

**UNITED STATES DISTRICT COURT  
SOUTHERN DISTRICT OF FLORIDA**

Case No.: 1:20-cv-20737-UU

JANE DOE, Individually and as  
Parent and Natural Guardian of  
F.H., a Minor,

Plaintiff,

v.

CARNIVAL CORPORATION *et al.*,

Defendants.

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**ORDER**

THIS CAUSE is before the Court upon Defendant Dufry Cruise Services, LLC's ("Dufry") Motion to Dismiss Counts II and IV of Plaintiff's Amended Complaint and to Strike Demand for Punitive Damages. D.E. 43 (the "Motion"). The Court has reviewed the Motion and the pertinent portions of the record and is otherwise fully advised in the premises. For the reasons set forth herein, the Motion is GRANTED IN PART AND DENIED IN PART.

**I. Background**

A more thorough recitation of the facts in Plaintiff's Amended Complaint, D.E. 22 (the "Complaint"), and procedural history of this case can be found in this Court's Order on codefendant Carnival Corporation's ("Carnival") motion to dismiss. *See Doe v. Carnival Corp.*, - -- F. Supp. 3d ----, 2020 WL 3772102 (S.D. Fla. June 26, 2020) (the "Carnival Order"). The Court will recite only those facts pertinent to Dufry.

Plaintiff Jane Doe ("Plaintiff") is the mother of 15-year-old F.H. *Id.* ¶¶ 5, 9. On November 15, 2019, Plaintiff and F.H. were passengers on Carnival's cruise ship, the *Carnival Valor*. *Id.* ¶¶

10, 12, 14. Dufry leased space from and contracted with Carnival to operate retail stores on the *Valor*. *Id.* ¶ 11.

While the ship was in transit and in navigable waters, one of Dufry's crewmember-employees committed statutory rape, rape, forcible rape, sexual battery, sexual assault, sexual abuse, and sexual molestation of F.H. *Id.* ¶ 14. This employee's name is believed to be Ganesh Joshi, *id.*, and the Court will refer to him as such. Another crewmember/Dufry employee (whose first name is believed to be "Segain" or to that effect, but whose last name is unknown) watched and guarded the door to the room in which the offenses were committed. *Id.* F.H. did not consent to the sexual acts committed by Mr. Joshi and, moreover, being only 15 years old, F.H. was incapable of giving effective consent. *Id.* ¶ 16.

Plaintiff claims that Dufry is an "onboard agent" of Carnival, which is a common carrier. *Id.* ¶ 40. Therefore, in Count II of the Complaint, Plaintiff alleges that Dufry is strictly liable for any and all assaults and batteries perpetrated by its employees upon Carnival cruise passengers, including the sexual assault of F.H. by Mr. Joshi. *See id.* ¶¶ 39–46. And in Count IV of the Complaint, Plaintiff alleges that Dufry was negligent in relation to training and monitoring its crew, which negligence allegedly proximately caused F.H. to be raped. *See id.* ¶¶ 61–73. In her prayer for relief as to Count IV, Plaintiff seeks punitive damages "to the extent that [Dufry] was more than simply negligent." *Id.* ¶ 73.

On June 23, 2020, Dufry filed the instant Motion, arguing that (1) Count II should be dismissed because Dufry is not a common carrier and therefore is not subject to strict liability for assault by a crewmember, (2) Count IV should be dismissed because Plaintiff has not alleged facts showing Dufry was on notice of any dangerous propensities held by its employee, (3) Count IV alternatively should be dismissed as an impermissible shotgun pleading that commingles legal

theories and is unsupported by facts to render any theory plausible, and (4) the punitive damages claims should be stricken or dismissed because punitive damages are unavailable as a matter of law in non-seaman personal injury maritime claims. D.E. 43.

The Motion is briefed and ripe for disposition.

## **II. Legal Standard**

In order to state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only “a short and plain statement of the claim showing that the pleader is entitled to relief.” A plaintiff must state his claims in numbered paragraphs, each limited as far as practicable to a single set of circumstances. Fed. R. Civ. P. 10(b). And “[i]f doing so would promote clarity, each claim founded on a separate transaction or occurrence...must be stated in a separate count.” *Id.*

While the Court must consider the allegations contained in the plaintiff’s complaint as true, this rule “is inapplicable to legal conclusions.” *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the complaint’s allegations must include “more than an unadorned, the-defendant-unlawfully-harmed-me accusation.” *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, “[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice.” *Id.* (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, “a complaint must contain sufficient factual matter, accepted as true, to ‘state a claim of relief that is plausible on its face.’” *Id.* (quoting *Twombly*, 550 U.S. at 570). A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant’s liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.*

Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw upon its judicial experience and common sense. *Id.* at 679.

As to Dufry's request to strike the punitive damages request, Federal Rule of Civil Procedure 12(f) states: "the Court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). "A motion to strike is a drastic remedy[,] which is disfavored by the courts." *Thompson v. Kindred Nursing Ctrs. E., LLC*, 211 F. Supp. 2d 1345, 1348 (M.D. Fla. 2002) (quoting *Augustus v. Bd. of Pub. Instruction of Escambia Cnty., Fla.*, 306 F.2d 862, 868 (5<sup>th</sup> Cir. 1962)). A motion to strike is often denied "unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *Bank of Am., N.A. v. GREC Homes IX, LLC*, No. 13-21718, 2014 WL 351962, at \*4 (S.D. Fla. Jan. 23, 2014) (internal quotations and citations omitted). However, "[a] request for punitive damages must be stricken from the complaint if the allegations therein do not present a factual basis supporting the recovery of punitive damages, in other words, factual allegations showing wanton, willful or outrageous conduct." *Doe v. Royal Caribbean Cruises, Ltd.*, No. 11-23321-Civ-SCOLA, 2012 WL 4479084, at \*2 (S.D. Fla. Sept. 28, 2012).

### **III. Analysis**

#### **A. Count II Presents a Valid Strict Liability Claim**

Dufry argues that Count II should be dismissed because it is not a common carrier and therefore cannot be strictly liable for the actions of its employees while on the ship.

The Eleventh Circuit has held that cruise lines are strictly liable for crew member assaults on their passengers during the cruise. *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 913 (11th Cir.

2004). In *Doe*, a passenger was raped by a crewmember/dinner waiter. *See id.* at 893. The passenger sued Celebrity Cruises, Inc. (the cruise operator), Zenith Shipping Corporation (owner of the vessel), Celebrity Catering Services Partnership (which provided food and beverage services to the vessel), and Apollo Ship Chandlers (which provided certain services and personnel to Celebrity Catering Services Partnership). *Id.* at 893 & n.1. After a jury verdict for the plaintiff, the district court *sua sponte* raised the issue of “which of the four defendants actually employed the errant crew member and whether that employer was a common carrier.” *Id.* at 893. “Soon thereafter, the district court granted a Rule 50(b) judgment as a matter of law to all defendants, concluding that the plaintiff failed to prove any single defendant was both a common carrier and the employer of the crew member and therefore that no defendant was liable for the crew member’s assault.” *Id.*; *see also Doe v. Celebrity Cruises, Inc.*, 287 F. Supp. 2d, 1321, 1329 (S.D. Fla. 2003) (granting Rule 50(b) judgment as to catering company and personnel provider because those defendants were not themselves common carriers), *rev’d by* 394 F.3d 891.

The Eleventh Circuit reversed the Rule 50(b) ruling and reinstated and affirmed the jury’s verdict as against all defendants—not just the cruise operator. *See generally* 394 F.3d at 891–918. The ruling was primarily a procedural one, based on the district court’s lack of authority “to enter judgment under Rule 50(b) on a new ground not raised by any party prior to submission of the case to the jury.” *Id.* at 918; *see also id.* at 902–04. However, the Eleventh Circuit also considered the defendants’ cross-appeal, seeking a clarification of whether “a cruise line, as a common carrier, is strictly liable for crew member assaults on its passengers during transit” or, instead, whether negligence must be shown. *Id.* at 904–916. The Eleventh Circuit’s analysis did not differentiate between the cruise line operator and the other non-operator defendants.

In a subsequent case, however, Magistrate Judge Torres (in a report and recommendation adopted by Judge Williams) concluded that the Eleventh Circuit’s *Doe* opinion on strict liability logically extends to concessionaires whose employees work onboard cruise lines. *Doe (T.C.) v. Celebrity Cruises, Inc.*, 389 F. Supp. 3d 1109, 1117–18 (S.D. Fla. 2019) (addressing whether strict liability is available as to defendant CR Spaclub at Sea, which owned and operated a spa on the subject vessel). Magistrate Judge Torres rejected the non-common-carrier argument that Dufry puts forth here:

The third amended complaint does not allege that CR Spaclub is a common carrier, but rather refers to CR Spaclub as an entity “under the direction and control of Celebrity,” an onboard “agent” of Celebrity who provides spa services to passengers, and/or an employer of the Assailant. [D.E. 38]. Nevertheless, the lack of a common carrier allegation against CR Spaclub is not dispositive for strict vicarious liability because CR Spaclub – an onboard agent under the control of a common carrier – shares in the duty of absolute protection owed to passengers who travel with the common carrier. *See Doe*, 394 F.3d at 913 (holding that the defendants – a group including the cruise line and its third-party service providers – owed “a non-delegable duty to protect their passengers” from crewmember assaults). Thus, the strict liability standard applies to both Celebrity and CR Spaclub.

To hold otherwise would permit common carriers to effectively eliminate its duty to protect passengers from the intentional torts of its crewmembers through the use of creative, carefully-drafted contractor and subcontractor agreements. We will not encourage such an arrangement.

*Id.* at 1117.

The Court agrees with Magistrate Judge Torres’ cogent reasoning and holds that Dufry—though not itself a common carrier—may be strictly liable for the acts of its employees onboard. Though it is true Dufry “is simply a retail sundries shop that has contracted with a cruise line to operate onboard Carnival’s ships,” D.E. 48 at 4, Dufry has undertaken that relationship with Carnival knowing that its retail employees will also be crewmembers having around-the-clock access to passengers of the common carrier. The Motion is denied as to Count II.

**B. Count IV is Unsupported by Sufficient Facts to Render the Claim Plausible**

At the outset, the Court finds that Count IV is not a shotgun pleading for the same reasons set forth in the Carnival Order. *See Doe*, 2020 WL 3772102, at \*4. However, like in the Carnival Order, Count IV lacks sufficient factual content to state a plausible claim for either negligent training or negligent monitoring against Dufry.

As an initial matter, Plaintiff cannot state a claim for negligent training or monitoring based on boilerplate allegations that Dufry failed to, among other things, (1) supervise and monitor the activities and whereabouts of its employee crewmembers onboard the subject vessel; (2) control the activities and whereabouts of all its employee crewmembers; (3) enforce unspecified “rules, regulations, policies and procedures” for employee crewmembers who fraternize with passengers; (4) train all its employee crewmembers regarding non-fraternization and sexual assault prevention; and (5) otherwise “promulgate, monitor, and enforce rules or policies regarding the prohibition against employee crewmembers having contact and interaction, including sexual relations, with passengers.” D.E. 22 ¶ 68; *Iqbal*, 556 U.S. at 678 (plaintiff must plead “more than a sheer possibility that a defendant has acted unlawfully”); *Summers v. Carnival Corp.*, No. 13-23932-CV, 2015 WL 11983231, at \*6 (S.D. Fla. Apr. 6, 2015) (granting motion to dismiss “because Plaintiff has failed to allege facts that are suggestive enough to render each element of his claim for negligent hiring, retention and training plausible”). Instead, Plaintiff must plausibly allege facts supporting each element of a claim for negligent training and negligent monitoring/supervision to state a claim under Rule 12(b)(6).

“Negligent training occurs when an employer was negligent in the implementation or operation of the training program and this negligence caused a plaintiff’s injury.” *Doe v. NCL (Bahamas) Ltd.*, No. 1:16-cv-23733-UU, 2016 WL 6330587, at \*4 (S.D. Fla. Oct. 27, 2016)

(internal quotations omitted); *accord Doe v. NCL (Bahamas) Ltd.*, No. 1:18-cv-20060-Civ-Scola, 2018 WL 3848421, at \*3 (S.D. Fla. Aug. 13, 2018). Because Plaintiff fails to plead that Dufry negligently implemented and operated its training program vis-à-vis Ganesh Joshi and “Segain” and that such negligence caused Ganesh Joshi to sexually assault F.H. and/or caused “Segain” to watch and guard the door, Plaintiff fails to state a claim for negligent training. *Cf. Doe*, 2018 WL 3848421, at \*3 (broad allegations of “fail[ing] to train...crewmembers [to] stay away from female and minor children passengers” which “allows and/or promotes improper conduct by its crewmembers including sexual assault, sexual battery, and sexual abuse” insufficient to state a claim).

Plaintiff also fails to state a claim for negligent monitoring or supervision. “Negligent supervision ‘occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigating, discharge, or reassignment.’” *Doe*, 2016 WL 6330587, at \*4 (quoting *Cruz v. Advance Stores Co.*, 842 F. Supp. 2d 1356, 1359 (S.D. Fla. 2012)). “Accordingly, Plaintiff ‘must allege that (1) the employer received actual or constructive notice of an employee’s unfitness, and (2) the employer did not investigate or take corrective action such as discharge or reassignment.’” *Id.* (quoting *Cruz*, 842 F. Supp. 2d at 1359).

Plaintiff fails to state a claim for negligent monitoring or supervision because she fails to allege that Dufry: (1) had actual or constructive notice of Ganesh Joshi’s or “Segain’s” unfitness;<sup>1</sup> and (2) failed to take corrective action in light of its knowledge. *See id.* Indeed, in the Carnival Order, the Court found insufficient Plaintiff’s generalized allegations about Carnival’s knowledge

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<sup>1</sup> The Court rejects Plaintiff’s contention that she need not plead facts demonstrating actual or constructive notice. *See* D.E. 46 at 5–8, 12–20.

that its foreign-born employees had a potential propensity to rape. *See Doe*, 2020 WL 3772102, at \*5. Here, there are no allegations whatsoever speaking to Dufry's knowledge.

In sum, Count IV lacks an adequate factual basis for either a claim of negligent training or negligent monitoring against Dufry. The count will be dismissed. And because the entire count is dismissed, the prayer for punitive damages in Count IV is also dismissed; the Court need not address Dufry's arguments on punitive damages.

One final point: Plaintiff requests leave to amend Count IV to "copy-and-paste the allegations of Carnival's training failures and modify those allegations so that they're applicable to Dufry." D.E. 46 at 9. "Copying-and-pasting the allegations of Carnival's training failures and modifying them so that they're applicable to Dufry would assuredly state a negligence cause of action." *Id.* The Court disagrees. In fact, the Court has already concluded that the allegations of Carnival's training failures were insufficient to state a claim against Carnival. *Doe*, 2020 WL 3772102, at \*4–5. Dufry's proposed amendment therefore would be futile.

#### **IV. Conclusion**

Plaintiff simply has not stated a valid claim against Dufry for negligent training and/or monitoring crew. However, Plaintiff has stated a valid claim against Dufry for strict liability. Accordingly, it is

ORDERED AND ADJUDGED that Dufry's Motion, D.E. 43, is GRANTED IN PART AND DENIED IN PART. Count IV is DISMISSED from the Complaint, D.E. 22. In all other respects, the Motion is DENIED. It is further

ORDERED AND ADJUDGED that Dufry SHALL file its Answer to the Complaint **on or before July 20, 2020.**

DONE AND ORDERED in Chambers at Miami, Florida, this 10th day of July, 2020.

  
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URSULA UNGARO  
UNITED STATES DISTRICT JUDGE

copies provided: counsel of record