UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 19-22917-CIV-LENARD/O'SULLIVAN

ROBERT McFEE,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_________________________________/

ORDER GRANTING DEFENDANT CARNIVAL CORPORATION'S MOTION TO DISMISS (D.E. 8), STRIKING COUNTS I, II, III, AND IV, DISMISSING COUNTS V AND VI WITHOUT PREJUDICE, AND PROVIDING PLAINTIFF FOURTEEN DAYS TO FILE AN AMENDED COMPLAINT

THIS CAUSE is before the Court on Defendant Carnival Corporation's Motion to Dismiss, ("Motion," D.E. 8), filed August 15, 2019. Plaintiff Robert McFee filed a Response on August 29, 2019, ("Response," D.E. 12), to which Defendant filed a Reply on September 10, 2019, ("Reply," D.E. 17). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

I. Background[1]

In September 2018, Plaintiff embarked on a cruise aboard the Carnival *Pride* ("the ship"). (Compl. ¶ 10.) On September 21, 2018, while travelling on a bus to a shore excursion in the Bahamas, Plaintiff suffered a stroke and requested immediate medical

[1] The following facts are gleaned from Plaintiff's Complaint, (D.E. 1), and are deemed to be true for purposes of ruling on Carnival's Motion.

attention. (Id. ¶ 11.) The bus drove Plaintiff back to the ship, but when Plaintiff arrived at the ship's medical center with clear and visible stroke symptoms, the ship's physician advised that Plaintiff needed to disembark and seek medical attention at a medical facility in the Bahamas. (Id.) The ship's physician advised that Plaintiff required a CT scan and assessment by a neurologist. (Id.)

Plaintiff had suffered strokes in the past. (Id. ¶ 91.) Therefore, when Plaintiff's family was booking his cruise over the phone with Defendant's agent, they asked the agent if Defendant would ensure that Plaintiff would be adequately treated if he suffered another stroke, and if Defendant would fly him back to the United States for medical treatment if he was unable to be treated on the ship. (Id.) Defendant's agent responded by offering them a traveler's insurance policy and said that if they purchased it, Defendant would ensure that Plaintiff would be adequately treated if he suffered a stroke, and that he would be flown back to the United States for medical treatment if he was unable to be treated on the ship. (Id.) In reliance on these representations, Plaintiff decided to go on the subject cruise and to purchase this traveler's insurance policy. (Id.)

After suffering the stroke in the Bahamas and being told by the ship's medical staff that they could not treat him, Plaintiff presented the traveler's insurance policy and requested to be flown back to the United States. (Id. ¶ 12.) Defendant denied Plaintiff's request to be flown to the United States, and instead took Plaintiff to a medical facility in Freeport, Bahamas. (Id. ¶ 14.) The medical facility in Freeport did not have a neurologist, equipment to perform a CT scan, or the medicine Plaintiff needed. (Id.) Plaintiff was advised that he needed to return to the ship for further assistance. (Id.) However, Plaintiff

was unable to re-board the ship because it was already leaving the port when he returned to it. (Id. ¶ 15.) Consequently, Plaintiff's family had to book a commercial flight to the United States so Plaintiff could be treated at an adequate medical facility. (Id. ¶ 16.) According to the Complaint, the delay in treatment caused Plaintiff injuries, or aggravated his injuries, including loss of memory and vision, "as well as permanent impairment." (Id.)

On July 15, 2019, Plaintiff filed the instant Complaint which contains six causes of action:

- Count I: Negligence, (id. ¶¶ 17-24);
- Count II: Vicarious liability for the negligence of the ship's medical staff, (id. ¶¶ 25-48);
- Count III: Apparent agency for the acts of the ship's medical staff, (id. ¶¶ 49-57);
- Count IV: Assumption of duty – negligence of the ship's medical staff, (id. ¶¶ 58-73);
- Count V: Non-delegable duty to provide reasonable medical care, (id. ¶¶ 74-87); and
- Count VI: Fraud, (id. ¶¶ 88-102).

Defendant moves to dismiss Counts I, V, and VI for failure to state a claim upon which relief can be granted. (Mot. at 1.)

II. Legal Standard

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for "failure to state a claim upon which relief can be granted." "To survive a motion to dismiss,

a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Conclusory statements, assertions or labels will not survive a 12(b)(6) motion to dismiss. Id. "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.; see also Edwards v. Prime, Inc., 602 F.3d 1276, 1291 (11th Cir. 2010) (setting forth the plausibility standard). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555 (citation omitted). Additionally:

> Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. Id.; see also Iqbal, 129 S. Ct. at 1951 (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449, 132 S. Ct. 1702, 1706 n.2 (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine

whether they plausibly give rise to an entitlement to relief.'" Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting Iqbal, 556 U.S. at 679).

Fraud claims are subject to a heightened pleading standard: "A party must state with particularity the circumstances constituting fraud." Fed. R. Civ. P. 9(b). "Rule 9(b) is satisfied if the complaint sets forth (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." Ziemba v. Cascade Int'l, Inc., 256 F.3d 1194, 1202 (11th Cir. 2001).

III. Applicable Law

"Federal maritime law applies to actions arising from alleged torts 'committed aboard a ship sailing in navigable waters.'" Smolnikar v. Royal Caribbean Cruises Ltd., 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) (citing Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1321 (11th Cir. 1989)). It also applies to tort actions arising at an offshore location during the course of a cruise. Ceithami v. Celebrity Cruises, Inc., 739 F. App'x 546, 550 n.4 (11th Cir. 2018) (citing Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 900-02 (11th Cir. 2004)).

> General maritime law is "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." See East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). See also Brockington v. Certified Elec., Inc., 903 F.2d 1523, 1530 (11th Cir. 1990). In the absence of well-developed maritime law pertaining to [Plaintiff's] negligence claims, [the Court] will incorporate general common law principles and Florida state law to the

> extent they do not conflict with federal maritime law. See Just v. Chambers, 312 U.S. 383, 388, 61 S. Ct. 687, 85 L. Ed. 903 (1941) ("With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."). See also Becker v. Poling Transp. Corp., 356 F.3d 381, 388 (2nd Cir. 2004) ("federal maritime law incorporates common law negligence principles generally, and [state] law in particular"); Wells v. Liddy, 186 F.3d 505, 525 (4th Cir. 1999) (in the absence of a well-defined body of maritime law relating to a particular claim, the general maritime law may be supplemented by either state law or general common law principles).

Smolnikar, 787 F. Supp. 2d at 1315; see also Hesterly v. Royal Caribbean Cruises, Ltd., 515 F. Supp. 2d 1278, 1282 (S.D. Fla. 2007).

IV. Discussion

Defendant moves to dismiss Counts I, V, and VI for failure to state a claim. For the reasons discussed below, the Court finds that Count I must be stricken, and Counts V and VI should be dismissed without prejudice. Additionally, the Court sua sponte strikes Counts II, III, and IV for failure to comply with the federal pleading standards.

a. Count I: Negligence

Count I asserts a negligence claim against Defendant. (Compl. ¶¶ 17-24.) "To plead negligence in a maritime case, '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.'" Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1253 (11th Cir. 2014) (quoting Chaparro v. Carnival Corp., 693 F.3d 1333, 1336 (11th Cir. 2012)).

Defendant initially argues that it is unclear whether Count I asserts direct or vicarious liability against Carnival, and "[s]uch ambiguity requires dismissal of the claim or a better statement because pleading a negligence claim together with a vicarious liability claim is improper, confusing, and violates Fed. R. Civ. P. 10(b)." (Mot. at 3 (citation omitted).) Defendant further argues that to the extent Count I asserts direct liability for the acts of third parties, it should be dismissed because that is not a viable legal theory. (Id. (citation omitted).) Defendant further argues that to the extent that Count I asserts a claim for negligent hiring and/or negligent retention, it should be dismissed for failing to allege facts that Defendant knew or should have known of the incompetence or unfitness of the ship's medical staff. (Id. at 4-6.) It further argues that Paragraph 19(e)—which alleges that Defendant breached its duty to ensure its shipboard medical staff "understood the standard of care for emergency physicians"—should be dismissed because Defendant has no duty to train, supervise, or instruct shipboard medical staff. (Id. at 6 (citations omitted).) Finally, in its Reply, Defendant appears to assert that Count I should be dismissed as a "shotgun" pleading. (Reply at 1-2.) Because the Court agrees that Count I is an impermissible "shotgun" pleading, it will confine its analysis to that issue.

Count I asserts that "Defendant, through its officers, managers, recruiters, vessel, and/or other agents, employees, staff, crew, and/or representatives . . . breached the duty of reasonable care owed to the Plaintiff and were [sic] negligent in one or more of the following ways":

> a. Through negligent vetting, selection, and/or hiring of its physicians, nurses, and other medical personnel, whom defendants knew or should have known were dangerous, incompetent, unqualified, and/or liable to do

harm, and who's negligence is outlined in Plaintiff's other medical negligence counts below;

b. Through failing to warn Plaintiff that its physicians, nurses, and other medical personnel were dangerous, incompetent, unqualified, and/or liable to do harm, and who's negligence is outlined in Plaintiff's other medical negligence counts below;

c. Through failing to warn Plaintiff that its physicians, nurses, and other medical personnel did not have proper licenses to practice medicine and/or nursing, including that they lacked such licenses to practice medicine and/or nursing in the United States of America, and who's negligence is outlined in Plaintiff's other medical negligence counts below;

d. Through failing to adequately evaluate its physicians', nurses', and other medical personnel's performance during their tenure with Carnival, including, but not limited to, by failing to properly review and/or analyze their success record in how often they were able to adequately treat patients' injuries, and failing to adequately discipline and/or terminate their employment when their success record was inadequate and/or improper;

e. Through failing to undertake reasonable measures to ensure its physicians, nurses, and other medical personnel understood the standard of care for emergency physicians, including, but not limited to, the need to send Plaintiff to a proper medical facility that could adequately treat him, giving proper discharge instructions, and ensuring that Plaintiff was receiving the treatment he needed before the ship left port;

f. By having its ship leave Freeport, Bahamas, without having followed up on Plaintiff and/or otherwise ensuring that Plaintiff was receiving the medical attention he needed; and/or

g. By failing to warn Plaintiff that it was unable to ensure that Plaintiff would be promptly taken care of if he suffered another stroke, and by failing to warn Plaintiff that it was unable to ensure that it would fly him back to the United States for medical treatment if he was unable to be treated on the ship, and that he would instead more likely be at the mercy of a medical facility at the closest port-of-call, and that Defendant could not ensure that he would receive the medical treatment he needed at any such medical facility.

(Compl. ¶ 19.) Count I further alleges that these breaches of the duty of reasonable care proximately caused (or exacerbated) Plaintiff's injuries. (Id. ¶¶ 20-22.)

The Court finds that Count I is a "shotgun" pleading in that it "commits the sin of not separating into a different count each cause of action or claim for relief." Weiland v. Palm Beach Cty. Sherriff's Office, 792 F.3d 1313, 1323 (11th Cir. 2015). Paragraph 19(a) through (g) contain separate theories of liability that must be pled separately. See Thanas v. Royal Caribbean Cruises Ltd., Civil Action No. 19-21392-Civ-Scola, 2019 WL 1755510, at *2 (S.D. Fla. Apr. 19, 2019) (striking maritime negligence claim where "[t]hrough a single 'negligence' count, [the plaintiff] asserts, without limitation, theories of liability for failure to investigate, failure to instruct, failure to warn, and negligent retention. These are separate causes of action that must be asserted independently and with supporting factual allegations."); Kercher v. Carnival Corp., Civil Action No. 19-21467-Civ-Scola, 2019 WL 1723565, at *1 (S.D. Fla. Apr. 18, 2019) (same); Gharfeh v. Carnival Corp., CASE NO. 17-20499-CIV-GOODMAN, 2018 WL 501270, at *6 (S.D. Fla. Jan. 22, 2018) (finding that single count which commingled claims of vicarious liability with allegations of direct negligence constituted an impermissible shotgun pleading); Kulakowski v. Royal Caribbean Cruises, Ltd., CASE NO. 16-21375-CIV-KING, 2017 WL 237642, at *2 (S.D. Fla. Jan. 18, 2017) (dismissing maritime negligence claim that "runs afoul of federal pleading requirements by including nineteen separate alleged breaches of the duty of care in a single count for negligence and by failing to allege facts to support the vast majority of the alleged breaches"); Brown v. Carnival Corp., 202 F. Supp. 3d 1332, 1338 (S.D. Fla. 2016) (finding that "[s]imply alleging that Carnival owed Plaintiff a duty

of 'reasonable care' in a conclusory fashion, while also pleading [forty-one] alleged breaches that purport to impose a heightened duty upon Carnival, is not sufficient to state a valid negligence claim under maritime law," and advising that "the burden will remain on Plaintiff to review her Complaint and ensure that each factual allegation is supported by law and plausible facts, and is alleged in good faith"); Flaherty v. Royal Caribbean Cruises, Ltd., CASE NO. 15–22295–CIV–LENARD/GOODMAN, 2015 WL 8227674, at *5 (S.D. Fla. Dec. 7, 2015) (dismissing maritime negligence claim as an impermissible shotgun pleading because, inter alia, it contained multiple causes of action in the same Count); Richards v. Carnival Corp., No. 14–23212–Civ, 2015 WL 1810622, at *3 (S.D. Fla. Apr. 21, 2015) (finding that the complaint's "laundry list of allegations does not comport with the applicable standards under federal maritime law"); Garcia v. Carnival Corp., 838 F. Supp. 2d 1334, 1337 & n.2 (S.D. Fla. 2012) (dismissing maritime negligence claim that "epitomizes a form of 'shotgun' pleading,'" where the plaintiff alleged that Defendant owed a duty of "reasonable care under the circumstances," and then "proceed[ed] to allege at least twenty-one ways in which Defendant breached this duty"); Gayou v. Celebrity Cruises, Inc., No. 11–23359–Civ, 2012 WL 2049431, at *5-6 & n.2 (S.D. Fla. June 5, 2012) (ordering plaintiff to amend complaint to "separately allege an independent count" for various theories of liability that were lumped into a single maritime negligence claim); see also Fed. R. Civ. P. 10(b) ("A party must state its claims or defenses in numbered paragraphs, each limited as far as practicable to a single set of circumstances.").

"[S]hotgun pleadings wreak havoc on the judicial system." Byrne v. Nezhat, 261 F.3d 1075, 1130 (11th Cir. 2001). "Such pleadings divert already stretched judicial

resources into disputes that are not structurally prepared to use those resources efficiently." Wagner v. First Horizon Pharm. Corp., 464 F.3d 1273, 1279 (11th Cir. 2006). When a plaintiff files a shotgun complaint, a district court is required to sua sponte order repleading pursuant to Federal Rule of Civil Procedure 12(e). Id. at 1280. Accordingly, the Court grants Defendant's Motion to the extent it seeks a more definite statement in Count I.

b. Count II: Vicarious Liability for the Ship's Medical Staff

Count II alleges that Defendant is vicariously liable for the negligence of the ship's medical staff based on principles of actual agency. (Compl. ¶¶ 25-48.) It alleges that Defendant, through the ship's medical staff, owed Plaintiff a duty to exercise reasonable care under the circumstances, and specifically to provide such medical care and assistance as would an ordinarily prudent person under the circumstances. (Id. ¶¶ 26-27.) It then alleges at least sixteen different ways in which the ship's medical staff breached its duty.[2]

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[2] Specifically, Count II alleges the following:

> 37. Defendant, through the ship's medical staff (including its physicians and nurses), and the ship's crew, breached its duties, and was negligent by failing to adequately examine, diagnose, and/ or treat Plaintiff's injuries.
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> 38. Furthermore, Defendant, through the ship's medical staff (including its physicians and nurses), and the ship's crew, breached its duties, and was negligent because the physicians and/or other crew members that were responsible for treating Plaintiff lacked adequate experience in treating injuries such as the one Plaintiff suffered.
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> 39. Defendant, through the ship's medical staff (including its physicians and nurses), and the ship's crew, also breached its duties and was negligent by failing to adequately supply its medical center to be able to adequately examine, diagnose, and treat Plaintiff's injuries.
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> 40. Moreover, Defendant, through the ship's medical staff (including its physicians and nurses), and the ship's crew, breached its duties, and was negligent by failing to take proper measures to ensure that Plaintiff was able to obtain the medical

(Id. ¶¶ 37-40, 41(a)-(*l*).) As such, Count II constitutes an impermissible shotgun pleading. See Thanas, 2019 WL 1755510, at *2; Kercher, 2019 WL 1723565, at *1; Gharfeh, 2018 WL 501270, at *6 Kulakowski, 2017 WL 237642, at *2; Brown, 202 F. Supp. 3d at 1338;

> treatment he needed in a reasonable amount of time, and as a result, Plaintiff suffered additional injuries and/or Plaintiff's injuries were aggravated and made worse.
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> 41. Additionally, at all times material hereto, Defendant, through the ship's medical staff (including its physicians and nurses), and the ship's crew, was careless, negligent, and breached its duties as follows:
>
> a. Failing to promptly provide Plaintiff with proper and/or adequate medical care and attention;
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> b. Failing to timely and properly diagnose Plaintiff's medical condition;
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> c. Failing to attend to the Plaintiff and his injuries after his stroke;
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> d. Failing to adequately escort Plaintiff and/or follow up with Plaintiff to ensure that he received reasonable medical care;
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> e. Failing to provide reasonable medical care;
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> f. Failing to properly treat and care for the Plaintiff;
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> g. Failing to reasonably diagnose the Plaintiff's injuries;
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> h. Failing to properly examine the Plaintiff's injuries;
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> i. Failing to send Plaintiff to a medical facility that could adequately treat him;
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> j. By failing to take proper measures to secure adequate treatment for Plaintiff, including unreasonably delaying taking measures to secure such adequate treatment;
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> k. Failing to medevac Plaintiff and/or to arrange for Plaintiff to be promptly taken back to the United States to receive the treatment he needed; and/or
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> l. Failing to give Plaintiff proper discharge instructions.

(Compl. ¶¶ 37-41.)

Flaherty, 2015 WL 8227674, at *5; Richards, 2015 WL 1810622, at *3; Garcia, 838 F. Supp. 2d at 1337 & n.2; Gayou, 2012, 2049431, at *5-6 & n.2; see also Fed. R. Civ. P. 10(b). When a plaintiff files a shotgun complaint, a district court is required to sua sponte order repleading pursuant to Federal Rule of Civil Procedure 12(e). Wagner, 464 F.3d at 1280. Plaintiff may replead his actual agency vicarious liability claim(s) consistent with federal pleading standards and to the extent that the claims are supported by specific factual allegations.

c. Count III: Apparent Agency Against Defendant for the Acts of the Ship's Medical Staff

Count III asserts a claim against Defendant for the negligence of the shipboard medical staff under the doctrine of apparent agency. (Compl. ¶¶ 49-57.) As with Counts I and II, Count III provides a laundry list of ways in which the shipboard medical staff allegedly breached its duty of care to Plaintiff. (Compl. ¶ 57 (a)-(*l*).)[3] As such, Count III

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[3] Specifically, Count III alleges that the shipboard medical staff was negligent by:

a. Failing to promptly provide Plaintiff with proper and/or adequate medical care and attention;

b. Failing to timely and properly diagnose Plaintiff's medical condition;

c. Failing to attend to the Plaintiff and his injuries after his stroke;

d. Failing to adequately escort Plaintiff and/or follow up with Plaintiff to ensure that he received reasonable medical care;

e. Failing to provide reasonable medical care;

f. Failing to properly treat and care for the Plaintiff;

g. Failing to reasonably diagnose the Plaintiff's injuries;

constitutes an impermissible shotgun pleading. See Thanas, 2019 WL 1755510, at *2; Kercher, 2019 WL 1723565, at *1; Gharfeh, 2018 WL 501270, at *6 Kulakowski, 2017 WL 237642, at *2; Brown, 202 F. Supp. 3d at 1338; Flaherty, 2015 WL 8227674, at *5; Richards, 2015 WL 1810622, at *3; Garcia, 838 F. Supp. 2d at 1337 & n.2; Gayou, 2012, 2049431, at *5-6 & n.2; see also Fed. R. Civ. P. 10(b). When a plaintiff files a shotgun complaint, a district court is required to sua sponte order repleading pursuant to Federal Rule of Civil Procedure 12(e). Wagner, 464 F.3d at 1280. Plaintiff may replead his apparent agency claim(s) consistent with federal pleading standards and to the extent that the claims are supported by specific factual allegations.

d. Count IV: Assumption of Duty – Negligence of the Ship's Medical Staff

Count IV asserts a claim against Defendant for the negligence of the shipboard medical staff under the "assumption of duty" doctrine. (Compl. ¶¶ 58-73.) As with Count II, Count IV lists sixteen separate ways in which Defendant allegedly breached its duty of

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h. Failing to properly examine the Plaintiff's injuries;

i. Failing to send Plaintiff to a medical facility that could adequately treat him;

j. By failing to take proper measures to secure adequate treatment for Plaintiff, including unreasonably delaying taking measures to secure such adequate treatment;

k. Failing to medevac Plaintiff and/or to arrange for Plaintiff to be promptly taken back to the United States to receive the treatment he needed; and/or

l. Failing to give Plaintiff proper discharge instructions.

(Compl. ¶ 57.)

care. (Id. ¶¶ 63 – 67(a)-(*l*).)[4] As such, Count IV constitutes an impermissible shotgun pleading. See Thanas, 2019 WL 1755510, at *2; Kercher, 2019 WL 1723565, at *1;

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[4] Specifically, Count IV alleges the following breaches:

> 63. Defendant breached its duties, and was negligent by failing to adequately examine, diagnose, and/or treat Plaintiff's injuries.
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> 64. Furthermore, Defendant breached its duties, and was negligent because the physicians and/or other crew members that were responsible for treating Plaintiff lacked adequate experience in treating injuries such as the one Plaintiff suffered.
>
> 65. Defendant also breached its duties and was negligent by failing to adequately supply its medical center to be able to adequately examine, diagnose, and treat Plaintiff's injuries.
>
> 66. Defendant breached its duties and was negligent by failing to take proper measures to ensure that Plaintiff was able to obtain the medical treatment he needed in a reasonable amount of time, and as a result, Plaintiff suffered additional injuries and/or Plaintiff's injuries were aggravated and made worse.
>
> 67. Additionally, at all times material hereto, Defendant was careless, negligent, and breached its duties as follows:
>
> a. Failing to promptly provide Plaintiff with proper and/or adequate medical care and attention;
>
> b. Failing to timely and properly diagnose Plaintiff's medical condition;
>
> c. Failing to attend to the Plaintiff and his injuries after his stroke;
>
> d. Failing to adequately escort Plaintiff and/or follow up with Plaintiff to ensure that he received reasonable medical care;
>
> e. Failing to provide reasonable medical care;
>
> f. Failing to properly treat and care for the Plaintiff;
>
> g. Failing to reasonably diagnose the Plaintiff's injuries;
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> h. Failing to properly examine the Plaintiff's injuries;
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> i. Failing to send Plaintiff to a medical facility that could adequately treat him;

Gharfeh, 2018 WL 501270, at *6 Kulakowski, 2017 WL 237642, at *2; Brown, 202 F. Supp. 3d at 1338; Flaherty, 2015 WL 8227674, at *5; Richards, 2015 WL 1810622, at *3; Garcia, 838 F. Supp. 2d at 1337 & n.2; Gayou, 2012, 2049431, at *5-6 & n.2; see also Fed. R. Civ. P. 10(b). When a plaintiff files a shotgun complaint, a district court is required to sua sponte order repleading pursuant to Federal Rule of Civil Procedure 12(e). Wagner, 464 F.3d at 1280. Plaintiff may replead his assumption of duty claim(s) consistent with federal pleading standards and to the extent that the claims are supported by specific factual allegations.

e. Count V: Non-Delegable Duty to Provide Reasonable Medical Care

Count V is titled: "Non-Delegable Duty to Provide Reasonable Medical Care." (Compl. ¶¶ 74-87.) It essentially repeats the same allegations found elsewhere in the Complaint, including asserting the laundry list of sixteen breaches of the duty of care owed to Plaintiff. (Id. ¶¶ 77-81.)

Defendant argues that even if Count V was sufficiently pled, it is not a viable theory of liability under maritime law. (Mot. at 7 (citing Sexton v. Carnival Corp., Case Number: 18-20629-CIV-MORENO, 2018 WL 3405246, at *3 (S.D. Fla. July 10, 2018)).) In his

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j. By failing to take proper measures to secure adequate treatment for Plaintiff, including unreasonably delaying taking measures to secure such adequate treatment;

k. Failing to medevac Plaintiff and/or to arrange for Plaintiff to be promptly taken back to the United States to receive the treatment he needed; and/or

l. Failing to give Plaintiff proper discharge instructions.

(Compl. ¶¶ 63-67.)

Response, Plaintiff argues that in addition to assuming the duty to provide reasonable care under the circumstances for its ailing passengers (Count IV), that duty is non-delegable. (Resp. at 7 (citing Franza, 772 F.3d at 1246).)

In Sexton, Judge Moreno rejected Plaintiff's argument (which was asserted by Plaintiff's counsel, who also represented Mr. Sexton):

> Plaintiff relies on Franza to support this claim, quoting language that says "[c]arriers owe their ailing passengers 'a duty to exercise reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances.'" This assertion, however, is taking Franza's dicta too far. Franza allows shipowners to be vicariously liable when a passenger receives negligent medical care by its agents aboard its ship. Franza, 772 F.3d at 1235. This Court has also allowed Plaintiff to proceed on its assumption of duty claim, stating that when a ship undertakes to provide medical care to its passengers, it must do so with reasonable care. While this Court recognizes that Franza changes the prior legal landscape, there is no language to support the creation of a non-delegable duty. Plaintiff has not cited any statutory authority or case law to support this assertion.

2018 WL 3405246, at *3. In his Response, Plaintiff wholly ignores Judge Moreno's Sexton order and Defendant's reliance on it.

The Court adopts Judge Moreno's rationale and dismisses Count V for failure to state a claim upon which relief can be granted.

f. Count VI: Fraud

Finally, Count VI asserts a fraud claim. (Compl. ¶¶ 88-102.) Defendant argues that Count VI fails to allege fraud with particularity as required by Rule 9(b) of the Federal Rules of Civil Procedure. (Mot. at 8.) It further argues that to the extent that Count VI relies on public representations as to a cruise ship's amenities, those statements are non-actionable "puffery and sales talk." (Id. (citing Alvarez v. Royal Caribbean Cruises, Ltd.,

905 F. Supp. 2d 1334, 1342 (S.D. Fla. 2012); Carnival Corp. v. Rolls-Royce PLC, No. 08–23318–CIV, 2009 WL 3861482, at *3 (S.D. Fla. Nov. 17, 2009); Hill v. Celebrity Cruises, Inc., No. 09–23815–CIV, 2011 WL 5360629, at *7 (S.D. Fla. Sept. 19, 2011)).) It further argues that Count VI is vague in that it appears to allege both affirmative misrepresentations and fraudulent omissions. (Id. at 10.) It further argues that "the allegations are disingenuous in that, as a condition to booking the cruise, plaintiff received and acknowledged a Passenger Ticket Contract" which includes a provision by which the passenger, as a condition of using the boarding ticket, "'acknowledges that all or part of their voyage may be in areas where medical care and evacuation may not be available' [and] 'warrants that he . . . [is] physically and emotionally fit to travel . . . .'" (Id. at 11-12 (quoting exemplar Passenger Ticket Contract (D.E. 8-1) ¶¶ 2(a), 5(b)).) Finally, it argues that insofar as Count VI alleges a misrepresentation in the travel insurance policy, Count VI should be dismissed because it is actually a breach of contract claim. (Id. at 12.)

In his Response, Plaintiff clarifies that Count VI is solely a claim for fraud by omission, (Resp. at 8 (citing Meyer v. Carnival Corp., CASE NO. 12–20321–CIV–ZLOCH, 2013 WL 12061857, at *6 (S.D. Fla. Sept. 4, 2013), although he appears to acknowledge that Count VI also alleges an affirmative misrepresentation by Defendant. Specifically, he argues "Defendant has deliberately and knowingly failed to disclose to Plaintiff that it would not fly him back to the United States if he was unable to receive the treatment he needed for a stroke while on the cruise, and even affirmatively misrepresented to Plaintiff that he would be flown back under those circumstances." (Resp. at 9.) He argues that Count VI does not allege breach of contract vis-à-vis the travel insurance policy,

(id.), and that the "ticket contract provision purporting or operating to limit a carrier's potential tort liability for a passenger injury is void under 46 U.S.C. § 30509(a)(1)(A)[,]" (id.).

In its Reply, Defendant asserts that the Ticket Contract supersedes all other agreements, and by using the ticket Plaintiff warranted that he was fit to sail and acknowledged that the availability of medical care and/or evacuation may be limited or delayed while the ship was at sea or in port. (Reply at 6.) Defendant further argues that cruise lines are not required to inform passengers of every health hazard associated with a cruise vacation, and that the duty to fully disclose information "is limited to specific contexts which are quite different than this one." (Id. at 7 (citations omitted).)

For the reasons that follow, the Court finds that Count VI involves an affirmative misrepresentation, i.e., fraud by commission, but because Plaintiff asserts that he is attempting to state a claim for fraud by omission, (see Resp. at 8), the Court dismisses Count VI without prejudice to being replead.[5]

"'There are four elements of fraudulent misrepresentation, i.e., fraud by commission: (1) a false statement concerning a material fact; (2) the representor's

[5] In doing so, the Court declines Defendant's invitation to consider the Ticket Contract. Plaintiff did not attach the Ticket Contract to the Complaint, and although Defendant attached an exemplar Ticket Contract to its Motion to Dismiss, (D.E. 8-1), the Court may only consider documents attached to a motion to dismiss if they are referred to in the complaint and central to the plaintiff's claims. See Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997) (citing Venture Assoc. Corp. v. Zenith Data Sys. Corp., 987 F.2d 429, 431 (7th Cir. 1993)). The Ticket Contract is not central to Plaintiff's claims, and the only reference the Complaint makes to the Ticket Contract is when it mentions that this lawsuit was filed in this court pursuant to "the federal forum selection clause in the Passenger Contract Ticket[.]" (Compl. ¶ 4.) Because the Complaint only makes a passing reference to the Ticket Contract, and because it is not central to Plaintiff's claims, the Court declines to consider it on Defendant's Motion.

knowledge that the representation is false; (3) an intention that the representation induce another to act on it; and (4) consequent injury by the party acting in reliance on the representation.'"" Lobegeiger v. Celebrity Cruises, Inc., 869 F. Supp. 2d 1356, 1366 (S.D. Fla. 2012) (quoting Butler v. Yusem, 44 So. 3d 102, 105 (Fla. 2010) (quoting Johnson v. Davis, 480 So. 2d 625, 627 (Fla. 1985))). "However, fraud can also occur by omission, 'and one who undertakes to disclose material information has a duty to disclose that information fully.'" Meyer, 2013 WL 12061857, at *6 (quoting Philip Morris USA, Inc. v. Nagle, 103 So. 3d 944, 947 (Fla. Dist. Ct. App. 2012)). "Florida law does not recognize a stark distinction between fraud by commission and fraud by omission." Woods v. On Baldwin Pond, LLC, 634 F. App'x 296, 298 (11th Cir. 2015) (citing Johnson, 480 So. 2d at 628 ("[W]here failure to disclose a material fact is calculated to induce a false belief, the distinction between concealment and affirmative representations is tenuous. Both proceed from the same motives and are attended with the same consequences; both are violative of the principles of fair dealing and good faith; both are calculated to produce the same result; and, in fact, both essentially have the same effect.")).

> It is not necessary that a direct statement be made to the representee in order to give rise to the right to rely upon the statement, for it is immaterial whether it passes through a direct or circuitous channel in reaching him, provided it be made with the intent that it shall reach him and be acted on by the injured party.

Nagle, 103 So. 3d at 947. Rule 9 requires that Plaintiff plead the circumstances constituting fraud with particularity. See Alvarez, 905 F. Supp. 2d at 1342.

Although Plaintiff's Response asserts that he is proceeding on a fraud by omission theory, (Resp. at 8), Count VI is properly construed as a claim for fraud by commission. Specifically, it alleges that because Plaintiff had suffered strokes in the past,

> when his family was booking his cruise over the phone with an agent of Defendant, they asked the agent if Defendant would ensure that he would be adequately treated if he suffered another stroke, and if Defendant would fly him back to the United States for medical treatment if he was unable to be treated on the ship. In response to this question, this agent of Defendant then offered them a traveler's insurance policy, and said that if they purchased it, Defendant would ensure that he would be adequately treated if he suffered a stroke, and that he would be flown back to the United States for medical treatment if he was unable to be treated on the ship.

(Compl. ¶ 91.) The Complaint alleges that Defendant made this representation intending "to induce Plaintiff to cruise on its ships, as well as to sell him an insurance policy that did not fulfil the purposes it lead him to believe it would fulfil, for financial gain, and to the detriment of Plaintiff." (Id. ¶ 95.) It further alleges that Defendant knew it was unable to ensure that Plaintiff would be promptly taken care of if he suffered another stroke, and knew it was unable to ensure it would fly him back to the United States for medical treatment if he was unable to be treated on the ship. (Id. ¶ 92.) But, in reliance on Defendant's representations, "Plaintiff decided to go on the subject cruise and to purchase this traveler's insurance policy." (Id. ¶ 91.) And, "[a]s a direct, proximate, and foreseeable result of the Defendant's fraud and/or misrepresentation, Plaintiff has suffered severe bodily injury resulting in pain and suffering, disability, disfigurement, mental anguish, loss of capacity for the enjoyment of life, expense of hospitalization, medical and nursing care and treatment, and loss of ability to earn money." (Id. ¶ 100.)

The Court finds that Plaintiff's attempts to turn Count VI into a fraud by omission claim are confusing, unnecessary, and unsupported by law. He argues, for example, that although Defendant's agent affirmatively stated that "Defendant would ensure that he would be adequately treated if he suffered a stroke, and that he would be flown back to the United States for medical treatment if he was unable to be treated on the ship[,]" (id. ¶ 91), Defendant "purposefully failed to disclose to Plaintiff that it was unable to ensure that he would be promptly taken care of if he suffered another stroke, and it failed to disclose to Plaintiff that it was unable to ensure that it would fly him back to the United States for medical treatment if he was unable to be treated on the ship," (id. ¶ 92). This argument is circuitous: Defendant's agent did not fail to disclose that Defendant could not ensure that Plaintiff would be adequately treated on the ship or otherwise flown back to the United States; rather, Defendant's agent affirmatively (mis)represented that Defendant would ensure that Plaintiff would be treated on the ship or otherwise flown back to the United States. This claim is properly understood as a fraudulent inducement claim, not a fraud by omission claim.[6]

Plaintiff's reliance on Meyer v. Carnival Corp. is misplaced, as Meyer also involved a fraud by commission claim. 2013 WL 12061857, at *7. In Meyer, the plaintiff booked a shore excursion which Carnival affirmatively "stated" would be operated by one of

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[6] Plaintiff's fraud by omission argument is akin to the following: "The car dealer told me that if I gave him $10,000 he would give me a Corvette, but he failed to disclose that if I gave him $10,000 he would not give me a Corvette." The car dealer did not fail to disclose that he would not give me a Corvette if I gave him $10,000—he affirmatively (mis)represented that he would give me a Corvette if I gave him $10,000.

Carnival's "hand-picked, insured shore excursion providers." Id. In reality, the excursion was contracted to a third party ("Cox") who then subcontracted the excursion to a different, uninsured company, ("Seaspray"). Id. The plaintiff was injured on the excursion and sued Carnival for, inter alia, fraudulent misrepresentation. Id. He argued that if he had known that the excursion was to be subcontracted out to an uninsured and unknown third party, he may have decided to not take the excursion. Id. Judge Zloch found that disputed material facts precluded the entry of summary judgment on this claim. Id.

It appears that the Plaintiff in Meyer argued, at least in part, that Carnival was liable for fraud by omission—i.e., that Carnival should have disclosed "the fact that the excursion was to be contracted to Defendant Cox and then subcontracted to another provider, Seaspray." Id. Judge Zloch did not indicate whether he was analyzing the claim as one for fraud by commission or fraud by omission—indeed, he recited the legal standards for both types of claims. See id. However, this Court finds that the misrepresentation in Meyer was an affirmative one: "Carnival stated that the tour would be operated by one of Carnival's 'hand-picked, insured shore excursion providers.'" Id. The alleged omission—i.e., that Carnival failed to disclose that the excursion would not be operated by a hand-picked, insured excursion provider—is an unnecessary and confusing way of saying the inverse of the same thing. The claim in Meyer, like Count VI here, is better understood as an affirmative misrepresentation.

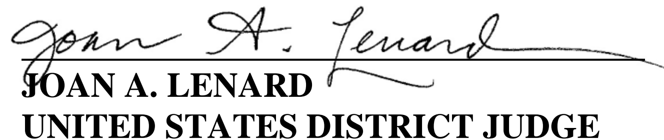
In sum, because Plaintiff is attempting to assert a fraud by omission claim, the Court dismisses Count VI without prejudice for being based on an incorrect legal theory.

V. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant Carnival Corporation's Motion to Dismiss (D.E. 8) is **GRANTED** consistent with this Order;
2. Counts I, II, III, and IV are **STRICKEN** with leave to replead;
3. Counts V and VI are **DISMISSED WITHOUT PREJUDICE** for failure to state a claim upon which relief can be granted; and
4. Plaintiff shall have fourteen days from the date of this Order to file an Amended Complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 16th day of September, 2019.



JOAN A. LENARD
UNITED STATES DISTRICT JUDGE