UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO.: 12-CV-20129-Williams/Turnoff

S. WILLIAM ARONSON,
Plaintiff,

vs.

CELEBRITY CRUISES, INC. and
WRAVE LTD. d/b/a WHACKY ROLLERS,

Defendants.
_____/

PLAINTIFF'S RESPONSE IN OPPOSITION TO DEFENDANT CELEBRITY CRUISES' MOTION TO DISMISS PLAINTIFF'S COMPLAINT

COMES NOW, Plaintiff, S. William Aronson, by and through undersigned counsel, and hereby files his Response in Opposition to Defendant Celebrity Cruises, Inc.'s (hereinafter "Celebrity") Motion to Dismiss Plaintiff's Complaint. In support thereof, Plaintiff alleges as follows:

1. BACKGROUND.

This case arises out of severe injuries sustained by Plaintiff while on a Celebrity cruise. Plaintiff is an elderly gentleman of obvious limited physical prowess. As part of the cruise experience, Defendant Celebrity offered to Plaintiff the opportunity to go on various excursions from the vessel *Equinox*. [D.E. 1, ¶ 13]. While on the ship, a Celebrity employee directly recommended to the Plaintiff to purchase an excursion referred to as the "High Hopes, High Ropes Tour" taking place in the scheduled port of call of Roseau, Dominica.[1] [D.E. 1, ¶ 10]. In spite of the fact that Plaintiff was an elderly gentlemen, when recommending and selling the excursion, the Celebrity employee never disclosed to him the magnitude of physical challenge required and the dangers he would encounter on the excursion. [D.E. 1, ¶ 22].

On or about March 17, 2011, the Plaintiff purchased a ticket for the excursion directly from Celebrity, at the Celebrity ship. [D.E. 1, ¶ 11]. During the course of the excursion, Plaintiff

[1] The excursion was operated jointly by Celebrity and the "Excursion Entity" (Defendant Wrave Ltd. d/b/a Whacky Rollers). [D.E. 1, ¶7].

was required to navigate an elevated narrow rope bridge, without adequate assistance, causing him to fall and suffer severe injuries. [D.E. 1, ¶22].

On January 11, 2012, Plaintiff filed his Complaint against Defendant Celebrity and against the Defendant Wrave Ltd. d/b/a Whacky Rollers (hereinafter "Excursion Entity") [D.E. 1]. The claims against Celebrity consist of Negligence (Count I), Apparent Agency or Agency by Estoppel (Count III), Joint Venture (Count IV), and Third Party Beneficiary (Count V).

On February 17, 2012, Celebrity filed a Motion to Dismiss Counts I, III, IV, and V of Plaintiff's Complaint for failure to state a claim upon which relief may be granted. [D.E. 9]. Thus, at issue in Celebrity's Motion are only those counts directed at Celebrity,

As the following memorandum of law makes clear, Celebrity's Motion to Dismiss should be denied because Plaintiff's Complaint properly states a claim for which relief can be granted on all five counts.

2. 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 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).

3. ON COUNT I (NEGLIGENCE), PLAINTIFF PROPERLY AND SUCCINCTLY ALLEGED CELEBRITY'S "DUTY OF CARE." THEREFORE, CELEBRITY'S MOTION TO DISMISS COUNT I (NEGLIGENCE) SHOULD BE DENIED IN ITS ENTIRETY.

A. *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 shipowner's "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 20 and 21 of the Complaint Plaintiff succinctly alleges that "[i]t was the duty of Celebrity, to provide Plaintiff with reasonable or ordinary care under the circumstances" and that "[o]n or about March 17, 2011, Celebrity and/or its agents … breached its duty to provide Plaintiff with reasonable or ordinary 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').

The applicable standard of reasonable care also "requires, as a prerequisite to imposing liability, that the carrier had actual or constructive notice of the risk creating condition." *Keefe v. Bahama Cruise Line., Inc.*, 867 F. 2d 1318 (11th Cir. 1989). Constructive notice may be established through evidence which shows 1) that the dangerous condition existed for such a length of time that in the exercise of ordinary care, the Defendant should have known of the condition; or 2) that the condition occurred with regularity and was therefore foreseeable. *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 522 (Fla. 3d DCA 2000). *See*, Complaint, D.E. 1, ¶25 alleging: ("Celebrity knew of the

foregoing conditions causing Plaintiff's accident and did not correct them, or the conditions existed for a sufficient length of time so that Celebrity in the exercise of reasonable care under the circumstances should have learned of them and corrected them").

B. *Count I.* Long standing jurisprudence sets forth that Celebrity, as a common carrier, owed Plaintiff a duty of reasonable care under the circumstances throughout the entire length of her cruise. This duty included Plaintiff's visit and shore excursion at the port of call of Roseau, Dominica. Contrary to Defendant's assertions, therefore, the fact that Plaintiffs injury occurred *off* the vessel is immaterial for purposes of the standard of care. Pursuant to binding precedent, Celebrity's duty of care was the same whether Plaintiff was onboard the ship or *off* the ship in the port of call.

In its motion to dismiss, Celebrity argues that the duty of reasonable care under the circumstances is different when incidents occur *off* the vessel. [D.E. 9 pg. 4]. Celebrity's argument appears to suggest that that a ship-owner's duty of care to a passenger onboard the vessel varies or is somehow different when that same passenger is off the vessel in a scheduled port of call. Celebrity's argument, however, is incorrect and contrary to law. As shown below, the duty of exercising reasonable care under the circumstances is owed to passengers to the extent of their entire cruise (both onboard and off the vessel).

Maritime law applies regardless of whether the Plaintiff was injured in the vessel or in a port of call. In fact, the duty of reasonable care applies even where a cruise ship passenger has been injured in a port of call outside of the ship. In *Doe v. Celebrity Cruises, et. al.*, 394 F. 3d 891 (11th Cir. 2004), the Court explained that it is immaterial whether a tort occurred on the ship, or in a scheduled port of call. Relying on the Supreme Court in *Norfolk Southern Railroad v. Kirby*, 343 U.S. at 25 ("[T]he shore is now an artificial place to draw a line"), the *Doe* Court focused on circumstances – similar to the case herein. For instance, that the stop "was a scheduled port-of-call, and was an integral part of the ongoing cruise or maritime activity in this case" *Id.*, and that "in many ways the particular incident effectively began and ended aboard the cruise ship." *See Doe*, at 901:

> … Ports-of-call not only add to the enjoyment of a cruise but form an essential function of the cruise experience. In fact, on this particular cruise, five of the seven nights were to be spent in Bermudian ports. Plainly, individuals choose cruise ship vacations because they want to visit unfamiliar places ashore. Cruises to Alaska, the New England States, Bermuda or the Caribbean offer fundamentally different experiences, not generally because of any material difference between ships, but often because of where the ship elects to stop. *See Isham v. Pacific Far East Line, Inc..*, 476 F. 2d 835, 837 (9th Cir. 1973) ("where a passenger or cruise vessels puts into numerous ports, these stopovers are sine qua non of the cruise"). When a passenger selects a particular

> cruise, ports-of-call or stopovers provide these passengers with the "cruise experience" for which they are paying … **there was little practical experience between the port-of-call and other parts of the ship.** Id. (Emphasis Added).

More importantly, under *Doe*, the purpose behind the exercise of admiralty jurisdiction on torts committed on ports of call, is to "provide for the uniform application of maritime law." Therefore, the standard of care for negligence does not vary whether the tort occurs on the ship or on the port of call:

> Jane Doe was no less a crew passenger the moment she stepped of the ship at the port-of-call than she was the moment she stepped on the ship. **We see no reason that a cruise line's liability to their passengers while at a regularly-scheduled port of call … should vary from port to port** … Indeed, a ruling that admiralty jurisdiction did not extend literally beyond the gangplank in this case would upset the very uniformity that the Supreme Court has determined so important for maritime activity.

Id. (Emphasis Added). *See also Sullivan v. Ajax Navigation Corp., and Celebrity Cruises, Inc.*, 881 F. Supp. 906 (S.D. NY. 1995) (*citing Isham v. Pacific Far East Line* (9th Cir. 1973), *Forrester v. Ocean Marine Indemnity Co.*, 11 F. 3d 1213 (5th Cir. 1993), and *Tradewind Transportation Co. v. Taylor*, 267 F. 2d 188 (9th Cir. 1959)):

> It is well settled that a **common carrier general owes a high duty of reasonable care** to provide its passengers with safe transportation, adequate supervision to and from a dock or pier… Such duty extends at least to the point of embarkation and debarkation. **It does not cease at each port of call where the passengers are free to disembark. Rather, it is owed for the extent of the voyage.**
>
> ... **ample case law supports the notion that a carrier may have an obligation to warn of reasonably foreseeable risks that exists beyond the gangplank**. *Tradewind Transportation Co. v. Taylor*, 267 F. 2d 188 (9th Cir. 1959). Such an obligation arises where the carrier knew, or should have known of dangers in places where passengers are likely to go. There is no indication in the record that Plaintiff was cautioned against sitting on the bollard. **The fact that the dock was owned and controlled by the Mexican government is of little consequence.** *See Tradewind*, 267 F. 2d at 188 (holding common carrier liable when passenger injured on premises owned and controlled by third party). *Id.* (emphasis added).

Herein, Celebrity's duty of exercising reasonable care under the circumstances extended to Plaintiff's shore excursion at the scheduled port of call of Roseau, Dominica. Like *Doe* and *Tradewind*, the vessel's visit to Dominica, was a scheduled part of the four-night cruise, and therefore, an integral part of the on-going cruise or maritime activity. Further, like *Doe* and *Tradewind* the particular incident effectively began and ended aboard the cruise ship. It is immaterial – as explained

in *Sullivan* above – that in addition to Celebrity, a third party may have controlled or owned the shore excursion on shore (i.e. Wrave Ltd. d/b/a Whacky Rollers).

All in all, contrary to Celebrity's assertions, the duty of reasonable care under the circumstances is owed to passengers to the extent of their entire cruise. This duty applies even where a cruise ship passenger has been injured in a port of call outside of the ship.

C. *Count I.* Contrary to Celebrity'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).

Celebrity argues that Count I of Plaintiff's complaint fails to meet the pleading requirements because it does not contain sufficient factual matter. Celebrity also alleges that Plaintiff's negligence allegations are "legal conclusions." [D.E. 9, pg. 5]. Celebrity 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 Celebrity owed him, as a passenger, a duty of care. (*see, e.g., Compl.* D.E. 1, ¶20). In support of that allegation, Plaintiff has pled with sufficient factual matter the different ways by which Defendant breached that standard of care. (*See e.g., Compl.* D.E. 1, ¶22(a)-(aa), and ¶24). [2] Plaintiff's allegations have therefore notified Celebrity of his claim. As

[2] The Complaint succinctly alleges that at all times material ***Celebrity failed to***: *See e.g.*: ¶22 (a) provide a safe excursion; and/or; (b) provide an excursion with proper equipment and/or adequately maintained equipment; (c) warn Plaintiff of the dangers with respect to going on the excursion; and/or (d) cancel the subject excursion; and/or **(e)** adequately monitor excursion providers so as to ensure that the excursion tours were reasonably safe for cruise passengers and the Plaintiff; and/or **(f)** adequately monitor excursion providers so as to ensure that the *operations* of excursion tours were reasonably safe for Plaintiff and cruise passengers; **(g)** ensure that properly trained and supervised persons operated the subject excursion; and/or **(h)** provide an excursion that utilized proper and adequate equipment and/or properly and/or adequately maintained equipment; **(i)** having a shore excursion that was not competently operated; **(j)** properly supervise and oversee the excursion marketed, advertised, offered and sold to its guests; and/or **(k)** require that its agents, employees and/or joint venturers initiate safety policies and practices and/or execute and comply with existing rules, regulations, policies and practices regarding the inspection and/or monitoring and/or maintenance of equipment; and/or **(l)** properly and adequately inspect the equipment used on the shore excursion; and/or **(m)** promulgate and/or enforce and/or follow policies and/or procedures for inspecting and/or monitoring and/or maintaining the equipment used on the shore

footnote 1 shows, there is nothing "conclusory or formulaic" about Plaintiff's allegations. On the contrary, Plaintiff's allegations contain a great deal of facts in support of the Negligence count.

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 Celebrity's negligence with sufficient particularity to give Celebrity 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.

As Judge King found in *Bridgewater*, there can be no doubt here that the allegations in the Complaint are sufficient to provide notice to Celebrity 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 Celebrity. *See Propenko v. Royal Caribbean*

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excursion; and/or **(n)** provide proper emergency are; and/or **(o)** provide prompt, proper medical care; and/or **(p)** allowing WRAVE to require the Plaintiff to execute a "Waiver of Liability"; and/or **(q)** failing to warn the Plaintiff that WRAVE would require the Plaintiff to execute a "Waiver of Liability"; and/or; **(r)** requiring the Plaintiff to execute a "waiver of liability;" and/or **(s)** failing to adequately describe the subject excursion to the Plaintiff; and/or **(t)** placing the Plaintiff in a position where she would be required to execute a "Waiver of Liability" in order to avoid suffering substantial damage and/or loss and/or hardship; and/or **(u)** failing to enforce the terms of its contract with WRAVE; and/or **(v)** warn the Plaintiff of the dangers posed by the subject excursion to elderly persons; and/or **(w)** warn the Plaintiff of the dangers posed by the shore excursion to him; and/or **(x)** ascertain Plaintiff's level of ability to participate in the subject excursion; and/or **(y)** adequately describe the level of activity required in the subject excursion so as to enable the Plaintiff to evaluate the subject activities in light of his age and level of ability; and/or **(z)** provide adequate assistance to the Plaintiff during the subject excursion; and/or **(aa)** promulgate and/or enforce adequate policies and procedures so as to provide adequate assistance to the Plaintiff during the subject excursion; **all of which caused the Plaintiff to be injured when he was required to navigate an elevated narrow rope bridge, without adequate assistance, causing him to fall and suffer injury.**

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 sufficiently pled Celebrity's knowledge. Celebrity additionally argues that the Plaintiff did not sufficiently pled that Celebrity "knew or reasonably should have known" of the dangerous condition causing Plaintiff's accident. At paragraph 25 of the Complaint, referring to all of the previous allegations listed in footnote 1 above (paragraphs 22(a)-(aa), and ¶24-), Plaintiff succinctly alleges:

> CELEBRITY knew of the foregoing conditions causing Plaintiff's accident and did not correct them, or the conditions existed for a sufficient length of time so that Celebrity in the exercise of reasonable care under the circumstances should have learned of them and corrected them.

In its Motion to Dismiss [D.E. 9, p. 5], Celebrity argues that this is a "boilerplate allegation, without any factual basis" which does not indicate how Celebrity "knew of the condition complained of." Defendant, however, is incorrect.

In the Complaint, Plaintiff succinctly alleges: a) that "Celebrity arranged for, sponsored, recommended and/or operated" the excursion (D.E. 1, ¶10); b) that "Celebrity was co-owner of the excursion" (D.E. 1, ¶14); c) that Celebrity "failed to provide an excursion that utilized proper and adequate equipment" (D.E. 1, ¶22(b)); and d) that "Celebrity negligently failed to determine the hazards that the excursion posed to Plaintiff [and] failed to eliminate the hazard" (D.E. 1, ¶24). Thus, the Complaint succinctly gives Defendant notice of the fact that, by virtue of Celebrity's operation and control of the excursion (¶10,14) and its failure to provide the necessary safety equipment (¶ 22(b)) and to eliminate the hazards that the excursion posed (¶ 24); at all times material, Celebrity **knew** of the **conditions** that caused Plaintiff's accident and did not correct them, or the conditions existed for a sufficient length time so that Celebrity, in the exercise of reasonable care under the circumstances **should have learned** of them and correct them (¶25).

Moreover, had Celebrity provided its passengers with an excursion that utilized the necessary safety equipment, the Plaintiff would not have sustained the serious injuries he ended up incurring, "**when he was required to navigate an elevated narrow rope bridge, without adequate assistance, causing him to fall and suffer injury** " *See* [D.E. 1, ¶22]. Thus, all four allegations (at paragraphs 10, 14, 22(b) and 24), show that in the absence of the necessary safety equipment,

Celebrity knew or should have known the condition that caused Plaintiff's incident. Any assertion that the Complaint does not give Celebrity notice of "what it knew" or "what it should have known" is therefore simply incorrect.

Plaintiff is not required to plead evidence. In its Motion to Dismiss [D.E. 9], Celebrity 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 bonbsled 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 Celebrity will have ample opportunity to learn more about Plaintiff's injury and the specific facts which he claims would have prevented his injury.

D. *Count I.* Contrary to Celebrity's assertions, a ship-owner's duty to warn is *not* a separate standard of care. Rather, it is one of the many duties owed by a ship-owner (both onboard the vessel and at the scheduled port of call) within the "reasonable care under the circumstances" standard.

In its Motion to Dismiss, in support of its failed argument that the standard of "reasonable care under the circumstances" does not apply to passengers while they are off the vessel, Celebrity also asserts, in part that "[…]a shipowner's only duty to its passengers beyond the port is to warn of dangers of which the shipowner knew or should have known and which are not open and obvious in nature […]."[D.E. 9, pg. 5-6]. Celebrity is incorrect.

As shown above, Celebrity owed to Plaintiff the same standard of "reasonable care under the circumstances" both while he was onboard the ship as well as while he was off the ship in the scheduled port of Roseau, Dominica. Despite the clear weight of authority, however, in an effort to improperly limit its liability, Celebrity not only asserts that the "reasonable care under the circumstances" standard does not apply off the ship, but also argues that its *only* duty to Plaintiff (while she was off the ship) was to warn her of the dangers/conditions it knew or should have known about.

Contrary to Celebrity's assertions, the duty to warn is not a separate standard of care. Rather it is one of the many duties owed by a ship-owner (both onboard and at the scheduled port of call) included <u>*within*</u> the "reasonable care under the circumstances" standard. As succinctly explained by this Honorable Court in *Goldbach v. NCL (Bahamas) Ltd.*, 2006 U.S. 92026 (S.D. Fla. 2006) (Huck, J.) *citing Carlisle v. Carnival Corp.*, 864 So. 2d 185 (Fla. 3d DCA 2003), a cruise line "**owes a duty to its passengers to exercise reasonable care under <u>all</u> the circumstances. This duty <u>includes</u> a duty to warn passengers of dangers the cruise line knows or reasonably should have known."** *Id.* (Emphasis Added). *See also Balashack v. Royal Caribbean Cruises, Ltd.*, 2009 U.S. Dist. LEXIS 126949 (S.D. Fla. 2009) (Altonaga, J.), involving, like in this case, a shore excursion *off* the vessel and holding:

> … The general characteristic of the activity giving rise to the incident here is, among other things, **Celebrity's alleged negligence in selecting and promoting the "Caribbean Cooking Adventure" excursion and its failure to warn its passengers of the risks thereof**. **Cruise lines owe their passengers a duty of reasonable care under the circumstances of each case**. *See Kermarec*, 358 U.S. at 362.

Id., (emphasis added).

Therefore, contrary to Celebrity's assertions, Celebrity's duty to warn is not a separate standard of care. Rather, regardless of whether the incident occurs on the ship or at the port of call; the duty to warn it is one of many duties owed by a ship-owner within the "reasonable care under the circumstances standard."

E. *Count I.* Failure to warn: whether 1) Celebrity had actual or constructive notice of the danger and 2) whether the danger was open and obvious presents questions of fact, not ripe for adjudication at a motion to dismiss stage. Plaintiff should be given the opportunity to conduct discovery and develop the record regarding these *factual* questions.

Count I of the Complaint succinctly alleges that Defendant Celebrity had the duty to provide Plaintiff with reasonable care under the circumstances. [D.E. 1, ¶ 20]. Plaintiff further alleges at ¶22 (c) that Carnival breached that duty by "fail[ing] to warn Plaintiff of the dangers of with respect to going on the excursion."

It is well settled law that for a cruise line to be liable for failing to warn passengers of dangers, the cruise line must have had actual or constructive notice of the risk creating condition. *Keefe v. Bahama Cruise Line, Inc.*, 867 F. 2d 1318, 1322 (11th Cir. 1989). Constructive notice may be established through evidence which shows that 1) the dangerous condition existed for such a length of time that in the exercise of ordinary care, the Defendant should have known of the condition, or 2) the condition occurred with regularity and was therefore foreseeable. *Kloster Cruise Ltd. v. Grubbs*, 762 So. 2d 522 (Fla. 3d DCA 2000). Additionally, the duty to warn passengers only extends to those dangers which are not apparent and obvious to the passengers. *Luby v. Carnival Cruise Lines, Inc.*, 633 F. Supp. 40 (S.D. Fla. 1986).

All questions regarding Celebrity's "notice" are issues of fact improperly determined at a motion to dismiss stage. *See Goldbach v. NCL (Bahamas) Ltd.*, 2006 U.S. Dist. LEXIS 92026 (S.D. Fla. 2006) (Huck, J.) (A cruise line "owes a duty to its passengers of reasonable care under all circumstances. This duty includes a duty to warn passengers of dangers the cruise line knows or reasonably should know … **The question of whether Defendant knew or should have known of the danger posed is a genuine issue of fact precluding summary judgment."**) *Id.* (Emphasis added).

Similarly, all questions regarding the "open or obvious" nature of the dangerous condition are questions of fact which cannot be properly determined at a motion to dismiss stage. Questions as to the "open or obvious nature" of the dangerous condition are issues of fact which cannot properly be decided at a 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)

Like in *Goldbach*, *Propenko* and *Rocha*, here, whether Celebrity failed to warn Plaintiff of the dangerous condition is a question of fact not ripe for adjudication at a motion to dismiss stage, requiring context specific inquiry and necessitating development of the factual record.

F. *Count I.* Celebrity's assertion that Plaintiff has made allegations of a standard of care "greater than that supported by the law" is incorrect and has been expressly rejected by this Honorable Court as an argument not ripe at a motion to dismiss stage.

In its Motion to Dismiss [D.E. 9, pg. 5-6], referring to the allegations in Count I - other than those concerning the duty to warn – Celebrity also makes the assertion that the "Plaintiff seeks to expand Celebrity's duties beyond the duties imposed by law. " In support thereof, for example, Celebrity asserts that it did not have a duty to "provide a safe excursion" or to "ascertain Plaintiff's level of ability to participate in the excursion." *See* D.E. 9, pg. 5-6:

> … a shipowner's only duty to its passengers beyond the port is to warn of dangers of which the shipowner knew or should have known and which are not open and obvious in nature …. the Plaintiff seeks to hold Celebrity liable for, *inter alia*, allegedly failing to provide a safe excursion, allegedly allowing Wrave to execute a "Waiver of Liability", allegedly failing to ascertain the Plaintiff's level of ability to participate in the subject shore excursion… Celebrity did not have a duty to do any of these acts …**. Celebrity respectfully requests that this Court dismiss the Plaintiff's Negligence claim to the extent that it seeks to expand Celebrity's duties beyond the duties imposed by law**.

First, Celebrity does not cite to any authority in support of its argument that "it is not required to provide for the safety of Plaintiff while on a shore excursion or to ascertain Plaintiff's level of ability to participate in the excursion." This lack of authority makes sense in light of the broad negligence standard of care. In the seminal case of *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959), the Supreme Court established that the standard of care that a shipowner owes its

passengers is that of "reasonable care **under the circumstances**." (emphasis added). A closer reading of the opinion shows that the *Kermarec* Court kept the standard purposefully broad.

Contrary to Celebrity assertions, nowhere in the opinion does the Supreme Court assert that under this standard a "ship-owner is not required to provide for the safety of Plaintiff while on a shore excursion." Rather, the "under the circumstances" language indicates that the standard involves a case-by-case fact intensive inquiry which requires a determination of what is reasonable care under the circumstances of each case. Therefore, because there can be no hard and fast rule as to what reasonable care includes for every negligence case; what constitutes reasonable care in one circumstance, might not be in another. **The ultimate determination is question for the fact finder which cannot be properly decided at a motion to dismiss stage**.

This case-by-case fact intensive inquiry was explained by the Second Circuit in *Rainey v. Paquet Cruises, Inc.*, 709 F. 2d 169 (2d Cir. 1983), holding that the duty is determined by analyzing how that particular situation is "different than those [situations] encountered in daily life and involve more danger to the passenger" than typical situations on land. Hence, there is a sliding scale as to what is "reasonable," with a higher duty imposed on the cruise operator where the danger resulting in the injury was more uniquely maritime and, therefore, greater than the dangers typically encountered on land. *Id.*

Herein, in the context **and circumstances** of this case, and taken the allegations of Plaintiff's Complaint as true, at all times material the duty of Celebrity to provide reasonable care included the duty to "provide for the safety of Plaintiff while on a shore excursion" and to "ascertain the Plaintiff's level of ability to participate in the shore excursion." It also included, all of the other duties alleged in ¶22(a)-(aa), and ¶24 . *See* Footnote 1, above.

Therefore, the Plaintiff does not seek to expand Celebrity's duties beyond those imposed by law.

Second, even if assuming, for the sake of argument, that Celebrity is correct, and the Plaintiff alleged standards different than those in *Kermarec*, this Honorable Court, specifically rejected the same argument in *Balaschak v. Royal Caribbean Cruises Ltd.*, 2009 U.S. Dist. LEXIS 126949 (S.D. Fla. 2009) (Altonaga, J.). In *Balaschak*, Celebrity argued – as it is doing here - that in the Negligence Count, Plaintiff had improperly alleged various "duties" greater than those supported by the applicable standard of care in *Kermarec*. Judge Altonaga disagreed and denied Celebrity's motion to dismiss, holding:

> Under *Kermarec*, "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. Balasachak has alleged duties of care different from the *Kermarec* standard … Some U.S. Federal courts in Florida have dismissed claims for negligence (with leave to amend) where passengers have pleaded that cruise ships owed standards different from the *Kemarec* standard. Others have not, stating that, **Federal Rule of Civil procedure 8(a) does not require plaintiffs to allege the applicable standard of care**. **The Court agrees with the latter cases for two reasons and concludes that Balaschack's pleading for standards of care different from the *Kemarec* standard does not warrant dismissal of Count VI [Negligence].**
>
> First, ***Rule 8(a)*** requires only a "short and plain statement of the claim showing that the pleader is entitled to relief." **It does not require that a Plaintiff specifically plead every element of a cause of action."** *Roe v. Aware Woman Ctr. for Choice Inc.*, 253 F. 3d 678, 683 (11th Cir. 2001). Although "notice pleading requires that a complaint contain inferential allegations from which we can identify each of the material elements necessary to sustain a recovery under *some* viable theory," *id*., at 684.
>
> **Here, Balaschak has pleaded facts that Celebrity owed her, as a passenger, a duty of care. Balaschak's allegations have notified Celebrity of her claim**. **That Balaschak alleges the *Kemarec* standard of less care in some paragraphs and not in others is not reason enough to warrant dismissal**.
>
> Second, "[p]leadings must be construed so as to do justice." FED. R. CIV. P. 8(e). **Requiring Balaschak's to replead the paragraphs alleging standards of care consistent with Kermarec would be time consuming and inefficient**. Rather, that go that route, *see* FED. R. CIV. P. 1, the Court elects to "keep the case moving," *Bennet v. Schmidt*, 153 F. 3d 516, 518 (7th Cir. 1998). **The merits of Count VI are best tested with a motion for summary judgment.**

Id. , at pg. 5; *see also Gentry v. Carnival Corp.*, 11-21580-JG (S.D. Fla. October 5, 2011) [D.E. 36]:

> Here Gentry pled sufficient facts to infer that, as a paying passenger aboard a Carnival ship, she was owed a duty of care by Carnival. Carnival's precise duty of care is a matter that is properly litigated at a later stage of this case, such as on a motion for summary judgment or in determining appropriate jury instructions.

Here, like in *Balaschak*, Rule 8(a) does not require that Plaintiff specifically plead every element of her cause of action against Celebrity. Celebrity's precise duty of care is a matter that is properly litigated at a later stage in this case.

G. *Count I.* Contrary to Defendant's assertions, the International Safety Management Code can be used as an indicator that Celebrity breached the duty of reasonable care under the circumstances.

Paragraph 24 of Plaintiff's Complaint states, in its entirety:

> At all times material hereto, Celebrity negligently failed to determine the hazards that the excursion posed to Plaintiff, failed to eliminate the hazard, failed to modify the hazard and failed to properly warn Plaintiff of the hazard. In addition, Celebrity violated the International Safety Management Code and failed to have a proper, adequate and safe Safety Management System Manual. All of the above caused the Plaintiff to be injured.

Celebrity argues that the International Safety Management code (hereinafter "ISM code") does not create or alter any duties that exist in general maritime law and, for that proposition, relies on a **summary judgment order** from a longshoreman's claim against a cargo ship operator, *Calderon v. Offen*, 2009 WL 3429771 (S.D. Fla. 2000). Celebrity is incorrect.

The ISM code, drafted by the International Maritime Organization, a United Nations body, provides an international standard for the safe management and operation of ships and for pollution prevention. The objectives of the code are to ensure safety at sea, prevent human injury or loss of life, and avoid chance of damage to the environment and to property. *See ISM Code,* §1.2. Further, the ISM Code mandates written documentation of a comprehensive safety and environmental program (Safety Management Plan), including training and internal auditing, and extends the traceable chain of responsibility for safety straight to the top of management. This documentation creates a paper trail of a company's compliance (or non-compliance), and gives rise to share responsibility for all those in the company's chain of command. *See The International Safety Management (ISM) Code: A New Level of Uniformity*, 37 Tul. L. Rev. 1585 (1999).

As a signatory to the 1974 SOLAS Convention and the amendatory 1978 protocol, the United States is bound to enforce the ISM code for vessels flying the United States flag and to foreign vessels calling at U.S. ports.[3] Id. In fact, **Congress enacted legislation to incorporate the code into the laws of the United States.** *See* 46 USC §§3201, 3202, 3203 , 3204, 3205 (2010). For instance, section 3204 (a) provides that each responsible [ship-owner] must establish and submit to [the Coast Guard] for a approval a safety management plan describing how that entity and vessels of the entity comply with the regulations under the ISM code. Section 3205

[3] The Celebrity Equinox calls at U.S. ports.

(c), further provides that the Coast Guard will "periodically review whether a responsible [ship-owner] is complying with the safety management plan." Finally. the ISM code requires each ship to "establish and implement against all identified risk." 33 C.F.R. § 96.230(b) and to have a detailed "written manual that outlines a Safety Management System."

In light of this, at paragraph 24 of the Complaint, Plaintiff alleges that at all times material, "defendant violated the International Safety Management Code and failed to have a proper, adequate and safe Management System Manual.. [which] caused Plaintiff to be injured."

Such wrongful conduct shows that in failing to comply with these statutory requirements, Celebrity breached its duty of reasonable care under the circumstances to the Plaintiff. The ISM code is the widely-accepted international standard of maritime safety. It therefore it acts as a benchmark – whose violation can show that a ship-owner failed to provide reasonable care under the circumstances. *See The International Safety Management (ISM) Code: A New Level of Uniformity*, 37 Tul. L. Rev. 1585 (1999).

Here, in the Complaint, Plaintiff reaffirms the *Kemarec* standard, alleging that "[i]t was the duty of Defendant, to provide Plaintiff him with reasonable care under the circumstances." Only then, in support of the allegation that Celebrity breached that duty, the Plaintiff listed 20 different reasons, including that Celebrity "violated the International Safety Management Code." This allegation is therefore not being made as a separate duty; but rather, as additional evidence that Celebrity did not provide Plaintiff with reasonable care under the circumstances.

In other words, what is plead by the Plaintiff is not that the ISM code creates a duty separate and independent from the duty of reasonable care under the circumstances. Rather, the Plaintiff refers to the ISM code within the Plaintiff's negligence count in further explanation of how Celebrity failed to provide the Plaintiff with reasonable care under the circumstances. All in all, the ISM code is pled in support of negligence, within the negligence count – and not as a separate and independent remedy.

The case cited by Celebrity, *Calderon v. Offen*, 2009 WL 3429771 (S.D. Fla. 2009), is therefore inapposite. While *Calderon* prohibits a seafarer from bringing a separate and independent cause of action under the ISM , it does not prohibit using the ISM code as indication that Celebrity

breached the duty of reasonable care under the circumstances, and that Celebrity was therefore negligent.[4]

Recently, in the matter of *Gentry v. Carnival Corp.*, 11-21580-JG (S.D. Fla. October 5, 2011) [D.E. 36], this Honorable Court rejected a cruise line's identical challenge against a Plaintiff's ISM code allegations in support of Negligence, holding:

> Here Gentry pled sufficient facts to infer that, as a paying passenger aboard a Carnival ship, she was owed a duty of care by Carnival. Carnival's precise duty of care is a matter that is properly litigated at a later stage of this case, such as on a motion for summary judgment or in determining appropriate jury instructions. **Similarly, because Gentry's complaint contains sufficient allegations to recover under a viable theory of negligence (because Carnival owed her a duty of care under *Kermarec*), the fact that Gentry alleged an additional basis for Carnival's duty predicated on the ISM is not relevant to deciding this motion to dismiss.**

Id. (emphasis added).

4. *COUNT III.* PLAINTIFF PROPERLY STATED A CLAIM FOR APPARENT AGENCY AND AGENCY BY ESTOPPEL. FURTHERMORE, THE DISCLAIMERS IN THE EXCURSION'S "WAIVER AND RELEASE DOCUMENTS" RAISE FACTUAL QUESTIONS REGARDING PLAINTIFF'S KNOWLEDGE WHICH ARE NOT CAPABLE OF RESOLUTION ON A MOTION TO DISMISS.

Count III of the Plaintiff's Complaint alleges that the shore excursion operator was an apparent agent of Celebrity. A claim for apparent agency exists 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 acted on such belief to his detriment." *Doonan v. Carnival Corp.*, 404 F. Supp. 3d 1378, 1371 (S.D. Fla. 2005).

[4] **Negligence per se.** Moreover, in failing to comply with the ISM requirements Celebrity's conduct could also constitute "negligence *per se*." Negligence *per se* is based on the violation a federal safety statute which in itself creates 'an actionable wrong'. *See Kelly v. Keystone Shipping Co.*, 281 F. Supp. 2d 313, 317 (D. Mass. 2003) (*citing O'Donnell v. Elgin*, 338 U.S. 384 (1949). It is demonstrated by 1) a violation of an applicable statute or regulation, 2) when the Plaintiff is within the class of persons sought to be protected and 3) the harm is of a kind sought to be prevented by the statute of regulation. Plaintiff has pled all of these elements (¶24) and alleged sufficient facts (¶21), arising from Defendant's failure to comply with the ISM code (¶24).

A. It is well settled that the existence of an agency relationship is a question of fact for the jury.

As a preliminary matter, it is well established that Federal Maritime Law embraces the principles of agency and that the existence of an agency relationship is a question of fact for the jury. *See Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367 (S.D. Fla. 2005) (citing *Archer v. Trans/American Servs., Ltd.*, 834 F. 2d 1570 (11th Cir. 1988)); *Borg-Warner Leasing v. Doyle Elec. Co.*, 33 F. 2d 833, 836 (11th Cir. 1984); *Church of Scientology of California v. Blackman*, 446 So. 2d 190 (Fla. 4th DCA). Thus, the agency relationship between Celebrity and the shore excursion entity cannot not be properly decided at the Motion to Dismiss stage.

B. Plaintiff properly pled apparent agency. The Complaint contains sufficient factual matter to infer that Plaintiff relied on Celebrity's representations to his detriment.

In the Motion to Dismiss [D.E. 9, p. 7], Celebrity argues that "Plaintiff fails to allege that Celebrity made any positive manifestation that would give rise to an apparent agency." Celebrity is incorrect. In fact, the Complaint is filled with specific factual instances in which Celebrity made affirmative representations to passengers – including Plaintiff – that the shore excursion entity was acting on its behalf. *See, e.g.* D.E. 1, ¶10 - 11:

> 10. On or about March 17, 2011, as part of Plaintiff's cruise aboard the *Equinox*, Plaintiff participated in an excursion in Roseau, Dominica. This excursion was arranged for, sponsored, recommended, operated, marketed and/or sold by CELEBRITY as part of the voyage on the Cruise vessel *Equinox*.
>
> 11. At all times material hereto, WRAVE was the agent and/or apparent agent of CELEBRITY by virtue of the following, such that CELEBRITY is estopped from denying that CELEBRITY was the agent for WRAVE:
>
> a. CELEBRITY made all arrangements for the subject excursion without disclosing to Plaintiff that the subject excursion was being run by another entity (and/or entities); and/or
>
> b. CELEBRITY marketed the subject excursion using its company logo on its website and/or in its brochures and/or on its ship without disclosing to Plaintiff that the subject excursion was being run by another entity (and/or entities); and/or
>
> c. CELEBRITY maintained an excursion desk on its ship whereby it offered, sold, provided information to, and answered questions of passengers about the subject excursion without disclosing to Plaintiff that the subject excursion was being run by another entity (and/or entities); and/or

> d. Until the point that Plaintiff first set foot on the excursion dock, the Plaintiff's exclusive contact concerning the subject excursion was with CELEBRITY; and/or
>
> e. CELEBRITY recommended to plaintiff to not engage in excursions, tours or activities that are not sold through CELEBRITY as CELEBRITY has no familiarity with other tours or their operations; and/or
>
> f. Plaintiff received a receipt exclusively from CELEBRITY for the purchase of the subject excursion; and/or
>
> g. The fee for the excursion was charged to the Plaintiff, and collected from the Plaintiff, exclusively by CELEBRITY; and/or
>
> h. The CELEBRITY employees at the shore excursion desk answered questions regarding the subject excursion and ensured the Plaintiff, as an elderly man, could safely participate

Taken as true, these specifically delineated representations led Plaintiff to rely on the belief that the excursion entity was an agent of Celebrity. *See* D.E. 1, ¶ 12:

> At all times material hereto, Plaintiff relied [on the eight separate representations made by Celebrity], to his detriment, so as to believe that Wrave and its employees were the employee(s) and/or agent(s) of Celebrity, in choosing the subject excursion. At no time did Celebrity represent to Plaintiff in particular, or the ship's passengers in general, in a meaningful way that Wrave and its employees were not agent(s) and/or employee(s) of Celebrity.

Accordingly, as Plaintiff has made the requisite allegations to properly plead apparent agency, Celebrity's motion to dismiss should be denied. *See, i.e. Gentry v. Carnival Corp.*, 11-21580-JG (S.D. Fla. October 5, 2011) [D.E. 36], rejecting a cruise line's identical challenge against the same apparent agency allegations in a shore excursion case:

> An apparent agency exists 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 acted on such belief to his detriment." *Doonan v. Carnival Corp.*, 404 F. Supp. 2d 1367, 1371 (S.D. Fla. 2005). **The complaint contains sufficient factual material to infer that Gentry relied on Carnival's representations to her detriment**. (Compl. ¶¶ 11- 12). **Gentry's allegations are sufficient to provide the fair notice required by Rule 8**.

Id. (emphasis added).

C. The shore excursion's "waiver & release of liability" is a document beyond the four corners of the complaint. Moreover, the wavier is void pursuant 46 U.S.C. §30509: Celebrity, a common carrier, is prohibited from contractually limiting its liability for personal injury or death caused by the negligence or fault of its employee's or agents.

As an additional ground to challenge Plaintiff's Apparent Agency claim (Count III), Celebrity relies and attaches to its Motion to Dismiss a document titled "Informed Consent & Participation Waiver of Liability/Release of Claims." Citing the document, Celebrity argues that "[it] cannot be held liable for the shore excursion's operator's alleged negligence under a theory of apparent agency" because the "Waiver clearly advised the Plaintiff that he was releasing the shore excursion operator from all liability for an injury he may suffer from participating in the … excursion." [D.E. 9, p. 9 – 10].

First, at the motion to dismiss stage, the scope of a court's review must be limited to the four corners of the complaint. *St. George v. Pinellas County*, 285 F. 3d 1334, 1337 (11th Cir. 2002). Pursuant to biding Eleventh Circuit precedent, the general rule is that at a district court does "not consider anything beyond the face of the complaint … when analyzing a motion to dismiss." *Financial Sec. Assur., Inc. v. Stephens, Inc.*, 500 F. 3d 1276, 1284 (11th Cir. 2007). Nevertheless, Celebrity has attached and relied upon a document outside of the pleadings. Because the document is beyond the four corners of the complaint – its consideration is inappropriate at this juncture.

Second, even if the document could be considered at this stage, the "waiver and release of liability" is void. 46 U.S.C. §30509 **expressly voids** language which attempts to contractually limit the liability of a common carrier for personal injury or death caused by the negligence or fault of the owner's employees or agents. 46 U.S.C. §30509, provides, in part:

> Provisions limiting liability for personal injury or death
> (a) Prohibition.
> (1) In general. The owner, master, manager, or agent of a vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country, may not include in a regulation or contract a provision limiting--
> (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
> …
> **(2) Voidness. A provision described in paragraph (1) is void**.

Id. (emphasis added).

Here, Celebrity is clearly a master/manager transporting passengers to (and from) ports on the United States. Moreover, the so called "waiver" purports to limit liability for personal

injury or death. *See* D.E. 9, p. 9. Therefore, pursuant to 46 U.S.C. §30509, the document is null and void. *See Kornberg v Carnival Cruise Lines, Inc*. 741 F. 2d 1332 (11th Cir. 1984) (cruise disclaimer of seaworthiness, including attempt to avoid liability for negligent conduct, is void as against public policy, particularly in relation to cruise passengers: the "law does not allow a public carrier [such as a Carnival vessel] to abandon altogether its obligations to the public, and to stipulate for exemptions which are unreasonable and improper.").

Finally, disclaimers and waivers raise questions of fact premature at a motion to dismiss stage. *See, i.e. Mika v. Celebrity Cruise, Inc.*, 2010 U.S. Dist. Lexis 49846 (S.D. Fla. 2010) (declining to consider the disclaimers in Celebrity's marketing materials because they **raise factual questions regarding Plaintiff's knowledge of the disclaimers and the reasonableness of Plaintiff's beliefs**) (emphasis added); *see also Bridgewater v. Carnival*, Case No. 10-22241-CIV-KING [D.E. 55, Ft. 3] (S.D. Fla. 2011) (King, J.):

> The Court notes that Defendant Carnival advances several arguments which are more appropriate for summary judgment … 2) the effect of an exculpatory clause in Plaintiff's passenger Ticket … Carnival contends that its contract with Plaintiff bars any claim resulting from injury suffered while on a shore excursion. Again, however, the cases relied upon by Defendant uniformly involve summary judgment. **As such, these arguments are premature at this time.**

Id. (Emphasis added). [5]

5. *COUNT IV*. THE PLAINTIFF PROPERLY STATED A CLAIM FOR JOINT VENTURE, AND THE EXISTENCE OF A JOINT VENTURE IS AN ISSUE OF FACT TO BE DECIDED BY THE TRIER OF FACT.

A. Pursuant to binding Eleventh Circuit Court precedent, whether or not a group of persons constitute a joint venture is usually a question of fact to be resolved by the jury. Therefore, it is premature to rule on this issue at the motion to dismiss stage.

In its Motion to Dismiss, Celebrity challenges the merits of Plaintiff's joint venture allegations (Count IV). As shown below, Celebrity's challenge is unwarranted.

Celebrity's Motion to Dismiss improperly invites this Honorable Court to make determinations concerning Plaintiff's Joint Venture claim. However, pursuant to Eleventh Circuit

[5] Celebrity also argues that Plaintiff has failed to allege a cause of action for agency by estoppel. The doctrine of apparent agency is also referred to as agency by estoppel. *Orlando Exec. Park v. P.D.R.*, 402 So. 2d 442, 449 (5th DCA 1981). **They are not separately alleged as different claims by the Plaintiff.** As Plaintiff has previously demonstrated, Plaintiff has properly alleged a cause of action for apparent agency and, therefore, has properly alleged a cause of action for agency by estoppel.

precedent, whether or not a group of persons constitute a joint venture is a **question of fact** to be resolved by the jury. *Misco-United Supply, Inc., v. The Petroleum Corporation et. al.*, 462 F. 2d 75 (OLD - 11th Cir. 1972);[6] and *Rose v. M/V Gulf Stream Falcon*, 186 F. 3d 1345 (11th Cir. 1999) ("[…] the district court's finding with respect to the existence of (or lack thereof) a joint venture is a factual determination that is reviewed under the clearly erroneous standard"; *see also USA Independence Mobilehome Sales, Inc., v. City of Lake City*, (Fla. 1st DCA 2005) ("The existence of a joint venture presents a question of fact."), and *Navarro v. Espino*, 316 So. 2d 646 (Fla. 3d DCA 1975) (same).

Therefore, as illustrated by the Eleventh Circuit in *Misco-United Supply* and *Rose* and Courts in Florida (i.e. *City of Lake City*, *Navarro)*, the existence of a joint venture raises questions of fact not ripe for adjudication at a motion to dismiss stage. Resolution of these questions requires context specific inquiries necessitating development of the factual record.[7]

B. The Complaint succinctly gave Celebrity fair notice of what the claim of "Joint Venture" is and the grounds upon which it rests.

A joint venture is nothing complicated. As summarized by the Florida Supreme Court in *Kislack v. Kreedian*, 95 So. 2d 510, 515 (Fla. 1957: "the relationship of joint adventurers is created when two or more persons combine **their property or time or a combination thereof** in conducting some particular line of trade or for some particular business deal." The elements of joint venture are "(1) intention of the parties to create a joint venture; (2) joint control or right of control; (3) joint proprietary interest in the subject matter of the venture; (4) right of both venturers to share in the profits; and (5) duty of both to share in the losses." *Skeen v. Carnival Corp.*, 2009 U.S. Dist. Lexis 39355 (S.D. Fla. 2009).

In its Motion to Dismiss, Celebrity incorrectly asserts that the Plaintiff's Complaint fails to allege that Celebrity and the Excursion Entity ***intended*** to enter into a joint venture. [D.E. 9, pg. 11]. In support of its argument, Celebrity refers to *Skeen v. Carnival Corp.*, 2009 U.S. Dist.

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[6] Fifth Circuit decisions prior to September 30, 1981 are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981).

[7] The cases cited by Celebrity (*i.e. Skeen v. Carnival Corp)* are inapposite to this end. The Plaintiff in *Skeen* did not make the argument – and therefore the Court did not consider – that determination of a joint venture is a question of fact for the jury and as such not ripe for determination at a motion to dismiss stage.

Lexis 39355 (S.D. Fla. 2009) where it was held that "the failure to allege an agreement between the parties amounted to a failure to assert that the parties intended to enter into a joint venture."

However, contrary to Celebrity's assertions, the Complaint *does* succinctly allege an intention of the parties to create a joint venture – making *Skeen* inapposite. For instance, paragraph 15 of the Complaint states in relevant part:

> [A]t all times material hereto, a partnership and/or joint venture existed between the Excursion Entities by virtue of the following, whereby CELEBRITY and WRAVE are jointly and severally responsible for the negligence of each other's as partners of the partnership and/or joint venture:
>
> a. CELEBRITY and WRAVE entered into **an agreement** whereby; CELEBRITY made all arrangements for the Plaintiff on behalf of the partnership with WRAVE for the subject excursion being run by WRAVE; . . .

Id. (emphasis added). Celebrity's intention is also alleged in paragraph 40 of the Complaint which sets forth that "[a]t all material times CELEBRITY and WRAVE engaged in a joint venture to provide excursions to passengers on board Celebrity's ship." Accordingly, contrary to Celebrity's assertions, the Complaint succinctly alleges an "*agreement between the parties*," and therefore, an *intention* of the parties to create a joint venture. [8]

[8] Paragraphs 14 – 17 and paragraphs 40 – 45 of the Complaint also allege facts evidencing 1) Celebrity and Wrave **intended** to enter into (and create) a joint venture, and 2) specific facts indicating that Celebrity and WRAVE entered into an agreement for the specific purpose (with the intent) of forming a joint venture and business partnership.

See, i.e. D.E.1, 15: **b.** CELEBRITY marketed on CELEBRITY's website and/or in its brochures and/or on its ship, on behalf of the partnership with WRAVE, the subject excursion being run by WRAVE; and/or **c.** CELEBRITY maintained an excursion desk on its ship whereby it offered, sold, provided information to, and answered questions of passengers, on behalf of the partnership with WRAVE about the subject excursion being run by WRAVE; and/or **d.** WRAVE provided the subject excursion boat to be used in the subject excursion; and/or **e.** WRAVE determined the amount of money charged for the subject excursion being run by WRAVE; and/or **f.** CELEBRITY collected the amount of money charged for the subject excursion being run by WRAVE; and/or **g.** CELEBRITY paid WRAVE a portion of the sales of tickets for the subject excursion after the subject excursion tickets were sold; and/or **h.** CELEBRITY shared profits and losses with WRAVE for the subject excursion.

By accepting the foregoing factual allegations in the Complaint as true and construing them broadly and in light most favorable to the Plaintiff; there are sufficient allegations in the Complaint showing an intention of the parties to create a joint venture. All in all, Plaintiff has gone above and beyond the pleading requirements set forth in rule 8(a), *Erickson*, and *Twombly*, by setting forth in succinct, enumerated statements Plaintiff's Joint Venture allegations with sufficient specificity to give Celebrity notice of the claims is and the grounds they rests on.

C. Pursuant to binding Eleventh Circuit precedent, a failure to specifically allege that the parties intended to create a joint venture is not fatal. The elements of joint venture can be inferred from the surrounding circumstances.

In the matter of *Gentry v. Carnival Corp.*, 11-21580-JG (S.D. Fla. October 5, 2011) [D.E. 36], this Honorable Court rejected a cruise line's challenge of a joint venture count because Plaintiff had failed to allege that "that the parties had ***intended*** to create a joint venture." Citing the Eleventh Circuit in *Fulcher's Point Pride Seafood v. M/V "Theodora Maria"*, 935 F. 2d 208, 212-13 (11th Cir. 1991), the Court held that 1) the element of intent could be inferred from the surrounding circumstances and 2) a failure to specifically allege that the parties intended to create a joint venture is not fatal so long as other allegations provide enough factual material to make it plausible that the parties intended to create one:

> Defendant cite[s] *Skeen v. Carnival Corp.*, 2009 U.S. Dist. Lexis 39355 (S.D. Fla. 2009), were the district court dismissed joint venture claims because of the Plaintiff's failure to allege the parties' intent to create a joint venture. In *Fulcher's Point Pride Seafood v. M/V "Theodora Maria"*… however, **the Eleventh Circuit warned against hyper-technical application of the elements of joint venture and suggested that the element of intent could be inferred from the surrounding circumstances**. ["We conclude that whatever the true intent of the parties, their conduct (and the intent thereby evidenced) created a joint venture."]
>
> In view of the Eleventh Circuit's holding in *Fulcher's Point*, Gentry's failure to specifically allege [intent] is not fatal so long as other allegations provide enough factual material to make it plausible that the parties intended to create one.

Id. (emphasis added). Here, even if for the sake of argument, Plaintiff did not specifically allege the "intent of the parties to the joint venture;" under *Fulcher's Point*, this hyper-technical failure does not warrant dismissal. In fact, as set forth earlier in detail, the complaint includes enough information from which it can be inferred that Celebrity and Wrave intended to form into a joint venture: i.e. they entered into an agreement to setup the joint venture (¶15(a)); they shared profits and losses (¶44(c)); Wrave determined the amount of money to be charged (¶15(e))– Celebrity collected it (¶15(f)), etc.

6. *COUNT V.* PLAINTIFF HAS SUFFICIENTLY PLED HER COUNT FOR "THIRD PARTY BENEFICIARY." PURSUANT TO BINDING ELEVENTH CIRCUIT PRECEDENT, ASCERTAINING WHETHER PLAINTIFF IS AN INTENDED THIRD PARTY BENEFICIARY IS A QUESTION OF FACT TO BE RESOLVED BY THE JURY. AT THE VERY LEAST, IT IS PREMATURE FOR THIS HONORABLE COURT TO RULE ON THIS ISSUE AT THE MOTION TO DISMISS STAGE.

A. Plaintiff has sufficiently pled her count for "Third Party Beneficiary." Under *Twombly* Plaintiff has given Defendant Carnival "fair notice of what the claim is and the grounds upon which it rests."

For the purpose of determining whether a third-party is an intended beneficiary to a contract, basic contract interpretation rules apply. *Progress Rail Services Corp. v. Hillsborough Area Regional Transit Authority*, 2006 U.S. Dist. LEXIS 5123 (M.D. Fla. 2006) at 4-5 *quoting* 28 Richard A. Lord *Willinston on Contracts* §70:226 (4th ed. 2005) ("Ascertaining whether the contracting parties intend to benefit a putative third party is a question of ordinary contract interpretation"). *See also Bochese v. Town of Ponce Inlet*, 405 F. 3d 964 (11th Cir. 2005):

> The Florida Supreme Court has explained that the question whether a contract was intended for the benefit of a third person is generally regarded as one of construction of the contract as a whole construed in light of the circumstances under which it was made and the apparent purpose that the parties are trying to accomplish. *Id.*

The *intent* of the parties is the key to determining whether a third party is an intended or only an incidental beneficiary. *Bochese v. Town of Ponce Inlet*, 405 F. 3d 964 (11th Cir. 2005). Under Florida law, a third party beneficiary is an intended beneficiary of a contract between two other parties only if a direct and primary object of the contracting parties was to confer a benefit on the third party. *Id. See also Vencor Hospitals d.b.a. Vencor Hospital v. Blue Cross Blue Shield of Rhode Island*, 169 F. 3d 677 (11th Cir. 1999) (**A party has a cause of action as a third-party beneficiary to a contract if the contracting parties express an intent primarily and directly to benefit that third party (or a class of persons to which that third party belongs**)). If the contracting parties had no such purpose in mind, any benefit from the contract reaped by the third party is merely "incidental," and the third party has no legally enforceable right in the subject matter of the contract. *Bochese*, 405 F. 3d 964, 981 (11th Cir. 2005).

In sum, the test is not that the promisee is liable to third person, or that there is some privity between them or that some consideration moved from the third person, but that the parties to the

contract intended that a third person should be benefited by the contract. *Bochese*, 405 F. 3d 964, 981 -982 (11th Cir. 2005), *quoting Mariana Lime Prods. Co., v. McKay*, 147 So. 264, 265 (Fla. 1933).

Here, the Complaint succinctly provides that "Celebrity and Wrave entered into a contract to provide excursions for passengers on board Carnival ships." (¶ 48). It further provides that "[t]he contract between the parties clearly manifested the intent of the contracting parties that the contract primarily and directly benefits the Plaintiff third party by requiring the excursion entities to exercise reasonable care in the operation of the subject excursion. (¶ 49).

Finally, it provides that "[t]his contract was breached" in 20 different ways. *See* (¶50)(a)-(u). Therefore, under *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007), Plaintiff has sufficiently pled her count for "Third Party Beneficiary." Accepting as true all of the factual allegations in the complaint, Plaintiff has given Defendant Celebrity fair notice of what her claim of "Third Party Beneficiary" is and the grounds upon which it rests.

Celebrity's only challenge to Plaintiff's third party beneficiary claim, is that the Complaint fails to allege that "*Celebrity* breached the contract." Plaintiff acknowledges that paragraph 50 of the Complaint provides that the contract was breached by Wrave only. This is a typo. The beginning of paragraph 50 should read" "This Contract was breached by WRAVE **and CELEBRITY**." Plaintiff therefore respectfully requests that this allegation be included in the Complaint by interleneation.

WHEREFORE, Plaintiff respectfully request that this Honorable Court enter an Order denying Celebrity's Motion to Dismiss Plaintiff's Complaint. **Alternatively,** in the event this Honorable Court grants Celebrity'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 March 15, 2012, 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.

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