Ruben v. Silversea Cruises LTD (Inc)

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UNITED STATES DISTRICT COURT SOUTHERN DISTRICT OF FLORIDA Case No. 19-cv-22241-BLOOM/Louis RONNA RUBEN, Plaintiff, v. SILVERSEA CRUISES, LTD. (INC.) and MEDIPORT SERVICES, Defendants. _____/

OMNIBUS ORDER THIS CAUSE is before the Court upon Motion

Motion for Leave to File Third Amended Complaint, ECF No. [44]

to Amend . The Court has carefully reviewed the Motions, all opposing and supporting submissions, the record in this case, the applicable law, and is otherwise fully advised. For the reasons that follow, denied Motion is granted denied; and Motion to Amend is denied.

I. BACKGROUND

On May 31, 2019, Plaintiff initiated the instant personal injury action against Silversea only for injuries sustained during a bicycle excursion in Corsica, France. ECF No. [1]

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2 Mediport as a Defendant. First Amended Com 1

On October 11, 2019, this Court granted Motion to Dismiss the First Amended Complaint, and granted Plaintiff leave to amend, ECF No. [28], which Plaintiff did on October 18, 2019, ECF No. [29]

In the Second Amended Complaint, Plaintiff alleges that she was a passenger on one of cruise ships the Silver Muse during an eight-day voyage beginning on July 8, 2018. Id. ¶ 16. On July 10, 2018, Plaintiff and her husband participated in a bicycle excursion that consisted of a guided tour of Bastia, Corsica, France. Id. ¶ 19. Plaintiff booked this excursion through one of representatives in advance of sailing and, in doing so, Plaintiff relied on the fact that Silversea held the operator of the excursion out as its agent. Id. ¶¶ 20-21. Mediport was the tour operator of the bicycle excursion Plaintiff participated in and Mediport exercised control over the tour guides operating the excursion. Id. ¶¶ 13-14. Plaintiff alleges that Silversea and/or vetting and/or screening and/or selecting the [excursion] the tour guides and the operation of the excursion. Id. ¶ 22. In booking this excursion, Plaintiff believed, based on representations, that it

Id. ¶ 24.

Upon commencing the excursion, Plaintiff discovered that, rather than being a leisurely bicycle tour on a manual bike, the excursion involved riding and operating an electric bicycle, -trafficked roads Id. ¶ 25. Plaintiff alleges that, at one

1 The Court will collectively refer to Silversea and

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3 point during the excursion, the group had to ride on a two-lane highway with a speed limit of 110 kilometers per hour. Id. Moreover, the tour guides did not provide participants with any instruction on how to operate the electric bicycles, nor did they size the bikes to each rider before beginning the tour. Id. In addition, none of the tour guides spoke English and, during the tour, the rear guide separated from the excursion group, thus leaving the group with only a single guide leading in the front. Id.

During the excursion, Plaintiff was informed by a Silversea employee who accompanied the group on the excursion to observe the performance of the excursion operator that Silversea had not previously vetted the tour operator and that it was first time conducting the excursion using this tour operator. Id. ¶ 26. This same Silversea employee had to act as an English interpreter for the guides during the excursion. Id. Plaintiff alleges that she and numerous other excursion participants expressed concerns about their safety to employee and complained that they did not want to finish the tour because they were concerned that they would be injured. Id. ¶ 27. The Silversea conducted in a safe manner and was sufficiently concerned that passengers would suffer injuries

pick the passengers up. Id. After contacting the cruise ship, employee indicated that

Plaintiff would need to continue the excursion until the group reached a better location because the bus was unable meet them at their current location. Id. Shortly thereafter, Plaintiff was thrown from her electric bike, sustaining injuries to her mouth, face, leg, elbow, and shoulder. Id. ¶ 28.

Second Amended Complaint asserts seven counts: Count I Negligence Negligent Hiring (against Silversea); Count II Negligence Negligent Misrepresentation (against Silversea); Count III Negligence Failure to Warn (against Silversea); Count IV

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4 Negligence Apparent Agency (against Silversea); Count V Negligence (against Mediport); Count VI Negligence Negligent Training (against Mediport); and Count VII Negligence Negligent Supervision (against Mediport). See generally id.

On November 13, 2019, Silversea filed its Motion to Dismiss pursuant to Rule 12(b)(6), requesting that this Court dismiss Counts I, II, III, and I Complaint with prejudice for her failure to state a claim. ECF No. [32]. Plaintiff filed her Response filed a Reply, ECF No. [34]. Similarly, on December 9, 2019, Mediport filed its Motion to Dismiss premised on a lack of personal jurisdiction and on forum non conveniens. ECF No. [35]. Plaintiff filed her Response in Opposition, ECF No. [38], and Mediport filed its Reply, ECF No. [41].

Furthermore, on January 13, 2020, Plaintiff filed her Motion for Jurisdictional Discovery, to conduct jurisdictional discovery as to Mediport, based on in support of its Motion to Dismiss, which alleged that Mediport has little to no ties to Florida. See ECF No. [39]. Mediport filed its Response opposing filed her Reply, ECF No. [43].

On January 28, 2020, Plaintiff filed her Motion to Amend, seeking leave to amend her Second Amended Complaint to add an additional count against both Defendants for third-party beneficiary breach of contract, based on information Plaintiff obtained during the course of discovery. See ECF No. [44]; ECF No. [44- Specifically, Plaintiff explains that, on January 3, 2020, Silversea served supplemental discovery responses to on. ECF No. [44] at 2. Included in these Case No. 19-cv-22241-BLOOM/Louis

5 - into an agreement between Mediport and Silversea, ECF No. [44] at 2. Plaintiff contends that the

Tour Operator Guidelines contains language confirming her status as a third-party beneficiary to which warrants granting Plaintiff leave to file a Third Amended Complaint. Id.; see also ECF No. [44]. Setting Trial and Pre-trial Schedule, Requiring Mediation, and Referring Certain Matters to Magistrate Judge, the deadline to file any amended pleadings in this case was October 11, 2019. ECF No. [13 Defendants each filed individual Responses in Opposition to to Amend, see ECF Nos. [46] & [47], to which Plaintiff filed a Reply, ECF No. [50].

The Court will address each motion in turn below. II. LEGAL STANDARD A. Rule 12(b)(2) Motion & Motion to Conduct Jurisdictional Discovery s

Kim v. Keenan, 71 F. Supp. 2d 1228, 1231 (M.D. Fla. 1999) (citing Cable/Home Commc n Corp. v. Network Prods., Inc. the exercise of personal jurisdiction over a nonresident defendant bears the initial burden of

United Techs. Corp. v. Mazer, 556 F.3d 1260, 1274 (11th Cir. 2009).

s for in personam jurisdiction, the burden shifts to the defendant to challenge plaintiffs allegations by affidavits or Carmouche v. Carnival Corp., 36 F. Supp. 3d 1335, 1388 (S.D. Fla. 2014), aff d sub nom. Carmouche v. Tamborlee Mgmt., Inc., 789 F.3d 1201 (11th Cir. 2015). A defendant

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6 Internet Sols. Corp. v. Marshall, 557 F.3d 1293, 1295 (11th Cir. 2009).

. . . the Defendant submits affidavit(s) to the contrary, the burden traditionally Meier ex rel. Meier v. Sun Int Hotels, Ltd., 288 F.3d 1264, 1269 (11th Cir. 2002); see also Internet Sols. Corp., 557 F.3d at 1295; ., 902 F.2d at 855. If the defendant makes a sufficient showing of the inapplicability of the long- jurisdictional allegations in the complaint by affidavits or other competent proof, and not merely

reiterate the factual allegations in the complaint. Polskie Linie Oceaniczne v. Seasafe Transp. A/S, 795 F.2d 968, 972 (11th Cir. 1986). Conclusory statements, factual declarations, are in substance legal conclusions that do not trigger a duty for Plaintiffs to

Posner v. Essex Ins. Co., 178 F.3d 1209, 1215 (11th Cir. 1999).

Where the evidence presented by the parties affidavits and deposition testimony conflicts, the court must construe all reasonable inferences in favor of the non-movant plaintiff. Gibson v. NCL (Bah.) Ltd., No. 11-24343-CIV, 2012 WL 1952670, at *2 (S.D. Fla. May 30, 2012) (citing Meier ex rel. Meier, 288 F.3d at 1269) Gibson I . But, when the plaintiff offers no competent evidence to the contrary, a district court may find that the defendants unrebutted denials [are] sufficient to negate plaintiffs jurisdictional allegations. Serra-Cruz v. Carnival Corp., 400 F. Supp. 3d 1354, 1357 (S.D. Fla. 2019) (citing Zapata v. Royal Caribbean Cruises, Ltd., No. 12-cv-21897, 2013 WL 1100028, at *2 (S.D. Fla. Mar. 15, 2013) Serra-Cruz I).

Additionally, because -arm statute is governed by Florida law, federal courts are required to construe it as would the Florida Supreme Court. Cable/Home

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7 ., 902 F.2d at 856 (quoting Oriental Imps. & Exps., Inc. v. Maduro & Curiel s Bank, N.V., 701 F.2d 889, 890-91 (11th Cir. 1983)). Absent some indication that the Florida Supreme Court would hold otherwise, [federal courts] are bound to adhere to decisions of its intermediate courts. Sculptchair, Inc. v. Century Arts, Ltd., 94 F.3d 623, 627 (11th Cir. 1996) (citing Polskie Linie Oceaniczne, 795 F.2d at 970). -arm statute must be strictly construed, and any doubts about the applicability of the statute are resolved in favor of the defendant and against a conclusion that personal ju Gadea v. Star Cruises, Ltd., 949 So. 2d 1143, 1150 (Fla. 3d DCA 2007) (citing , 869 So. 2d 732, 733 (Fla. 4th DCA 2004)).

The Court of Appeals for the Eleventh Circuit has [d] that jurisdictional discovery is highly favored before resolving Federal Rule of Civil Procedure 12(b)(2) motions to dismiss for Exhibit Icons, LLC v. XP Companies, LLC, No. 07-80824-CIV, 2008 WL 616104, at *2 (S.D. Fla. Mar. 3, 2008) (citing Eaton v. Dorchester Dev., Inc., 692 F.2d 727, 731 (11th Cir. 1982) (holding that such jurisdictional discovery is

not entirely discretionary, but rather, is at least partly mandatory); Chudsama v. Mazda Motor Corp., 123 F.3d 1353, 1367 for example, a motion to dismiss for lack of personal jurisdiction pursuant to Fed. R. Civ. P. 12(b)(2) may require some limited discovery before a meaningful ruling can Majd-Pour v. Georgiana Cmty. Hosp., Inc., 724 F.2d 901, 903 (11th Cir. 1984)); see also ACLU v. City of Sarasota [W] jurisdiction are intertwined and genuinely in dispute, parties have a qualified right to jurisdictional

discovery, meaning that a district court abuses its discretion if it completely denies a party jurisdictional discovery, unless that party unduly delayed in propounding discovery or seeking

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8 leave to initiate discovery. (citations omitted)). Thus, a motion to dismiss for lack of personal jurisdiction may require limited jurisdictional discovery if the resolution of the motion turns on RMS Titanic, Inc. v. Kingsmen Creatives, Ltd., 579 F. Appx 779, 791 (11th Cir. 2014) (quoting Chudasama, 123 F.3d at 1367).

A Majd-Pour, 724 F.2d at 903; see also Eaton, 692 F.2d at 729 n.7 genuinely in dispute and the court cannot resolve the issue in the early stages of the

litigation, . . . then discovery will certainly be useful and may be essential to the revelation of facts necessary to decide the is Gibson I, 2012 WL 1952670, at *3 (allowing jurisdictional discovery when the plaintiff did not delay in making the request and finding that, jurisdictional discovery, Plaintiff cannot refute the statements made in the affidavit submitted by

Commercial Indus. Americana v. Acad. Roofing & Sheet Metal of Fla., Inc., No. 11-60774-CIV,

2012 WL 13005796, at as ample authority to permit jurisdictional discovery, particularly where a motion to dismiss for lack of personal jurisdiction ; El-Fadl v. Cent. Bank of Jordan faced with a motion to dismiss for lack of personal jurisdiction is entitled to reasonable discovery,

lest the defendant defeat the jurisdiction of a federal court by withholding information on its .

Nonetheless may deny use of this procedural tool under facts specific to a given case. Utsey v. New Eng. Mut. Life Ins. Co., No. 07-0199-WS-M, 2007 WL 1076703, at *2 (S.D. Ala. Apr. 9, 2007); see also

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9 Barboza v. Drummond Co., No. 06-61527-CIV, 2007 WL 8025825, at *7 (S.D. Fla. July 17, 2007) (denying plaintiffs request to undertake jurisdictional discovery where significant time had passed during which plaintiffs could have sought permission to conduct such discovery but failed to do so, and absent a specific showing by plaintiffs as to their need for discovery at that juncture). This

discovered Posner, 178 F.3d at 1214; see also Bernardele v. Bonorino, 608 F. Supp. 2d 1313,

ust be sufficiently material

; Instabook Corp. v. Instantupublisher.com, 469 F. Supp. 2d generally requested such discovery, without explaining how such discovery would bolster its

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B. Rule 12(b)(6) Motion

. Civ. P. 8(a)(2).

Bell Atl. Corp. v. Twombly, 550 U.S. 544, 555 (2007); see Ashcroft v. Iqbal, 556 U.S. 662, 678

- defendant-unlawfully-harmed- Iqbal, 556 U.S. at 678 (alteration in original) (quoting Twombly Twombly, 550 U.S. at 555. These elements are required

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10 to survive a motion brought under Rule 12(b)(6) that requests dismissal for failure to state a claim upon which relief can be granted.

When reviewing a motion under Rule 12(b)(6), a court, as a general rule, must accept the s allegations as true and evaluate all plausible inferences derived from those facts in favor of the plaintiff. Miccosukee Tribe of Indians of Fla. v. S. Everglades Restoration All., 304 F.3d 1076, 1084 (11th Cir. 2002). However, this tenet does not apply to legal conclusions, and courts Twombly, 550 U.S. at 555; see Iqbal, 556 U.S. at 678; Thaeter v. Palm Beach Cty. Sheriff s Office, 449 F.3d 1342, 1352 (11th Cir. 2006). , 605

F.3d 1283, 1290 (11th Cir. 2010) (quoting Iqbal, 556 U.S. at 682).

Wilchombe v.

TeeVee Toons, Inc., 555 F.3d 949, 959 (11th Cir. 2009) (citing Brooks v. Blue Cross & Blue Shield of Fla., Inc., 116 F.3d 1364, 1369 (11th Cir. 1997)); see also Maxcess, Inc. v. Lucent Techs., Inc., he four corners of the complaint Horsley v. Feldt, 304 F.3d 1125, 1135 (11th Cir. 2002))).

C. Motion for Leave to Amend

Federal Rule of Civil Procedure 15 governs amendments to pleadings. Apart from initial a party may

amend its pleading only with the opposing partys written consent or the courts leave. The court should freely give leave when

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11 justice so requires. A plaintiff should be afforded the opportunity to test their claim on the merits as long as the underlying facts or circumstances may properly warrant relief. Foman v. Davis, 371 U.S. 178, 182 (1962). Ho . . . allow an amendment (1) where there has been undue delay, bad faith, dilatory motive, or repeated failure to cure deficiencies by amendments previously allowed; (2) where allowing amendment would cause undue prejudi Bryant v. Dupree Foman, 371 U.S. at 182.

Sosa v. Airprint Sys., Inc., 133 F.3d 1417, 1418 n.2, 1419 (11th Cir. 1998).

Federal Rule of Civil Procedure 16 states in relevant part that a district court must enter a scheduling order that limit[s] the time to join other parties, [and] amend the pleadings, Civ. P. 16(b)(3), and a g order , Fed. R.

Civ. P. 16(b)(4). Sosa, 133 F.3d at 1418 (internal

quotations omitted). Id. (quoting Johnson v. Mammoth Recreations, Inc., 975 F.2d 604, 609 (9th Cir. 1992)). for their delay in seeking to amend the Remington v. Newbridge Sec. Corp., No. 13-cv-60384, 2014

WL 505153, at *12 (S.D. Fla. Feb. 7, 2014).

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12 been discovered in the exercise of reasonable diligence until after the amendment deadline

Donahay v. Palm Beach Tours & Transp., Inc., 243 F.R.D. 697, 699 (S.D. Fla. 2007) (internal citation omitted). Likewise modification of a scheduling order, good cause is not shown if the amendment could have been Id. Thus, the inquiry into the propriety of amendment under the more liberal Rule 15, and obtaining permission to amend diminishes drastically after the court enters a scheduling order with Id. (citing Sosa, 133 F.3d at 1418). III. DISCUSSION

for lack of personal jurisdiction Motion for Jurisdictional Discovery.

A. Motion for Jurisdictional Discovery

Mediport argues that the Second Amended Complaint should be dismissed for a lack of both general and specific personal jurisdiction. Mediport also contends that the Second Amended Complaint

should be dismissed under the doctrine of forum non conveniens.

court sitting in diversity undertakes a two-step inquiry in determining whether personal jurisdiction exists: the exercise of jurisdiction must (1) be appropriate under the state long-arm statute and (2) not violate the Due Process Clause of the Fourteenth Amendment to the United Techs. Corp., 556 F.3d at 1274 The Due Process Clause requires that the defendant have minimum contacts with the forum state so that the exercise of

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13 personal jurisdiction over the defendant does not offend traditional notions of fair play and substantial justice. Peruyero v. Airbus S.A.S., 83 F. Supp. 3d 1283, 1287 (S.D. Fla. 2014) (citing Melgarejo v. Pycsa Pan., S.A., 537 F. Appx 852, 858-59 (11th Cir. 2013)) test] must be satisfied for a court to exercise personal jurisdiction over a non- Am. Fin. Trading Corp. v. Bauer, 828 So. 2d 1071, 1074 (Fla. 4th DCA 2002).

- specific and general Caiazzo v. Am. Royal Arts Corp., 73 So. 3d 245, 250 (Fla. 4th DCA 2011). Thus, under § 48.193, a non-resident defendant can be subject to personal jurisdiction in Florida in two a defendant [can be subject] to specific personal jurisdiction that is, jurisdiction over suits that arise out of or relate to a defendants contacts with Florida, and (2) Florida courts may exercise general personal jurisdiction that is, jurisdiction over any claims against a defendant, whether or not they involve the defendants activities in Florida if the defendant engages in substantial and not isolated activity in Florida. Carmouche, 789 F.3d at 1203-04 (citing Fla. Stat. § 48.193(1)(a), (2)); see also Future Tech. Today, Inc. v. OSF Healthcare Sys., 218 F.3d 1247, 1249 (11th Cir. 2000); Sculptchair, Inc., 94 F.3d at 626. Plaintiff contains allegations regarding both specific and general personal jurisdiction over Mediport. See ECF No. [29] ¶¶ 7, 9. 2

Accordingly, the Court will address each basis for personal jurisdiction separately.

2 In the briefs on the Motions before the Court, the parties have inconsistently addressed the bases for specific and general personal jurisdiction. ECF No. [35] at 7- Motion, however, only addressed the arguments presented on specific personal jurisdiction over Mediport based on . ECF No. [38] at 6-11. On the same day Discovery, which requested leave to conduct jurisdictional discovery on the issue of general personal jurisdiction. See generally Reply to her Motion for Jurisdictional Discovery, she argues that she is entitled to jurisdictional discovery to determine whether there were any discussions between Defendants when they were negotiating the Tour Operator Agreement regarding

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14 1. Specific Jurisdiction Specific jurisdiction depends on an affiliatio[n] between the forum and the

underlying controversy Goodyear Dunlop Tires Operations, S.A., 564 U.S. at 919 Specific jurisdiction arises out of a partys activities in the forum that are related to the cause of action alleged in the complaint. Consol. Dev. Corp., 216 F.3d at 1291 (citing Madara v. Hall, 916 F.2d 1510, 1516 n.7 (11th Cir. 1990); Helicopteros Nacionales de Colom., S.A. v. Hall, 466 U.S. 408, 414 n.8 & n.9 (1984)). court has the minimum contacts to support specific jurisdiction only where the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws. Id. (quoting Hanson v. Denckla, 357 U.S. 235, 253 (1958)). The requirement that there be minimum contacts is grounded in fairness id., and defendants conduct and connection with the forum State [is] such that

[it] should reasonably anticipate being haled into court there, World-Wide Volkswagen Corp. v. Woodson, 444 U.S. 286, 297 (1980). See also Fraser v. Smith, 594 F.3d 842, 847-48 (11th Cir. 2010) (discussing specific jurisdiction under Floridas long-arm statute); Vermeulen v. Renault, U.S.A., Inc., 985 F.2d 1534, 1546 (11th Cir. 1993) (discussing minimum contacts for purposes of specific jurisdiction consistent with due process).

Plaintiff alleges that specific jurisdiction over Mediport exists under § 48.193(1)(a)(9), which states that [e]ntering into a contract that complies with s. 685.102, Fla. Stat. § 48.193(1)(a)(9), because Mediport entered into a contract with Silversea that satisfies the statutory requirements. Under § 685.102(1),

personal injury suits brought by passengers or what forum Defendants intended such suits to be litigated in i.e., whether specific jurisdiction over Mediport exists. See ECF No. [42]. The briefing on Pl Motion to Amend also raises arguments relating only to specific personal jurisdiction based on a conferral of jurisdiction. See ECF Nos. [44], [46], & [50]. Nevertheless, the Court will address both bases of personal jurisdiction.

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15 any person may, to the extent permitted under the United States Constitution, maintain in this state an action or proceeding against any person or other entity residing or located outside this state, if the action or proceeding arises out of or relates to any contract . . . for which a choice of the law of this state . . . has been made pursuant to s. 685.101 and which contains a provision by which such person or other entity residing or located outside this state agrees to submit to the jurisdiction of the courts of this state. Fla. Stat. § 685.102(1). Moreover, § 685.101 provides that:

The parties to any contract . . . in consideration of or relating to any obligation arising out of a transaction involving in the aggregate not less than $250,000, the equivalent thereof in any foreign currency, or services or tangible or intangible property, or both, of equivalent value . . . may, to the extent permitted under the United States Constitution, agree that the law of this state will govern such contract . . . the effect thereof and their rights and duties thereunder, in whole or in part,

whether or not such contract . . . bears any relation to this state. Fla. Stat. § 685.101(1). Florida courts have explained that in order to exercise jurisdiction over a foreign defendant pursuant to §§ 685.101-.102, the contract must:

(1) Include a choice of law provision designating Florida law as the governing law, in whole or in part; (2) Include a provision whereby the non-resident agrees to submit to the jurisdiction of the courts of Florida; (3) Involve consideration of not less than $250,000 or relate to an obligation arising out of a transaction involving in the aggregate not less than $250,000; (4) Not violate the United States Constitution; and (5) Either bear a substantial or reasonable relation to Florida or have at least one of the parties be a resident of Florida or incorporated under the laws of Florida. Corp. Creations Enters. LLC v. Brian R. Fons Attorney at Law P.C., 225 So. 3d 296, 301 (Fla. 4th DCA 2017). exercised and [] courts may dispense with the more traditional minimum contacts analysis. In other

words, sections 685.101 and 685.102 allow parties to confer jurisdiction on the courts of Florida by contract alone, provided that all five factors listed above are satisfied. Id.

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16 Mediport contends that there is no conferral of jurisdiction in this case because Plaintiff was not a signatory to the agreement between Defendants, Plaintiff is not a third-party beneficiary to the agreement, and, even if she is a third-party beneficiary, Plainti Plaintiff, on the other hand, argues that specific jurisdiction exists

§§ 685.101-.102 are satisfied and Plaintiff is a third-party beneficiary to the agreement. Even if Plaintiff is correct that she is a third-party beneficiary to the agreement between Defendants in this case, the Court nonetheless concludes that the five factors required to establish specific jurisdiction over Mediport -arm statute cannot be met. Specifically, neither Mediport nor Silversea is incorporated under the laws of Florida. ECF No. [29] ¶¶ 3-4 (Silversea is a Monacan corporation with its principal place of business at 7 Rue du Gabian Block D Level 11 Monaco 98000 MC is a French corporation with its principal place of business at 1 Rue De Luce De Casabianca 20200 Bastia, Corsica on a foreign subsidiary for the purpose of establishing specific jurisdiction in Florida based on a

contractual conferral of jurisdiction clause is entirely unsupported by any citations to law. 3 Moreover, even if such a statement had any merit under the law, which it does not, the Second Amended Complaint is completely devoid of any factual allegations company or its ties to Florida. Therefore, the Court concludes that Plaintiff has failed to meet her

3 sound despite a lack of supporting authority or in the face of contrary authority, forfeits the point. [The Phillips v. Hillcrest Medical Ctr., 244 F.3d 790, 800 n.10 (10th Cir. 2001) (citation omitted).

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17 burden of establishing a prima facie case of specific personal jurisdiction over Mediport. See United Techs. Corp., 556 F.3d at 1274 (over a nonresident defendant bears the initial burden of alleging in the complaint sufficient facts

2. General Jurisdiction -resident defendant may be haled into a tate, whether such activity is wholly interstate, intrastate, or otherwise, is subject to the jurisdiction of the courts may assert general jurisdiction over foreign (sister-state or foreign- affiliations with the State are so

Goodyear Dunlop Tires Operations, S.A. v. Brown, 564 U.S. 915, 919 (2011) (quoting Int l Shoe Co. v. Washington, 326 U.S. 310, 316 (1945)).

The due process requirements for general personal jurisdiction are more stringent than for specific personal jurisdiction and require a showing of continuous and systematic general business contacts between the defendant and the forum state. Consol. Dev. Corp. v. Sherritt, Inc., 216 F.3d 1286, 1292 (11th Cir. 2000) (citing Borg-Warner Acceptance Corp. v. Lovett & Tharpe, Inc., 786 F.2d 1055, 1057 (11th Cir. 1996)). Thus, only a limited set of affiliations with a forum will render a defendant amenable to all- Daimler AG v. Bauman, 571 U.S. 117, 137 (2014). A corporations place of incorporation and its principal place of business are paradigm all-purpose forums. Carmouche, 789 F.3d at 1204 (quoting Daimler AG, 571 U.S. at 137). Furthermore, a corporations operations in a forum other than its formal place of

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18 incorporation or principal place of business will be so substantial and of such a nature as to render the corporation at home in that State only in exceptional cases. Id. (quoting Daimler AG, 571 U.S. at 139 n.19).

The Eleventh Circuit has further explained the contacts necessary to render a corporation See Waite v. AII Acquisition Corp., 901 F.3d 1307 (11th Cir. 2018).

state, a jurisdiction is still proper. Id. at 1317- a court] must consider whether e the activities that ordinarily Id. at 1318 (quoting Carmouche, 789 F.3d at 1205). In Waite, the plaintiff, who was diagnosed with mesothelioma caused by asbestos exposure in Massachusetts, later sued an asbestos manufacturer in Florida. Id. at 1310. Despite the facts that the defendant manufacturer was registered to do business in Florida, maintained an agent for service of process in Florida, hired a Florida distributor, had customers in Florida, and operated a plant in Brevard County, the Court found it Id. of incorporation and principal place of business, only a limited set of affiliations will be substantial

enough to make the corporation at home in that State. Id. at 1317.

Mediport argues that this Court lacks general jurisdiction because it is a foreign entity that has its principal place of business and place of incorporation in Corsica, France, and thus it is not No exceptional affiliations with the State of Florida exist. any ties to this State are as follows:

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19 At all times material to this action, Defendants, personally or through an agent:

a. Operated, conducted, engaged in or carried on a business venture in this state and/or county or had an office or agency in this state and/or county; b. Was engaged in substantial and not isolated business activity within this state; and c. Committed one or more of the acts stated in Florida Statutes § 48.081, § 48.181 or § 48.193. ECF No. [29] ¶ 9. Further, the only additional argument Plaintiff makes with regard to general jurisdiction over Mediport is presented in her Motion for Jurisdictional Discovery, where she ECF No. [29] ¶¶ 52-61) (footnote omitted).

unrebutted declaration of Jacques Bindinelli , the current liquidator and former co-

manager of Mediport, in support of its Motion. ECF No. [35-1] . In Id. ¶¶ 9, 11.

it does not pay taxes in Florida, business in Florida, or Id. ¶¶ 14, 15, 18, 21. Mediport has never employed any Florida residents nor does it have any employees, agents, directors, or officers located in Florida all material times, Medipor s former managers all reside[d] outside the State of Florida and [were] not legal residents of the State of Florida Id. ¶¶ 12-13. Bindinelli also states Mediport does

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20 not, and has never, maintained a Florida telephone listing does not itself own, lease, rent or otherwise maintain any property in Florida maintain, own and/or operate an internet site directed to, or through which it is transacting business with, Florida or its residents Id. ¶¶ 10, 22, substantial revenue from operations or activities in Florida Id. ¶¶ 19-20.

While Plaintiff is correct that certain contacts with the forum state can establish general jurisdiction, this Court does not find that such contacts exist here. As such, exercising general jurisdiction over Mediport would violate due process. The Court also notes that Bindinelli Declaration demonstrates

presented in Waite, where the Eleventh Circuit concluded that no general jurisdiction existed over the foreign defendant. Waite, 901 F.3d at 1317, 1322. As explained above, if a defendant makes a sufficient showing of the inapplicability of the long-arm statute, the plaintiff then bears the burden [producing] affidavits or other competent proof, and not merely reiterat[ing] the factual allegations in

the complaint. Polskie Linie Oceaniczne, 795 F.2d at 972; Meier ex rel. Meier, 288 F.3d at 1269. Here, however, Plaintiff has failed to submit any evidence to substantiate the jurisdictional allegations regarding general personal jurisdiction. Thus, Plaintiff has failed to establish facts sufficient to bring Mediport within

3. Fourteenth Amendment Due Process Requirements -arm statute, it is apparent that jurisdiction over Mediport would not comport with Due Process. As discussed above, Plaintiff has failed to establish the requisite personal jurisdiction over Mediport based on either specific or general jurisdiction. Plaintiff has failed to sufficiently establish a

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21 conferral of jurisdiction for the purposes of specific personal jurisdiction because Mediport and Silversea are both foreign defendants. Likewise, Mediport does not have sufficient connections with Florida so as to render it at home in this State. Carmouche, 789 F.3d at 1204 (quoting Daimler AG, 571 U.S. at 139 n.19). - [] finding [that] a defendant is not subject to jurisdiction under Florida law means that jurisdiction is also inappropriate under the Due Process Clause Serra-Cruz I, 400 F. Supp. 3d at 1359-63 (quoting Melgarejo at 860). Therefore, th exercise of personal jurisdiction over Mediport in this case would offend the traditional notions of fair play and substantial justice. See Shoe Co., 326 U.S. at 316. As such, Mediport to Dismiss is granted.

4. Ruben to Conduct Jurisdictional Discovery Plaintiff requests leave to conduct jurisdictional discovery on the statements D at 3-4. The Court, however, ery

here is unwarranted because Peruyero, 83 F. Supp. 3d at 1290; see also Serra-Cruz I, 400 F. Supp. 3d at 1363; Yepez v. Regent Seven Seas Cruises, No. 10-23920-CIV, 2011 WL 3439943, at *1 Plaintiff has only

generally requested such discovery, without explaining how such discovery would bolster [her] contentions, and Plaintiff has not persuaded the Court that such discovery is warranted in this Instabook Corp., 469 F. Supp. 2d at 1127; Brown v. Carnival Corp., 202 F. Supp. 3d 1332,

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22 1346 (S.D. Fla. 2016); cf. Commissariat à L Energie Atomique v. Chi Mei Optoelectronics Corp., 395 F.3d 1315, 1323 (Fed. Cir.

. Specifically, Plaintiff has failed to submit any evidence or affidavit in support of the jurisdictional allegations asserted in her Second Amended Complaint. Nor did she respond to the substantive arguments on general jurisdiction presented in Declaration. Yet, as explained above, t to conduct

jurisdictional discovery. Barboza, 2007 WL 8025825, at *7 (quoting Utsey, 2007 WL 1076703, at *2).

This is especially so when Plaintiff[] ha[s] failed to specify what [she] thought could or should be discovered. Posner, 178 F.3d at 1214. Discovery is denied.

B. 4

because they each fail

to state a claim. The Court addresses the arguments presented on each individual Count.

4 substantive law is general maritime law, the rules of which are developed by the federal courts. Keefe v. Bah. Cruise Line, Inc., 867 F.2d 1318, 1320 (11th Cir. 1989) (citing Kermarec v. Compagnie Generale Transatlantique e location during the course of a cruise, federal maritime law applies, just as it would for torts occurring on Aronson v. Celebrity Cruises, Inc., 30 F. Supp. 3d 1379, 1392 (S.D. Fla. 2014) (citing Smolnikar v. Royal Caribbean Cruises Ltd., 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011)); see also Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 901 (11th Cir. 2004). In the absence of well-developed maritime law, courts may supplement the maritime law with general common law and state law principles. See Smolnikar, 787 F. Supp. 2d at 1315. The parties here agree that maritime law governs.

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23 1. Count I Negligence Negligent Hiring dismissed because it fails to sufficiently allege that Silversea did not diligently inquire into the tour

prior to the excursion in this case. Plaintiff, however, takes the opposing position, arguing that the

Second Amended Complaint alleges sufficient facts to satisfy each element of a negligent hiring cause of action.

ship owners . . . cannot be held vicariously liable for the negligence of an independent contractor, it is well-established that they may be liable for negligently hiring or McLaren v. Celebrity Cruises, Inc., No. 11-23924-CIV, 2012 WL 1792632, at *4 (S.D. Fla. May 16, 2012) (quoting Smolnikar, 787 F. Supp. 2d at 1318). Negligent have known of the employees unfitness, and the issue of liability primarily focuses upon the

adequacy of the employers pre-employment investigation into the employee Mumford v. Carnival Corp., 7 F. Supp. 3d 1243, 1249 (S.D. Fla. 2014) (citing Williams v. Feather

Sound, Inc., 386 So. 2d 1238 (Fla. 2d DCA 1980)). To state a claim for negligent hiring, a plaintiff must allege (1) that an employee or independent contractor (like an excursion entity) was incompetent or unfit to perform the work provided; (2) that Defendant knew [or] reasonably should have known of

the particular incompetence or unfitness; and (3) that the competence or unfitness proximately caused the injuries. Kennedy v. Carnival Corp., 385 F. Supp. 3d 1302, 1334 (S.D. Fla. 2019) (citing Smolnikar, 787 F. Supp. 2d at 1318), report and recommendation adopted, No. 18-20829-CIV, 2019 WL 2254962, at *1 (S.D. Fla. Mar. 21, 2019).

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24 alleges that Mediport was incompetent or unfit to conduct the excursion at issue in this case because the tour guides did not speak English and could not communicate with the tour participants, ECF No. [29] ¶¶ 25, 31, the tour required operating electric bicycles without prior guidance or instruction from the tour guides on how to safely use them, id., and the tour involved riding along dangerous, high-trafficked roads at unsafe speeds, id. In addition, Plaintiff alleges that a Silversea employee who accompanied the group on the excursion admitted that Silversea had not previously vetted the tour operator and that it was the first time [Silversea] had ever conducted [t]he [e]xcursion using [Mediport] Id. ¶ 26. Likewise, the Second Amended Complaint states that Silversea reasonably should have known of incompetence, given the unsafe manner in which Mediport operated the excursion. Id. ¶¶ 25, 31- 32. Finally, Plaintiff alleges that the unsafe manner in which the tour was conducted directly and proximately resulted in Plaintiff being thrown off of her electric bicycle and sustaining significant personal injuries. Id. ¶¶ 28, 34. The Court concludes that these factual allegations, and the reasonable inferences drawn from them, are sufficient to state a plausible claim of negligent hiring upon which relief can be granted. Cf. Ferretti v. NCL (Bah.) Ltd., No. 17-CV-20202, 2018 WL 1449201, at *4 (S.D. Fla. Mar. 22, 2018) (dismissing a negligent hiring claim based on the lack of factual support for the p the defendant failed to properly vet or investigate the excursion operator before hiring it or that the excursion operator exhibited any unsafe or improper conduct to put the defendant on notice of the incompetence). Motion is denied as to Count I.

2. Count II Negligence Negligent Misrepresentation Next, Silversea argues that Plaintiff has failed to sufficiently allege a negligent misrepresentation claim in Count II because the alleged misrepresentations are mere puffing that

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25 were not made with any intent to induce Plaintiff, and the Second Amended Complaint fails to allege facts establishing that many of the alleged misrepresentations were false. Conversely, Plaintiff argues that the Second Amended Complaint sufficiently states a claim for negligent misrepresentation and satisfies the heightened pleading requirements under Federal Rule of Civil Procedure 9(b).

To state a claim for negligent misrepresentation in Florida, a plaintiff must allege: (1) a misrepresentation of a material fact; (2) that the defendant made the representation without knowledge as to its truth or falsity, or under circumstances in which he ought to have known of its

falsity; (3) that the defendant intended that the misrepresentation induce another to act on it; and (4) injury must result to the party acting in justifiable reliance on the misrepresentation. Souran v. Travelers Ins. Co., 982 F.2d 1497, 1503 (11th Cir. 1993). egligent representation, as distinguished from fraudulent representation, [is] Gilchrist Timber Co. v. ITT Rayonier, Inc., 127 F.3d 1390,

1395 (11th Cir. 1997) (quoting Restatement (Second) of Torts § 552 cmt. a); see also Burger King Corp. v. Austin, 805 F. Supp. 1007, 1024 (S.D. Fla. 1992) Negligent misrepresentation is similar to fraud, except that it involves negligent failure to ascertain the truth or falsity of a representation, rather than knowledge that such representation is false. 5

5 Lamm v. State St. Bank & Tr., 749 F.3d 938, 951 (11th Cir. 2014) (citing Souran, 982 F.2d at U.S. ex rel. Clausen v. Lab. Corp. of Am., Inc. W. Coast Roofing & Waterproofing, Inc.

v. Johns Manville, Inc. Coquina Invs. v. Rothstein, No. 10-60786-CIV,

2011 WL 197241, at *7 n.2 (S.D. Fla. 2011).

made in what documents or oral representations or what omissions were made, and (2) the time and place

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26] fact is material if, but for the misrepresentation, the aggrieved party would not have Balaschak v. Royal Caribbean Cruises, Ltd., No. 09-21196-CIV, 2010 WL 457137, at *1 (S.D. Fla. Feb. 4, 2010) (quoting Ribak v. Centex Real Estate Corp., 702 So. 2d 1316, 1317 (Fla. 4th DCA 1997)). statement of opinion, such as occurs in puffing, is not a statement of fact, but is one of opinion. Puffing is not to be taken seriously, is not to be relied upon, and is not binding as a legal obligation or promise. Silver v. Countrywide Home Loans, Inc., 760 F. Supp. 2d 1330, 1342 (S.D. Fla. 2011) (citing Wasser v. Sasoni, 652 So. 2d 411, 412 (Fla. 3d DCA 1995)), , 483 F. Appx 568 (11th Cir. 2012). Nevertheless, a cause of action for negligent misrepresentation is not contingent on the representor having actual or constructive knowledge of falsity. Gayou v. Celebrity Cruises, Inc., No. 11-23359-CIV, 2012 WL 2049431, at *8 (S.D. Fla. June 5, 2012) (quoting Fojtasek v. NCL (Bah.) Ltd., 613 F. Supp. 2d 1351, 1355 (S.D. Fla. 2009)). The knowledge element of negligent misrepresentation is satisfied when the representer made the representation without knowledge of its truth or falsity or should have known the representation was false. Gilchrist Timber Co., 127 F.3d at 1395 (quoting Baggett v. Electricians Local 915 Credit Union, 620 So. 2d 784, 786 (Fla. 2d DCA 1993)). Moreover person is justified in relying on a representation of fact although he might have ascertained the falsity of the representation had he made an investigation. Field v. Mans, 516 U.S. 59, 70 (1995) (citations and internal quotations omitted). Although the plaintiffs reliance on the misrepresentation must be justifiable . . . this does not mean that his conduct must conform to the standard of the reasonable man. Justification is a matter of the qualities and

of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendant Clausen, 290 F.3d at 1310 (quoting Ziemba v. , 256 F.3d 1194, 1202 (11th Cir. 2001)).

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27 characteristics of the particular plaintiff, and the circumstances of the particular case. Id. at 70- 71 (citations and internal quotations omitted). embarking,

[o]n or about April 5, 2018, a Silversea employee in the Silversea Excursion Department misrepresented and/or omitted material facts to Ruben about the Excursion. Specifically, the employee told Ruben when she called to inquire about the safety of the Excursion that the Excursion was a safe, leisurely, bicycle tour conducted on flat surfaces in an area surrounded by a natural preserve. The Silversea representative failed to tell her that the bicycles used in the Excursion were electrically powered, moved at speeds far in excess of manually operated bicycles, and that a portion of the time was on a heavily trafficked highway. ECF No. [29] ¶ 36; see also id. ¶ 20.

However, Plaintiff alleges that because Silversea had not vetted Mediport at the time of these representations, id. and/or omissions without knowledge as to their truth or falsity id. ¶ 37. Moreover, the Second Amended Complaint alleges that the representations that the excursion consisted of a safe and leisurely bicycle tour on flat surfaces around a natural preserve were false because the excursion entailed riding electric bicycles at very high speeds along dangerous, heavily trafficked roads. Id. ¶¶ 25, 38. Silversea intended the misrepresentations to induce [Plaintiff] to purchase the shore excursion id. reasonably relied on these representations when she decided to purchase and participate in the excursion, id. ¶ 24. Finally, Plaintiff alleges that, in relying on the misrepresentations by the Silversea employee about the nature of the tour, during the course of the excursion, she sustained significant injuries. Id. ¶ 40.

The Court concludes that these allegations sufficiently state a claim of negligent misrepresentation under the heightened pleading requirements of Rule 9(b). [T]he misrepresentations are material if, but for them, [Plaintiff] would not have bought the excursion, or whether, when buying the excursion, she would attach importance to [their] existence or

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28 nonexistence in determining h[er] choice of action. Balaschak, 2010 WL 457137, at *2 (citing Ribak, 702 So. 2d at 1317; Restatement (Second) of Torts § 538(2)(a)) (citations and internal quotations omitted). statements were material because she reasonably relied on them in deciding to participate in the excursion. ECF No. [29] ¶ 24. She also alleges facts to support the contention that were false or untrue, and thus were misrepresentations. See id. ¶¶ 25, 26, 38. Consequently, the Second Amended

Complaint provides [Silversea] with the respective sources of the representations and facts supporting Plaintiffs claim that negligent representations were actually made to her. Serra-Cruz v. Carnival Corp., 400 F. Supp. 3d 1364, 1370 (S.D. Fla. 2019), appeal dismissed, No. 19-13725-DD, 2019 WL 7167484 (11th Cir. Nov. 25, 2019) Serra-Cruz II

Moreover, these well-pleaded allegations, which the Court must accept as true, satisfy the heightened pleading requirements under Rule 9(b) because they set forth facts explaining (1) precisely what representations or omissions were made, (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what Clausen, 290 F.3d at 1310 (quoting Ziemba, 256 F.3d at 1202); see also Sinaltrainal v. Coca-Cola Co., 578 F.3d 1252, 1260 (11th Cir. 2009). Specifically, Plaintiff alleges the date on which the misrepresentations were made, see ECF No. [29] ¶ 36, the person who made the false statements, see id., her reliance on these misrepresentations, see id. ¶ 24, and what Silversea obtained as a consequence of the false statements, see id. ¶ 39. See Doria v. Royal Caribbean Cruises, Ltd., 393 F. Supp. 3d 1141, 1145 (S.D. Fla. 2019) (denying motion to dismiss negligent misrepresentation claim where the pleading (1) the exact statements that are alleged to be misleading or false; (2) the sources of the

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29 allegedly misleading materials; (3) and where and when the allegedly misleading or false statements were made Serra-Cruz II, 400 F. Supp. 3d at 1370 (same); cf. Ceithaml v. Celebrity Cruises, Inc., 207 F. Supp. 3d 1345, 1353-54 (S.D. Fla. 2016) (dismissing negligent particularized allegations about the timing, source, and precise content of the statements on which [the plaintiff] relied in purchasing her [excursion] ticket Ceithaml I ; Gibson v. NCL (Bah.) Ltd., No. 11- 24343-CIV, 2012 WL 1952667, at *6 (S.D. Fla. May 30, 2012) (dismissing negligent what statements [the crewmembers at the Shore Excursion Department made to her or when the statements were made Gibson II .

the allegedly false statements are actually omissions based on excursion circumstances that Silversea did not know existed, and that these omissions are insufficient to state a claim of negligent misrepresentations or to alleged intent to induce Plaintiff. cause of action for negligent misrepresentation is not contingent on the representor having actual or constructive knowledge of falsity. Gayou, 2012 WL 2049431, at *8 (quoting Fojtasek, 613 F. Supp. 2d at 1355). Rather, the knowledge element of a negligent misrepresentation claim can be satisfied when made the representation without knowledge of its truth or falsity or should have Gilchrist Timber Co., 127 F.3d at 1395 (quoting Baggett, 620 So. 2d at 786). Plaintiff has sufficiently alleged that Silversea made the representations at issue without knowledge of their truth or falsity. See id. at 1395-96 (knowledge element for negligent Case No. 19-cv-22241-BLOOM/Louis

30 because such cause of acti Burger King Corp., 805 F. Supp. at 1024 (negligent

r

Regarding argument that its general representation that the excursion was safe and leisurely amounts to non-actionable puffing, the Court concludes that this argument is without merit. See Gayou, 2012 WL 2049431, at *7-8 allegations that [the defendant] touted and promoted the zip-lining excursions safety even though defendant] had not vetted the excursion, its operator, or the equipment, and in particular the braking system, used in the excursion are sufficient to withstand dismissal for failure to state a claim the particularly identify the timing of any of the alleged misrepresentations ; see also Doria, 393 F. Supp. 3d at 1145; Serra-Cruz II, 400 F. Supp. 3d at 1370. The representations alleged in the Second Amended See Silver, 760 F. Supp. 2d at 1342 (citing Wasser, 652 So. 2d at 412). Instead, these representations were allegedly safety of the excursion. ECF No. [29] ¶ 36. Thus, these misrepresentations were not puffing.

Complaint.

3. Count III Negligence Failure to Warn be dismissed because Silversea only had a duty to warn of known dangers beyond the point of

debarkation that were not readily apparent to Plaintiff, not of dangers that were unknown to

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31 Silversea but were apparent and obvious to Plaintiff before she began the tour. Plaintiff, however, argues that Count III sufficiently alleges a negligence claim for the failure to warn because Silversea knew or should have known of the excursion dangers and these dangers were obscured, and thus were not apparent or obvious to Plaintiff, by Silversea employees who represented that the excursion was a leisurely bicycle tour on flat surfaces.

defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached

that duty; (3) the breach actuall Chaparro v. Carnival Corp., 693 F.3d 1333, 1337 (11th Cir. 2012).

te Flaherty v. Royal Caribbean Cruises, Ltd., No. 15-22295, 2015 WL 8227674, at *2 (S.D. Fla. Dec.

7, 2015) (citing Chaparro, 693 F.3d at 1337).

Id. at *3. Chaparro, 693 F.3d at 1336 (quoting Kermarec, 358 U.S. at 630). call, only to resume when the passenger re- Carlisle v. Ulysses Line Ltd., S.A., 475 So.

2d 248, 251 (Fla. 3d DCA 1985) (citation omitted). Thus of known dangers beyond the point of debarkation in places where passengers are invited or Chaparro, 693 F.3d at 1336 (citing Carlisle, 475

So. 2d at 251). Keefe

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32 on shore that are not open and obvious, of which the cruise line had actual or constructi[ve]

Lapidus v. NCL Am. LLC, 924 F. Supp. 2d 1352, 1356-57 (S.D. Fla. 2013) Lapidus I .

This duty to warn passenge Carlisle -

Wolf v. Celebrity Cruises, Inc. (quoting Keefe, 867 F.2d at 1322 (finding the duty of care owed by a shipowner to its passengers

imposing liability, that the carrier have had actual or constructive notice of the risk-creating); see also Twyman v. Carnival Corp., 410 F. Supp. 3d 1311, 1320 (S.D. Fla. 2019).

Smolnikar, 787 F. Supp. where passengers are invited or reasonably expected to visit, not to general hazards, Aronson, 30

F. Supp. 3d at 1392-93 (footnote omitted).

The Second Amended Complaint alleges that Silversea had a duty to warn, yet it failed to warn, Plaintiff of the known dangers on the excursion, which included warning her that the bicycle was electric and required greater skill to operate, that the tour guides would travel at high speeds and expected passengers to maintain similar speeds, that the tour would ride along a route that involved hills and highways, and that the tour operator did not speak English and thus Plaintiff would not be able to understand any instructions given. See ECF No. ¶¶ 42-46. Likewise, Plaintiff alleges that Silversea knew or in the exercise of reasonable care should have known that the tour was operated in dangerous areas and at unsafe speeds, the tour operator was not vetted properly

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33 ing to operate the tour. Id. ¶ 45. Further, the Second Amended Complaint explains that the dangers with the excursion and the equipment involved were not readily apparent and obvious to Plaintiff because a Silversea employee had obscured the true nature of the tour, id. she had never previously operated an electric bicycle and/or operated a bicycle at unreasonably dangerous speeds and was unfamiliar with the terrain, streets, traffic, and geography of the country id. ¶ 47.

The Court concludes that these allegations are sufficient to state a claim for negligence At the time that Plaintiff[] made the choice to [participate in the excursion], there was no way [she] could have known of the path the [tour operator] would take at that time, the danger was not apparent and

obvious. Ash v. Royal Caribbean Cruises Ltd., No. 13-20619-CIV, 2014 WL 6682514, at *3 (S.D. Fla. Nov. 25, 2014); id. (explaining that for the excursion); see also Bonck v. Carnival Corp., No. 18-23991-CIV, 2019 WL 4866292, at

*3 (S.D. Fla. June 25, 2019) (collecting cases), report and recommendation adopted, No. 18- 23991-CIV, 2019 WL 4291346, at *1 (S.D. Fla. Sept. 11, 2019); Heller v. Carnival Corp., 191 F. Supp. 3d 1352, 1358 (S.D. Fla. 2016) (finding that a claim for negligence based on the failure to warn was sufficiently alleged where the plaintiff claimed that (1) the defendant sold tickets for, advertised, approved, marketed and/or operated the excursion; (2) the defendant represented to her the [excursion] was safe, and the Segways were easy to operate ; (3) the defendant knew or should have known, based on inspections, of the possible dangers of the excursion; (4) the plaintiff embarked on the excursion; and (5) the plaintiff was injured during the [excursion] when she and another participant collided. (citing Chaparro, 693 F.3d at 1337 It is clear that . . . [Silversea] had a duty to warn Plaintiff[] about the alleged dangers associated with the

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34 [excursion] route . . . because that route posed a risk hidden to Plaintiff[] at that time, whereas [Silversea] allegedly knew or should have known of the risk at that time. Ash, 2014 WL 6682514, at *3; see also Bonck, 2019 WL 4866292, at *3 (Plaintiff alleges that Carnival periodically conducts site visits to its chosen excursion providers in order to evaluate the fitness and suitability of the equipment the providers use, and requires its excursion operators to provide a safe history report. safety of its excursion providers, it knew or should have known that Exotic used poorly maintained

vessels, including during the . . . excursion. (citing Chaparro, 693 F.3d at 1335- 37)). The allegations in Count III are sufficient and satisfy the requirements of Rule 12(b)(6).

4. Count IV Negligence Apparent Agency Finally, Silversea contends that Plaintiff has not sufficiently pled the necessary elements to state a valid cause of action for negligence under an apparent agency theory because: (1) clear representations that Mediport was its agent; (2) Plaintiff has not sufficiently plead facts to support a reasonable reliance, even if any representations were made by Silversea, because Plaintiff received the Passage Contract, which indicated that all excursions were operated by independent contractors, as did the Tour Operator Agreement between Defendants; and (3) Plaintiff has not alleged any reasonable belief upon which justifiable reliance can be established. Plaintiff, however, argues that Count IV alleges numerous facts sufficient to support her cause of action of negligence under a theory of apparent agency. Moreover, Plaintiff notes that the Passage Contract that Silversea attaches to its Motion cannot properly be considered on a motion to dismiss because it is not a

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35 Franza

v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1249 (11th Cir. 2014). where the alleged principal makes a manifestation that causes a third party to reasonably believe

that the alleged agent had the authority to act for the benefit of the principal, and the third party Gayou, 2012 WL 2049431, at *9 (citing Fojtasek, 613 F. Supp. 2d at 1357); see also Flaherty, 2015 WL 8227674, at *6.

To prevail on a cause of action for negligence based upon a theory of apparent agency, d agent is authorized to act for the

Franza, 772 F.3d at 1252. manifestation by the cruis Smolnikar, 787 F. Supp. 2d

at 1324 (quoting Doonan v. Carnival Corp., 404 F. Supp. 2d 1367, 1371-72 (S.D. Fla. 2005)); see also Warren v. Ajax Navigation Corp. of Monrovia,, No. 91-0230-CIV, 1995 WL 688421, at *2 principal liable for the negligence of an apparent agent, a plaintiff must sufficiently allege the

elements of apparent agency in addition to the elements of the underlying negligent act of the agent Rojas v. Carnival Corp., 93 F. Supp. 3d 1305, 1311 (S.D. Fla. 2015); Ferretti, 2018 WL 1449201, at *4; Thompson v. Carnival Corp., 174 F. Supp. 3d 1327, 1342 (S.D. Fla. 2016); Zapata, 2013 WL 1296298, at *1.

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36 The Court finds that Plaintiff has sufficiently alleged her claim of apparent agency. Silversea made manifestations which caused [Plaintiff] to believe that Mediport had authority to act for the benefit of Silversea ertise, and market the excursion;

excursion was operated by a separate entity; promoting the excursion as part and parcel of the Silversea cruise experience, making all arrangements, booking the excursion, collecting payment and providing a receipt from Silversea and sending a Silversea employee on the excursion who acted as an interpreter between the tour

guides and the passengers. ECF No. [29] ¶¶ 56, 26. Additionally, Plaintiff alleges that she reasonably relied on these representations to her detriment when she elected to purchase the which caused her to reasonably believe that Mediport was the agent of Silversea and/or that its employees were controlled by Silversea in choosing the Excursion. Additionally,

behalf. Id. ¶¶ 21, 57. Courts in the Southern District of Florida have repeatedly found similar factual allegations to be sufficient to support a negligence claim under an apparent agency theory of

liability. See Doria, 393 F. Supp. 3d at 1147 (citing Zapata, 2013 WL 1296298, at *5; Lapidus v. NCL Am. LLC, No. 12-21183-CIV, 2012 WL 2193055, at *5 (S.D. Fla. June 14, 2012) Lapidus II ; Gibson II, 2012 WL 1952667, at *7); Serra-Cruz II, 400 F. Supp. 3d at 1372 (citing Aronson, 30 F. Supp. 3d at 1396-97; Gayou, 2012 WL 2049431, at *8); Heller, 191 F. Supp. 3d at 1362; Ash, 2014 WL 6682514, at *7. Silversea argues that the cruise ticket contract precludes Plaintiff from sufficiently pleading ut her on

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37 notice that Mediport was an independent contractor. 6

Generally, courts do not consider anything beyond the face of the complaint and documents attached thereto when ruling on a motion to dismiss. Kennedy, 385 F. Supp. 3d at 1336; see also Fin. Sec. Assurance, Inc. v. Stephens, Inc., 500 F.3d 1276, 1284 (11th Cir. 2007). Nevertheless, courts may consider a document not attached to the complaint where: (1) the plaintiffs complaint refers to the document; (2) the document is central to the plaintiffs claim; (3) its contents are not in dispute; and (4) the defendant attaches the document to its motion to dismiss. Heller, 191 F. Supp. 3d at 1361 (citing Fin. Sec. Assurance, Inc., 500 F.3d at 1284). The Court concludes that the cruise ticket contract is not central to sound[] Heller, 191 F. Supp. 3d at 1361 n.9 (citing Gentry, 2011 WL 4737062, at *5). Thus, the Court will not consider this document at the motion-to-dismiss stage. well-established agency principles contradict position. It has been widely held that the existence or scope of an agency relationship is not controlled by the parties use of descriptive labels. Witover v. Celebrity Cruises, Inc., 161 F. Supp. 3d 1139, 1149-50 (S.D. Fla. 2016) (quoting In re Brican Am. LLC Equip. Lease Litig., No. 10-md-02183, 2015 WL 235409, at *1 (S.D. Fla. Jan. 16, 2015) (holding -column Financing Agreements cannot trump a consistent pattern of behavior between the defendants)). Amended Complaint sufficiently alleges a claim of negligence under an apparent agency theory.

6 Silversea also relies on the language of the Tour Operator Agreement between Defendants indicating that Mediport was an independent contractor to further agreement during any of the relevant time periods in this action, it appears illogical to use the Tour Operator

Agreement as evidence that Plaintiff reasonably should have known at the time of the excursion that

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38 C. to Amend

Motion to Amend seeks leave to file a Third Amended Complaint after the amendment deadline. As such, the Court must first determine whether under Rule 16 to justify her delay in seeking to amend her pleadings. See Sosa, 133 F.3d at 1418 n.2, 1419; Remington, 2014 WL 505153, at *12.

Plaintiff explains that, on January 3, 2020, Silversea served supplemental discovery August 28, 2019,

request for production, including the Tour Operator Guidelines. ECF No. [44] at 2; ECF No. [44-3]. Plaintiff contends that the Tour Operator Guidelines contains language indicating that Plaintiff is an intended beneficiary of the agreement between Mediport and Silversea. Id. if she was an intended beneficiary of the agreement between [Defendants] Id. Thus, Plaintiff

filed the instant Motion on January 28, 2020, after receiving the Tour Operator Guidelines in Silversea , seeking to add an additional count for breach of contract as a third-party beneficiary.

Based on these facts, it is clear that Plaintiff could not have met the amendment deadline here, despite the exercise of reasonable diligence, because Silversea did not produce the Tour Operator Guidelines until January 3, 2020 well after the October 11, 2019, amendment deadline. See Sosa, 133 F.3d at 1418 (internal quotations omitted). The Court therefore concludes that the t would not have been discovered Donahay, 243 the pleadings after the Cour Remington, 2014 WL 505153, at *12.

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39 Having concluded that good cause exists, the Court next turns to the question of whether granting Plaintiff leave to amend would be futile.

be freely given. Crawford s Auto Ctr., Inc. v. State Farm Mut. Auto. Ins. Co., 945 F.3d 1150, 1162 (11th Cir. 2019) (quoting Hall v. United Ins. Co. of Am., 367 F.3d 1255, 1262 (11th Cir. 2004)); Fed. R. Civ. P. 15(a)(2). However, leave to amend need not be given if amendment would be futile. Bryant, 252 F.3d at 1163.

ill Burger King Corp. v. Weaver, 169 F.3d 1310, 1320 (11th Cir. 1999) (quoting Halliburton & Assoc., Inc. v. Henderson, Few & Co., 774 F.2d 441, 444 (11th Cir. 1985)); see Dysart v. BankTrust, 516 F. Appx 861, 865 (11th Cir. 2013) (same); St. Charles Foods, Inc. , 198 F.3d 815, 822- denies the plaintiff leave to amend a complaint due to futility, the court is making the legal conclusio Bill Salter Advert., Inc. v. City of Brewton, Ala., No. 07-0081-WS- B, 2007 WL 2409819, at *2 (S.D. Ala. Aug. 23, 2007). Thus, if the proposed amended pleading still could not withstand a motion to dismiss, leave to amend may be denied for futility. See Fla. Power & Light Co. v. Allis Chalmers Corp., 85 F.3d 1514, 1520 (11th Cir. 1996). Nevertheless, ts to deny leave to amend, the discretion of the district court is not Shipner v. E. Air Lines, Inc., 868 F.2d 401, 407 (11th Cir. 1989); see also Moore v. Baker, 989 F.2d 1129, 1131 (11th Cir. ing reason Ultimately he futility issue is concerned less with whether [a plaintiff] has otherwise stated a claim against the [defendant] than with

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40 whether, when all is said and done, he can do so. Silberman v. Miami Dade Transit, 927 F.3d 1123, 1133 (11th Cir. 2019).

grounds of futility. Mediport argues that granting Plaintiff leave to amend would be futile because the Third Amended Complaint would still be subject to dismissal due to the lack of personal jurisdiction over Mediport and because the proposed amendment nonetheless fails to state a claim for third-party beneficiary breach of contract. Silversea argues that permitting Plaintiff to file a Third Amended Complaint would be futile because the additional claim added in the Third Amended Complaint is time barred and does not relate back to the allegations in prior pleadings. are dispositive as to both Defendants, the Court will address them first.

To establish an action for breach of a third party beneficiary contract, a plaintiff must allege nifest intent of the contracting parties that the contract primarily and directly benefit the third party; (3) breach Found. Health v. Westside EKG Assocs. non-party is the specifically intended beneficiary only if the contract clearly expresses an intent to

primarily and directly benefit the third party or a class of persons to which that party belon Biscayne Inv. Grp., Ltd. v. Guarantee Mgmt. Servs., Inc., 903 So. 2d 251, 254 (Fla. 3d DCA 2005).

-defined class of readil Wills v. Royal Caribbean Cruises Ltd., No. 17-cv-21890, 2018 WL 4375075, at *3 (S.D. Fla. Sept.

13, 2018) (quoting Belik v. Carlson Travel Grp., Inc., 864 F. Supp. 2d 1302, 1312 (S.D. Fla.

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41 2011) he test is whether the parties to the contract intend that a third person be benefited by the contract, not whether a party to the contract is liable to a third person as a consequence of entering into the agreement. Networkip, LLC v. Spread Enters., Inc., 922 So. 2d 355, 358 (Fla. 3d DCA 2006) (citing Marianna Lime Prods. Co. v. McKay, 147 So. 264, 265 (1933)).

The Court concludes that Plaintiff is not a third- in the instant action clear or manifest intent of the contracting parties that the Found. Health, 944 So. 2d at 195. The proposed Third Amended Complaint alleges that Defendants clearly or manifestly intended for the primary and/or direct benefit and protection of Silversea passengers . . . participating in Mediport excursions, ECF No. [44-1] ¶ 83, based on the language in the agreement requiring that Mediport: (1) [P]rovide efficient, well-operated transfer and/or , id. ¶ 81; (2) [U]nderstand the requirements of these guidelines and provide ground/shore excursions that will enhance [Silversea] guests , id.; (3) [P]rovide . . . tours, products and related services . . . directly to [Silversea] Guests who desire [Mediport] services and who have paid for them as agreed, id. ¶ 82; (4) [F]urnish experienced, capable, trained, English-speaking staff to provide services to [Silversea] Guests and to comply with all laws and requirements id.; (5) Indemnify and hold harmless Silversea from any and all claims for losses, injuries, damages, made against Silversea arising out of any alleged - performance id.; Procure and maintain passenger liability insurance id.; (7) Provide its services to Silversea employees without charge in conjunction

with their escort duties id.; (8) Operate in full compliance with the Tour Operator Guidelines id. Appoint

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42 Secretary of State of the State of Florida as resident agent for service of all process or notice of any judicial proceedings id.

As Mediport correctly notes, the provisions quoted above do not demonstrate the clear or ourts have held that excursion contractor agreements similar to the Agreement here do not confer third-party beneficiary status upon plaintiff-guests. Serra-Cruz I, 400 F. Supp. 3d at 1361 (citing Thompson, 174 F. Supp. 3d at 1344; Aronson, 30 F. Supp. 3d 1379 at 1398). Upon review of the relevant cases addressing claims for third-party beneficiary breach of contract based on excursion contractor agreements, the Court agrees with the reasoning in Serra-Cruz I repeated use of the word guests in the Agreement does not refer to a clearly expressed well-defined class of readily identifiable persons that [the Agreement] intends to benefit Id. at 1362 (quoting Aronson, 30 F. Supp. 3d at 1398). Moreover, as in Serra-Cruz I, the consent to jurisdiction clause in the Tour See id.; ECF No. [44-2] at 4.

Furthermore, the Court declines to follow the reasoning in Steffan v. Carnival Corp., No. 16-cv-25295, 2017 WL 4182203, at *4-7 (S.D. Fla. Aug. 1, 2017), and Lienemann v. Cruise Ship Excursions, Inc., 349 F. Supp. 3d 1269 (S.D. Fla. 2018). In Steffan, the district court concluded that an excursion contractor agreement between a cruise line and an excursion operator was sufficient to establish personal jurisdiction over the foreign excursion operator and assert a viable claim for third-party beneficiary breach of contract. 2017 WL 4182203, at *7. Similarly, in Lienemann, which relied almost entirely on the reasoning in Steffan, the district court also concluded that an excursion contractor agreement established personal jurisdiction over the excursion contractor in a personal injury action asserting claims of negligence and third-party beneficiary breach of contract. 349 F. Supp. 3d at 1274. Importantly, however, in Steffan, the

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43 district court explicitly recognized that neither the cruise-line-defendant, nor the excursion-operator- -party beneficiary of the excursion contractor agreement. See

. . . Plaintiff continues to have a viable claim for third-party breach of contract against [the excursion operator], which has not been contested. The Court agrees with Carnival and Plaintiff, the [second amended complaint] offers sufficient factual allegations which Defendant has not challenged save one, brief statement in a footnote to show Plaintiff is an intended third-party beneficiary of the Steffan -party beneficiary to their agreement, the Court concludes that the circumstances presented in Steffan are distinguishable from the facts of the instant case.

Moreover s contention that the Tour Operator Guidelines guarantee safe is far too general. The contract was not designed to warranty the safety of all cruise passengers. Gayou, 2012 WL 2049431, at *11 (citing Gentry, 2011 WL 4737062, at *8 (cruise passengers breach of contract claim fails unless there is express provision guaranteeing safe passage; passengers remedy, if any, lies in negligence); Joseph v. Carnival Corp., No. 11-20221-CIV, 2011 WL 3022555, at *2 (S.D. Fla. July 22, owner . . . is not an insurer of its passengers Young v. Carnival Corp., No. 09-21949- CIV, 2011 WL 465366, at *3 (S.D. Fla. Feb. 4, e a guarantee that no harm will befall plaintiff (citation omitted)));

see also Serra-Cruz I, 400 F. Supp. 3d at 1363; Heller, 191 F. Supp. 3d at 1365 (citing Ash, 2014

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44 WL 6682514, at *10 (finding allegation substantially similar to Plaintiffs insufficient); Aronson, 30 F. Supp.).

Further, the allegation that Defendants included the Tour Operator Guidelines to ensure the protection of Silversea passengers also does not adequately plead that [Defendants] intended to primarily and directly Plaintiff because even if the contract contains this language, a breach of contract claim for passengers must be based on an express provision in the contract guaranteeing safe passage, which Plaintiff has not alleged. Lapidus I, 924 F. Supp. 2d at 1361 (citing Gayou, 2012 WL 2049431, at *11 (dismissing third-party beneficiary claim where contract stated only Gentry, 2011 WL 4737062, at *8 (passengers only remedy is in negligence unless passengers contract of carriage guarantees safe passage) (collecting cases)).

In addition, to establish a claim for third- oth contracting parties must intend to benefit third parties; it is insufficient if only one party unilaterally intends to benefit some third party. Belik, 864 F. Supp. 2d at 1312 (citing Fla. Power & Light Co. v. Rd. Rock, Inc., 920 So. 2d 201, 203 (Fla. 4th DCA 2006)). Here, however, any contractual la -party beneficiary claim,

Defendants. This is insufficient to assert a third-party beneficiary breach of contract claim.

As explained above, intent to benefit the third party must be mutual, specific, and clearly expressed in order to endow a third-party beneficiary with a legally Thompson, 174 F. Supp. 3d at 1344 (quoting Hawaiian Airlines, Inc. v. AAR Aircraft Servs., Inc., No. 14-cv-20560, 167 F. Supp. 3d 1311, 1319, 2016 WL 867116, at *5 (S.D.

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45 Fla. Mar. 7, 2016)); see also Aronson, 30 F. Supp. No such legally enforceable right can be alleged here because Defendants did not enter into the Tour Operator Agreement with the intent of benefitting . As su third-party beneficiary breach of contract in the Third Amended Complaint must

necessarily fail.

Accordingly IV. CONCLUSION

Accordingly, it is ORDERED AND ADJUDGED as follows:

1. ECF No. [35], is GRANTED. Defendant Mediport

Services is DISMISSED from this action. 2. ECF No. [42], is DENIED. 3. ECF No. [32], is DENIED. 4. Motion for Leave to File Third Amended Complaint, ECF No. [44], is

DENIED. DONE AND ORDERED in Chambers at Miami, Florida, on February 25, 2020.

_____ BETH BLOOM UNITED STATES DISTRICT JUDGE Copies to: Counsel of Record