provide Safe Means of Boarding, Negligent Selection and Retention, and Negligent Failure to Warn

Royal Caribbean first moves to dismiss Counts I, III, and IV, of the amended complaint on the grounds that Plaintiff has failed to plead that Royal Caribbean had notice of any dangerous condition related to the boarding of the Blue Lagoon Ferry. [D.E. 20 at 3]. As we further explain, Plaintiff's complaint is not deficient in this respect, contrary to Defendant's arguments.

To state a negligence claim, a plaintiff must allege that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm. *Chaparro*, 693 F.3d at 1336. In a claim based on an alleged tort occurring at an offshore location during a cruise, federal maritime law applies, just as it would for torts occurring on ships sailing in navigable waters. *See Smolnikar v. Royal Caribbean Cruises*, 787 F.Supp.2d 1308, 1315 (S.D. Fla. 2011) (citing *Doe v. Celebrity Cruises*, 394 F.3d 891, 901 (11th Cir. 2004)). Generally, under maritime law a ship owner "owes to all who are on board for purposes not inimical to his legitimate interests the duty of exercising reasonable care under the circumstances of each case." *Keefe v. Bahama Cruise Line*, 867 F.2d 1318, 1321 (11th Cir.1989) (citation omitted).

This standard of negligence "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of the risk-creating condition, at least where . . . the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Keefe*, 867 F.2d at 1322. Because cruise ship operators are common carriers with a "continuing obligation of care for their passengers," *see Carlisle v. Ulysses Line*, 475 So. 2d 248, 251 (Fla. 3d DCA 1985), their duty of care includes a duty to warn passengers of the "known dangers" which exist "beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Chaparro*, 693 F.3d at 1336; *see also Smolnikar*, 787 F. Supp. 2d at 1322–23. However, this duty "encompasses only 'those dangers which are not apparent and obvious to the passenger.'" *Smolnikar*, 787 F. Supp. 2d at 1323 (quoting *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1237 (S.D. Fla. 2006)). And this duty to warn extends only to specific, known dangers particular to the places where passengers are invited or reasonably expected to visit, not to general hazards. *See Joseph v. Carnival Corp.*, No. 11–20221–CIV, 2011 WL 302255, at *3–4 (S.D. Fla. July 22, 2011).

Moreover, "[t]hough cruise ship owners, such as Royal Caribbean, cannot be held vicariously liable for the negligence of an independent contractor, it is well-established that they may be liable for negligently hiring or retaining a contractor. *Smolnikar* , 787 F. Supp. 2d at 1318. And to succeed under a claim for negligent retention, Plaintiff must establish 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.'" *Id.* at 1318 (quoting *Davies v. Commercial Metals Co.*, 46 So. 3d 71, 73–74 (Fla. 5th DCA 2010)).[6]

According to Defendant, although Plaintiff "does allege prior incidents involving Dolphin Encounters where passengers were injured, none of the incidents mentioned are similar enough to the current matter to put Royal Caribbean on notice" as to Counts I, III, and IV. [D.E. 20 at 5]. We strongly disagree. Not only does Plaintiff allege prior incidents going as far back as March 17, 2016, involving Dolphin, but these incidents also involved cruise ship passengers who, like Plaintiff, participated in the Blue Island tour and *were embarking or disembarking* the Blue Lagoon ferry when, as a consequence of improper docking, action, or instruction by Dolphin's staff, they sustained serious physical injuries. Indeed, all three incidents resulted in personal injury lawsuits that are identical to the one at hand against the cruise line (Royal Caribbean on two occasions) and Dolphin in this District Court. *See* [D.E. 15 ¶¶ 67–72] (citing the complaints in *McShane v. NCL (Bahamas)*, No. 16-cv-20991-JLK, *Brenda Francke v. Royal Caribbean*, No. 19-cv-20582, and *Connie Hadfield v. Royal Caribbean*, No. 21-cv-20950). One of these disembarking incidents

[6] The difference between negligent selection and negligent retention claims is "the time at which the [principle] is charged with knowledge of the [contractor's] unfitness." *See Garcia v. Duffy*, 492 So. 2d 435, 438 (Fla. 2d DCA 1986). In a negligent selection claim, liability is premised upon the inadequate pre-selection investigation into the contractor's background. *See id.* But in a negligent retention claim, liability is founded upon a showing that, during the course of the contractor's employment, the principal was aware or should have been aware of problems evidencing the unfitness of the contractor and failed to investigate or terminate the contractor. *See id.* at 438–49.

resulted in identical injuries to those sustained by Plaintiff in this case, including a broken tibia.

In our view, allegations of three prior incidents reflecting that Dolphin's embarking and disembarking procedures led to similar incidents, are sufficient to meet the pleading standards required to make a showing of notice at this stage of the proceedings. *See Taylor v. Royal Caribbean Cruises*, 437 F. Supp. 3d 1255, 1260 (S.D. Fla. 2020) (Gayles, J.) (holding that notice was sufficiently established at summary judgment stage where "the record reflects three prior incidents where passengers" sustained injuries similar to plaintiff's); *Sofillas v. Carnival Corp.*, No. CV 14-23920-CIV, 2016 WL 5416110, at *2 (S.D. Fla. July 8, 2016) (concluding that the "prior incidents are substantially similar" despite involving different vessels and different types of harmful bacteria).

Accordingly, Defendant's motion to dismiss Counts I, III, and IV on the basis of lack of actual or constructive notice should be **DENIED**.

2. Count II: Failure to Provide a Reasonably Safe Excursion

Turning to Count II, Royal Caribbean moves to dismiss this claim on the basis that Plaintiff centers her claim on an alleged "non-delegable contractual duty to provide her with a reasonably safe excursion," which in Royal Caribbean's view, is a duty of care not recognized under general maritime law. [D.E. 20 at 7]. Here, too, Plaintiff has the better argument (at least on a motion to dismiss) and we thus disagree with Defendant.

As this Court has previously held, a plaintiff in Ms. Gilles-Jean's position may properly plead a non-delegable duty to offer reasonably safe excursions if the complaint offers facts that demonstrate "some form of representation or assurance of safety [by the cruise line], above and beyond contract language." *Blow v. Carnival Corp.*, No. 22-22587-CIV, 2023 WL 3686840, at *11 (S.D. Fla. May 26, 2023) (citing *Bailey v. Carnival Corp.*, 369 F. Supp. 3d 1302, 1309 (S.D. Fla. 2019)). This is exactly what Plaintiff has done here. Among other things, the complaint asserts that, prior to buying her excursion ticket, Plaintiff spoke with one of Royal Caribbean staff members who answered questions and provided information about the Blue Lagoon expedition. [D.E. 15 ¶ 52]. Furthermore, the complaint alleges that, at different times, Royal Caribbean made representations of control over the shore excursion program and vouched for the safety and operational soundness of the Dolphin excursion program—representations on which Plaintiff relied when purchasing her ticket. *Id.* ¶¶ 53–54.

As in *Bailey and Blow*, these types of statements via advertisements or employees' representations, are sufficient to withstand scrutiny at the motion to dismiss stage. *See Witover v. Celebrity Cruises*, 161 F. Supp. 3d 1139, 1146 (S.D. Fla. 2016) (denying motion to dismiss claim of non-delegable duty where plaintiff alleged that representations of safety were made through cruise ship's employees and advertisements). Thus, Defendant's motion to dismiss Count II should be **DENIED**.

3. Count XII: Breach of Third-Party Beneficiary

We have already disposed of Plaintiff's third-party beneficiary theory in this ruling's jurisdictional section above, *see* supra at 19–20, holding that the plain text of the Tour Operator Agreement between Dolphin and Royal Caribbean clearly forecloses enforcement by non-signatories on the basis of third-party beneficiary. Incorporating that same analysis here, we agree with Defendant that Plaintiff's complaint fails to plead an actionable claim for third-party beneficiary breach and, thus, Royal Caribbean's motion to dismiss Count XII should be **GRANTED**.[7]

4. Counts V, VI, and VII: Negligent Training, Negligent Supervision, and Negligent Operation

Lastly, Royal Caribbean moves to dismiss Counts V, VI, and VII, on the grounds that Plaintiff cannot establish the existence of an agency, partnership, or joint venture relationship between Royal Caribbean and Dolphin, as to allow for the extension of vicarious liability upon Royal Caribbean. [D.E. 20 at 10]. In support of this argument, Defendant relies primarily on the TOA, a document outside the four corners of the complaint, whose plain language expressly denies the existence of any such relationship between Dolphin and Royal Caribbean. *Id.* at 11. Yet, while Defendant's theory may prove successful at summary judgment, this line of argument is ineffective at the present pleading stages of the case. *See Adams v. Carnival Corp.*,

[7] "[W]here the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal." *Brooks*, 116 F.3d at 1369. In her amended complaint, Plaintiff refers generally to an "agreement," but courts "understand[ ] 'agreement' in [the] Complaint to mean the Tour Operator Agreement." *Barham v. Royal Caribbean Cruises Ltd.*, 556 F. Supp. 3d 1318, 1331 (S.D. Fla. 2021), *appeal dismissed*, No. 21-13119-JJ, 2021 WL 6197353 (11th Cir. Nov. 22, 2021).

482 F. Supp. 3d 1256 (S.D. Fla. 2020) (holding that a website disclaimer that all shore excursions are operated by independent contractors is insufficient to dismiss an apparent agency claim as a matter of law); *Belik v. Carlson Travel Grp., Inc.*, 864 F. Supp. 2d 1302 (S.D. Fla. 2011) (ruling that ticket contract was not central to the Plaintiff's agency claims as to allow for the consideration of extratextual documents at the motion to dismiss stage).

Plaintiffs' agency allegations center on the intertwined business relationship between Royal Caribbean and Dolphin, including the sale and marketing of shore excursions on board the cruise ship, express manifestations of control of the excursion by Royal Caribbean's employees and advertisement, and Plaintiff's alleged reliance on these representations to her detriment, among other facts. [D.E. 15 ¶¶ 51–58]. As Plaintiff highlights, "the existence of an agency relationship is a question of fact under the general maritime law." *Franza v. Royal Caribbean Cruises*, 772 F.3d 1225, 1235–36 (11th Cir. 2014). Thus, because it is a fact intensive question and Plaintiff has sufficiently pled allegations of a plausible agency relationship for the purposes of Rule 8(a)(2), Defendant's motion to dismiss Counts V, VI, and VII should be **DENIED**. *See Giuliani v. NCL (Bahamas)*, No. 1:20-CV-22006, 2021 WL 2573133, at *6 (S.D. Fla. June 23, 2021) (Gayles, J.) (denying motion to dismiss premised on alleged lack of agency between tour operator and cruise line).

IV. CONCLUSION

For the foregoing reasons, the Court **RECOMMENDS** that Defendants Dolphin Encounters' and Robert Meister's Motions to Dismiss for lack of personal

jurisdiction [D.E. 19 & 59] be **GRANTED**, and that Defendant Royal Caribbean's Motion to Dismiss for failure to state a claim [D.E. 20] be **GRANTED in part** and **DENIED in part** as follows:

1. Royal Caribbean's Motion to Dismiss should be GRANTED solely with respect to **Count XII** (third-party beneficiary breach).
2. In all other respects, Royal Caribbean's Motions should be **DENIED**.

Pursuant to Local Magistrate Rule 4(b) and Fed. R. Civ. P. 73, the parties have Seven (7) business days from service of this Report and Recommendation within which to file written objections, if any, with the District Judge. 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. Commissioner of Social Security,* 2016 WL 7321208 (11th Cir. Dec. 16, 2016).

DONE AND SUBMITTED in Chambers at Miami, Florida, this 28th day of August, 2023.

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