UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 13-20847-CIV-Martinez/McAliley

SARAH ALEXANDRA BARDLEY KIRBY

Plaintiff,

v.

CARNIVAL CORPORATION,
DR. STEVE SARIS,
DR. ALLA SIMOVSKYKH
PRICILLA ISAACS
AUDREY MINARDI
DR. JOHN/JANE DOE
NURSE JOHN/JANE DOE

Defendants.
_____ /

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT CARNIVAL'S MOTION TO DISMISS [D.E. 10]

Plaintiff, Sarah Alexandra Bardley Kirby, by and through undersigned counsel, files her Response in Opposition to Defendant Carnival Corporation ("Carnival") Motion to Dismiss, [D.E. 10]. In support thereof, the Plaintiff alleges as follows:

I. BACKGROUND.

A. Factual Background.[1]

This matter arises out of severe injuries sustained by the Plaintiff while traveling in one of the Defendant's cruise ships. Due to the Defendant's negligence and reckless disregard for the Plaintiff's safety, she fell overboard and was abandoned in the middle of the ocean for an unreasonable period of time.

[1] As a preliminary matter, Plaintiff lays out the factual background of this case, as succinctly alleged in the Complaint. [D.E. 1].

On or about October 21, 2012, the Plaintiff was traveling on board Defendant's cruise ship, *Destiny*, en route from Miami to Jamaica. [D.E. 1, ¶ 12].

A major source of income for Defendant Carnival is earned by selling alcoholic beverages on its ships. Id., ¶13. To this end, during the course of the Plaintiff's cruise, Carnival encouraged over serving of alcohol on its ships for financial gain, without regard to the fact that it resulted in injuries and accidents. Id.

In particular, Carnival promulgated and/or established a compensation a compensation scheme on board its vessels, including the *Destiny*, in which tips were the main source of income for bar servers and bar tenders. On or about the above referenced date, Defendant Carnival knew that bar tenders and bar servers would over serve passengers, but intentionally, willfully, wantonly, and/or recklessly ignored this in order to make more money from alcohol sales. Id., ¶14.

During the course of the cruise, Carnival automatically charged passengers a gratuity on service of alcoholic beverages. Because gratuities grow in proportion to the quantity of alcohol purchased, Carnival intentionally, willfully, wantonly, and/or recklessly developed an incentive system in which bar tenders are encouraged to over serve passengers, including Plaintiff. Defendant Carnival did not make any meaningful steps to enforce a reasonable alcohol policy since it would have resulted in less money for Carnival. Id., ¶15.

Indeed, on or about October 21, 2012, Carnival was operating a "floating dram shop," permitting passengers, including Plaintiff, to become extremely intoxicated by over serving them unreasonable amounts of alcohol for profit. In particular, on or about October 21, 2012, bar tenders on board the *Destiny* over served Plaintiff large quantities of alcohol, including several "Long Island Iced Teas," a cocktail containing five shots of different types of alcohol (which the bar tender kept pushing on the Plaintiff). Moreover, to encourage the Plaintiff and her companions to buy more "Long Island Iced Teas," the Carnival bar tender offered them free $5 coupons for the ships' casino. The more drinks they purchased, the more free coupons the Carnival bar tender offered the Plaintiff and her companions. Id., ¶16.

That evening, while the ship was at sea, the Plaintiff returned to her cabin with her friend Rebecca. At approximately 12.10 am, the Plaintiff stepped out to the cabin balcony to get some air. As she was holding on to the balcony's wooden banister, the Plaintiff lost her grip and balance, slipped off the ground and fell overboard into the ocean. As she fell from the balcony, which was

7 stories high (approximately 100 feet), the Plaintiff fell onto a life raft, and after hitting the life raft, fell 5 more stories into the water. As a result, Plaintiff suffered severe injuries, including: fractured orbital bones, lung contusions, hypothermia, fractured ribs, dissection of the carotid artery, heart arrhythmia, broken optical shelves, blood clots in her eyes, arms, and legs, as well as extreme hematomas all over her body. Id., ¶ 17.

The Plaintiff fell in the water without a life jacket or a life preserver. After a few minutes, the cruise ship speed away, until it disappeared in the horizon, leaving the Plaintiff alone in the middle of the ocean. Id., ¶ 18.

In order to be able to stay afloat, the Plaintiff swam until she ran out of energy. So she would not drown, she periodically stopped swimming, and floated in the water with her face up in order to rest and to catch her breath. She could do this for only short periods of time, however, as ocean waves would crash into her face forcing her to swallow water, which she constantly had to cough up. Id., ¶ 19.

During the time that the Plaintiff was floating in the ocean (in the middle of the night, by herself), she was terrified of running out of energy and drowning. Plaintiff constantly feared that she was going to be attacked by sharks, and believed that her death was imminent. All of this caused Plaintiff severe emotional distress. Id., ¶ 20.

Rebecca, the Plaintiff's friend, immediately noticed that the Plaintiff had fallen overboard. Moreover, people in different parts of the ship either saw and/or heard the Plaintiff fall into the ocean. Id., ¶ 21.

Both Rebecca and the other passengers who witnessed the fall, immediately notified several Carnival staff members that the Plaintiff had fallen overboard. Rebecca and the Plaintiff's fiancé, repeatedly demanded the cruise ship staff to stop the ship. Their request, however, was summarily denied. Instead, the cruise ship staff explained that they were not going to stop the vessel, until they first searched the ship. The cruise ship staff also explained that they were "following standard procedure." Id., ¶ 22.

Rebecca and the Plaintiff's fiancé were then escorted to the Captain's quarters and/or offices. There, over the next 90 minutes (while the ship was still moving) they were questioned by the ship's security staff and the ship's officers regarding the incident. Rebecca and the Plaintiff's fiancé repeated their story several times, and again demanded several times that the ship be stopped

immediately. Once again, however, their request was denied, and the ship's officers insisted they were not going to stop the vessel until they first searched the ship. Id., ¶ 23.

At approximately 1:45am, while the ship was still moving (and the Plaintiff had been in the water for over one hour and thirty minutes), the ship's officers notified all passengers via intercom that they were going to turn around the ship to find the Plaintiff. Id., ¶ 24.

After drifting in the ocean for almost two hours, Carnival located the Plaintiff. The Plaintiff saw the cruise ship appear with its lights pointing towards her. A crewmember in a life boat approached her, threw her a life preserver and helped her into the boat. Id., ¶ 25.

The Plaintiff was taken back to the ship to receive medical treatment. At the vessel's medical facility, the cruise ship staff cut the Plaintiff's clothes off. Plaintiff reported to the Carnival doctors and nurses that she was feeling unbearable amounts of pain in her chest, neck and face. Plaintiff was also coughing up and throwing up water. The Carnival doctors told the Plaintiff that her heart was beating irregularly. Id., ¶ 26.

Rather than treating her severe injuries, the Carnival doctors' treatment of the Plaintiff was primarily limited to giving her pain medication. The Carnival medical personnel further stated that she needed to go to a land based hospital to be treated. Id., ¶ 27.

Despite the severity of her incident and injuries (including falling 100 feet – hitting a life boat and then the water -and spending close to two hours in the ocean); Carnival refused to airlift (air evac) the Plaintiff from the cruise ship. Instead, the Carnival Captain and/or other ship officers decided to divert the ship and take the Plaintiff to Key West for medical treatment. Id., ¶ 28.

The cruise ship arrived at Key West, FL at 2.00pm the next day. Once at Key West, paramedics boarded the ship to take the Plaintiff to an emergency room in Key West. The paramedic asked Carnival for a summary of the situation. A Carnival staff member reported that Plaintiff fell from the 7th floor, hit a life raft on the way down and then was in the ocean for almost two hours. Visibly shocked, the paramedic demanded to know why, in light of the severity of the incident, the Plaintiff had not been airlifted previously. Id., ¶ 29.

The Plaintiff was taken to Key West Hospital in an ambulance. At the hospital the doctors asked the paramedics for her status and history. Once again, the paramedics explained that the Plaintiff had fallen from the 7th floor, hit a life raft, and was stuck in the ocean for almost two hours. The Key West doctors explained that they did not have the equipment to handle the severe

trauma that Plaintiff had suffered. They also stated that the Plaintiff should have been air evacuated from the cruise ship directly to Jackson Memorial Hospital in Miami. Id., ¶ 30.

Upon examining the Plaintiff, the Key West doctors, immediately called an air ambulance to airlift the Plaintiff (at Plaintiff's own expense) from Key West to Jackson Memorial Hospital in Miami. While the air ambulance arrived, the Key West doctors communicated with Jackson Memorial trauma doctors on videoconference and explained the Plaintiff's status. Id., ¶ 31.

The Medevac crew arrived in a helicopter and airlifted the Plaintiff to Jackson Memorial Hospital in Miami. Almost 16 hours after her incident, the Plaintiff arrived to Miami, Florida and was finally treated for her injuries. In Miami, the doctors diagnosed the Plaintiff with (among other things) spinal injuries, a dissected carotid artery, broken optical shelves, fractured ribs, lung contusions, heart arrhythmia, and extreme hematomas over most of her body. Id., ¶ 32.

Due to complications, the Plaintiff was kept in ICU for 7 days, and then remained hospitalized for a total of 3 weeks. Id., ¶ 33.

B. Procedural Background.

As a result of the incident, Plaintiff filed suit against Defendant Carnival for: Negligence (Count I)**,** Intentional Infliction of Emotional Distress (Count II), Negligent Infliction of Emotional Distress (Count III), Apparent Agency for the Acts of the Medical Staff (Count IV), Third Party Beneficiary (Count VI), Joint Venture (Count VII) and Punitive Damages (Count VIII). [2]

On April 24, 2013, Carnival filed a Motion to Dismiss Counts I, II, III, IV, VI, VII, and VIII. For the reasons set forth below, Carnival's Motion should be denied in its entirety. In the alternative, if this Honorable Court is inclined to grant any part of Carnival's Motion, Plaintiff respectfully moves for leave to file an Amended Complaint.

II. STANDARD OF REVIEW.

When ruling on a motion to dismiss, the Court must accept as true all of the factual allegations contained in the complaint. *Erickson v. Pardus*, 551 U.S. 89 (2007). In *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), the Court reaffirmed the "notice pleading" principle codified in Federal Rule of Civil Procedure 8, asserting that a complaint must offer more than a formulaic recitation of the elements of a cause of action. Three weeks after issuing *Twombly*, the Supreme Court put its decision in context

[2] The Plaintiff also has an independent count of negligence against the shipboard medical personnel (Count V). This claim is not the subject of Carnival's Motion to Dismiss. [D.E. 10].

with its ruling in *Erickson v. Pardus*, 551 U.S. 89 (2007). Quoting *Twombly* and *Conley v. Gibson*, 355 U.S. 41 (1957), the Supreme Court in *Erickson* held:

> *Federal Rule of Civil Procedure 8(a)(2)* requires only "a short and plain statement of the claim showing that a pleader is entitled to relief." **Specific facts are not necessary; the statement need only "give the defendant fair notice of what the… claim is and the grounds upon which it rests**." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson,* 355 U.S. 41 (1957)). **In addition, when ruling on a defendant's motion to dismiss, a judge must accept as true all of the factual allegations in the complaint**. *Bell Atlantic Corp. Supra., at 555-556.*

Id., at 93-94. (Emphasis added) (Other internal citations omitted).

All in all, as this Honorable Court recently explained in the matter of *Rocha v. Carnival Corporation*, Case No: 10-22799-CV-LENARD/TURNOFF (S.D. Fla. 2011) [D.E. 26] even after *Twombly*, "it remains black-letter law today that in the ordinary case a complaint need not provide detailed factual allegations in order to withstand 12(b)(6) scrutiny." "*Twombly* neither eliminated nor marginalized the liberal pleading rules." Id., at 3-4, *citing Caytrans BBC, LLC v. Equipment Rental & Contractors Corp.*, 2009 WL857554, at *2 (S.D. Ala. Mar. 25, 2009) and *Wilchombe v. TeeVee Toons, Inc.*, 555 F. 3d 949, 958 (11th Cir. 2009).

III. ARGUMENT.

A. DEFENDANT'S MOTION TO DISMISS COUNT I OF THE COMPLAINT ALLEGING NEGLIGENCE AGAINST CARNIVAL SHOULD BE DENIED.

1. *Count I.* The standard of care.

To satisfy the burden of proof in a negligence action Plaintiff must show: 1) that defendant owed plaintiff a duty; 2) that defendant breached that duty; 3) that this breach was the proximate cause of Plaintiff's injury; and 4) that Plaintiff suffered damages. *Hasenfus v. Secord*, 962 F. 2d 1556, 1559-60 (11th Cir. 1992).

In the context of admiralty torts, a ship-owners "duty" was defined in the seminal case of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). In *Kermarec* the Supreme Court held that "the owner of a ship in navigable waters **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**." (Emphasis added).

At paragraphs 34 and 35 of the Complaint Plaintiff succinctly alleges that "[i]t was the duty of Defendant, Carnival Corporation, to provide Plaintiff with reasonable care under the circumstances" and that "[o]n or about October 21, 2012, Defendant Carnival Corporation and/or its agents … breached their duty to provide Plaintiff with reasonable care under the circumstances."

Therefore, it is undisputed that Plaintiff pled the correct duty of care in this matter. *See, i.e. Gentry v. Carnival Corp.*, 11-21580-JG (S.D. Fla. October 5, 2011) [D.E. 36] ("Plaintiff properly alleges that Carnival's duty was 'to provide Plaintiff with reasonable care under the circumstances').

2. *Count I*. Contrary to NCL's assertions, Plaintiff pled sufficient factual matter in support of the allegations in Count I (Negligence) in compliance with *Twombly* and Fed. R. Civ. P. 8(a)(2).

Carnival argues that Count I of Plaintiff's complaint fails to meet the pleading requirements because it does not contain sufficient factual matter. Carnival also alleges that Plaintiff's negligence allegations are "conclusory." Carnival is incorrect.

As illustrated earlier, it remains black-letter law today that a complaint need not provide detailed factual allegations in order to withstand 12(b)(6) scrutiny. As the Supreme Court explained in *Twombly* and subsequently in *Erickson*, Rule "8(a)(2) requires only a short and plain statement of the claim showing that a pleader is entitled to relief." The statement need only "give the defendant fair notice of what the… claim is and the grounds upon which it rests." *Erickson v. Pardus*, 551 U.S. 89 (2007), *citing Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007).

Here, Plaintiff has succinctly alleged that Carnival owed him, as a passenger, a duty of care. (*see, e.g., Compl.* D.E. 1, ¶36). **In support of that allegation, Plaintiff has pled with sufficient factual matter at least 31 <u>specific</u> ways by which Defendant breached the duty of providing the Plaintiff with reasonable care under the circumstances.** (*See e.g., Compl.* D.E. 1, ¶36 (a)-(ee)).

Indeed, the Complaint succinctly alleges that at all times material ***Carnival*** breached the duty of care by (*See e.g.*: ¶36):

> **a)** Failing to timely, properly and adequately rescue the Plaintiff at sea, despite having notice (as reported by several passengers) that she had fallen overboard. In particular, Carnival failed to immediately stop the vessel and initiate the search of the Plaintiff at sea. Instead, Carnival refused to stop the *Destiny* and deliberately and/or recklessly

chose to search the ship first. In doing so, Carnival abandoned the Plaintiff in the middle of the ocean for an unreasonable period of time; and/or **b)** failing to timely divert the vessel to promptly, properly and adequately rescue the Plaintiff at sea; and/or **c)** failing to make every reasonable effort consistent with the safety of the ship and passengers to rescue the Plaintiff as soon as her situation was discovered; and/or **d)** failing to promulgate and/or enforce and/or comply with rules and/or policies to ensure that passengers that fall overboard are not left out in the ocean by themselves for unreasonable periods of time; and/or **e)** failing to promulgate and/or enforce and/or comply with rules and/or policies to ensure that passengers do not fall overboard into the ocean; and/or **f)** failing to install unsafe and/or defective railings and banisters in cabin balconies, which place passengers at unreasonable risk of falling overboard; and/or **g)** failing to install unsafe and/or defective railings and banisters in cabin balconies, which are too short, placing passengers at unreasonable risk of falling overboard; and/or **h)** failing to comply with industry standards and/or international guidelines regarding the height and safety requirements for railings and banisters in cabin balconies; and/or **i)** failing to properly maintain banisters and railings in cabin balconies, which over time, after exposure to the elements (including sea water), causes them to become unsafe and/or inadequate, placing passengers at unreasonable risk of falling overboard; and/or **j)** failing to have safety mechanisms in place to detect and alert ship personnel that a passenger has fallen overboard; and/or **k)** failing to have in place polies and/procedures which prevent ship personnel from promptly and/or adequately rescue a passenger at sea; and/or **l)** failing to maintain and monitor security cameras on the ship so as to allow and/or fail to prevent passengers from falling overboard; and/or **m**) failing to provide Plaintiff with the means to stay afloat at sea for the period that she was abandoned by Carnival in the middle of the ocean; and/or **n)** failing to timely evacuate the Plaintiff by helicopter to receive prompt, proper and adequate medical care in Miami, Florida. Instead, Carnival left the Plaintiff in a medical facility in Key West which did not have the equipment to handle the severe trauma that Plaintiff had suffered (from where Plaintiff at her own expense was ultimately airlifted to Jackson Memorial Hospital in Miami). This resulted in the Plaintiff having to wait approximately 16 hours to receive proper and adequate medical treatment (further aggravating her injuries); and/or **o)**Failing to provide reasonable safe conditions for the Plaintiff during her voyage aboard the Carnival *Destiny*. The unsafe conditions included but are not limited to operating a "floating dram shop," permitting passengers, including Plaintiff, to become extremely intoxicated by over serving them unreasonable amounts of alcohol for profit; and/or **p)** failing to warn the Plaintiff and other passengers of the dangers of becoming intoxicated due to over serving of alcohol on the vessel; and/or **q)** Failing to maintain and monitor security cameras on the ship so as to allow and/or fail to prevent intoxicated passengers from becoming injured; and/or **r)** Failed to provide adequate training and supervision to crewmembers and employees in regard to preventing crew members from over serving alcohol to passengers who are already intoxicated; and/or **s)** Failed to promulgate and/or enforce rules to prevent the service of alcohol to intoxicated passengers and/or encouraging the sale of alcohol to intoxicated passengers; and/or **t)** Encouraging crewmembers to over serve alcohol to intoxicated passengers, by having

> in place a system of tips to compensate bar tenders and bar servers as their main source of income; and/or **u)** Over serving alcohol to passengers by offering the passengers $5 coupons to the casino for every drink they purchase containing several shots of alcohol; and/or **v)** failing to have an adequate number of personnel aboard the ship so as to be able to promptly, properly and adequately rescue passengers at sea; and/or **w)** properly train personnel aboard the ship so as to be able to promptly, properly and adequately rescue passengers at sea; and/or **x)** Violated the International Management Code and failed to have a proper, adequate and safe Safety Management Manual; and/or **y)** failed to hire properly qualified ships doctors and/or nurses; and/or **z)** failed to hire properly licensed ship's doctors and/or nurses which had the proper licenses in the jurisdiction of the flag of the ship in which they were hired to provide medical care; and/or **aa)** failing to disclose to passengers that the ship's doctors and/or nurses: (1) did not have the proper licenses in the jurisdiction of the flag of the ship on which they were hired to provide medical care; and/or (2) were not properly qualified; and/or **bb)** Negligently relied on the medical opinions and/or advice and/or instructions of ship's doctors who were: (1) not properly qualified; and/or (2) failed to have the proper licenses in the jurisdiction of the flag of the ship on which they were hired to provide medical care; and/or **cc)** Negligently retained ship's doctors and/or nurses which did not have the proper licenses in the jurisdiction of the flag of the ship on which they were hired to provide medical care; and/or **dd)** Negligently retained ship's doctors and/or nurses which were not properly qualified; and/or **ee)** Failure to provide prompt, proper and/or adequate medical care to the Plaintiff.

Id. [D.E. 1].

Plaintiff's allegations have therefore notified Carnival of her claims. A review of paragraph 36 of the Complaint reveals that there is nothing "conclusory or formulaic" about Plaintiff's allegations. On the contrary, Plaintiff's allegations contain a great deal of specificity in support of the Negligence count.

Carnival also seems to be making the argument that the complaint does not contain any facts that explain what caused the Plaintiff's injury. **Paragraph 36 of the Complaint (as noted above), however, provides a list of <u>31 reasons</u> that caused the Plaintiff to fell (i.e. "all of which caused the Plaintiff to be injured and/or which caused the Plaintiff's injuries to be aggravated and made worse.")** *See* pg. 12 of the Complaint, D.E. 1, ¶36; *see also* Id., at ¶ 38:

> As a direct and proximate result of the negligence of Defendant, Carnival Corporation (described above), the Plaintiff: 1) fell from a 7th story balcony, hit a life boat and then fell 5 stories into the ocean, 2) was abandoned in the middle of the ocean (at night) for an unreasonable amount of time, and 3) did not receive prompt, proper or adequate medical treatment for approximately 16 hours.

All in all, Plaintiff has gone above and beyond the pleading requirements set forth in Federal Rule 8(a), *Erickson*, and *Twombly*, by setting forth in succinct, enumerated statements Carnival's negligence with sufficient particularity to give Carnival notice of what the claim is and the grounds it rests on. *See Bridgewater v. Carnival Corporation*, 10-22241-JLK [D.E. 55] (S.D. Fla. 2011) (King, J.):

> In large part, Plaintiffs' claim for negligence under Count I is predicated upon a laundry list of duties allegedly owed by Carnival to Plaintiff … Nonetheless, Defendant would have this Court dismiss Count I on the basis that Plaintiff failed to plead "sufficient factual matter" to support a claim for negligence. **The Court cannot agree**. As was well settled by the Supreme Court in *Bell Atlantic v. Twombly*, 550 U.S. 544 (2007), **only a short and plain statement of a claim is required**. Upon consideration of the Complaint (DE #1), **there can be no doubt that the allegations are sufficient to provide notice to Carnival of both Plaintiffs claims and the factual bases upon which that claim is predicated.** As such, Defendant's Motion to Dismiss must be denied as to Count I.

Id., D.E. 55 at 3 (Emphasis added).

As Judge King found in *Bridgewater*, there can be no doubt here that the allegations in the Complaint are sufficient to provide notice to Carnival of Plaintiff's claim for negligence and the factual bases upon which that claim is predicated. Moreover, these facts are sufficient to draw a reasonable inference of negligence under *Iqbal* against Carnival. *See Propenko v. Royal Caribbean Cruise Ltd.*, 10-20068, 2010 U.S. Dist. Lexis 37618 (S.D. Fla. Apr. 15, 2010) (allegation that plaintiff "was caused to fall on water on deck of the ship at or near the swimming pool, causing her serious injury" was "sufficient to draw a reasonable inference of negligence" under *Iqbal*).

Plaintiff is not required to plead evidence. In its Motion to Dismiss [D.E. 10], Carnival also seems to be making the argument that Plaintiff should plead evidence or even to plead every single fact/detail upon which his claim is based. However, nothing of the sort is required under Federal Rule 8(a), *Twombly*, or *Erickson. See, i.e. Gentry v. Carnival Corp.*, 11-21580-JG (S.D. Fla. October 5, 2011) [D.E. 36]:

> Carnival also argues that Gentry has not alleged sufficient details regarding her injury. Gentry alleged that she was injured when the seat belt restraint on the excursion bobsled ride failed. Nevertheless, Carnival contends that it is unclear from the complaint what Gentry claims Carnival knew or should have known about the dangers of going on the excursion…

> …. The Court finds that Gentry sufficiently alleged a negligence claim for purposes of surviving a Rule 12(b)(6) motion and requiring Gentry to replead this claim in greater detail would be unnecessary and inefficient. **The complaint contains "enough factual matter (taken as true) to suggest that" Carnival was Negligent**. *Twombly,* 550 U.S. at 556 … **It provides Carnival with notice of what the claim is about.** *See Thomson v. Allstate Ins. Co.,* 476 F. 2d 746, 749 (5th Cir. 1973). **Gentry is not required to plead evidence, nor even all of the facts upon which her claim is based.** *Bogosian v. Gulf Oil Corp.*, 561 F. 2d 434, 446 (3d Cir. 1977). Carnival will have ample opportunity to learn more about Gentry's injury and the specific dangers which she claims Carnival failed to warn her about during discovery.

Id., at pg. 8 (emphasis added).

Here, like in *Gentry*, during discovery Carnival will have ample opportunity to learn more about Plaintiff's injury and the specific facts which he claims would have prevented his injury.

3. Count I: The request to dismiss paragraph 36(ee) should be denied.

At paragraph 36(ee) of the Complaint, Plaintiff alleges that Carnival breached its duty of reasonable care under the circumstances by "fail[ing] to provide prompt, proper, and/or adequate medical care."

At page 3 of the Motion to Dismiss, Carnival argues that this allegation should be dismissed because "Carnival did not have a duty to provide medical care to the Plaintiff." In support of this allegation, Carnival cites to *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364 (5th Cir. 1988). In *Barbetta*, the Fifth Circuit held that a cruise ship is not a floating hospital, and therefore, has no duty to provide medical care.

The *Barbetta* Court, relying mostly on nineteenth century decisions,[3] based its ruling on two factors: (1) that the shipowner lacked the expertise to meaningfully evaluate and, therefore, control a doctor's treatment; and 2) even if it had the knowledge, the ship-owner lacked the power to intrude into the physician-patient relationship. As shown below, Carnival's reliance on *Barbetta* is misplaced.

First, this Court is not bound **that portion** of the ruling in *Barbetta*.[4] Neither the Supreme Court nor the Eleventh Circuit has addressed the question of whether a cruise line has a duty to

[3] *O'Brien v. Cunard Steamship Co.*, 154 Mass. 272, 28 N.E. 266, 267 (1891); *Laubheim v. De Koninglyke Neder Landsche Stoomboot Maatschappy*, 107 N.Y. 228, 13 N.E. 781 (1887).

[4] As noted below, other portions of the *Barbetta* ruling, dealing with "negligent hiring" and "the duty to hire qualified shipboard doctors" have sound reasoning and should be followed.

provide prompt, proper, and/or adequate medical care." In the absence of binding precedent, this Court is free to recognize the inherit flaws of *Barbetta* and the inherit weaknesses of applying that ruling to this matter. *See Fairly v. Royal Caribbean Cruise Line Limited*, 1993 AMC 1633 (S.D. Fla. 1993) (Marcus, J.) ("The United States Court of Appeals for the Eleventh Circuit has not addressed the issue"); *Huntley v. Carnival Corp.*, 307 2d 1372 (S.D. Fla. 2004) (King, J.) ("The Eleventh Circuit has not addressed the issue").

Second, both advances in telecommunications technology and the fact that a cruise line's medical department (based in corporate headquarters) is ran by physicians and experts in cruise ship medicine; undermine the anachronistic reasoning in *Barbetta.* Plaintiff anticipates discovery will reveal that: 1) Carnival's medical department *has* the expertise to meaningfully evaluate and, therefore control the treatment of a ship's doctor; and 2) videoconferencing and other contemporaneous means of transmission allows Carnival's medical department to monitor in real time the doctor's treatment of a passenger.

To put things into perspective, *Barbetta* was decided approximately 23 years ago in 1988. Moreover, at the time of the *Barbetta* decision, satellite video transmission to communicate in real time (i.e. between the mainland and a ship on the ocean half way around the world) had not yet been developed.[5]

To recognize these facts alone is to recognize the anachronistic nature of the ruling in *Barbetta*:

> It is pure sophistry to assert that… some shore-based "company chief surgeon," by his very existence, is capable of supervising or controlling the actions of a ship's physician.

Barbetta, at 848 F. 2d *at* 1371.

What may have been "pure sophistry" in 1988, however, could be factually correct in 2013. With the advances in technology, including videoconferencing and satellite communications, upon

[5] IP (Internet Protocol) based videoconferencing became possible, and more efficient video compression technologies were developed, permitting desktop, or personal computer (PC)-based videoconferencing in the 1990's. In 1992 CU-SeeMe was developed at Cornell by Tim Dorcey et al. In 1995 the First public videoconference and peacecast between the continents of North America and Africa took place, linking a technofair in San Francisco with a techno-rave and cyberdeli in Cape Town. http://en.wikipedia.org/wiki/Videoconferencing

information and belief, Plaintiff anticipates discovery will reveal that at all times material, Carnival had the ability to monitor and control (and *in fact* monitored and controlled) the services rendered by shipboard medical personnel to passengers. Using cotemporaneous transmission, Carnival medical directors – located in Carnival's medical department in Miami, Florida – supervise ship's doctors. This technology, generally referred to as "Face to Face Telemedicine," makes the location of the cruise ship (one of the primary grounds for the 1988 *Barbetta* decision) irrelevant and allows a cruise line to directly control, from its corporate headquarters, the medical care on the ship.

Thus, just because in 1988 the ship-owner in *Barbetta* did not have the requisite degree of control over the ship's doctors; it does not follow that in 2013, Carnival (a different company) also lacks the requisite control over its shipboard medical facilities. In fact, discovery might prove otherwise. This is a question of fact which can only be resolved by allowing the Plaintiff to conduct discovery.[6]

The weakness of relying on the anachronistic rule in *Barbetta* was recently recognized by Judge Altonaga in the matter of *Lobeigeiger v. Celebrity Cruises, Inc.*, 11-21620-CIV-Altonaga/Simonton (S.D. Fla. Aug. 23rd, 2011):

> Some of the facts alleged in the Complaint suggest that the twin rationales underlying the *Barbetta* rule have weak application in this case. The Complaint alleges that, during his treatment of Plaintiff, Dr. Laubscher contacted a Celebrity medical professional in Miami who confirmed Dr. Laubscher's diagnosis and advised him to send Plaintiff to a hospital in Juneau to receive a skin graft. (*See* Compl. ¶¶ 64–66). **This suggests that, in contrast to the justifications underlying the majority rule as explained in *Barbetta*, Celebrity did control the mode of treatment followed by Dr. Laubscher. Moreover, it shows that Celebrity (at least purports) to have the expertise to supervise its shipboard doctors**.

Id., (emphasis added) at pg. 17.

---

[6] Upon information and belief, Carnival's Medical Department in Miami, Florida, is headed and staffed by physicians and other medical professionals, with expertise in cruise line medicine (medical treatment aboard cruise ships). For instance, undersigned counsel, in other related cases, found that the cruise line's medical department, located in corporate headquarters, was under the direction and control of practicing physicians. These physicians' interview and make hiring decisions regarding shipboard doctors, host and organize seminars/courses in Miami on emergency medicine for ship doctors and nurses. Moreover, these shore-side physicians also create any and all applicable guidelines which govern the day-to-day operations of each ship's medical facility. **Therefore, any argument that Carnival's shore-side medical department lack's any expertise in medical care is unfounded.**

Whether Carnival is in the business of providing medical care is a question of fact. In its Motion to Dismiss, Carnival argues that "it is not in the business of providing medical care." Whether Carnival is in the business of providing medical care, however, involves questions of fact. For instance, upon information and belief, just like Carnival profits from the marketing and sale of merchandise, alcohol and shore excursions; it also profits from the marketing and sale of medical services on its ships.[7] In fact, Plaintiff anticipates discovery will reveal that Carnival derives a significant share of its total revenues from the sale and marketing of medical services. *See, i.e.* ¶ 79 - 81 of Plaintiff's Complaint [D.E. 1].

The significant benefits cruise lines derive from the operation of shipboard medical facilities were recognized by this Court in *Fairly v. Royal Caribbean Cruise Line Limited*, 1993 AMC 1633 (S.D. Fla. 1993) (Marcus, J.):

> Granted, the cruise ship is not a "floating hospital." It is more like a "floating hotel." But the passengers on a floating hotel are in a radical different situation from the guests in a hotel ashore: they are a captive audience. Contrary to the reasoning in *Barbetta*, they are not "free to contract with him for any medical services they may require." … **If a passenger is ill, and a port is distant, the ship's doctor is the passenger's only resort**, since evacuation by air rescue is expensive, possible and appropriate only for emergencies. Further, the passenger may be reluctant to seek treatment from an unknown doctor in a foreign country. **Moreover, the doctor is not merely** "**carried on board a ship for the convenience of passengers.**" Although the carrier has no duty to supply a doctor on board, **it does have a duty to provide reasonable attention under the circumstances.** This duty can be discharged by putting into port or summoning air rescue … The carrier avoids many of these costs and inconveniences by the economic expedient of carrying the ship doctor. The carrier benefits once again by advertising the availability of the ship doctor, since the presence of a qualified physician on board, with a well-equipped and staffed infirmary, is an enticement to purchase the ticket**. <u>Where the cruise line has reaped the benefits of carrying a doctor aboard its vessels there may be circumstances where it should be required to bear its consequences</u>**.

Id., at pg. 4 (emphasis added).

All in all, whether "Carnival is in the business of providing medical care" is a question of fact premature for determination at the motion to dismiss stage.

[7] Just like any other land based hospital, Carnival charges passengers for the medical care it provides on its ships.

4. Count I: Plaintiff adequately pled the requisite elements of "negligent hiring" and "negligent retention" at paragraphs 36(y), 36 (aa)(2), and 36 (dd).

Carnival also challenges paragraphs 36(y), 36(aa)(2), and 36(dd). In these paragraphs, the Plaintiff alleges that Carnival breached its duty of care because it "failed to hire properly qualified doctors and/or nurses," and "failed to disclose to passengers that the ship's doctors and/or nurses … were not properly qualified." D.E. 1, ¶ 36(y), (aa)(2)

As a preliminary matter, Carnival concedes that it has a duty to hire competent and qualified physicians/medical personnel. *See* D.E. 10, pg. 4: "Regarding Plaintiff's negligent hiring allegations, Carnival concedes that a ship owner who elects to provide a physician for its passengers has a duty to use reasonable care in selecting competent medical staff." Thus, Carnival concedes that these allegations are valid as a matter of law.

Indeed, long standing maritime jurisprudence imposes on shipowners the duty to hire competent and adequate medical personnel. Thus, a cruise line can be found to be negligent, if it hired an incompetent and/or unqualified doctor. *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1369 (5th Cir. 1988). This requirement falls under a carrier's duty to exercise ""reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances." *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1369 (5th Cir. 1988).

To the extent that a carrier negligently hires an incompetent doctor, the carrier has not discharged its duty to its sick passengers. Id. (emphasis added). *See Barbetta*, at 1371 – 1372:

> First of all, the cases uniformly hold that a carrier, when hiring a doctor for its passengers' convenience, must choose a doctor who is competent and duly qualified. To the extent that a carrier negligently hires an incompetent doctor, therefore, the carrier has not discharged its duty to its sick and injured passengers.

Id., *see also Hilliard v. Cloister Cruise, Ltd.*, 1991 AMC 314 (1990) ("When a carrier undertakes to employ a doctor aboard ship for its passengers' convenience, the carrier has a duty to employ a doctor who is competent and duly qualified. If the carrier breaches its duty, it is responsible for its own negligence.")

According to Carnival the problem with the allegations is that the "Plaintiff fails to allege any facts regarding Carnival's inquiry into the fitness of the shipboard medical personnel" and that the "claim lacks factual allegations that any doctor performed his or her duties so poorly that

Carnival should have immediately relieved the doctor of all responsibility for treating any other patients." Id. Carnival's arguments fail.

Contrary to Carnival's assertions, the Plaintiff did allege sufficient facts to show that the shipboard medical personnel were incompetent and not properly qualified. In Carnival's own words, the Plaintiff *did* allege facts showing that the shipboard medical personnel performed their duties so poorly that Carnival should have immediately relieved the doctor of all responsibility for treating any other patients. *See* Complaint, D.E. 1, ¶¶ 26 – 27; *See also* Id., at ¶ 67.

Additionally, at paragraph 36(aa) of the Complaint, the Plaintiff succinctly alleged that Carnival was negligent in hiring improperly qualified personnel because "the ships doctor's and/or nurses (1) did not have the proper licenses in the jurisdiction of the flag of the ship on which they were hired to provide medical care." This allegation has, in and of itself, been held to be a sufficient factual allegation in support of negligent hiring. *See Rinker v. Carnival Corp.*, CASE NO. 09-23154-CIV (S.D. Fla. 2010) (J. Seitz):

> **If a carrier chooses to hire a doctor it must hire one that is competent and qualified.** *Id.* …. **Plaintiffs have also alleged that Carnival breached its duty to hire competent medical staff**. Carnival also argues that this claim should be dismissed because Plaintiffs have not adequately pled a breach of this duty. Carnival assets that Plaintiffs have merely pled a conclusion without supporting facts, which does not comply with *Iqbal*. **However, the Complaint does allege that Defendants Doe and Law did not have proper licensing. Thus, Plaintiffs have adequately pled a claim for negligent hiring.**

Id., (Emphasis added)

5. Count I: Plaintiff succinctly pled Carnival's duty to promptly evacuate the Plaintiff.

In its Motion to Dismiss, Carnival asserts that paragraph 36(n) of the Complaint, alleging Carnival's duty to air evacuate the Plaintiff for medical treatment, should be dismissed. Carnival's main argument is that the Plaintiff's allegation is "conclusory." That is simply untrue. In fact, paragraph 36(n) provides in great detail the reasons why that Carnival breached the duty of reasonable care by failing to timely "evacuate the Plaintiff by helicopter." *See* D.E. 1, ¶36 (n):

> Failing to timely evacuate the Plaintiff by helicopter to receive prompt, proper and adequate medical care in Miami, Florida. Instead, Carnival left the Plaintiff in a medical facility in Key West which did not have the equipment to handle the severe trauma that Plaintiff had suffered (from where Plaintiff at her own expense was ultimately airlifted to Jackson Memorial Hospital in Miami). This resulted in the Plaintiff having to wait

> approximately 16 hours to receive proper and adequate medical treatment (further aggravating her injuries)

It is well-settled that ship-owners "owe its sick and injured passengers a duty to exercise reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances.'' *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364, 1371 (5th Cir. 1988). Under general maritime law, if a ship's medical facilities are incapable of dealing with a passenger's illness, there is a duty of reasonable care to secure medical help. *The Iroquois*, 194 U.S. 240 (1904). "This duty can be discharged **by putting into port or summoning air rescue**." *Fairley v. Royal Cruise Line Ltd.*, 1993 A.M.C. 1633, 1639 (S.D. Fla. Mar. 12, 1993) (emphasis added); *see also Schoenbaum*, Admiralty and Maritime Law, Fourth Ed., §3-5, citing *Desmond v. Holland America*, 1981 AMC 211 (S.D.N.Y. 1981) (This duty is fulfilled by a requirement that the master must put in at the nearest port or arrange for a medical evacuation).

Here, considering that Plaintiff was a "sick and injured passenger," Carnival owed her a duty to exercise reasonable care to furnish aid and assistance, including, but not limited to, evacuating her in order for her to obtain medical care on shore.

In support of this, in the addition to the detailed allegations at paragraph 36(n), the Plaintiff also alleged as follows in paragraphs 27-32:

> 27. Rather than treating her severe injuries, the Carnival doctors' treatment of the Plaintiff was primarily limited to giving her pain medication. The Carnival medical personnel further stated that she needed to go to a land based hospital to be treated.
>
> 28. Despite the severity of her incident and injuries (including falling 100 feet – hitting a life boat and then the water -and spending close to two hours in the ocean); Carnival refused to airlift (air evac) the Plaintiff from the cruise ship. Instead, the Carnival Captain and/or other ship officers decided to divert the ship and take the Plaintiff to Key West for medical treatment.
>
> 29. The cruise ship arrived at Key West, FL at 2.00pm the next day. Once at Key West, paramedics boarded the ship to take the Plaintiff to an emergency room in Key West. The paramedic asked Carnival for a summary of the situation. A Carnival staff member reported that Plaintiff fell from the 7th floor, hit a life raft on the way down and then was in the ocean for almost two hours. Visibly shocked, the paramedic demanded to know why, in light of the severity of the incident, the Plaintiff had not been airlifted previously.

> 30. The Plaintiff was taken to Key West Hospital in an ambulance. At the hospital the doctors asked the paramedics for her status and history. Once again, the paramedics explained that the Plaintiff had fallen from the 7th floor, hit a life raft, and was stuck in the ocean for almost two hours. **The Key West doctors explained that they did not have the equipment to handle the severe trauma that Plaintiff had suffered. They also stated that the Plaintiff should have been air evacuated from the cruise ship directly to Jackson Memorial Hospital in Miami**.
>
> 31. Upon examining the Plaintiff, the Key West doctors, immediately called an air ambulance to airlift the Plaintiff (at Plaintiff's own expense) from Key West to Jackson Memorial Hospital in Miami. While the air ambulance arrived, the Key West doctors communicated with Jackson Memorial trauma doctors on videoconference and explained the Plaintiff's status.
>
> 32. The Medevac crew arrived in a helicopter and airlifted the Plaintiff to Jackson Memorial Hospital in Miami. Almost 16 hours after her incident, the Plaintiff arrived to Miami, Florida and was finally treated for her injuries. In Miami, the doctors diagnosed the Plaintiff with (among other things) spinal injuries, a dissected carotid artery, broken optical shelves, fractured ribs, lung contusions, heart arrhythmia, and extreme hematomas over most of her body.

Id. (emphasis added).

The Plaintiff's allegations have therefore notified Carnival of her claim for "its failure to promptly and properly evacuate the Plaintiff" and the factual grounds upon which it rests.

6. Count I: Carnival had a duty to maintain and monitor security cameras on its vessels.

In its Motion to Dismiss, Carnival asserts that paragraphs 36(l) and 36(q) should be dismissed because "Carnival did not have a duty to maintain and monitor security cameras on its vessels." Carnival is incorrect. *See Doe v. Royal Caribbean Cruises, Ltd.*, 2012 A.M.C. 761 (S.D. Fla. 2011) (Plaintiff passenger's claim against defendant cruise line operator for damages due to rape by a fellow passenger based upon defendant's failure to continuously monitor video camera surveillance, survives defendant's motion to dismiss where plaintiff alleges that she relied on the continuous monitoring of the security cameras).[8]

[8] In support of the assertion that Carnival has no duty to monitor security cameras, Carnival cites to *Miziner v. Carnival Corp.*, 2006 U.S. Dist. LEXIS 44332 (S.D. Fla. 2006). As pointed out by this Court in *Doe*, 2012 A.M.C. 761 (S.D. Fla. 2011), however, *Mizener* is distinguishable because in that case the Plaintiff did not allege that she relied on the continuous monitoring of the camera surveillance. Here, it can be implied from the allegations in the complaint that Plaintiff relied on such continuous monitoring. Nevertheless, to the extent that the Court finds that it is necessary for the Plaintiff to state that "she relied

7. Count I: The Plaintiff's allegations regarding over service of alcohol support a cause of action for negligence under the general maritime law. Under the general maritime law, Carnival had a duty to *not* over serve Plaintiff alcohol. The Florida dram shop statutes are strictly inapplicable.

In the Complaint, Plaintiff succinctly alleged that Carnival breached its duty of reasonable care by *over* serving her unreasonable amounts of alcohol. *See* D.E. 1, ¶¶ 13 – 16; 36(o), 36(p), (r), (s), (t), (u).

First, under the general maritime law, a cruise line's over service of alcohol to its passengers constitutes a breach of the duty of reasonable care. *See Doe v. Royal Caribbean Cruises, Ltd.*, 2011 WL 6727959, at *4 (S.D. Fla. 2011) (where plaintiff was served alcohol at ship lounge, was observed by crewmembers staggering around drunk and rebuffing advances of another passenger, and was later raped by other passenger, plaintiff stated actionable claim for negligence); *see* Id., at pg. 4: ("Here, the plaintiff alleges that the defendant served her alcohol in sufficient quantity to intoxicate her. This behavior may have been negligent."); *Doe v. NCL (Bahamas), Ltd.*, 2012 WL 5512347 *6 (S.D. Fla. 2012) ("[A] cause of action for over service of alcohol [by cruise line] sounds in negligence"); *Tello v. Royal Caribbean Cruises, Ltd.*, 2013 WL 1500573 (S.D. Fla. 2013) (Cruise passenger whose son fell overboard after bartenders over served him multiple drinks adequately pleaded a claim of negligence under the general maritime law).

Second, contrary to Carnival's assertions, this Honorable Court has held that the Florida anti-dram shop liability statute does not apply to a negligence action (alleging over service of alcohol) against a cruise line. *See Doe v. NCL (Bahamas), Ltd.*, 2012 WL 5512347 *4-5 (S.D. Fla. 2012) (Cooke, J.):

> Defendant argues that Defendant had no duty to not over serve alcohol because the Florida anti-dram shop liability statute applies to this case. Defendant also argues that,

---

on the continuous monitoring of camera surveillance," Plaintiff moves for leave to amend. *See Doe*, 2012 A.M.C. 761 (S.D. Fla. 2011) (emphasis added):

> First, the plaintiff specifically alleges that she relied upon the fact that she would be continuously monitored during the cruise. In granting the motion to dismiss, *Mizener* noted the absence of any reliance allegation. The plaintiff's alleged reliance here is a factual circumstance, not a legal conclusion which the court must accept as true. **Whether the Plaintiff did in fact rely on the presence of surveillance cameras, and whether that reliance was reasonable in view of defendant's actions, are not questions that can be resolved on a motion to dismiss under Rule 12(b)(6).**

> even assuming it had such a duty, the evidence demonstrates that Defendant did not breach that duty.
> … **Florida law is not applicable to this case.** Indeed, as Plaintiff points out, the contract between the parties does not contemplate the application of Florida law, the cruise ship is registered in Bahamas, and the service occurred on the high seas, not on the Florida territorial waters.[9] …

Id., (emphasis added). Moreover, contrary to Carnival's assertions, in *Doe* this Court held that state law cannot supplement federal maritime law by applying state dram shop acts. To do so, would undermine the objective of uniformity of maritime law. *Doe* further explained that the premise that there is no maritime dram shop rule (as alleged by Carnival here) is simply untrue. *See Doe,* 2012 WL 5512347 *5-6 (S.D. Fla. 2012) (emphasis added):

> I share the [Florida] Third District's criticism of the few isolated cases [from California and Iowa] that have supplemented federal maritime law by applying state dram shop acts.
> … **First and foremost, the application of state dram shop acts necessarily undermines the objective of uniformity of maritime law** … Second, the courts that applied state dram shop acts to bar such negligence claims often relied on the premise that there was no maritime dram shop rule and thus that they were free to supplement maritime law with state law provisions that did not undermine the general principles of admiralty law. **The field, however, is already preempted by the general principles of negligence**. *See, e.g. Kermarec v. Co. Gen. Transatlantique*, 358 U.S. 625, 626 (1959) (rejecting New York's premises liability law in favor of the "settled principle of maritime law" that a ship owner owes a duty of reasonable care under the circumstances declining, where the guest of a cruise ship passenger sued the cruise line for injuries sustained in a fall on a stairway of the vessel).

Therefore, because Florida law is strictly inapplicable, and the Plaintiff's claims of negligent over service of alcohol are governed under the general maritime law (as set forth in the seminal case of *Kermarec*); the Florida anti-dram shop act cannot bar Plaintiff's claims. *See Doe,* 2012 WL 5512347 *5-6 (S.D. Fla. 2012):

> **Accordingly, I decline to apply the Florida dram shop act to bar Plaintiff's negligence claim in this case**. Instead, the *Kermarec* reasonable care standard shall apply. Thus, **the Florida anti-dram shop act cannot bar Plaintiff's claim** and does not warrant the entry of summary judgment as to Count II of the Complaint.

[9] Like the cruise line in *Doe*, here the contract between the parties does not contemplate the application of Florida law, the cruise ship is registered in Panama, and the over service occurred on the high seas, not on Florida territorial waters.

Id. (emphasis added). *See also Doe v. Royal Caribbean Cruises Ltd.*, 2011 WL 6727959, at *1 (S.D. Fla. 2011) (declining to apply the Florida anti-dram shop act to a maritime case).

Third, under Florida law, the Florida anti-dram shop statute is also strictly inapplicable to this case. Indeed, Florida courts of appeal have unequivocally held that in negligence actions against cruise lines, alleging over service of alcohol to passengers, the Florida anti-dram shop statute does not apply. In *Hall v. Royal Caribbean Cruises, Ltd.*, 888 So. 2d 654 (Fla. 3d DCA 2004) (Exhibit "2"), Florida's Third District Court of Appeal held that the plaintiff could sue the ship owner in negligence for serving Plaintiff alcohol past the point of intoxication, where, unable to look after himself, the inebriated plaintiff fell down a two flights of open stairways. The Third District Court of Appeal stated that it disagreed with the minority position adopted by few lower courts in other circuits that the issue may be governed by the dram shop act of the forum state. Id., at 655 n.1. The *Hall court* explained that, although most maritime suits may be filed in state court, they are nonetheless governed by substantive federal maritime law to maintain the uniformity which is necessary for a national maritime law. Id.[10]

Fourth, the Florida anti-dram shop statute is also strictly inapplicable because, as Carnival *admits* in its own Motion to Dismiss, at page 2 [D.E. 10], "[t]his matter is subject to the general maritime law of the United States … Moreover, it is well settled that general maritime law governs passengers" Id. Therefore, Carnival's assertion that Florida law should apply is disingenuous in light of its own admission (earlier in its Motion to Dismiss) that the general maritime law exclusively governs this matter.[11]

Fifth, Plaintiff sufficiently pled her claim of Carnival's breach of the duty of reasonable (by over serving her alcohol), and the factual grounds upon which it rests. *See* D.E. 1, ¶¶ 13 – 16; *See also* D.E. 1, ¶36 (o), 36(p), (r), (s), (t), (u):

---

[10] Thereafter, the defendant-cruise line sought to challenge, among other things, the *Hall court's* refusal to apply the Florida anti-dram shop liability act by filing a petition of writ of certiorari in the Supreme Court of the United States. *Royal Caribbean Cruises, Ltd. v. Hall,* 2005 WL 623117 (U.S.). The Supreme Court, however, summarily denied certiorari. 545 U.S. 1114 (2005).

[11] *See Hall v. Royal Caribbean Cruises, Ltd.,* 888 So. 2d 654 (Fla. 3d DCA 2004) ("The first lesson that every law student studying Admiralty I learns is that, although most maritime suits may be filed in state court, they are nonetheless governed by substantive maritime law to maintain the uniformity which is necessary for a national maritime law").

> o. Failing to provide reasonable safe conditions for the Plaintiff during her voyage aboard the Carnival *Destiny*. The unsafe conditions included but are not limited to operating a "floating dram shop," permitting passengers, including Plaintiff, to become extremely intoxicated by over serving them unreasonable amounts of alcohol for profit; and/or
>
> p. Failing to warn the Plaintiff and other passengers of the dangers of becoming intoxicated due to over serving of alcohol on the vessel; and/or
>
> r. Failed to provide adequate training and supervision to crewmembers and employees in regard to preventing crew members from over serving alcohol to passengers who are already intoxicated; and/or
>
> s. Failed to promulgate and/or enforce rules to prevent the service of alcohol to intoxicated passengers and/or encouraging the sale of alcohol to intoxicated passengers; and/or
>
> t. Encouraging crewmembers to over serve alcohol to intoxicated passengers, by having in place a system of tips to compensate bar tenders and bar servers as their main source of income; and/or
>
> u. Over serving alcohol to passengers by offering the passengers $5 coupons to the casino for every drink they purchase containing several shots of alcohol

Id.

Finally, to the extent that Carnival asserts that "the dangers of becoming intoxicated are open and obvious," D.E. 10, pg. 12, this Honorable Court has previously rejected that argument as premature, at the motion to dismiss stage. Indeed, whether a danger is open and obvious raises questions of fact for the jury, which cannot be properly determined at the motion to dismiss stage. *See Propenko v. Royal Caribbean Cruises Ltd.*, 2010 U.S. Dist. LEXIS 37618 (S.D. Fla. 2010) (Huck, J.):

> Royal Caribbean argues that it had no duty to warn … [and] cites two cases which granted summary judgment to the defendant cruise ship companies… Propenko distinguishes these cases because they were decided on summary judgment … **The Court also agrees with Propenko that the "open and obvious" question requires a context specific inquiry and necessitates development of the factual record before the Court can decide whether, as matter of law, the danger was open and obvious**.

Id. (Emphasis Added); *see also Rocha v. Carnival Corporation*, Case No.: 10-22799-CV-LENARD/TURNOFF (S.D. Fla. 2011) [D.E. 26, pg. 4]. In *Rocha*, the cruise line filed a motion to dismiss alleging that the dangerous condition that occurred off the ship in a port of call was "open and obvious." Citing *Propenko*, this Honorable Court denied the cruise line's Motion to Dismiss and held:

> … **many of the allegations in the Complaint require a "context specific inquiry" and "necessitate the development of the factual record before the Court can decided whether, as a matter of law, [Defendant was negligent].** Defendant's arguments, which are certainly colorable, are best addressed by way of a motion for summary judgment.

Id. (Emphasis added).

B. DEFENDANT'S MOTION TO DISMISS COUNT II OF THE COMPLAINT ALLEGING INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AGAINST CARNIVAL SHOULD BE DENIED. CARNIVAL *RECKLESSLY* ABANDONED THE PLAINTIFF IN MIDDLE THE OCEAN, AT NIGHT, FOR AN UNREASONABLE PERIOD OF TIME. SUCH CONDUCT (WHICH EXPOSED THE PLAINTIFF TO IMMENENT DEATH FROM DROWNING AND SHARKS) WAS EXTREME, OUTRAGEOUS AND CAUSED THE PLAINTIFF SEVERE EMOTIONAL DISTRESS.

In order to state a claim for intentional infliction of emotional distress, the Plaintiff needs to asset the following elements: (1) the wrongdoers conduct was intentional or reckless; (2) the conduct was outrageous, that is as to go beyond all bounds of decency, and to be regarded as utterly intolerable in a civilized community; (3) the conduct caused emotional distress; and (4) the emotional distress was severe. *Irwin v. Miami-Dade Pub. Schs.*, 2009 U.S. Dist. Lexis 14726 *27 (S.D. Fla. 2009).

In its Motion to Dismiss, Carnival does not dispute that Plaintiff properly and succinctly pled elements (1), (3) and (4). Instead, Carnival solely focuses on element (2), and argues that Plaintiff "fails entirely to allege the element number two, the 'outrageous conduct' prong." D.E. 10, pg. 16. Carnival's assertion is simply untrue.

A defendant is liable for intentional infliction of emotional distress if the defendant's "extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another. …" *Metropolitan Life Ins. Co. v. McCarson*, 467 So. 2d 277, 278-79 (Fla. 1985).

In evaluating the degree of severity of defendant's conduct, courts have held that liability for intentional infliction of emotional distress is found "only where the conduct has been so outrageous in character, and so extreme in degree as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *McCarson*, 467 So. 2d at 279 (quoting Restatement (Second) of Torts §46 cmt d. (1965)). A defendant's conduct is deemed intentional where the defendant "knows that such distress is certain, or substantially certain, to

result from his conduct …" Id. *See also* Restatement (Second) of Torts §46 cmt d: "Generally, the case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor, and lead him to exclaim, 'Outrageous!'

Here, at paragraphs 42 - 43 of the Complaint, contrary to Carnival's assertions, the Plaintiff succinctly alleged in detail that "Carnival's conduct was so outrageous in character, and so extreme in degree, as to be regarded as atrocious, and utterly intolerable in a civilized community." *See* D.E. 1, ¶¶ 41 – 44:

> 41. On or about the above referenced date, Carnival and/or its agents, servants and/or employees intentionally and/or recklessly refused to immediately stop the ship and rescue the Plaintiff.
>
> 42. Instead, Carnival intentionally and/or recklessly decided to search the ship first, despite knowing (as represented by Plaintiff's friend, fiancé and other passenger witnesses) that the Plaintiff had fallen overboard. In doing so, Carnival intentionally and/or recklessly abandoned the Plaintiff in the middle of the ocean for an unreasonable period of time. **Carnival's conduct was so outrageous in character, and so extreme in degree, as to go beyond all possible bounds decency, and to be regarded as atrocious, and utterly intolerable in a civilized community**.
>
> 43. Carnival and/or its agents, servants and/or employees knew and/or should have known that emotional distress would likely result from their actions.
>
> 44. During the time that the Plaintiff was floating in the ocean (in the middle of the night, by herself), she was terrified of running out of energy and drowning. Plaintiff constantly feared that she was going to be attacked by sharks, and believed that her death was imminent. All of this caused Plaintiff severe emotional distress.

Indeed, the facts alleged in the Complaint (which must be taken as true), reveal that Carnival knowingly abandoned the Plaintiff in the middle of the ocean, at night, for an unreasonable period of time. Rather than stopping the ship and turning around to look for the Plaintiff in the water, the facts alleged in the Complaint show that Carnival wilfully disregarded the reports of multiple witnesses (including the Plaintiff's friend and her boyfriend) that she had fallen overboard. Instead (for the next two hours), while the Plaintiff was alone at sea, Carnival made the deliberate (and outrageous) choice to continue the voyage and search the ship first. *See* D.E. 1, ¶¶ 17 – 25:

17. That evening, while the ship was at sea, the Plaintiff returned to her cabin with her friend Rebecca. At approximately 12.10 am, the Plaintiff stepped out to the cabin balcony to get some air. As she was holding on to the balcony's wooden banister, the Plaintiff lost her grip and balance, slipped off the ground and fell overboard into the ocean. As she fell from the balcony, which was 7 stories high (approximately 100 feet), the Plaintiff fell onto a life raft, and after hitting the life raft, fell 5 more stories into the water. As a result, Plaintiff suffered severe injuries, including: fractured orbital bones, lung contusions, hypothermia, fractured ribs, dissection of the carotid artery, heart arrhythmia, broken optical shelves, blood clots in her eyes, arms, and legs, as well as extreme hematomas all over her body.

18. The Plaintiff fell in the water without a life jacket or a life preserver. After a few minutes, the cruise ship speed away, until it disappeared in the horizon, leaving the Plaintiff alone in the middle of the ocean.

19. In order to be able to stay afloat, the Plaintiff swam until she ran out of energy. So she would not drown, she periodically stopped swimming, and floated in the water with her face up in order to rest and to catch her breath. She could do this for only short periods of time, however, as ocean waves would crash into her face forcing her to swallow water, which she constantly had to cough up.

20. During the time that the Plaintiff was floating in the ocean (in the middle of the night, by herself), she was terrified of running out of energy and drowning. Plaintiff constantly feared that she was going to be attacked by sharks, and believed that her death was imminent. All of this caused Plaintiff severe emotional distress.

21. Rebecca, the Plaintiff's friend, immediately noticed that the Plaintiff had fallen overboard. Moreover, people in different parts of the ship either saw and/or heard the Plaintiff fall into the ocean.

22. Both Rebecca and the other passengers who witnessed the fall, immediately notified several Carnival staff members that the Plaintiff had fallen overboard. Rebecca and the Plaintiff's fiancé, repeatedly demanded the cruise ship staff to stop the ship. Their request, however, was summarily denied. Instead, the cruise ship staff explained that they were not going to stop the vessel, until they first searched the ship. The cruise ship staff also explained that they were "following standard procedure."

23. Rebecca and the Plaintiff's fiancé were then escorted to the Captain's quarters and/or offices. There, over the next 90 minutes (while the ship was still moving) they were questioned by the ship's security staff and the ship's officers regarding the incident. Rebecca and the Plaintiff's fiancé repeated their story several times, and again demanded several times that the ship be stopped immediately. Once again, however, their request was denied, and the ship's officers insisted they were not going to stop the vessel until they first searched the ship.

> 24. At approximately 1:45am, while the ship was still moving (and the Plaintiff had been in the water for over one hour and thirty minutes), the ship's officers notified all passengers via intercom that they were going to turn around the ship to find the Plaintiff.
>
> 25. After drifting in the ocean for almost two hours, Carnival located the Plaintiff. The Plaintiff saw the cruise ship appear with its lights pointing towards her. A crewmember in a life boat approached her, threw her a life preserver and helped her into the boat.

Despite these allegations, in its motion to dismiss, Carnival has the *chutzpah* [12] to argue that its conduct (i.e. knowingly and/or recklessly abandoning the Plaintiff in the middle of the ocean, floating in the dark of night, after falling seven stories and bleeding) does not raise to the level of "outrageous and extreme conduct in a civilized society." This assertion is not only disingenuous but also defies logic.

Certainly, in a *civilized society*, passengers that purchase cruise tickets entrust their lives and well-being to the cruise operator. When a passenger falls overboard (and other passengers report to the operator/captain seeing or hearing such passenger falling overboard) a *civilized society* expects a shipowner to do what is *decedent*: immediately stop the ship and initiate a search and rescue of the missing passenger in the water.

Here, as alleged in the complaint, Carnival did not do this. Instead, it made the deliberate and *outrageous* choice to: 1) ignore the reports of other passengers (that the Plaintiff had fallen overboard), 2) continue the voyage and 3) refuse to promptly begin a "search and rescue" of the Plaintiff in the water.

It was therefore *outrageous*, for Carnival to recklessly abandon the Plaintiff in the middle of the ocean, at night, for two hours, despite having reports that other passengers heard or saw her fall overboard. This outrageous conduct caused Plaintiff severe emotional distress. *See* D.E. 1, ¶44: "During the time that the Plaintiff was floating in the ocean (in the middle of the night, by herself), she was terrified of running out of energy and drowning. Plaintiff constantly feared that

[12] *Chutzpah* is a Yiddish word that derives from the Hebrew word *hutspa*, meaning "insolence" or "audacity." In Hebrew, *chutzpah* is used indignantly, to describe someone who has overstepped the boundaries of accepted behavior. "

she was going to be attacked by sharks, and believed her death was imminent. All of this caused Plaintiff severe emotional distress."

All in all, as explained by the Restatement (Second) of Torts §46 cmt d, there is no doubt that this "case is one in which the recitation of the facts to an average member of the community would arouse his resentment against the actor [Carnival], and lead him to exclaim, 'Outrageous!'

The case of *De Cicco v. Trinidad Area Health Association*, 573 P. 2d 559 (Col. Ct. App. 1977) is instructive here. In *De Cicco*, the Defendant refused to provide ambulance service for the plaintiff's critically ill wife unless she was brought to the local hospital first (the wife's physician, who had recently resigned from the local hospital, thought that she needed care in a larger hospital in another county). The arrangements that then had to be made with another ambulance caused a substantial delay. Plaintiff's wife died within an hour of reaching the larger hospital. The court held that the refusal to provide ambulance service in this situation and on these grounds met the classic test of arousing people to cries of "outrageous."

C. DEFENDANT'S MOTION TO DISMISS COUNT III OF THE COMPLAINT ALLEGING NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS AGAINST CARNIVAL SHOULD BE DENIED. AS A MATTER OF LAW, PLAINTIFF CAN HAVE TWO SEPARATE AND INDEPENDENT CAUSES OF ACTION FOR 1) NEGLIGENCE AND 2) NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS.

In its Motion to Dismiss, Carnival's only challenge against the Plaintiff's claim for Negligent Infliction of Emotional Distress (Count III), is that the allegations in Count I (Negligence) and Count II (Negligent Infliction of Emotional Distress "NIED") are "duplicative." Thus, Carnival seems to be arguing that because Plaintiff has a claim for Negligence (Count I), she is not allowed to have a separate and independent count for NIED (Count II). Carnival's argument is meritless and a misstatement of the law.

Pursuant to binding Eleventh Circuit precedent, the Plaintiff can simultaneously plead, separate and independent counts for negligence and NIED. *See Chaparro v. Carnival Corp.* 639 F. 3d 1333 (11th Cir. 2012). Moreover, as the Eleventh Circuit explained in *Chaparro*, because the allegations under a NIED claim are premised on the wrongdoer's negligence; if the Plaintiff's allegations in the negligence count are sufficiently pled, the Plaintiff's has likewise stated a valid and separate claim for NIED. *See Chaparro*, at 1336:

> We consequently conclude that the district court erred in dismissing Appellant's negligence claim under *Iqbal* … The district court also dismissed count II, the claim for negligent infliction of emotional distress, because that claim requires an adequately pled underlying claim of negligence. Because Appellants pled negligence sufficiently, we conclude that they likewise stated a valid claim for negligent infliction of emotional distress.

As noted earlier, in the discussion regarding Count I, because the Plaintiff pled her negligence claim sufficiently, she likewise stated a valid claim for negligent infliction of emotional distress.

D. DEFENDANT'S MOTION TO DISMISS COUNT IV SHOULD BE DENIED. WHILE *BARBETTA* PROVIDES THAT A SHIP-OWNER CANNOT BE HELD VICARIOUSLY LIABLE FOR A SHIPBOARD PHYSICIAN'S MALPRACTICE BASED ON A THEORY OF *RESPONDEAT SUPERIOR*; AS A MATTER OF LAW, CARNIVAL MAY STILL BE VICARIOUSLY LIABLE BASED ON ALTERNATIVE THEORIES SUCH AS APPARENT AGENCY. HEREIN, THE COMPLAINT SETS FORTH THE REQUIRED ELEMENTS OF APPARENT AGENCY, WITH SUBSTANTIAL FACTUAL ALLEGATIONS IN SUPPORT THEREOF

Counts IV in Plaintiff's Complaint alleges Carnival's vicarious liability for acts of the shipboard nurse(s) and physician(s), on a theory of apparent agency. Carnival, however, incorrectly attempts to prevent Plaintiff from proceeding under a theory of apparent agency by citing *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364 (5th Cir. 1988). Contrary to Defendant's assertions, however, *Barbetta* holds ***only*** that cruise lines cannot be held vicariously liable for a shipboard physicians malpractice ***based on a theory of respondeat superior***. As *Barbetta* states: "we hold … that general maritime law does not impose liability under ***under the doctrine of respondeat superior*** upon a carrier or ship owner for the negligence of a ship's doctor who treats the ship's passengers." *Barbetta*, 848 F. 2d at 1372 (emphasis added). *See also Carnival Corp. v. Carlisle*, 953 So. 2d 461, 471 (Fla. 2007), *citing Barbetta* ("the ship owner is not vicariously liable ***under a theory of respondeat superior*** for the medical negligence of the shipboard physician.")

Thus, contrary to Carnival's argument, *Barbetta* only limits causes of action of vicarious liability under a theory of respondeat superior.

1. Courts in the Eleventh Circuit, including the Southern District of Florida, have unequivocally held that vicarious liability based on a theory of *apparent agency* (as opposed to *respondeat* superior) is a valid cause of action.

There is a simple, yet crucial distinction between claims based on *respondeat superior* and those based on *apparent agency*. While a claim based on *respondeat superior* is premised on ***control*** (i.e. an employer's control or right to control his employee), a claim based on apparent agency is based on ***manifestations***. And when a ship-owner holds out a ship's doctor and/or a nurse to be its agent(s), under circumstances suggesting the medical professional was treating the Plaintiff on behalf of the carrier, and the Plaintiff relied on those representations to his detriment, then the defendant can be held liable for the shipboard medical professional's malpractice.

Indeed, courts in the Eleventh Circuit have held that *Barbetta* does not bar passengers from holding a cruise line vicariously liable for the acts of a ship's doctor based on a theory of *apparent agency*. *See, i.e.: Rinker v. Carnival Corporation,* 09-23154-CIV (S.D. Fla. 2010) (Seitz, J.) [D.E. 38, p. 7 – 8] (Denying Carnival's Motion to dismiss and explaining that the "theories and elements of proving [apparent agency and respondeat superior] are different"); *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371 (S.D. Fla. 2005):

> "While the majority rule under federal maritime law is that a cruise ship cannot be vicariously liable for the conduct of a ship's doctor under an actual agency theory ..**a number of courts have held that a plaintiff can seek to hold a cruise line vicariously liable for the conduct of a ship's doctor under an <u>apparent agency</u> theory.**"

Id. (emphasis added); *Lobegeiger v. Celebrity Cruises*, 2011 WL 3703329 (S.D. Fla. Aug. 23 2011) (Altonaga, J.):

> Notwithstanding the rationale in *Barbetta*, several courts, including this Court, have found it permissible for a court sitting in admiralty to hear vicarious liability claims premised on shipboard doctors' negligence under the theory of *apparent* agency. *See Hajtman v. NCL (Bahamas) Ltd.*, 526 F. Supp. 2d 1324, 1328 (S.D. Fla. 2007); *Suter*, 2007 WL 4662144, at *6 (Altonaga, J.); *Peterson v. Celebrity Cruises, Inc.*, 753 F. Supp. 2d 1245, 1248 (S.D. Fla. 2010) ("The Court generally agrees that *Barbetta* does not prohibit, as a matter of law, such apparent agency claims."). **In the instant case, the Court finds that permitting the application of apparent agency, assuming the necessary elements are satisfied, is consistent with the general maritime tort principles of harmony and uniformity**.

Id. (emphasis added); *Boney v. Carnival Corporation*, 08-22299 (S.D. Fla. Nov. 13, 2009) (same); *Fairley v. Royal Caribbean Cruises, Ltd.*, 1993 AMC 1633, 1639-40 (S.D. Fla. 1993) (Marcus, J.) (same).

Apparent Agency is established when: 1) the alleged principal makes 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 relied acted on such belief to his detriment." *Doonan v. Carnival Corporation*, 404 F. Supp. 2d 1367 (S.D. Fla. 2005). Courts in the Eleventh Circuit sitting in admiralty have held that Federal Maritime Law embraces the principles of agency and that the existence of an agency relationship is a question of fact. *Archer v. Trans/American Servs., Ltd.*, 834 F.2d 1570, 1573, (11th Cir. 1988).

Herein, **Count IV** of the Plaintiffs' Complaint concisely alleges a claim based on *apparent agency*. As to element one, 'manifestations by the principal,' *see* paragraph 55. As to element two, the Plaintiff's' 'reasonable belief,' *see* paragraphs 56 and 57. Finally, as to element three, the Plaintiff's 'detrimental reliance,' *see* paragraph 58.

These pleaded elements and supporting facts for apparent agency in the complaint herein are virtually identical to those pleaded in the Complaint in *Boney v. Carnival Corporation*, 08-22299 (S.D. Fla. Nov. 13, 2009) (Seitz, J.) [D.E. 131] and in *Suter v. Carnival Corp.*, 2007 WL 4662144, *6 – 7 (S.D. Fla. 2007). In both *Boney* and *Suter*, this Court denied Carnival's identical arguments at the motion to dismiss stage.

2. Carnival's reliance on the terms of the passenger ticket contract has been previously rejected as premature at the motion to dismiss stage.

In page 18 of the Motion to Dismiss, Carnival argues that because of language in the passenger-ticket contract discussing the relationship between the shipboard medical staff and Carnival, Plaintiffs' belief "could not have been reasonable." However, this Honorable Court has previously rejected Carnival's argument that "Plaintiff's reliance was unreasonable given the disclaimer of the [passenger] ticket contract." *See Suter v. Carnival Corp.*, 2007 WL 4662144, *6 – 7:

> Suter argues that Carnival "held out" Dr. Mahomed to the public as an officer and crew member of the Spirit, in addition to being the Ship's doctor. In opposition, Carnival maintains that Suter's reliance on any "holding out" by Carnival that Dr. Mahomed was its agent was unreasonable because Suter's passenger ticket disclosed that the shipboard doctor was an independent contractor and not Carnival's agent. In support, Carnival relies on a line of cases in which courts granted summary judgment in favor of hospitals challenging claims of apparent authority over doctors who practiced in those facilities.
>
> Carnival's reliance on those cases is misplaced. The cases were decided on either summary judgment or after trial, after the court and/or the jury had an opportunity to

> evaluate the facts uncovered during discovery. For example, Carnival relies on *Floyd v. Humana of Virginia, Inc.*, 787 S.W.2d 267, 270 (Ky.Ct.App.1990), for the proposition that a plaintiff's claim of apparent agency is not actionable if the plaintiff read and signed a form indicating that the purported agent is an independent contractor. In *Floyd*, the court concluded, *inter alia*, that a hospital could not be held vicariously liable for the acts of a doctor practicing in that hospital because evidence presented at summary judgment demonstrated that the plaintiff had read, understood, and signed a form indicating that the doctor was an independent contractor, and because the hospital made no representation to induce the plaintiff to believe the doctor was an employee of the hospital. *See id.*
>
> In contrast, Defendant here presents a motion to dismiss, not a motion for summary judgment as was the case in *Floyd*, and thus, the Court must determine whether the facts alleged, taken as true, form the basis for a valid claim. Moreover, the pleading does not show that Suter read and understood the terms and conditions included in her ticket. Consequently, Carnival's argument is premature.

Id.; *see also Boney v. Carnival Corporation*, 08-22299 (S.D. Fla. Nov. 13, 2009) (Seitz, J.) [D.E. 131]:

> **However, the determination of agency/independendent contractor is a factually intensive issue, and the cruise line ticket is merely *one* factor relevant to the "reasonableness" of Plaintiff's belief.** *See, e.g. Estate of Miller v. Toyota Moto Corp.*, 2007 WL 4482589 * at 3 (M.D. Fla. 2007) ("the issue of agency is fact intensive"). Since the cruise ticket is not dispositive of the legal relationship between Carnival and the medical personnel, it also is not dispositive of whether Plaintiffs' belief was reasonable. … **As a result, Plaintiffs' have adequately pled that their reliance on Carnival's manifestations was reasonable**.

Id. (emphasis added); *see also Fairley v. Royal Cruise Line, Ltd.*, 1993 AMC 1633, 1639-40 (S.D. Fla. 1993) (passenger contract "will not dispose of issue of whether the ship doctor was an independent contractor on a motion to dismiss.").

Here, like in *Suter*, *Boney* and *Farley*, Plaintiffs' have adequately pled that their reliance on Carnival's manifestations was reasonable. Moreover, like *Suter*, *Boney* and *Farley*, Carnival's arguments regarding the passenger-ticket contract are premature at the motion to dismiss stage.

E. COUNT VI – PLAINTIFF STATED A VALID CLAIM FOR THIRD PARTY BENEFICIARY.

Count VI of the Plaintiff's Complaint succinctly alleges a cause of action based on third party beneficiary. Generally, to maintain a cause of action for breach of a third party beneficiary contract,

the party asserting the third party beneficiary status must show (1) the existence of the contract; (2) clear or manifest intent of the parties that the contract primarily and directly benefits the third party; (3) breach of a contact by a contracting party; and (4) damages to the third-party resulting from the breach. *Steadfast Ins. Co. v. Corporate Protection Security, Inc*., 554 F. Supp. 2d 1335 (S.D. FL 2008) *citing Jenne v. Church & Tower, Inc.*, 814 So. 2d 522, 524 (Fla. 4th DCA 2002). Herein, all of these elements were sufficiently pled in paragraphs 70 and 71 of the Complaint.

In the Motion to Dismiss, Carnival argues that the Plaintiff's count for Third Party Beneficiary fails because Plaintiff failed to give details about the contract between the medical Defendants and Carnival, which the Plaintiff alleges is a third party beneficiary of. At the pleading stage, however, Plaintiff cannot provide the excessively large amount of details Carnival is requesting. Information on the signatories of the contract, the types of claims covered, the form of the contract, cannot be provided without the benefit of discovery. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544 (2007), holding that to meet the *Rule 8* requirement of providing a "short plain statement of the claim showing that the pleader is entitled to relief," the factual allegations in the complaint must be sufficient to "raise a right above the speculative level."

F. COUNT VII – JOINT VENTURE. PLAINTIFF STATED A VALID CAUSE OF ACTION BASED ON JOINT VENTURE.

Count VII of the Plaintiff's Complaint states that Carnival and the Medical Defendants engaged in a joint venture to operate a ship's medical facility for profit. Since joint venturers are legally liable for each other's negligence, Carnival is liable for the negligence of the medical defendants. As its part of the joint venture, Carnival financed and equipped the ship's medical facility and assisted in running it. As its part of the joint venture, the Medical Defendants provided labor and/or assisted in running the ship's medical facility so as to generate charges to passengers which were thereby collected by Carnival and the money collected was then shared by Carnival and the Medical Defendants

Contrary to Carnival's assertions, Plaintiff succintly pled all of the elements to maintain a joint venture claim. To maintain a cause of action for joint venture there must be the concurrence of the following elements: 1) a community of interest in the performance of the common purpose; 2) joint control or right to control; 3) a joint proprietary interest in the subject matter; 4) a right to

share in the profits; and 5) a duty to share any losses which may be sustained. *See Sasportes v. M/V Sol de Copacabana*, 581 F. 2d 1204. These elements cannot be applied mechanically.

Herein, Plaintiff's Complaint alleges sufficient facts to support the conclusion that 1) Carnival and the medical personnel **shared a 'common purpose**' (¶¶76-79). It also alleges sufficient facts to support the conclusion that 2) Carnival and the medical personnel possessed '**joint control** (¶¶77-78) **and joint proprietary interest'** (¶80) in that common purpose. Finally, it alleges sufficient facts to support the conclusion that 3) Carnival and the Medical personnel '**shared a right to profits**,' as well as a '**duty to share fiscal losses**,' (¶¶80-81) in connection with the joint venture.

G. PURSUANT TO BINDING SUPREME COURT PRECEDENT, CARNIVAL CANNOT CHALLENGE THE PLAINTIFF'S PRAYER FOR PUNITIVE DAMAGES.

In the Motion to Dismiss, Carnival seems to be challenging the Plaintiff's prayer for punitive damages. Contrary to Carnival's assertions, however, as a matter of law punitive damages are available in admiralty cases. *See Lobegeiger v. Celebrity Cruises, Inc.*, 2011 WL 3703329 (S.D. Fla. Aug. 23, 2011):

> "[T]he Supreme Court, considering another Eleventh Circuit decision, Atlantic Sounding Co., Inc. v. Townsend, 496 F.3d 1282, 1284 (11th Cir.2007) [hereinafter Atlantic Sounding I], held "punitive damages have long been available at common law[, and] the common-law tradition of punitive damages extends to maritime claims." Atl. Sounding Co., Inc. v. Townsend, 129 S.Ct. 2561, 2569, 174 L.Ed.2d 382 (2009) [hereinafter Atlantic Sounding II] (footnote call number omitted) …The opinion in Atlantic Sounding II indicates punitive damages are available as damages in all actions under general maritime law unless specifically limited by Congress… Accordingly, a plaintiff may recover punitive damages under general maritime law, consistent with the common law rule, where the plaintiff's injury was due to the defendant's "wanton, willful, or outrageous conduct."

IV. CONCLUSION

For the reasons outlined above, Carnival's Motion to Dismiss should be denied in its entirety.

Alternatively, in the event this Honorable Court grants Carnival's Motion to Dismiss, or any part thereof, Plaintiff respectfully moves this court for leave to file an Amended Complaint.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on May 30, 2013, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

LIPCON, MARGULIES,
ALSINA & WINKLEMAN P.A.
Attorneys for Plaintiff
One Biscayne Tower, Suite 1776
2 South Biscayne Boulevard
Miami, Florida 33131
Telephone: (305) 373-3016
E-mail: cllinas@lipcon.com

By: /s/ *Carlos Felipe Llinás Negret*_____
CARLOS FELIPE LLINAS NEGRET
FL BAR NO. 73545