UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 1:19-cv-20836-UU

MARTHA Y. NICHOLS, individually,
and as wife and Personal Representative
of the Estate of LARRY NICHOLS,

Plaintiff
,

v.

CARNIVAL CORPORATION,

Defendant.

_____/

ORDER

THIS CAUSE comes before the Court upon Defendant Carnival Corporation's ("Carnival") Motion to Dismiss Plaintiff's Complaint (D.E. 8) (the "Motion"). The Court has considered the Motion, the pertinent portions of the record and is otherwise fully advised in the premises. For the reasons discussed *infra*, the Motion is GRANTED.

I. Factual Background

Unless otherwise indicated, the following facts are taken from the well-pleaded allegations in Plaintiff's Complaint. D.E. 1 (the "Complaint").

A. The Parties

Plaintiff Martha Y. Nichols ("Plaintiff") brings this suit individually, as the surviving spouse of decedent Larry Nichols ("Decedent"), and as personal representative of Decedent's estate. Compl. ¶¶ 7–8. Plaintiff is a citizen of Arkansas. *Id.* ¶ 8. Defendant Carnival is a foreign

corporation with its principal place of business in Miami-Dade County, Florida. *Id.* ¶ 9. Carnival owns, operates, manages, maintains and/or controls the cruise ship *Breeze* (the "Ship"). *Id.* ¶¶ 10, 15.

On or about September 5, 2018, Plaintiff and Decedent were passengers on the Ship, which was docked in the Roatan, Honduras. *Id.* ¶¶ 11, 15. This action stems from Decedent's participation in a sailing and snorkeling excursion called "Jolly Roger Roatan" (the "Excursion") as part of his cruise on the Ship. *See id.* ¶¶ 16, 28.

B. Promotional Materials and Advertising of the Excursion

After Plaintiff booked the subject cruise aboard the Ship, Carnival sent Plaintiff promotional material providing information and descriptions of shore excursions, including the Excursion. *Id.* ¶ 16. Additionally, Carnival's website contained information regarding shore excursions, and the Excursion, and sold tickets for excursions. *Id.* ¶ 17. At some point, Plaintiff "reviewed" Carnival's website and saw that Carnival markets the excursions, including the Excursion, as "Uniquely CARNIVAL." *Id.* ¶ 21 (emphasis in original).

Once Decedent was aboard the Ship, Carnival made a presentation to passengers, during which Carnival discussed and promoted the excursion options available to passengers during the cruise. *Id.* ¶ 18. Carnival described the excursions, including the Excursion as "CARNIVAL excursions." *Id.* (emphasis in original). Additionally, at the shore excursion desk and elsewhere aboard the Ship, Carnival had promotional materials with information and descriptions of the Excursion and other excursions. *Id.* ¶ 19. Tickets for the Excursion and other excursions were available for sale on the Ship's shore excursion desk. *Id.*

The information and material Carnival made available and/or distributed to Plaintiff represented that the excursions offered by Carnival, including the Excursion, were of the highest

safety standards and would be safe for passengers like Decedent. *Id.* ¶ 20. Carnival and/or its crewmembers also advised its passengers, including Plaintiff, not to engage in excursions, tours or activities that were not selected and sold by Carnival. *Id.* ¶ 21. Carnival promotional materials and information concerning excursions represented that Carnival "partnered with experts around the world" and that safe transportation to the excursion locations and back to the Ship was included in the tickets sold by Carnival. *Id.* ¶ 23.

C. The Incident on September 5, 2018

Plaintiff obtained all Excursion-related information from Carnival, purchased a ticket for the Excursion directly from Carnival, and made all reservations through Carnival. *Id.* ¶¶ 23–24. Plaintiff purchased tickets for and participated in the Excursion in reliance "exclusively" on Carnival's presentations as well as "the safety and reputability of the excursions offered by" Carnival. *Id.* ¶¶ 23, 25–26.

Plaintiff understood from Carnival's presentations that Carnival regularly inspected the Excursion, including transportation and the Excursion operators, to ensure that they were reasonably safe. *Id.* ¶ 26. Plaintiff also believed the Excursion was owned or operated by Carnival as part of Plaintiff's cruise aboard the Ship. *Id.* ¶ 27. However, the Excursion actually was operated by a separate (unnamed) entity.[1] *Id.* ¶ 29.

On or about September 5, 2018, Plaintiff participated in the Excursion in Honduras. *Id.* ¶ 28. The Excursion consisted of participants (including Plaintiff and Decedent) being taken by catamaran to sail, swim, and snorkel. *Id.* ¶ 30. All transportation was part of the Excursion sold by Carnival. *Id.* While he was snorkeling, Decedent began to suffer symptoms resembling the

[1] Nevertheless, Plaintiff's Complaint is replete with reference to "JOLLY ROGER ROATAN EXCURSION" (so capitalized) as some kind of fictitious entity with which Carnival maintained an employer-employee, principal-agent (actual or apparent), master-servant, partner or joint venture relationship. *See, e.g., id.* ¶¶ 47, 52–53, 55, 68–71, 73–74, 76–88.

symptoms suffered during a respiratory and/or emergency cardiac condition. *Id.* ¶ 31. There were no lifeguards, tour guides, and/or crew members supervising the area. *Id.* ¶ 32. After a delay, Decedent was brought back on the catamaran; due to his condition, Decedent was incapacitated and had to be transported to a local hospital for medical attention. *Id.* ¶ 33.

Once he was aboard the tender, Carnival crew members failed to provide any emergency response aid and/or assistance. *Id.* ¶ 34. Carnival also had failed to equip the tender with properly functioning defibrillators and/or any other first aid/first response equipment to provide emergency care. *Id.* ¶ 35. (Plaintiff also alleges, presumably in the alternative, that any first aid equipment was not labeled appropriately and/or not readily accessible for use. *Id.* ¶ 36.) Neither the Carnival crew members on the tender nor any other agents, tour guides, crewmembers and/or employees were properly trained on how to respond to emergency situations. *Id.* ¶¶ 34, 36. Additionally, Carnival failed to appropriately inspect (either prior to or after Carnival's approval of the Excursion) the Excursion's operators and/or employees and the transportation used for the Excursion. *Id.* ¶¶ 38–42.

Carnival's various alleged failures caused Decedent to die on September 5, 2018. *Id.* ¶ 37.

II. Procedural Background

On March 4, 2019, Plaintiff filed her complaint against Carnival, alleging five causes of action against Carnival relating to Decedent's incident on the Excursion: (1) general negligence; (2) negligent hiring and/or retention; (3) negligence "based on apparent agency"; (4) negligence "based on joint venture"; and (5) breach of third party beneficiary contract.[2] *See generally* Compl. As a remedy, Plaintiff seeks, *inter alia*: medical, funeral, and burial expenses that have become a charge of the estate and/or have been paid on Decedent's behalf;

[2] This claim is erroneously labeled as Count VI. There is no Count V in the Complaint.

compensatory damages; loss of support and services; loss of companionship; loss of net accumulations of the estate; mental pain and suffering; and all other damages allowed by law. *See id.* ¶¶ 61, 67, 75, 89, 96. Carnival moved to dismiss the Complaint on April 1, 2019. The Motion is now ripe for disposition.

III. Legal Standard on a Motion to Dismiss

In order to state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." While a court, at this stage of the litigation, must consider the allegations contained in the plaintiff's complaint as true, this rule "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the complaint's allegations must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* (citing *Twombly*, 550 U.S. at 555).

In practice, 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.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id.* at 679.

IV. Analysis

A. Plaintiff's Complaint Generally

Plaintiff's Complaint will be dismissed without prejudice in its entirety for failure to comply with Rule 8. The most pervasive and fundamental issue is Plaintiff's failure to tie her factual allegations to her legal claims. For example, in Count One, Plaintiff asserts a negligence claim, but pleads causation in completely conclusory fashion; there is no explanation as to how or why the alleged acts or omissions caused her injury. Compl. ¶ 59 ("All or some of the above acts and/or omissions by Carnival and/or its agents, servants, and/or employees, caused and/or contributed to the Decedent's death as a result of participating in the subject excursion.").

Similarly, Plaintiff begins every Count with a preamble re-alleging and incorporating by reference a group of 55 paragraphs of factual allegations. *See generally id.* ("The Plaintiff readopts and realleges paragraphs 1 through 55 as if fully set forth herein:"). But, with a few exceptions, Plaintiff does not explain which facts in these 55 paragraphs, spread across thirteen pages, support her numerous causes of action. This makes the complaint a shotgun pleading. *See Great Fla. Bank v. Countrywide Home Loans, Inc.*, 2011 WL 382588, at *2 (S.D. Fla. Feb. 3. 2011) ("A shotgun-style complaint is [sic] one that incorporates all of the general factual allegations by reference into each subsequent claim for relief.") (quotation omitted); *Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll.*, 77 F.3d 364, 366 (11th Cir.1996) (finding complaint was "perfect example of 'shotgun' pleading in that it [was] virtually impossible to know which allegations of fact [were] intended to support which claim(s) for relief") (citation omitted).

To be sure, there are many detailed and well-pled factual allegations, and if the Court were Plaintiff's counsel it could likely marshal these allegations in support of the claims Plaintiff seeks to bring. But, "[u]nder the adversary system, it is counsel's responsibility to explain why these

points have legal merit; the Court does not serve as counsel's law clerk." *Fed. Ins. Co. v. Cty. of Westchester*, 921 F. Supp. 1136, 1138 (S.D.N.Y. 1996). Accordingly, the Court will dismiss the entirety of the complaint without prejudice and with leave to amend. *See Wagner v. First Horizon Pharm. Corp*., 464 F.3d 1273, 1280 (11th Cir. 2006) ("Given the district court's proper conclusions that the complaint was a shotgun pleading and that plaintiffs' [sic] failed to connect their causes of action to the facts alleged, the proper remedy was to order repleading *sua sponte*."). Nevertheless, to ensure that any amended complaint complies with the pleading requirements of Rule 8 and will not require the filing of another motion to dismiss, and another amendment, the Court will also address Carnival's contentions in its motion to dismiss.

B. Death on the High Seas Act ("DOHSA") Preemption

Carnival first argues that DOHSA preempts Plaintiff's state-law claims because DOHSA provides the "sole, exclusive remedy" for claims arising from Decedent's death. Mot. at 3–4. DOHSA applies "[w]hen 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." 46 U.S.C. § 30302. DOHSA precludes the award of any non-pecuniary damages. 46 U.S.C. § 30303; *see also Ridley v. NCL (Bahamas) Ltd.*, 824 F. Supp. 2d 1355, 1360 (S.D. Fla. 2010). Plaintiff argues that because Decedent died on land, and because Carnival's negligent acts (its marketing of the Excursion, failing to inspect the Excursion operator, failing to provide medical equipment, failing to properly train personnel, etc.) occurred on land, DOHSA does not apply. *See* D.E. 13 at 16–17.

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. *See, e.g., Kennedy v. Carnival Corp.*, --- F. Supp. 3d ----, 2019 WL 2254918, at *3 (S.D. Fla. Mar. 6, 2019) (collecting cases), *report and recommendation adopted at* 2019 WL

2254962 (S.D. Fla. Mar. 21, 2019). It is well-established that when a negligence-based death occurs on the high seas, DOHSA governs the claim, even if the locus of the negligence causing the death is elsewhere. *See Motts v. M/V GREEN WAVE*, 210 F.3d 565, 569-570 (5th Cir. 2000); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207, 218 (1986); *Bergen v. F/V ST. PATRICK*, 816 F.2d 1345, 1348 (9th Cir. 1987). The Eleventh Circuit and Florida state courts have made clear that when a cause of action exists for wrongful death under DOHSA, no additional action exists under state law or general maritime law for wrongful death caused by negligence. *See Ford v. Wooten*, 681 F.2d 712, 715-16 (11th Cir. 1982); *Ray v. Fifth Transoceanic Shipping Co., Ltd.*, 529 So.2d 1181 (Fla. 2d DCA 1988); *see also Kennedy*, 2019 WL 2254918, at *4 (DOHSA provides the "exclusive remedy"); *Ridley v. NCL (Bahamas) Ltd.*, 824 F. Supp. 2d 1355, 1359–60 (S.D. Fla. 2010) (same).

The case of *Moyer v. Rederi*, 645 F. Supp. 620 (S.D. Fla. 1986), squarely addresses the applicability of DOHSA in this case. There, like here, the decedent was a cruise ship passenger who, during a snorkeling expedition, began to suffer a heart attack. *See id.* at 622–23, 627–28. The snorkeling expedition took place off the shores of Cozumel, Mexico. *Id.* at 622. The decedent's heart attack began offshore, but he was brought ashore and was still alive at the time of his arrival onshore. *Id.* Moreover, the plaintiff—the decedent's personal representative—pointed to "land-based negligence *prior* to the snorkeling expedition" such as inadequate pre-expedition screening and training. *Id.* at 627 (emphasis in original). There, as here, the plaintiff argued that the land-based death and land-based negligent acts rendered DOHSA inapplicable. *See id.* at 627–28. The court carefully considered applicable case law and concluded that the application of DOHSA depends on where the alleged wrongful acts or omissions took effect. *See id.* Because the defendants' acts took effect off the shore of Mexico, the plaintiff's arguments

lacked merit:

> Plaintiff's allegations that Defendants acted negligently both before and after the snorkeling expedition do not defeat admiralty jurisdiction. The key operative fact, disputed by none of the parties, is that the decedent's illness commenced while he was participating in the snorkeling expedition; i.e., while he was on the high seas, as defined by DOHSA, in connection with an activity bearing a substantial relationship to a traditional maritime activity—the operation of a cruise ship on the high seas.

Id. at 628.

This Court is persuaded by Judge Marcus's well-reasoned opinion in *Moyer* that the applicability of DOHSA turns on whether the decedent's illness commenced while on the high seas while engaged in a maritime-related activity. And here, as in *Moyer*, Carnival's alleged land-based negligence took effect both when Decedent's injuries began (that is, while snorkeling off the shore of Honduras) and when Decedent was deprived of adequate medical care at sea while on the tender. Though Decedent was taken to a "local" hospital in Honduras, Compl. ¶ 33, and may have died on land, DOHSA still applies. *Cf. Kennedy*, 2019 WL 2254918, at *5 (DOHSA applied "even though the Decedent may have ultimately succumbed on land at the Mexican shore"). And though Carnival allegedly committed various pre-snorkeling acts of negligence, those negligent acts did not take effect until Decedent began exhibiting the symptoms requiring medical care, i.e., on the high seas.

As a result, all of Plaintiff's claims are preempted by DOHSA. To the extent Plaintiff purports to bring Florida and/or general maritime claims (*see* Compl. ¶ 1), the claims shall be dismissed. *Cf. Ford*, 681 F.2d at 716; *see also Varner v. Celebration Cruise Line, LLC*, No. 0:15-CIV-60867-WPD, 2015 WL 12868132, at *3 (S.D. Fla. Sept. 15, 2015) ("Plaintiffs also argue that because they have invoked diversity jurisdiction under 28 U.S.C. § 1332, Plaintiffs are entitled to assert their negligence claim in addition to their DOSHA claim. Plaintiffs fail to cite

any supporting case law for this proposition, and the Court rejects it."). Plaintiff may replead to bring her claims under DOHSA.

Additionally, because DOHSA applies, non-pecuniary damages are unavailable. *See Kennedy*, 2019 WL 2254918, at *7. As the Court is dismissing the Complaint without prejudice and with leave to amend, Plaintiff is instructed that any amended complaint's prayer for relief may include only categories of pecuniary damages. If the amended complaint again includes non-pecuniary damages, such as loss of companionship and mental pain and suffering, those categories of damages will be stricken with prejudice. *Cf id.*[3]

C. Theories of Negligence

As explained above, DOHSA is the exclusive vehicle for Plaintiff to remedy Carnival's allegedly wrongful acts. However, there is a paucity of case law delineating the elements of a DOHSA claim. At least one case in this District has applied the traditional maritime negligence elements to DOHSA claims. *See Tello v. Royal Caribbean Cruises, Ltd.*, 939 F. Supp. 2d 1269, 1275 (S.D. Fla. 2013) (describing DOHSA negligence elements as "(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").[4] And at least one other case in this District has recognized that DOHSA claims may encompass various theories of negligence, such as negligent selection/retention, negligence

[3] The Court agrees with Carnival that medical, funeral, and burial expenses are non-recoverable to the extent they were or are chargeable to the estate rather than the Decedent's dependents. *See Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 624 n.20 (1978) (suggesting DOSHA pecuniary losses could include funeral costs that dependents have paid or will pay for the decedent's funeral, "on the theory that, but for the wrongful death, the decedent would have accumulated an estate large enough to pay for his own funeral"); *see also Chute v. United States*, 466 F. Supp. 61, 69 (D. Mass. 1978) (funeral costs could be a pecuniary loss under DOHSA "only…where the claimants have paid or will pay for the decedent's funeral, and not where the estate has paid for the funeral" (internal citation and footnote omitted)).

[4] *See also* Amended Complaint, *Tello v. Royal Caribbean Cruises, Ltd.*, No. 1:11-cv-24503-JAL, D.E. 38 (Count I styled as "Negligence Wrongful Death Under DOHSA").

based on apparent agency, and "catch-all" negligence. *See Gavigan v. Celebrity Cruises, Inc.*, 843 F. Supp. 2d 1254, 1260 (S.D. Fla. 2011). To the extent Plaintiff will replead her various claims to be subsumed within DOHSA, the Court hereby explains why her claims as pled would be deficient under that cause of action. Plaintiff must resolve these deficiencies in any amended complaint.

a. Count One

1. Duty

In Count One, Plaintiff's general negligence claim, Plaintiff recites 28 alleged failures of Carnival, "[a]ll or some" of which "caused and/or contributed to the Decedent's death." *See* Compl. ¶¶ 58(a)–(bb), 59. These failures include Carnival's alleged breaches of its duty to warn, specifically, and other alleged breaches of the duty of reasonable care, broadly.[5] Beyond the failure to warn, for example, Plaintiff alleges that Carnival caused injury through its "failure to provide a safe shore excursion," "failure to properly supervise and/or oversee the excursion," "failure to adequately monitor excursion providers," "having a shore excursion that was not competently operated," and "failure to promulgate and/or enforce adequate policies and procedures." *See* Mot. at 7–8 (citing Compl. ¶ 58). Carnival contends these allegations improperly impose a heightened duty upon it.

The Court agrees with and follows *Tello* to conclude that the traditional maritime negligence elements would apply to Count I if it were pled as a DOSHA negligence claim. "A carrier by sea . . . is not liable to passengers as an insurer, but only for its negligence." *Kornberg v. Carnival*

[5] The duty to warn is part and parcel of the duty of ordinary care. *See, e.g., Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1322 (S.D. Fla. 2011) (cruise shipowner's duty of ordinary reasonable care under the circumstances "*includes* a duty to warn passengers of dangers the cruise line knows or reasonably should have known" (emphasis added)).

Cruise Lines, Inc., 741 F.2d 1332 (11th Cir. 1984). "A shipowner generally owes to its passengers a duty to exercise 'reasonable care under the circumstances.'" *Wolf v. Celebrity Cruises, Inc.*, 683 F. App'x 786, 794 (11th Cir. 2017) (quotation omitted). As part of this duty of reasonable care, cruise ship operators owe a duty "to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citing *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248 (Fla. 3d DCA 1985)). But a shipowner only has a duty to protect passengers from dangers "of which the carrier knows, or reasonably should have known." *Wolf*, 683 F. App'x at 794. "Accordingly, as a prerequisite to imposing liability, a carrier must have had 'actual or constructive notice of the risk-creating condition.'" *Wolf*, 683 F. App'x at 794 (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989)).

Thus, Carnival is correct that it only has a duty to warn of dangers of which it knows or reasonably should have known. But, at this stage, the Court cannot conclude that the duty to warn is the *only* duty Carnival owed to the Decedent. "While generally the duty to warn is the most relevant duty regarding off-vessel 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." *Heller v. Carnival Corp.*, 191 F. Supp. 3d 1352, 1357 n.4 (S.D. Fla. 2016) (citing *Nielsen v. MSC Crociere, S.A.*, No. 10-62548-CIV, 2011 WL 12882693, at *4–6 (S.D. Fla. June 24, 2011)). Because Plaintiff has alleged an agency relationship between Carnival and the unnamed excursion entity, it is possible that Carnival owed additional duties to the Decedent beyond the duty to warn.

Accordingly, Carnival's motion to dismiss must be denied on this ground; viewing the allegations in the light most favorable to Plaintiff, Carnival owes a duty of reasonable care under

the circumstances, which may include duties beyond the duty to warn. Which alleged duties may ultimately apply to Carnival will depend on which theories of liability vis-à-vis the excursion entity (*i.e.*, partnership, agency, etc.) that Plaintiff is able to plead and prove. *See Nielsen*, 2011 WL 12882693, at *6. And to the extent Carnival seeks to challenge whether it actually breached its duties, "such a contention is more appropriate for summary judgment than for the consideration upon a motion to dismiss." *Bridgewater v. Carnival Corp.*, No. 10-22241-CIV, 2011 WL 817936, at *2 (S.D. Fla. Mar. 2, 2011).

2. Notice

"As a prerequisite to imposing liability, a carrier must have had 'actual or constructive notice of the risk-creating condition.'" *Keefe*, 867 F.2d at 1322. Carnival argues that Count One must be dismissed because Plaintiff has failed to adequately allege that Carnival knew or should have known of any dangerous conditions that would trigger its duty to warn or act with reasonable care. Plaintiff responds by pointing to paragraph 60 of the Complaint, which she alleges indicate that Carnival knew of the dangerous conditions created by the Excursion and the catamaran (tender). *See* D.E. 13 at 6. Paragraph 60 reads, in its entirety:

> At all times material hereto, CARNIVAL knew of the foregoing conditions causing the subject incident and did not correct them, or the conditions existed for a sufficient length of time so that CARNIVAL, in the exercise of reasonable care under the circumstances, should have learned of them and corrected them. This knowledge was or should have been acquired through: (a) CARNIVAL's initial approval process of JOLLY ROGER ROATAN EXCURSION, including, but not limited to, having CARNIVAL's representative(s) take the excursion; (b) CARNIVAL's inspections of JOLLY ROGER ROATAN EXCURSION and/or the excursion, including, but not limited to, conducting site inspections; and/or (c) prior incidents involving tour operators for excursions in Roatan, Honduras, including the subject excursion and/or other excursions operated by JOLLY ROGER ROATAN EXCURSION that have been or should have been reported within the cruise industry[.]

Compl. ¶ 60.

The Court agrees with Carnival that Plaintiff's allegations of notice are conclusory and formulaic. Plaintiff has insufficiently pled notice because she has failed to articulate what facts gave Carnival actual or constructive notice about any dangerous condition. *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1392–93 (S.D. Fla. 2014) (explaining that the "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.") (emphasis added). For example, Plaintiff argues that Carnival had or should have had knowledge based on prior incidents involving Honduran excursions, generally, and the Excursion, specifically, which were or should have been reported. Compl. ¶ 60. But Plaintiff does not allege what prior incidents may have occurred, and on what excursions, nor *how* these incidents put Carnival on notice. *See Polanco v. Carnival Corp.*, No. 10-21716-CIV, 2010 WL 11575228, at *3 (S.D. Fla. Aug. 11, 2010) ("The problem for the plaintiffs is that . . . [t]here are no details about how long Carnival knew of the negligent operation of the motor vehicle on the excursion, or how it was that Carnival knew or should have known about such negligent operation. There are also no details about the similar past incidents that Carnival allegedly failed to investigate. What were the incidents, and how were they similar? When did they occur? Who was the excursion operator? Who were the drivers of the motor vehicles in the other incidents? How did Carnival learn of the incidents? The complaint is bereft of information on these material issues. It therefore fails to state a claim for negligence, and is dismissed without prejudice."). Count One therefore is dismissed without prejudice and with leave to amend.

b. Count Two

In Count Two, Plaintiff pleads a claim for negligent hiring and/or retention, arguing that Carnival was negligent in hiring the Excursion entity to run the excursion. Compl. ¶¶ 62-67.

Carnival again argues that this Count must be dismissed because Plaintiff has failed to plead any facts tending to show that Plaintiff was on notice of any unsafe condition or knew of the Excursion operator's incompetence. Plaintiff responds that she has pled each element in Count Two.

> To bring a claim of *prima facie* negligent selection/retention, a plaintiff must plead:
>
> (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.

Smolnikar v. Royal Caribbean Cruises Ltd., 787 F. Supp. 2d 1308, 1318 (S.D. Fla. 2011). The Court agrees with Carnival that Plaintiff has not adequately pled the second element. *See infra* p. 13–14. Plaintiff fails to plead what facts gave Carnival actual or constructive notice of the operator's incompetence or unfitness. For example, Plaintiff pleads that it was "incumbent on Carnival" to conduct site inspections, but fails to explain what alleged incompetence the inspections revealed or should have revealed to Carnival. *Compare* Compl. ¶ 64, *with id.* ¶¶ 65–66. Moreover, Plaintiff fails to plead the third element of this claim. Her allegations as to causation are entirely conclusory and plead no facts explaining how or why any of the Excursion operator's allegedly incompetent acts led to her husband's death:

> At all times material hereto, JOLLY ROGER ROATAN EXCURSION'S incompetence and/or unfitness caused and/or contributed to the Plaintiff's death while participating in the subject shore excursion . . . As a direct and proximate result of the negligence of CARNIVAL and/or JOLLY ROGER ROATAN EXCURSION the Plaintiff, LARRY NICHOLS, was killed. . . .

Id. ¶ 67 (emphasis added). Accordingly, Count Two is dismissed without prejudice and with leave to amend.

d. Count Three

In Count Three, Plaintiff alleges that Carnival is vicariously liable for the negligence of the Excursion operator based on apparent agency. *Id.* ¶¶ 69–75. Carnival argues that as Plaintiff

has failed to plead factual support for its negligence claim, any related negligence claim relying on agency similarly fails. Mot. at 13–14. Carnival also argues that Plaintiff has failed to plead that she reasonably believed that Carnival and the Excursion operator were agents because Carnival's exemplar shore excursion ticket, passenger ticket contract, and Shore Excursion FAQ page, as attached to Carnival's motion, expressly categorize excursion operators as independent agents. *Id.* at 14–16. Plaintiff does not address this first contention other than to reassert that her negligence claim is well pled. As to the second argument, Plaintiff argues that the Court cannot consider the ticket or the website at the pleading stage without converting the motion into a motion for summary judgment.

To plead the existence of an agency relationship via apparent agency, a Plaintiff must allege that:

> 1) the alleged principal made some sort of manifestation causing a third party to believe that the alleged agent had authority to act for the benefit of the principal, 2) that such belief was reasonable and 3) that the claimant reasonably acted on such belief to his detriment.

Zapata v. Royal Caribbean Cruises, Ltd., No. 12-21897-CIV, 2013 WL 1296298, at *5 (S.D. Fla. Mar. 27, 2013). The Court has already determined that Plaintiff's direct negligence action against Carnival is deficiently pled as to causation and notice, and the Court also notes that these pleading deficiencies are present in Plaintiff's apparent agency claim; for example, Plaintiff again lodges the conclusory assertion that "[a]ll or some of the above acts and/or omissions by CARNIVAL and/or its apparent agents, JOLLY ROGER ROATAN EXCURSION, caused and/or contributed to the Plaintiff's death while participating in the subject excursion." Compl. ¶ 74. Therefore, as Plaintiff's negligence claim based on an agency relationship between the Excursion operator and Carnival is deficiently pled as to causation it must be dismissed. In addition, as it is dependent upon a deficiently pled allegation as to Carnival's negligence, the Court agrees with

Carnival that this claim should be dismissed without prejudice. *See Zapata*, 2013 WL 1296298, at *5 ("I already have dismiss[ed] without prejudice . . . Plaintiff's negligence claim. Accordingly, Plaintiff's apparent agency claim must be dismissed without prejudice as well."). However, assuming Plaintiff amends her complaint to cure these deficiencies, she will have otherwise pleaded a claim for apparent agency. Plaintiff lists several manifestations that led her to believe that the Excursion operator was acting on behalf of Carnival—for example, that Plaintiff purchased her ticket directly from Carnival. *See* Compl. ¶ 69. Plaintiff also asserts such a belief was reasonable given that all arrangements were done through Carnival. *Id.* ¶ 71.

Next, the Court agrees with Carnival that the passenger ticket contract is expressly incorporated by reference in the Complaint. *See id.* ¶¶ 2–4, 12. However, the exemplar ticket (which is dated March 20, 2019, and therefore not necessarily dispositive proof of representations on the Decedent's ticket on September 5, 2018) and the Shore Excursion FAQs website are not. The Court therefore agrees with Plaintiff that at this stage, the Court may not consider these documents.

> [A] document attached to a motion to dismiss may be considered by the court without converting the motion into one for summary judgment only if the attached document is: (1) central to the plaintiff's claim; and (2) undisputed . . . "Undisputed" in this context means that the authenticity of the document is not challenged.

Horsley v. Feldt, 304 F.3d 1125, 1134 (11th Cir. 2002) (citation omitted). As Plaintiff rightly notes, *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1237–38 (11th Cir. 2014), forecloses Carnival's reliance on these documents at the pleading stage. Even if the Court could consider all the extrinsic documents, the Court need not conclude that the Excursion operator is an independent contractor simply because that is how Carnival characterizes them; indeed, this characterization is contrary to Plaintiff's allegations, which the Court must construe in the light most favorable to Plaintiff at this stage. *See Franza*, 772 F.3d at 1238 (concluding that, on balance, the complaint

sets out a plausible basis for apparent agency based on the allegations, noting that even if the court could consider defendant's exhibits, it would not consider nurse and doctor to be independent contractors "simply because that is what the cruise line calls them"). Carnival is free to re-assert this argument at the motion for summary judgment or motion in limine stage. Accordingly, Count Three is dismissed without prejudice.

e. Count Four

In Count Four, Plaintiff brings a claim for negligence arising out of an alleged joint venture between Carnival and the Excursion operator. Carnival argues that this claim must be dismissed because Plaintiff has pled no facts supporting the existence of a joint venture under Florida law.[6] Plaintiff argues that she has adequately pled each element. *See* D.E. 13 at 13–15. Assuming without deciding that Florida law would apply to Plaintiff's DOHSA negligence claim premised on joint venture,[7] under Florida law:

> [i]n order for a joint venture to exist, there must be: (1) a community of interest in the performance of a common purpose; (2) joint control or right of control; (3) a joint proprietary interest in the subject matter; (4) a right to share in the profits; and (5) a duty to share in any losses which may be sustained.

Fojtasek v. NCL (Bahamas) Ltd., 613 F. Supp. 2d 1351, 1357 (S.D. Fla. 2009). The Court agrees that, unlike the rest of her Counts, Plaintiff has adequately pled facts to support the existence of

[6] Carnival also argues that the standard shore excursion independent contractor agreement forecloses this argument, but the Court does not consider the agreement as dispositive for the reasons explained above. *Cf. Franza*, 772 F.3d at 1238.

[7] Carnival also argues that Count Four should be dismissed because "Joint Venture" is not an independent cause of action. The text of the Count makes clear that it is simply an alternative negligence claim based on the existence of an alleged joint venture between the parties, not that Plaintiff is bringing an action for "Joint Venture." Indeed, the title of Count Eight is "NEGLIGENCE AGAINST CARNIVAL BASED ON JOINT VENTURE BETWEEN CARNIVAL AND JOLLY ROGER ROATAN EXCURSION." Compl. at 23 (emphasis added). *See Ash v. Royal Caribbean Cruises Ltd.*, No. 13-20619-CIV, 2014 WL 6682514, at *8 (S.D. Fla. Nov. 25, 2014) ("There is no cause of action for 'Joint Venture,' but, as with Count III, it is clear from review of the substance of the count that Plaintiffs' Count IV simply advances another alternative theory for *negligence* liability—namely, that because Royal Caribbean and the Excursion Entities were engaged in a joint venture, Royal Caribbean is liable for the Excursion Entities' negligent conduct."). Accordingly, it goes without saying that the Court does not dismiss Count Four on this ground.

a joint venture. Plaintiff pleads the first element: that Carnival and the Excursion operator "shared a common purpose: to operate the subject excursion for a profit." Compl. ¶ 81. The second element:

> CARNIVAL and JOLLY ROGER ROATAN EXCURSION had joint and/or shared control over aspects of the joint venture. JOLLY ROGER ROATAN EXCURSION had control over the day to-day workings of the excursions. CARNIVAL also had control over the day-to-day workings of the excursions in that they required JOLLY ROGER ROATAN EXCURSION to exercise reasonable care in the operation of the subject excursion. CARNIVAL had control over the arrangements, marketing and sales of the excursion.

Id. ¶ 80. The third element:

> CARNIVAL and JOLLY ROGER ROATAN EXCURSION had a joint proprietary and/or ownership interest in the subject excursion. Carnival had an interest in arranging, sponsoring, recommending, advertising, operating, and selling the subject excursion as well as collecting money for such excursion, and JOLLY ROGER ROATAN EXCURSION had a proprietary interest in the time and labor expended in operating the subject excursion.

Id. ¶ 82. The fourth element:

> CARNIVAL and JOLLY ROGER ROATAN EXCURSION shared and/or had the right to share in the profits of the subject excursion, as CARNIVAL retained a portion of the ticket sales for the subject excursion after the tickets were sold, and CARNIVAL paid JOLLY ROGER ROATAN EXCURSION the remaining portion of the ticket sales for the subject excursion.

Id. ¶ 83. And finally, the fifth element: "CARNIVAL and JOLLY ROGER ROATAN EXCURSION shared losses that may have been sustained with the subject excursion, including, for instance, when CARNIVAL issued a refund to passengers for JOLLY ROGER ROATAN EXCURSION (s), including, but not limited to, the subject excursion." *Id.* ¶ 84. Accordingly, the Court denies Carnival's Motion on this ground, but as the negligence claim that underlies Count One is deficiently pled as to causation and notice, among other things, the Court will also dismiss this alternative negligence claim without prejudice. *See supra* pp. 11–14.

f. Count Six

In Count Six,[8] Plaintiff brings a claim for breach of a third-party beneficiary contract, alleging that Carnival and the Excursion operator entered into a contract to benefit Plaintiff by providing shore excursions and breached that contract by, *inter alia*, failing to provide a safe excursion. Compl. ¶¶ 90–96. Carnival argues that no implied contract exists because there was no intent by Carnival and the Excursion operator to create a third-party beneficiary relationship. *See* Mot. at 17–19. Plaintiff responds that she has pled all the elements of her third-party beneficiary contract claim and that resolution of Carnival's argument would require factual determinations inappropriate at the pleading stage. D.E. 13 at 15–16.

To allege a claim for breach of a third-party beneficiary contract, a party 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; and (4) damages resulting from the breach." *Heller*, 191 F. Supp. 3d at 1364. The intent to benefit a third party in the contract "must be specific and must be clearly expressed in the contract." *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1398 (S.D. Fla. 2014) (internal quotation marks omitted) (quoting *Bochese v. Town of Ponce Inlet*, 405 F.3d 964, 982 (11th Cir. 2005)). It is not sufficient for a third party to have an "incidental or consequential benefit." *Id*. (internal quotation marks omitted).

As an initial matter, Plaintiff does not contest that the agreement attached to Carnival's motion is the agreement underlying her third-party beneficiary claim. *Compare* Mot. at 18–19 & Ex. E *with* D.E. 13 at 15–16. Thus, as to Count Six, the Court can consider the agreement, as it is central to Plaintiff's claim. *Compare* Compl. ¶ 90 (incorporating by reference the contract

[8] *See supra* n.2.

between Carnival and the Excursion operator to provide the subject excursion for Carnival cruise passengers) *with* Mot. at Ex. E. The agreement expressly provides that "Each party represents and warrants to the other party that…its execution and performance under this Agreement will not result in a breach of any obligation to any third party or infringe or otherwise violate any third party's rights." Mot. at Ex. E ¶ 12. Therefore, at best, any benefit to Plaintiff from this contract's express terms is incidental.

Plaintiff's allegations of a "specific and clearly expressed" intent to benefit Plaintiff effectively boil down to an allegation that the Excursion operator and Carnival contracted to ensure that passenger excursions would be safe. *See* Compl. ¶ 93. As this Court and multiple other courts have found, "[t]o 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." *Aronson*, 30 F. Supp. 3d at 1398; *Finkelstein v. Carnival Corp*., No. 1:14-CV-24005-UU, 2015 WL 12765434, at *4 (S.D. Fla. Jan. 20, 2015) (holding no third party beneficiary claim because contract's requirement that excursion operators maintain insurance and exercise reasonable care "fail[ed] to satisfy the pleading requirements because they do not clearly and specifically express Defendants' intent to primarily and directly benefit Plaintiffs.") (Ungaro, J.) (alteration added) (internal quotations omitted); *Heller*, 191 F. Supp. 3d at 1364 (holding no third-party beneficiary claim based on plaintiff's allegation that "the contract primarily and directly benefit[ted] the third-party Plaintiff by requiring the Excursion Entities to *maintain insurance* and/or *exercise reasonable care* in the operation of the Segway Tour.") (emphasis added); *Thompson v. Carnival Corp*., 174 F. Supp. 3d 1327, 1344 (S.D. Fla. 2016) (holding no third party beneficiary claim where plaintiff alleged that "Carnival and the Excursion Entities entered into a contract that primarily and directly benefit[s] him by requiring the

Excursion Entities to maintain insurance and/or exercise reasonable care in the operation of the subject shore excursion.") (internal quotations omitted) (alteration in original); *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-CIV, 2012 WL 2049431, at *11 (S.D. Fla. June 5, 2012) (holding no third-party beneficiary contract where intent to benefit third party was predicated upon statement that excursion operator "will satisfy the highest standards in the industry").

Nevertheless, as the question of whether Carnival and the Excursion operator intended Plaintiff to be a third party beneficiary is a question of fact, and Plaintiff may have some other proof of intent besides the contract attached to Carnival's motion, the Court also will dismiss this count without prejudice. *See Barnett v. Carnival Corp.*, No. 06–22521–CIV, 2007 WL 1746900, at *4 (S.D. Fla. June 15, 2007) ("[T]he issue of intent is not appropriate for resolution on a motion to dismiss."). However, if in her amended complaint, Plaintiff continues to rely only on the same allegations and the same contract attached to Carnival's motion, the Court will dismiss the claim with prejudice.

V. Conclusion

In sum, Plaintiff's Complaint fails under Rule 8 and does not assert a DOHSA claim, which is Plaintiff's exclusive remedy. Thus, the Complaint will be dismissed without prejudice and with leave to amend to assert claim(s) under DOHSA, which claim(s) must specifically identify what facts support each element of each cause of action. Accordingly, it is

ORDERED AND ADJUDGED that the Motion, D.E. 8, is GRANTED. It is further

ORDERED AND ADJUDGED that the Complaint, D.E. 1, is DISMISSED WITHOUT PREJUDICE AND WITH LEAVE TO AMEND in its entirety. It is further

ORDERED AND ADJUDGED that if Plaintiff wishes to file an amended complaint, she must do so by **July 1, 2019. FAILURE TO FILE AN AMENDED COMPLAINT CURING**

THE DEFICIENCIES IDENTIFIED IN THIS ORDER BY THIS DATE WILL RESULT IN DISMISSAL WITHOUT FURTHER NOTICE. It is further

ORDERED AND ADJUDGED that the Initial Planning and Scheduling Conference is HEREBY RESET before the Honorable Ursula Ungaro, at the United States Courthouse, 400 North Miami Avenue, Room 12-4, Miami, Florida, for **Friday, July 19, 2019**, at **9:30 a.m.**

DONE AND ORDERED in Chambers at Miami, Florida, this _21st__ day of June, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc:
counsel of record via CM/ECF