UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 0:20-cv-21481-KMM

Paul Turner, on his own behalf and on behalf of all other similarly situated passengers aboard the Costa Luminosa,

Plaintiffs,

v.
COSTA CROCIERE S.P.A., and COSTA CRUISE LINES INC.,

Defendants.
_____/

DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 8 AND 12(b)(6)

Respectfully submitted,

Catherine J. MacIvor

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Defendants, Costa Crociere S.p.A. ("Costa Crociere") and Costa Cruise Lines, Inc. ("CCL"), respectfully request this Honorable Court to enter an Order dismissing Plaintiff's Complaint pursuant to Federal Rules of Civil Procedure 8 and 12(b)(6) and state:

I. ISSUES BEFORE THE COURT

Plaintiff brought a five count complaint against Defendants, Costa Crociere and CCL for negligence, negligent infliction of emotional distress ("NIED"), intentional infliction of emotional distress ("IIED"), misleading advertising under Florida Statute § 817.41 ("FMA") and negligent misrepresentation. [DE 1]. Plaintiff's Complaint cannot survive dismissal for a number of reasons.[1] As an initial matter, CCL is entitled to dismissal *with prejudice* because there are no allegations in the Complaint concerning CCL's purported tortious conduct. Class allegations should also be dismissed *with prejudice* because they are barred under the Contract[2] that Plaintiff accepted. Plaintiff's Complaint must also be dismissed as noncompliant with Rule 8 and legal authorities barring shotgun pleadings. Additionally, Plaintiff has failed to, and cannot, allege the essential elements of his negligence, IIED, NED, FMA and negligent misrepresentation claims and he improperly alleged entitlement to punitive damages.

II. RELEVANT FACTS

Plaintiff brought this putative class action despite the fact that he accepted the terms and conditions of Costa Crociere's Contract before boarding his March 5, 2020 cruise and after receiving five (5) confirmations from Costa Crociere referring him to the web page on the Costa Crociere website where he could become meaningfully informed of the terms and conditions of the Contract. [Declaration of Ruben Perez ("Perez Dec."), DE 17-1, ¶¶ 11-42].

A. Plaintiff Accepted Costa Crociere's Passage Ticket Contract

On November 17, 2019, Plaintiff reserved a ten (10) day cruise on the Costa *Luminosa* on Costa Crociere's website ("Website"). *Id.* at ¶ 21, Ex. 2]. The cruise was scheduled to commence

[1] Defendants have also contemporaneously moved to dismiss based on *forum non conveniens.*

[2] The Court may consider this undisputed document, central to and referenced in the Complaint. *See, e.g., Brooks v. Blue Cross & Blue Shield of Fla., Inc.,* 116 F.3d 1364, 1369 (11th Cir.1997) ("Where the plaintiff refers to certain documents in the complaint and those documents are central to the plaintiff's claim, then the Court may consider the documents part of the pleadings for purposes of Rule 12(b)(6) dismissal."). *See Meadors v. Carnival Corp.,* 281 F. Supp. 3d 1304, 1307 (S.D. Fla. 2017) (although not attached to the complaint, ticket contract was incorporated by reference and deemed central to plaintiff's breach of contract claim).

on March 5 in Ft. Lauderdale and end on March 25, 2020 in Venice, Italy. *Id.*. Before paying a $500.00 deposit for his cruise, Plaintiff could not have completed his reservation without first checking a box indicating his acceptance of the terms and conditions of the Contract, which were available for his review via hyperlink before he accepted them. *Id.* ¶¶ 12-21, 32, Ex. 8. Shortly after reserving the cruise, Costa Crociere's system automatically generated a confirmation reflecting the $500.00 deposit and again referred Plaintiff to the webpage for the Contract on the Website. *Id.* ¶¶ 21, 33, Exs. 2, 8. On December 6, 2019, Plaintiff paid the balance of his cruise fare and received another confirmation reflecting that the balance had been paid. *Id.* ¶ 34, Exs. 8, 3. Between the time Plaintiff reserved his cruise and boarding, Costa Crociere sent Plaintiff a total of five (5) confirmations on the following dates: November 17, 2019, December 7, 2019, February 3, 2020, February 15, 2020, and February 27, 2020. *Id.* ¶¶ 21, 23, 31-36, Exs. 2-6. Each confirmation referred Plaintiff to the webpage where he could read the terms and conditions of the Contract on the Website. *Id.*

On February 15, 2020, after having completed the web-check-in process, Costa Crociere's system sent Plaintiff an email with a link to the online version of the terms and conditions of the Contract, stating that they must be accepted before the cruise ticket may be downloaded. *Id.* ¶¶ 24-28, 35, Exs. 7-8. In order to open the Contract from the email, the guest must check a box in the email affirming, "I have read and accept the above mentioned Terms and Conditions in their entirety." *Id.* ¶¶ 24-28, 36-37, Exs. 7-9. Plaintiff accepted the terms and conditions of the Contract prior to downloading his cruise ticket. *Id.* A cruise ticket is required to board all Costa Crociere vessels. *Id.* ¶ 37.

B. Costa Crociere's Cruise Ticket and Contract

At the top of the first page of the Cruise Ticket, Plaintiff's booking number appears. [Perez Dec., DE 17-1, ¶ 38, Ex. 9 (Cruise Ticket), p. 1]. Directly under the booking number, it states "IMPORTANT NOTICE" in capital letters and blue font. *Id.* This notice is followed by the following statement:

> PLEASE READ THIS TICKET IN FULL UPON RECEIPT AS IT LIMITS YOUR LEGAL RIGHTS
> In accepting this ticket, Guests agree to be bound by all of its terms including the limitations of the Guests's rights. Each Guest should carefully examine the ticket, especially the section noted "General Conditions Of Passage Ticket Contract" located on pages 4 – 7 of this document.

Id.

The Contract appears on pages 4-7 of the Cruise Ticket. *Id.,* Ex. 9 (Cruise Ticket), pp. 4-7. At the top of the first page of the Contract, there is a notice in blue font stating: "Important notice: this is your passage ticket contract. Read it carefully as it governs your legal rights. Pay particular attention to paragraphs 1 through 9 which limit the carrier's liability and your right to take legal action." *Id.,* ¶ 39, Ex. 9 (Cruise Ticket), p. 4, ¶ 2. Directly under the notice, the Contract provides: "By accepting or using this ticket, you, the Guest, acknowledge, accept and agree to all of its terms and conditions. Certain provisions are highlighted to call your attention to them but all provisions are important and binding upon you. The Carrier undertakes to transport the Guest and the Guest's baggage only under the following conditions, which the Guest acknowledges and undertakes to comply with fully." *Id.* The Contract includes a class action waiver in paragraph 9, which states:

> **9. WAIVER OF CLASS OR REPRESENTATIVE ACTIONS**
>
> This contract provides for the exclusive resolution of disputes through individual legal action on each Guest's own behalf instead of through any class or representative action. Even if the applicable law provides otherwise, Guest agrees that any arbitration or lawsuit against carrier whatsoever shall be litigated by the Guest individually and not as a member of any class or representative action, and the Guest expressly agrees to waive any law entitling him/her to participate in a class or representative action.

Id. ¶ 41, Ex. 9 (Cruise Ticket), p. 5, ¶ 9.

III. LEGAL STANDARDS

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to "state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678 (2009). "While a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitle[ment] to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atlantic Corp. v. Twombly,* 550 U.S. 545, 555 (2007) (internal citation omitted; alteration in original). "Conclusory allegations, unwarranted factual deductions or legal conclusions masquerading as facts will not prevent dismissal." *Davila v. Delta Air Lines, Inc.,* 326 F.3d 1183, 1185 (11th Cir. 2003). Finally, a court is not required to "'accept as true allegations that contradict matters properly subject to judicial notice.'" *In re Gilead Scis. Sec. Litig.,* 536 F.3d 1049, 1055 (9th Cir. 2008) (citation omitted). In addition to the requirements of *Twombly, Iqbal,*

and Rules 8(a) and 12(b)(6), fraud claims are subject to the pleading standards of Rule 9(b).[3] *See U.S. ex. rel. Clausen v. Lab. Corp. of Am., Inc.,* 290 F.3d 1301, 1309-10 (11th Cir. 2002); *Gayou v. Celebrity Cruises, Inc.,* 2012 WL 2049431, at *3 (S.D. Fla. June 5, 2012).

IV. DISMISSAL OF CLASS ACTION ALLEGATIONS *WITH PREJUDICE* IS REQUIRED

A. Courts Enforce Class Action Waivers

Contractual class action waiver provisions have been enforced by the United States Supreme Court and the Eleventh Circuit in the context of arbitration. *See Am. Express Co. v. Italian Colors Restaurants,* 570 U.S. 228, 235-36 (2013); *Nitro-Lift Techs., LLC v. Howard,* 568 U.S. 17, 20 (2012); *AT&T Mobility LLC v. Concepcion,* 563 U.S. 333, 344-52 (2011); *Pendergast v. Sprint Nextel Corp.,* 691 F.3d 1224 (11th Cir. 2012); *Cruz v. Cingular Wireless, LLC,* 648 F.3d 1205, 1207(11th Cir. 2011); *Jenkins v. First Am. Cash Advance of Georgia, LLC,* 400 F.3d 868, 878 (11th Cir. 2005) (determining that a class action waiver had no effect on the substantive rights of the parties and therefore the waiver was valid).

Class action waivers in cruise ticket contracts have also been ruled enforceable in the Southern District of Florida. *See Caretta v. Royal Caribbean Cruises, Ltd,* 343 F. Supp. 3d 1300, 1303 (S.D. Fla. 2018) (Ungaro, J.); *McIntosh, v. Royal Caribbean Cruises, Ltd.,* 2018 WL 1732177, *3 (S.D. Fla. Apr. 10, 2018) (King., J.); *DeLuca v. Royal Caribbean Cruises, Ltd.,* 244 F.Supp.3d 1342, 1349 (S.D. Fla. 2017) (King, J.); *Lankford v. Carnival Corp.,* 2014 WL 11878384, *4 (S.D. Fla. July 25, 2014) (Altonaga, J.) "While the waiver modifies the form of action a plaintiff may pursue, a limitation on use of the class action device does not affect substantive liability, because 'the Rules Enabling Act forbids interpreting Rule 23 to abridge, enlarge or modify any substantive right ....'." *Wal–Mart Stores, Inc. v. Dukes,* 564 U.S. 338, 367 (2011); *Crusan v. Carnival Corp.,* 13-cv-20592-KMW [ECF No. 41] (Mar. 11, 2014) (Williams, J.) (*see also* Mot., Ex. B 17 [ECF No. 262–2] ("I think the waiver is enforceable. I do not think it affects the substantive rights of the parties, where they don't still have the capacity to recoup their damages ....")). The class action waiver should be enforced and the class action allegations dismissed *with prejudice*.

[3] Rule 9(b) is satisfied if the plaintiff pleads "(1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud." *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1202 (11th Cir. 2001).

1. The Class Action Waiver Was Reasonably Communicated to Plaintiff

Under the general maritime law, the terms of cruise ticket contracts that are reasonably communicated to passengers are "presumptively enforceable" absent a "strong showing" from plaintiffs that enforcement of the terms would be unreasonable. *See Carnival Cruise Lines, Inc. v. Shute,* 499 U.S. 585, 590-91, 595 (1991). Because it is a procedural device only, like a forum-selection clause, courts determine the enforceability of a class action waiver in a cruise ticket contract using the same reasonable communicativeness test. *Palmer v. Convergys Corp.,* 2012 WL 425256, *3 (M.D. Ga. Feb. 9, 2012); s*ee Estate of Myhra v. Royal Caribbean Cruises Ltd.,* 695 F.3d 1233, 1244 (11th Cir. 2012) (quoting *Krenkel v. Kerzner International Hotels Ltd.,* 579 F.3d 1279, 1281 (11th Cir. 2009)). "The test involves a two-pronged analysis of: (1) the physical characteristics of the clause in question; and (2) whether the plaintiff had the ability to become meaningfully informed of the contract terms." *See Deluca,* 244 F.Supp.3d at 1346 (citing *Estate of Myhra,* 695 F.3d at 1244). Each prong is easily met here and Costa Crociere's Contract has been previously held to satisfy the reasonable communicativeness test. *Santos v. Costa Cruise Lines, Inc.,* 91 F. Supp.3d 372, 377-78 (E.D.N.Y. 2015).

First, the limitations provision is clear and conspicuous. The Contract is a several-page document that each passenger must acknowledge and accept before boarding the vessel. [Perez Dec., DE 17-1, ¶ 3, 37, Ex. 9]. On the first page of the Contract there is a prominent notice in blue font and at the top of the page informing all passengers that the Contract contains important terms and conditions. *Id.,* Ex. 9 at p. 4. The guest's attention is specifically directed to carefully read paragraphs 1-9 of the Contract that follow, including the class action waiver found in paragraph 9. *Id.* at p. 4. The heading of paragraph 9 also alerts the reader to its contents *Id.* ("WAIVER OF CLASS OR REPRESENTATIVE ACTIONS"). *Nash v. Kloster Cruise A/S,* 901 F.2d 1565, 1567-68 (11th Cir.1990) (affirming finding of reasonable communicativeness where first page of contract directed passengers to specific paragraphs that contained limitations provision); *see also Krenkel,* 579 F.3d at 1281–82 (holding that a forum-selection provision that was "not hidden or ambiguous," was set apart in a separate paragraph, and contained "plain" language satisfied the reasonable communicativeness test). At all relevant times, the terms and conditions of the Contract were also publicly available on Costa Crociere's website. [Perez Dec., DE 17-1, ¶¶ 3, 11, 42].

Second, Plaintiff also had the ability to "become meaningfully informed" of the limitations provision to satisfy the second prong of the reasonable communicativeness test, which concerns

not whether Plaintiff actually read the Contract, but whether he had the *opportunity* to do so. *See Myhra,* 695 F.3d at 1246 n.42 ("We note that whether the Myhras chose to avail themselves of the notices and to read the terms and conditions is not relevant to the reasonable communicativeness inquiry."); *Krenkel,* 579 F.3d at 1281; *Hayes v. Royal Caribbean,* 2019 WL 1338574, *3 (S.D. Fla. Mar. 22, 2019) (Moore, J.) (ruling that plaintiff was able to become meaningfully informed of the ticket contract's terms where allegations about the contract were in the complaint). Plaintiff did not simply have the opportunity to become meaningfully informed, he acknowledged and accepted the terms and conditions of the Contract before boarding and his Complaint includes allegations about the Contract. [DE 1, ¶¶ 10, 58; Perez Dec., DE 17-1, ¶¶ 24-28, 30-41, Ex. 9]. Costa Crociere also sent five (5) separate communications to his email address before the cruise requesting him to review the Contract and providing the terms and conditions may be reviewed. [Perez Dec., DE 17-1, ¶¶ 21, 23, 30-37, Exs. 2-6]. As explained above, the Contract contains overarching warnings specifically directing all passengers, including Plaintiff, to the class action waiver provision of the Contract. Since Plaintiff incorrectly claims it violates U.S. law, *see infra,* it is uncontroverted in the Complaint that the Contract, including the class action waiver provision, was reasonably communicated to Plaintiff prior to cruising. This Court should dismiss the class action allegations *with prejudice*.

2. The Class Action Waiver in the Contract Does Not Limit Defendants' Liability

Plaintiff alleges that the class action waiver is unenforceable because it attempts to limit Defendants' liability in violation of 46 U.S.C. § 30509(a) (the "Act"), citing *Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1335-36 (11th Cir. 1984).[4] [DE 1, ¶ 58 and n. 1]. This argument has been repeatedly rejected by courts in cases involving almost identical class action waivers.

First, Plaintiff's allegation rests on a mistaken premise about the Act's scope. Under the Act, a contract provision that (a) limits the liability of the shipowner for personal injury or (b) limits the right of the passenger to a trial by a competent court is void. *Id.* The class action waiver here does neither; rather, it merely requires Plaintiff, and any others who may bring claims, to prosecute actions in their own names. Courts in this District uniformly recognize that a class action waiver does not infringe on a substantive right to bring an individual claim. *Palmer,* 2012 WL 425256 at

[4] *Kornberg,* a case involving an express liability waiver unlike the present case, simply held that disclaimers of liability for negligence, unseaworthiness, or to provide accommodations were unenforceable in light of the predecessor statute to 46 U.S.C. § 30509 (2018).

*3 ("Class action waivers, like many other contractual terms, are proper subjects for contractual bargaining because there is no substantive right associated with class action litigation"); *McIntosh,* 2018 WL 1732177 at *2; *DeLuca,* 244 F. Supp.3d at 1345-48; *Lankford v. Carnival Corp.,* 2014 WL 11878384, *4; *Crusan,* No. 13-cv-20592 [ECF No. 41]. The class action waiver does not affect Plaintiff's substantive right to bring claims against Defendants and it does not limit Defendants' liability. *See Palmer,* at *3. The Act simply does not apply.

Second, Plaintiff argues for a "modification" of existing law, noting that the Eleventh Circuit has not yet ruled on the enforceability of this particular class action waiver. *Id.* But there is *no* material difference between the class action waiver that Judge King enforced in *Deluca* and the present one. *Compare* 244 F.Supp.2d at 1344 with [Perez Dec., DE 17-1, Ex. 9, ¶ 9].

Finally, Plaintiff incorrectly likens the class action waiver to an "exculpatory" clause to avoid negligence, and alleges that because he pleaded purported intentional conduct, the class action waiver should not be enforced. *Id.,* n. 2. Not so. Plaintiff's counsel made the identical allegations in the *Deluca* class action complaint and they were *rejected*. *See Deluca,* No. 16-cv-20689 [ECF 1, ¶ 30, n. 1-2]. The *same lead Plaintiff's counsel* from the *same law firm* has repeatedly and unsuccessfully urged courts in this District to reject nearly identical class action waivers. *See e.g., McIntosh,* 2018 WL 1732177 at *2; *DeLuca,* 244 F. Supp.3d at 1345-48; *Crusan,* Case No. 13-cv-20592 [ECF No. 41, pp. 17-18] (Mar. 11, 2014). This Court should enforce the class action waiver.

B. The Class Action Waiver Should Be Enforced by Motion to Dismiss

Finally, the enforceability of a procedural device such as the class action waiver should be resolved by way of a motion to dismiss. *See, e.g., Cruz*, 648 at 1216; *Caretta,* 343 F. Supp. 3d at 1303 (Ungaro, J.) (granting motion to dismiss Florida Deceptive and Unfair Trade Practices Act putative class action allegations with prejudice based on class action waiver in cruise ticket contract); *McIntosh,* 2018 WL 1732177, *3 at (King., J.) (granting motion to dismiss putative class action allegations involving personal injuries sustained as a result of a hurricane based on class action waiver); *DeLuca,* 244 F.Supp.3d at 1349 (King, J.) (granting motion to dismiss class allegations in case involving alleged physical and emotional injuries to passengers encountered during a winter storm based on the class action waiver in the cruise ticket contract);[5] *Palmer,* 2012

[5] In the *DeLuca* case, the same counsel representing Plaintiff in the present action <u>*agreed*</u> that the court should rule on the class action waiver at the motion to dismiss stage. *See DeLuca,* 244 F.Supp.3d at 1344-1345.

WL 425256 at *3 (class action waiver is a litigation device similar to venue provisions). Plaintiff's class action allegations must be dismissed with prejudice.

V. DISMISSAL IS WARRANTED AS TO ALL (COUNTS I-V)

A. Plaintiff's Complaint Should Be Dismissed as a Shotgun Pleading

In *Weiland v. Palm Beach Cty. Sheriff's Office,* the Eleventh Circuit reasserted its thirty-year disdain for shotgun pleadings of the type alleged in Plaintiff's Complaint, which includes three of the four categories of shotgun pleadings identified in *Weiland*. 792 F.3d 1313, 1321 (11th Cir. 2015). *See also Thompson v. Carnival Corp*., 174 F. Supp. 3d 1327, 1340-45, n. 10 (S.D. Fla. 2016) (Moore, J.) (comparing proclivity for maritime plaintiffs to file shotgun pleadings as resembling an automotive assembly line resulting in pleadings that are "more jalopy than Jaguar").

First, the Complaint "commits the sin of not separating into a different count each cause of action or claim for relief." *Id.* at 1322. Plaintiff's negligence claim includes thirty-four (34) separate subparts which purportedly constitute a negligence claim. [DE 1, ¶ 61(a-hh)]. Some subparts constitute completely separate causes of action, others do not exist under general maritime law, others are redundant and others yet are so non-descript that it is difficult to determine what they are and whether they are legally viable. Shoehorning thirty-four (34) separate, vaguely pleaded, legally deficient and factually bereft subparts into one negligence count fails to comply with Eleventh Circuit precedent and Rule 8. *Genesis NYC Enterprises, Inc. v. JAI Grp., SA,* 2016 WL 1588397, at *3 (S.D. Fla. Apr. 20, 2016) (Moore, J.) (dismissing complaint because it was a shotgun pleading and noting: "In its current state, the Complaint undoubtedly places an onerous burden on the Court's ability to discern the specific bases of the claims against each defendant).

The Complaint also improperly asserts multiple claims against multiple defendants without specifying which of the Defendants are responsible for which acts or omissions. *Weiland,* 792 F.3d at 1323. Plaintiff alleges the legal conclusion that venue is proper as to Costa Crociere and CCL because Costa Crociere does business at its wholly owned subsidiary's address in Broward County, Florida and thereafter refers to both Costa Crociere and CCL without distinguishing between them.[6] [DE 1, ¶¶ 2-4]. Plaintiff made no attempt to assert particular claims against a specific

[6] CCL should be dismissed *with prejudice* because there are no allegations concerning CCL's tortious conduct in the Complaint. The Contract provides that Costa Crociere is the owner and operator of the *Luminosa* and provided officers, staff, and crew. [DE 1, ¶¶ 10, 58; Perez Dec., ¶ 37, Ex. 9 (Definitions), at p. 1]. Costa Crociere is also defined as the "Carrier" and CCL is the sales and marketing agent that issues passage ticket contracts for Costa Crociere. *Id.* and ¶ 4(iv).

Defendant in each count or to allege which Defendant committed what act or omission as to each claim for relief.

Finally, the Complaint is almost entirely bereft of any allegations specific to Plaintiff, his alleged injuries and his purported damages and is rife with legal conclusions without factual support. *See e.g.,* [DE 1 ¶¶ 10, 12, 46, 48-58, 60-68, 72-78, 84-85, 88-90]. It is difficult to tell from the Complaint whether Plaintiff had any actual injuries or whether he simply claims he suffers from emotional injuries due to *exposure to a risk of injury* because these injuries were pleaded as "and/or" injuries that include a "virus." For example, in paragraph 61, Plaintiff simply alleges the conclusion that he was "injured" by 34 different alleged breaches of duty. *Id.* That conclusory allegation is followed by paragraph 63, which alleges injuries as ambiguously as possible. Finally, Plaintiff alleges in paragraph 64 that Plaintiff was *exposed to an actual risk of physical injury*, which purportedly resulted in a laundry list of alleged symptoms "and/or" Plaintiff contracted the coronavirus."[7] *Id.* at ¶ 67(a)-(b). Such vague, conclusory, and contradictory allegations are repeated throughout Plaintiff's claims and should not be accepted as true for purposes of ruling on this motion. *See Id.* at ¶¶ 68, 73(a)-(b), 76, 78(a)-(b), 85, 90. Although the Court is required to accept all of the allegations in the Complaint as true for purposes of this motion, this tenet is inapplicable to factual and legal conclusions. *Iqbal,* 556 U.S. at 678. If the legal and factual conclusions are excluded, Plaintiff's Complaint must be dismissed.

As a sales and marketing agent, CCL bears no substantive liability to Plaintiff as a passenger. *See Pearl Cruises v. Cohon,* 728 So. 2d 1226, 1227 (Fla. 3d DCA 1999) (dismissing complaint and noting that the dispute was between Costa Crociere and its passenger and not the Florida marketing subsidiary); *Kisling v. Home Lines Cruises, Inc.,* 1990 WL 128926, at *2, fn.1 (S.D. N.Y. Aug. 30, 1990) (court dismissed the defendant ticket agent from the suit under the theory that the ticket agent was not liable for any injuries caused by the negligence of the vessel's owner as "[a]n agent cannot be held liable for the negligent acts of its principal."). Finally, when a plaintiff claims fraud by several defendants, "the complaint should contain specific allegations with respect to each defendant; generalized allegations 'lumping' multiple defendants together are insufficient." *W. Coast Roofing & Waterproofing, Inc. v. Johns Manville, Inc.,* 287 F. App'x. 81, 86 (11th Cir. 2008). Plaintiff has completely failed to do so here. [DE 1, ¶¶ 2-4].

[7] Also, for example, Plaintiff fails to allege in a non-conclusory manner with supporting factual allegations whether he contracted COVID-19 or whether he was merely *exposed to potentially becoming ill* from a "virus" that is presumably COVID-19. [DE 1, ¶¶ 67, 73, 78, 85, 90]. Additionally, the Complaint alleges a panoply of damages that are dubious in this case (e.g., disfigurement) and without alleging that *Plaintiff* actually experienced *any* of these damages. [DE 1, ¶¶67, 73, 78, 85, 90].

B. Plaintiff Failed to State a Claim for Negligence Under General Maritime Law

A cruise ship operator is "not liable to passengers as an insurer," but only liable for its negligence. *Malley v. Royal Caribbean Cruises Ltd.,* 713 F. App'x 905, 907 (11th Cir. 2017) (citation omitted). To avoid dismissal, a plaintiff must allege that "(1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Chaparro Carnival Corp.,* 693 F.3d 1333, 1336 (11th Cir. 2016). A cruise ship operator owes its passengers "the duty of exercising reasonable care under the circumstances of each case." *Torres v. Carnival Corp.,* 635 F. App'x 595, 600–01 (11th Cir. 2015) (citation omitted). This standard of care "requires, as a prerequisite to imposing liability, that the carrier 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). "Further, a cruise ship operator's duty of reasonable care includes a duty to warn passengers of dangers of which the carrier knows or should know, but which may not be apparent to a reasonable passenger." *Taiariol v. MSC Crociere, S.A.,* 2016 WL 1428942, at *3 (S.D. Fla. Apr. 12, 2016) (citation and internal quotation marks omitted). Where a danger is open and obvious, there is no duty to warn. *Smith v. Royal Caribbean Cruises, Ltd.,* 620 F. App'x 727, 730 (11th Cir. 2015).

First, the fact that Plaintiff has attempted to allege thirty-four different claims in a single negligence count that also incorporates fifty-eight (58) other paragraphs requires the dismissal of the Complaint for the reasons set forth above in section V(A). Second, the remainder of the negligence claim is simply a series of formulaic legal conclusions that the Court should not accept as true. [DE 1, ¶¶ 62-67]. *See* section III *supra.*

Plaintiff's negligence claim must also be dismissed for failure to properly allege causation. The Complaint is vague, conclusory, inconsistent and lacks facts that would indicate whether Plaintiff became ill from COVID-19 (as opposed to any other "virus") or whether he claims injury from a "risk" of exposure to COVID-19. If he became ill with COVID-19, when did he become ill? What were his symptoms? When did the symptoms commence such that Defendants' failure to warn could have plausibly been a proximate cause of Plaintiff's injury?

In *Brown v. Oceania Cruise, Inc.,* the court dismissed a negligence claim because the complaint lacked details as to the injury and how it was allegedly incurred by the plaintiff. In that case, the same injuries could have been caused in a manner for which the defendant could not be

liable. 2017 WL 10379580, **3-4 (S.D. Florida Nov. 20, 2017). Like the *Brown* plaintiff, Plaintiff alleges in paragraph 62 that he contracted the "coronavirus," but the pleading fails to provide any facts to plausibly tie causation to Defendants since, for example, Plaintiff may have contracted the illness prior to boarding or from another *asymptomatic*[8] passenger. There are no allegations to point to the essential element of causation as to Defendant's purported liability. *Id.* (dismissing negligence claim because the court was left to guess whether the excursion company's conduct (of which defendant was alleged to have notice) proximately caused plaintiff to fall, or whether some other reason—which could completely absolve defendant of liability—caused the accident). Because the causal link between Plaintiff's alleged injuries and Defendants' alleged negligence is so attenuated, the claim should be dismissed.

C. Plaintiff's Intentional Infliction of Emotional Distress Claim Should Be Dismissed

Count III for alleged IIED, must be dismissed with *prejudice* because Plaintiff has failed to, and cannot, adequately allege the necessary elements of the claim. [DE 1, ¶¶ 74-78]. "Courts sitting in admiralty typically look to the standards set out in the Restatement (Second) of Torts § 46 (1965) as well as state law to evaluate claims for [IIED]. *Wu v. NCL (Bahamas) Ltd*., 2017 WL 1331712, *2 (Apr. 11, 2012) (citing *Wallis v. Princess Cruises, Inc.,* 306 F.3d 827, 841 (9th Cir. 2002) (citations omitted) (noting that since there is no maritime law concerning IIED claims, courts regularly employ the Restatement (Second) of Torts to evaluate IIED claims in federal maritime cases); *York v. Commodore Cruise Line, Ltd.,* 863 F. Supp. 159, 164 (S.D.N.Y. 1994) *Metro. Life Ins. Co. v. McCarson,* 467 So. 2d 277, 278 (Fla. 1985). To state a claim for IIED, the plaintiff must establish: (1) deliberate or reckless infliction of mental suffering; (2) by outrageous conduct; (3) which conduct must have caused the suffering; and (4) the suffering must have been severe. *Garcia v. Carnival Corp.,* 838 F.Supp.2d 1334, 1339 (S.D. Fla. 2012) (Moore, J.). Defendant's conduct must be "[s]o outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Lockhart v. Steiner Mgmt. Serv., LLC,* 2011 WL 1743766, *3 (S.D. Fla. May 6, 2011). Notably, the cause of action for IIED is "sparingly recognized by the Florida courts."

[8] *See e.g., Leah F. Moriarty et al., Public Health Responses to COVID-19 Outbreaks on Cruise Ships — Worldwide, February–March 2020, Centers for Disease Control & Prevention: Morbidity & Mortality Wkly. Rep.* (March 27, 2020), https://www.cdc.gov/mmwr/volumes/69/wr/mm6912e3.htm (noting that 46.5% of the passengers and crew on the Diamond Princess tested were asymptomatic).

Vamper v. United Parcel Serv., Inc., 14 F. Supp. 2d 1301, 1306 (S.D. Fla. 1998) (King, J.).

Whether the alleged conduct is outrageous enough to support an IIED claim is an initial matter of law for the judge, is not a question of fact for the jury. *Gandy v. Trans World Comp. Tech. Group,* 787 So. 2d 116, 119 (Fla. 2d DCA 2001). Further, the requisite standard for IIED is extremely difficult to meet under both Florida law and the general maritime law. *Wallis v. Princess Cruises, Inc.,* 306 F.3d at 842; *Golden v. Complete Holdings, Inc.,* 818 F. Supp. 1495, 1498 (M.D. Fla. 1993); *DeShiro, et al. v. Branch, et al.,* 1996 WL 663974, at *2 (M.D. Fla. Nov. 4, 1996). While there is no definitive example of what constitutes "outrageous conduct," Florida legal authorities on the subject have evinced an extremely high standard "as Florida courts have repeatedly found a wide spectrum of behavior insufficiently 'outrageous.'" *Brown v. Royal Caribbean Cruises, Ltd.,* 2017 WL 3773709, *3 (S.D. Fla. March 6, 2017).

The allegations in this case are strikingly similar to the allegations in *Brown.* As such, the *Brown* case is dispositive of Plaintiff's IIED claim because, just as in *Brown,* Plaintiff has also failed to allege the level of outrageousness required to survive dismissal *with prejudice*. In *Brown,* the plaintiff alleged that RCL knew of the presence of Legionnaires' disease as early as July 2015, and acted with deliberate and wanton recklessness in choosing not to advise passengers of the presence of the disease prior to the ship's departure from port. *Brown* at *2; *compare* DE 1, ¶¶ 12-15, 17, 26. Just as in the present Complaint, the *Brown* complaint also alleged that RCL's motivation in failing to advise passengers of the presence of the disease prior to the departure of the ship was to protect the RCL's economic interests, and that such conduct is outrageous, extreme, beyond the bounds of decency, and utterly intolerable in a civilized society. *Brown* at *2; DE 1, ¶¶, 74, 79. However, unlike the Plaintiff in the *Brown* case, as described more fully in section V(A) above, Plaintiff has not clearly alleged whether or not he became ill from COVID-19 or whether he simply feared he would become ill (and he has alleged both).[9] *Brown* at *2; DE 1, ¶78. The IIED claim is therefore facially deficient.

In addition to being facially deficient, the conduct alleged by Plaintiff fails to rise to the level

[9] In a paragraph challenging the forum-selection clause in the Contract, Plaintiff does allege that he and others similarly situated, suffer from "coronavirus," but the allegation is not a model of clarity as to Plaintiff's specific injuries, if any, particularly where the IIED claim refers to fear of *exposure* to the risk of injury "and/or" a laundry list of purported injuries including "disfigurement." [DE 1, ¶¶ 10(c), 78].

of outrageousness required by the Restatement (Second) of Torts and Florida state law. "Outrageous" conduct is that which "goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community." *Rubio v. Lopez,* 445 F. App'x. 170, 175 (11th Cir. 2011). In *Brown*, Judge Scola extensively analyzed the Restatement (Second) of Torts, § 46, cmt. d and decisions where "Florida courts have repeatedly found a wide spectrum of behavior insufficiently 'outrageous,'" including this Court's ruling in *Garcia v. Carnival Corp.* 838 F.Supp.2d 1334, 1339 (S.D. Fla. 2012), in which this Court found no outrageous conduct where crew members assaulted a cruise passenger and prevented her from leaving her room for a period of time. *See Brown* 2017 WL 3773709, at *3 (collecting cases);[10] *Garcia,* 838 F. Supp. 2d at 1334 (Moore, J.). Judge Scola ruled that even construing the facts in the light most favorable to plaintiff, RCL's alleged conduct did not go beyond all possible bounds of decency such that it could be regarded as "atrocious and utterly intolerable in a civilized community." *Brown* at *3 (citing *Rubio,* 445 F.App'x. at 175) (the allegations simply do not rise to the level of outrageousness required by the applicable case law). The same result is required here.

D. Plaintiff's Negligent Infliction of Emotional Distress Should be Dismissed

A NIED claim requires an adequately pled underlying claim of negligence, which is not the case here and for that reason alone this claim must be dismissed. *See Chaparro,* 693 F.3d at 1337. Additionally, a plaintiff seeking recovery for emotional harm due to the negligent acts of another must satisfy "the 'zone of danger' test." *Id.* at 1338; *Tassinari v. Key West Water Tours, L.C.,* 480 F. Supp. 2d 1318, 1320 (S.D. Fla. 2007) (Moore, J.) ("Claims of negligent infliction of emotional distress under maritime law of the United States must survive the zone of danger test."). That doctrine bars recovery for negligently inflicted emotional harm unless the plaintiff (i) "sustains a physical impact as a result of" the negligent act of a defendant, or (ii) is otherwise "placed in

[10] *See also, e.g., Wallis,* 306 F.3d at 842 (finding no outrageous conduct where crew member on cruise ship remarked in the plaintiff's earshot after her husband fell overboard that her husband was probably dead and that his body would be sucked under the ship, chopped up by the propellers, and would probably not be recovered); *Vamper,* 14 F. Supp.2d at 1306-07 (finding no outrageous conduct where defendants fabricated reckless driving charge against plaintiff, called him the "n" word, threatened him with termination, and physically struck him on ankle); *Blair v. NCL (Bahamas) Ltd.,* 212 F. Supp. 3d 1264, (S.D. Fla. 2016) (Seitz, J.) (finding failure to allege sufficiently outrageous conduct where plaintiff's child drowned in a pool advertised as "kid friendly," though lacking life guards, lifesaving equipment, and personnel prepared to respond to a drowning event).

immediate risk of physical harm by" that conduct. *Id.*; *Smith v. Carnival Corp.,* 584 F.Supp.2d 1343, 1354 (S.D. Fla. 2008) (Moore, J.) (quoting *Consol. Rail Corp. v. Gottshall,* 512 U.S. 532, 547-48 (1994) (holding that "those within the zone of danger can recover for fright, and those outside of it cannot.")).

Plaintiff's NIED claim should be dismissed because Plaintiff alleges he was "placed in an immediate *risk* of physical harm," which "included but is not limited to[ ] contracting coronavirus[11] and/or virus and/or medical complications arising from it and/or injury and/or death and/or severe emotional distress and/or psychological harms." [DE 1, ¶ 68] (emphasis added). The injuries alleged in this claim, "which [purportedly] *did cause* or *could have caused* serious physical, mental and/or emotional injury and/or illness" does not plausibly allege that Plaintiff actually sustained a "physical impact" from Defendants' purported negligent conduct; rather, Plaintiff alleges he was placed in an immediate risk of physical harm. [DE 1, 73] (emphasis added). Simply said, Plaintiff's shotgun and scattershot allegations make it impossible to determine whether (1) Plaintiff actually contracted *COVID-19* as opposed to a "virus" because fear from the risk of exposure to a "virus" is legally insufficient as a matter of law to state a claim for NIED.

In *Heinen v. Royal Caribbean Cruises LTD.,* the Eleventh Circuit upheld the dismissal of a NIED claim where each plaintiff suffered "physical and emotional damage," but still failed to specify their individual physical and emotional injuries from being exposed to hurricane force winds. "Rather, like the Plaintiff in this case, in shotgun fashion, the appellants ticked off a laundry list of injuries [ ] without specifying who suffered what." 2020 WL 1510290, *1 (11th Cir. 2020). In holding that the district court rightly dismissed their complaint for failure to state a claim for NIED, the Eleventh Circuit stated:

> For starters, the appellants failed to specify their individual physical and emotional harms. Although each appellant alleged that Royal Caribbean's delay caused them "physical and emotional damage," that threadbare allegation does not suffice without factual allegations in support. The only specific factual support for the appellants' threadbare allegations of harm comes in a combined paragraph listing what seems to be every possible injury imaginable. Among many others, the injury list includes claims of "injury about their body and extremities," "physical pain and suffering," "disfigurement," "aggravation of any previously existing conditions,"

[11] Coronaviruses are a large family of viruses, many of which can make people ill with sniffles or coughs. *See Strains of Coronavirus, WebMD,* https://www.webmd.com/lung/coronavirus-strains#1 (last updated May 5, 2020). SARS-CoV-2, which causes COVID-19, is one of several coronaviruses known to infect humans. *Id.*

> and "physical handicap." Yet the appellants still fail to identify which appellant suffered which injury.
>
> For example, is Mr. Heinen disfigured? Did Ms. Ruiz aggravate a pre-existing condition? Does Mr. Russell now have a physical handicap? Surely each appellant did not suffer every injury listed in the kitchen-sink paragraph the appellants add at the end. In any event, the complaint does not plausibly allege that they have done so. *See Iqbal,* 556 U.S. at 678–79. Because the appellants fail to connect their general allegations of "physical and emotional damage" with the specific facts they pleaded in bulk, we must ignore that threadbare assertion of harm. *See id.* And without sufficiently plausible allegations of harm, the appellants cannot state a claim.

Id. at *2 (emphasis added). Plaintiff's recitation of factual and legal conclusions and laundry list of alleged harms caused by risk of *exposure* to a "virus" or having contracted "a virus" is patently insufficient to state a claim for NIED.

The Supreme Court has ruled that Plaintiff must allege that he *contracted* COVID-19 or suffered an actual physical injury or else he cannot recover. *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 427 (1997) (a plaintiff cannot recover for emotional distress stemming from potential exposure to a disease "unless, and until, he manifests symptoms of a disease"). Allegations that Plaintiff allegedly suffered a physical impact through contact with an individual with COVID-19 (or the even more legally deficient allegation of fear of contact with someone with COVID-19) if Plaintiff did not contract COVID-19 is not actionable. *Negron v. Celebrity Cruises, Inc.,* 360 F.Supp.3d 1358, 1362 (S.D. Fla. 2018); *Tassinari,* 480 F.Supp.2d 1318 (S.D. Fla. 2007) (holding the same, and noting the rule's "beneficial public policy of placing an objective and easily applied restriction on frivolous claims"). Fear of risk of exposure to an illness is insufficient to survive a motion to dismiss a NIED claim as a matter of law. *See Negron,* at 1362-63 (The words "physical impact" do not encompass every form of "physical contact" and "do not include a contact that amounts to no more than an exposure"); *Metro-North*, 521 U.S. at 427. Plaintiff's NIED claim must be dismissed.

E. Plaintiff's Florida Misleading Advertising Claim Should Be Dismissed *with Prejudice*

Plaintiff's claim for FMA cannot survive a motion to dismiss. In order to state a claim for relief under Florida Statute § 817.41(1), Plaintiff must allege the elements of common law fraud in the inducement: (1) Defendants made a misrepresentation of a material fact; (2) Defendants knew or should have known of the falsity of the statement; (3) Defendants intended that the representation would induce Plaintiff to rely and act on it; and, (4) Plaintiff suffered injury in justifiable reliance

on the representation. *See Samuels v. King Motor Co. Of Ft. Lauderdale,* 782 So.2d 489, 495-496 (Fla. 4th DCA 2001)(addressing statutory definition of "misleading advertising" under Fla. Stat. § 817.40(5), as well as each element of common law fraud in the inducement); *see also Smith v. Mellon Bank,* 957 F.2d 856, 858 (11th Cir. 1992) ("In order to prove a violation of Section 817.41, Florida law requires the plaintiff to prove reliance on the alleged misleading advertising, as well as each of the other elements of common law fraud in the inducement"). A FMA claim therefore requires Plaintiff to establish "the 'who, what, when, where, and how' of the fraud." *Garfield v. NDC Health Corp.,* 466 F. 3d 1255, 1262 (11th Cir. 2006)); *see Ziemba,* 256 F. 3d at 1202. Plaintiff's FMA claim fails several times over and should be dismissed.

First, the FMA does not apply to the allegedly false communication at issue. Florida Statute § 817.41 provides in relevant part that it is "unlawful for any person to make or disseminate or cause to be made or disseminated before the general public of the state, or any portion thereof, any misleading advertisement." Fla. Stat. § 817.41(1) (emphasis added). By its plain terms, the FMA statutes do not encompass representations made by the seller directly to a consumer. *See DA Air Taxi LLC v. Diamond Aircraft Indus. Inc.,* 2009 WL 10668151, *5 (S.D. Fla. May 15, 2009) ("[I]nstead, the allegedly false or misleading representations must be 'disseminated before the general public of the state, or any portion thereof.'") (quoting § *see S.H. Inv. & Dev. Corp. v. Kincaid,* 495 So. 2d 768, 770–71 (Fla. 5th 1986) ("Although the representations made by the sales agent directly to the [plaintiffs] may have been fraudulent, that fraud is not encompassed by the provisions of section 817.40 or 817.41, which related to misleading advertising 'disseminated before the general public of the state, or any portion thereof.'").

The Complaint demonstrates that the e-mail that is the subject of Plaintiff's FMA claim was not an advertisement to the Florida general public, but rather a direct communication to booked customers. Paragraphs 18, 79-80 of the Complaint do not even allege that Plaintiff, a Wisconsin resident, received the email much less that the e-mail was disseminated to the general public of Florida or a portion thereof. [DE 1, ¶¶ 18 (referencing "prospective" passengers and including a e-mail screenshot sent directly by CCL to Emilio Hernandez), 79-80]. The screenshot of a selected portion of the email in paragraph 18 of the Complaint also reflects a booking number for a Mr. Hernandez and specifically states that it is an "upcoming Cruise Notification" concerning the "Costa Luminosa – Cruise from 03/05/20." [DE 1, ¶ 18]. The e-mail therefore reveals that it was sent directly to a ***booked*** passenger who had obviously paid for cruise fare for the March 5, 2020

Costa *Luminosa* cruise. The entire email, however, reveals that it was a communication to passengers who had already paid and the communication specifically states that "This message is sent regarding your upcoming cruise plans" and "It is not a promotional advertisement." [Perez Dec., DE 17-1, ¶ 10]. The allegation that Defendants sent the email with the intent of inducing passengers to rely on the statements to "purchase" cruise tickets is refuted by the screenshot of the email Plaintiff inserted into the Complaint and by the entire document.[12] [DE 1, ¶ 18]. Since CCL sent the e-mail directly to its customers at 8:45 pm on the night before the Costa *Luminosa* was to set sail on March 5, 2020, it was not intended to induce passengers to *buy* a cruise ticket on the Costa *Luminosa and the FAM* claim is not actionable. The Complaint itself makes it clear that the e-mail is not an "advertisement" under the statute. The FAM claim is fatally deficient.

Second, the first element of a fraudulent inducement claim is fraud must be based on a *material* fact, not on a promise or a prediction of future events. *See First Union Brokerage v. Milos,* 717 F.Supp. 1519, 1525 (S.D. Fla.1989). "To constitute actionable fraud, a false representation must relate to an existing or pre-existing fact." *Id.* (citing *Cavic v. Grand Bahama Dev. Co. Ltd.,* 701 F.2d 879, 883 (11th Cir.1983); *Sleight v. Sun & Surf Realty, Inc.,* 410 So.2d 998 (Fla. 3rd DCA 1982). The email specifically states that "[w]ith the main *aim* to gain the most up-to-date information," Costa Crociere is in contact with local authorities of the countries called by its vessels. [DE 1, ¶ 18] (emphasis added). These statements amount to nothing more than statements of opinion concerning *future* acts. Even a false statement amounting to a promise to do something in the future is not actionable fraud. *Royal Typewriter Co. v. Xerographic Supplies Corp.,* 719 F.2d 1092, 1104 (11th Cir.1983). And promises of future performance are not actionable even if the promise induces another to enter into a contract. *Id.*; *Stoler v. Metropolitan Life Ins. Co.,* 287 So.2d 694, 695 (Fla. 3d DCA 1974).

Third, the second and third elements of a fraudulent inducement claim require Plaintiff to allege that Defendants knew or should have known of the falsity of the statements at issue and Defendants intended that the representation would induce another to rely and act on it. [DE 1, ¶ 82]. In paragraphs 82-83 of the Complaint, however, Plaintiff simply alleges legal conclusions to

[12] By including a selected portion of this email in the Complaint, Plaintiffs incorporated it by reference. *See supra* at footnote 2. Also, where documents attached to a Complaint conflict with conclusory allegations of the Complaint, the document controls. *See, e.g., Crenshaw v. Lister,* 556 F.3d 1283, 1292 (11th Cir. 2009) (citing cases).

purportedly fulfill these essential elements without regard to Rule 9(b)'s requirement for specific factual allegations to support the claim. The Court and Defendants are therefore left to ferret out which of the 54 paragraphs of allegations in Plaintiff's prolix pleading are intended to meet these requisite elements. For example, Plaintiff alleged that Defendants "and the cruise industry" received an "early warning" about the spread of the virus on cruise vessels, but the vessels that are the subject of those allegations are from separate companies and even though Carnival is the ultimate owner of all of the brands, they are run separately and there is no allegation of any direct communication between these two brands. [DE 1, ¶¶ 12-15]. These general assumptions, innuendo and suppositions are insufficient to meet Rule 9(b) requirements to allege how Costa should have known about the falsity of its statements in the e-mail and that the intent in sending the e-mail was to induce Plaintiff to justifiably rely on it in deciding to board the vessel.

Plaintiff may also claim that the allegations concerning a passenger who had been medically disembarked on February 29, 2020 fulfills Plaintiff's Rule 9(b) requirements. Plaintiff simply alleged that the passenger was medically disembarked from the Costa *Luminosa* on February 29, 2020 "following symptoms of the coronavirus and a stroke," but failed to allege how that may have resulted in the alleged fraudulent representations in the e-mail. [DE 1, ¶ 17]. The Complaint is silent as to this passenger's purported COVID-19 symptoms (likely due to the fact that there were none) and, at the time, stroke was not known to be consistent with COVID-19.[13] *Id.* Costa Crociere's e-mail to guests who had booked and paid for a cruise generally advising them that Costa Crociere was taking measures in connection with COVID-19 was not specific and general statements such as those in the email cannot constitute fraud.[14] [DE 1, ¶¶ 18, 79]. Puffing standing

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[13] *See Akshay Avula et al, NAT'L CTR. FOR BIOTECHNOLOGY INFO., NAT'L INST. OF HEALTH, Brain, Behavior, and Immunity: COVID-19 presenting as stroke (Apr. 28, 2020),* https://www.ncbi.nlm.nih.gov/p/articles/PMC7187846/ (as of *April 28, 2020* "'[s]o far, there are no reported cases of COVID-19 presenting with strokes …").

[14] Statements such as "most adequate measures" and "highest level of safety" are generally considered to be statements of opinion and are not statements of material fact. *Carmouche v. Carnival Corp.,* 2014 WL 12580521, at *8 (S.D. Fla. May 15, 2014) ("A general promise that a trip will be 'safe and reliable' does not constitute a guarantee that no harm will befall a plaintiff in a maritime negligence suit"); *Hill v. Celebrity Cruises, Inc.,* 2011 WL 5360629, *7 (S.D. Fla. Sept. 19, 2011), *report and recommendation adopted in part, rejected in part*, 2011 WL 5360247 (S.D. Fla. Nov. 7, 2011) (citing *Hoffman v. A. B. Chance Co.,* 339 F.Supp. 1385, 1388 (M.D.Pa.1972) (holding statement by manufacturer that a product "offered unprecedented safety" was puffing).

alone is not sufficient to constitute a material statement of pre-existing fact on which Plaintiff could have relied. *Cavic,* 701 F.2d at 883. Statements of pure opinion cannot constitute actionable fraudulent statements. *Id.* ("an unspecific and false statement of opinion such as occurs in puffing generally cannot constitute fraud").

As for the fourth element, "[t]he law is clear that reliance by a party claiming fraud must be reasonable and justified under the circumstances." *Id.* (citations omitted). Rule 9(b)of the Federal Rules of Civil Procedure provides that "[i]n all averments of fraud ... the circumstances constituting fraud ... shall be stated with particularity." Fed.R.Civ.P. 9(b). Plaintiff's Complaint simply alleges this essential element as a legal conclusion. [DE 1, ¶ 89]. Plaintiff has an obligation to allege the elements of his fraud-based claims with specificity, which requires more than labels and conclusions. *Twombly,* 550 U.S. at 545. Plaintiff must allege that he not only relied on the e-mail in a non-conclusory manner, but that his reliance was *justifiable*. That he has not done. Plaintiff's FMA claim must be dismissed *with prejudice* for all of the reasons expressed above.

F. Plaintiff's Claims for Negligent Misrepresentation Should be Dismissed

To state a negligent misrepresentation claim under Florida law, Plaintiffs must allege each of the requisite elements set forth in the preceding section with one exception: for the second element, Plaintiff must allege that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known of its falsity. *Balaschak v. Royal Caribbean Cruises, Ltd.,* 2009 WL 8659594, *8 (S.D. Fla. Sept. 14, 2019). Federal Rule of Civil Procedure 9(b) also applies to negligent misrepresentation claims. *See Holguin v. Celebrity Cruises, Inc.,* 2010 WL 1837808, at *2 (S. D. Fla. May 4, 2010); *Ziemba v. Cascade Int'l, Inc.,* 256 F.3d 1194, 1202 (11th Cir.2001). Thus, all of the arguments addressed above supporting dismissal of the FMA claim apply to support dismissal of the negligent misrepresentation claim except the second element of the FMA claim.

This claim is also based on general assertions concerning the safety of passengers during the cruise, but Courts have repeatedly held that general statements regarding passenger safety are insufficient to support a negligent misrepresentation claim as a matter of law. *See Isbell v. Carnival Corp.,* 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006);, 2009 WL 8659594, at * 9 (S.D. Fla. 2009). In *Isbell,* Judge Moreno ruled that "it is well-settled that [a] general promise that the trip will be 'safe and reliable' does not constitute a guarantee that no harm will befall plaintiff." *Isbell,* at 1237. This is so because it is well established that a cruise line is not the insurer of its passengers. *Isbell,*

at 1238. Plaintiff's claim for negligent misrepresentation should be dismissed *with prejudice* for failure to allege an actionable negligent misrepresentation claim.

VI. Plaintiff's Request for Punitive Damages Should Be Dismissed

The Eleventh Circuit has explained that "[o]ur court has held that plaintiffs may not recover punitive damages . . . for personal injury claims under federal maritime law." *Eslinger v. Celebrity Cruises, Inc.*, 772 F. App'x 872 (11th Cir. 2019) (internal citations omitted) see also *Dutra Group v. Batterton*, 139 S.Ct. 2275, 2019 WL 2570621 at * 1 (U.S. June 24, 2019) (expanding maritime law to allow punitive damages "would be contrary" to the principle that "federal courts should seek to promote a 'uniform rule applicable to all action' for the same injury, whether under the Jones Act or the general maritime law"). Here, Plaintiff alleges that all claims arise under federal maritime law, but has failed to allege a sufficient basis for punitive damages. [DE 1 ¶ 8]. In addition, a party may be entitled to punitive damages ***only*** if the purported wrongdoer engaged in "intentional misconduct" in "exceptional cases."[15] *Simmons v. Royal Caribbean Cruises, Ltd.*, 423 F. Supp. 3d 1350, 1353-54 (S.D. Fla. 2019) (dismissing punitive damages claims because the plaintiff's allegations failed to establish "intentional misconduct" against the cruise line); *see also T.W.M. v. American Medical Sys., Inc.*, 886 F. Supp. 842, 845 (M.D. Fla. 1995) (striking demand for punitive damages because of failure to "allege[] factual matters that would support an award of punitive damages").[16]

WHEREFORE, for all of the foregoing reasons, Defendant requests the relief set forth above and for all other relief that this Court deems just and proper.

Dated: June 25, 2020
Miami, Florida

Respectfully submitted,

[15] None of plaintiff's claims support its claim for punitive damages, especially Plaintiff's claims for negligence, NIED, and negligent misrepresentation, which do not require or reflect any "intentional misconduct."

[16] All the underlying claims associated with Plaintiff's punitive damages request fail to meet the requisite pleading standards as discussed *supra*. *Alhallaq v. Radha Soami Trading, LLC*, 484 Fed. Appx. 293, 299 (11th Cir. 2012) (explaining "dismissal of tort claims necessarily causes dismissal of claim for punitive damages") (internal citations omitted).

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that the foregoing was electronically filed with the Clerk of the Court via CM/ECF on June 25, 2020. I also certify that the foregoing was served on all counsel or parties of record on the attached Service List 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 electronic Notices of Filing.

By: /s/ Catherine J. MacIvor
Catherine J. MacIvor

SERVICE LIST

Turner v. Costa Crociere S.P.A. and Costa Cruise Lines, Inc.
20-cv-21481-Moore

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