UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
Case No.: 1:24-cv-25022-WILLIAMS/GOODMAN

ROBIN FISHER

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

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REPORT AND RECOMMENDATIONS ON MOTION TO DISMISS

In this maritime personal injury action, Defendant Carnival Corporation ("Defendant" or "Carnival") filed a motion to dismiss Plaintiff Robin Fisher's ("Plaintiff") Amended Complaint. [ECF No. 17 ("FAC")]. Plaintiff filed a response in opposition, and Defendant filed a reply. [ECF Nos. 19; 20]. United States District Judge Kathleen M Williams referred the motion to the Undersigned. [ECF No. 18].

For the reasons stated below, the Undersigned **respectfully recommends** that the District Court **deny in part** and **grant in part** Defendant's motion to dismiss **without prejudice**.

I. Background

Plaintiff filed suit against Defendant for damages related to physical injuries she

allegedly sustained after falling aboard the Carnival *Liberty* as a result of slipping on a pool of liquid on a marble-like floor. [ECF No. 13]. These physical injuries include: "a fracture to the lateral tibial plateau with slight cortical undulation, moderate to severe marrow edema, and mild marrow edema to the medial tibial spine, and other injuries." *Id*. at ¶ 14.

Defendant filed a Motion to Dismiss Counts I—V from Plaintiff's FAC because it says Plaintiff failed to sufficiently allege that it had notice of the alleged dangerous condition. [ECF No. 17].

Plaintiff's FAC contains seven counts: Negligent Failure to Inspect (Count I); Negligent Failure to Maintain (Count II); Negligent Failure to Remedy (Count III); Negligent Failure to Warn (Count IV); Negligent Design, Construction and Selection of Materials (Count V); Vicarious Liability for Employee's Negligence (Count VI); and Vicarious Liability for Negligent Design (Count VII). She alleges that:

> 12. [Plaintiff's] incident occurred on or about February 27, 2024, while she was a fare paying passenger on CARNIVAL'S vessel, the *Liberty*.
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> 13. On or about February 27, 2024, between approximately 1:00 PM and 2:00 PM, [Plaintiff] was walking on the lido deck of the Liberty in a normal and proper manner. As she transitioned from the outside to the hallway with a marble-like floor near the elevators, she suddenly slipped on a significant amount of clear liquid that had pooled on the floor, causing her to fall. Resulting in [Plaintiff] suffering severe injuries.
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> 14. As a result, [Plaintiff] sustained severe injuries that include, but are not limited to, a fracture to the lateral tibial plateau with slight cortical undulation, moderate to severe marrow edema, and mild marrow edema to the medial tibial spine, and other injuries.

15. At all relevant times, the dangerous and/or risk creating condition was the subject unreasonably wet and slippery surface.

16. The lighting was also unreasonably dim, which made the liquid on the subject floor harder for [Plaintiff] to see, and is therefore also relevant to the case.

17. CARNIVAL either knew or should have known of this risk-creating and/or dangerous condition, due to reasons that include, but are not limited to, the following:

a. There was a CARNIVAL crewmember in the subject area approximately 15 feet from the location of [Plaintiff's] fall and was in the subject area prior to when [Plaintiff] walked there. This crewmember had direct line of sight on the location [Plaintiff] slipped on, was within viewing distance thereof, was close enough to have seen that the subject surface was wet and did see the subject liquid prior to [Plaintiff's] incident. However, this crewmember failed to block off, warn of, and/or clean up the subject liquid prior to [Plaintiff's] fall.

b. CARNIVAL participated in the installation and/or design of the subject surface, or alternatively, CARNIVAL accepted the surface with its design defects present after having been given an opportunity to inspect the ship and materials on it, including the subject surface, such that CARNIVAL should have known of the design defects of the subject surface before providing them for public use. These design defects include, but are not limited to, the dangers outlined in paragraph 15.

c. There are relevant safety standards/recommendations/other guidelines regarding the safety of the subject area, including, but not limited to, prohibitions and/or recommendations against walking surfaces such as the surface FISHER slipped on having a coefficient of friction or slip resistance below .42, including, but not limited to, A137.1 and B101.3 of the American National Standards Institute (ANSI). Although FISHER maintains that the correct industry standard to apply is a .60 coefficient of friction and slip resistance when wet, since the subject surface fell below .42, it also fell below .60.

> CARNIVAL should have known of these standards/ recommendations/ other guidelines because whether such standards/ recommendations/other guidelines are legally required for CARNIVAL to comply with or not, a fact finder is entitled to determine, if it so choses [sic], that these standards/ recommendations/ other guidelines show what a reasonable cruise line should have done. In fact, CARNIVAL's own standard for slip resistance required the subject surface to be above .42, as seen in CARNIVAL's attached slip resistance standards and ratings table below. Notably, .42 is the lowest acceptable slip resistance out of all of the slip resistance values CARNIVAL permits, so regardless of how CARNIVAL classifies the subject area in the chart below, the subject surface's slip resistance fell below the rating CARNIVAL itself designates for the safety of its passengers.
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> d. CARNIVAL also knew or should have known of this dangerous condition through inspecting the subject area involved in [Plaintiff's] incident, and if it did not know of this dangerous condition, this was because CARNIVAL failed to adequately inspect the subject area prior to [Plaintiff's] incident.
>
> e. Previous passengers in prior cases suffered prior slip and fall incidents involving similar surfaces on the same ship and other ships in CARNIVAL'S fleet (including Carnival Cruise Line, Princess Cruises, Holland America Line, Seabourn, P&O Cruises (Australia), Costa Cruises, AIDA Cruises, P&O Cruises (UK) and Cunard), including, but not limited to, *Williams v. Carnival Corp*., 440 F. Supp. 3d 1316, 1318 (S.D. Fla. 2020) ("On June 4, 2017, Williams **slipped and fell** on the **Lido Deck** of Carnival's cruise ship, the **Carnival *Liberty***. [D.E. 41, ¶¶ 2-3]. Williams claims that she fell after slipping in a **puddle of water** measuring approximately four by two feet.") (emphasis added).

[ECF No. 13, ¶¶ 12–17 (emphasis in original; chart omitted)].

II. Legal Standard

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must take all well-pleaded facts in the plaintiff's complaint and all reasonable

inferences drawn from those facts as true. *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994). To state a claim for relief, a pleading must contain: "(1) a short and plain statement of the grounds for the court's jurisdiction[;] . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought[.]" Fed. R. Civ. P. 8(a). Thus, "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) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. Analysis

"Personal-injury claims by cruise ship passengers, complaining of injuries suffered at sea, are within the admiralty jurisdiction of the district courts." *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1365 (11th Cir. 2018) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88, 111 S. Ct. 1522, 1524, 113 L. Ed. 2d 622 (1991)). "Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters." *Guevara v. NCL (Bah.) Ltd.*, 920 F.3d 710, 720 (citing *Keefe v. Bah. Cruise Line, Inc.*, 867 F.2d 1318, 1320–21 (11th Cir. 1989)).

"In analyzing a maritime tort case, [courts] rely on general principles of negligence law." *Van Deventer v. NCL Corp. Ltd.*, No. 23-CV-23584, 2024 WL 836796, at *4 (S.D. Fla. Feb. 28, 2024) (quoting *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012)). "To prevail on a negligence claim, a plaintiff must show 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.'" *Guevara*, 920 F.3d at 720 (quoting *Chaparro*, 693 F.3d at 1336).

The duty of care owed by an owner of a ship in navigable waters while its passengers are on board the vessel is a duty of exercising reasonable care under the circumstances. *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 632 (1959); *Everett v. Carnival Cruise Lines*, 912 F.2d 1355, 1358 (11th Cir. 1990). For a direct negligence claim, this standard "requires, as a prerequisite to imposing liability, that the carrier have had actual or constructive notice of [a] risk-creating condition, at least where, as here, the menace is one commonly encountered on land and not clearly linked to nautical adventure." *Keefe*, 867 F.2d at 1322. *See generally Yusko v. NCL (Bahamas), Ltd.*, 4 F.4th 1164, 1167 (11th Cir. 2021) ("[A] passenger cannot succeed on a maritime negligence claim against a shipowner unless that shipowner had actual or constructive notice of a risk-creating condition.").

But a cruise passenger plaintiff need not establish actual or constructive notice by the cruise ship operator of a risk-creating condition when the claim is based on vicarious liability (*i.e.*, negligence by specific cruise ship crew members, employees, or other agents, acting within the scope of their employment). *Id.* at 1169–70.

Here, the at-issue Counts (I—V) are based solely on direct liability. Therefore, in order to proceed under these direct liability claims, Plaintiff **must** sufficiently and plausibly allege actual or constructive notice.

Actual notice exists when the defendant knew about the dangerous condition; constructive notice exists when the defendant "ought to have known." *Collazo v. Carnival Corp.*, No. 23-23451-CIV, 2024 WL 1554853, at *2 (S.D. Fla. Apr. 10, 2024) (quoting *Holland v. Carnival Corp.*, 50 F.4th 1088, 1095 (11th Cir. 2022)).

Notice Regarding a Dangerous Condition
Existing for a Sufficient Length of Time

Defendant first highlights Plaintiff's allegations that it had notice "because there was a Carnival crewmember in the subject area approximately fifteen (15) feet from the location of Plaintiff's fall." [ECF No. 17, p. 5 (citing [ECF No. 13, ¶ 17(a)])[1]]. It argues that this is insufficient because it "fails to specify when the crewmember allegedly saw the liquid." *Id*. at 6. Defendant states that Plaintiff is obligated to "allege that the crewmember saw the hazardous condition with sufficient time to remedy it and failed to do so." *Id*. at 6 (citing *Cruz v. Carnival Corp.*, No. 23-cv-24692, 2024 U.S. Dist. LEXIS 210423, at *7–8 (S.D.

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[1] Paragraph 17(a) states:

> There was a CARNIVAL crewmember in the subject area approximately 15 feet from the location of [Plaintiff's] fall and was in the subject area prior to when [Plaintiff] walked there. This crewmember had direct line of sight on the location [Plaintiff] slipped on, was within viewing distance thereof, was close enough to have seen that the subject surface was wet and did see the subject liquid prior to [Plaintiff's] incident. However, this crewmember failed to block off, warn of, and/or clean up the subject liquid prior to [Plaintiff's] fall.

[ECF No. 13, ¶ 17].

Fla. Nov. 18, 2024) (holding that allegations that a dangerous condition existed "for a sufficient length of time" were insufficient without specific factual details)).

Plaintiff disagrees and states that under this Court's precedent in *Quiñones*, the allegation sufficiently alleges notice because it is parallel to the one at-issue[2] in *Quiñones*, [ECF No. 19, p. 2 (citing *Quiñones v. MSC Cruises, S.A.*, No. 1:24-CV-20626, 2024 WL 3653076, at *6 (S.D. Fla. July 2, 2024), *report and recommendation adopted*, No. 24-20626-CV, 2024 WL 3650097 (S.D. Fla. Aug. 5, 2024))]. She additionally highlights how the Eleventh Circuit, in a case with a similar fact pattern, held that there was sufficient evidence of notice on a motion for summary judgment. *Id*. (citing *Aponte v. Royal Caribbean Cruise Lines Ltd*., 739 F. App'x 531, 537 (11th Cir. 2018) ("In some cases the proprietor may be held to have constructive knowledge if the plaintiff shows that an employee of the proprietor was in the immediate area of the dangerous condition and could have easily seen the substance and removed the hazard.").

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[2] The at-issue *Quiñones* allegation states:

> There was a male MSC crewmember in the subject area within viewing distance of the exact location of QUIÑONES' fall who was in the subject area prior to when QUIÑONES' walked there. This crewmember was within viewing distance and close enough to have seen that the subject lighting was inadequate because he was looking right in the direction of the subject area but who failed to adjust the lighting or to assist passengers in using the stairs while the lighting could be fixed.

Quiñones, 2024 WL 3653076, at *2.

Defendant contends that *Quiñones* is not parallel to this case because the dangerous condition alleged in *Quiñones* was poor lighting, and here it is a liquid puddle. [ECF No. 20, p. 3]. It also argues that *Aponte* is equally as unhelpful because "the crew member's presence in the restroom, coupled with evidence that the soap bottle had already fallen, suggested the hazard existed for a sufficient time to establish notice." [ECF No. 20, p. 4 (citing *Aponte*, 739 F. App'x at 531, 533)]. Defendant states that the Court should follow the *Cruz* holding because the FAC fails to "allege that the crewmember actively observed the liquid before her fall or that it had been present for a meaningful period." *Id*. at 3–4. The Undersigned disagrees.

Contrary to Defendant's argument (and unlike the at-issue *Cruz* complaint),[3] the FAC explicitly states that "[t]his crewmember had **direct line of sight** on the location [Plaintiff] slipped on, was **within viewing distance thereof**, was **close enough** to have seen that the subject surface was wet and **did see the subject liquid prior to [Plaintiff's] incident."** [ECF No. 13, ¶ 17(a) (emphasis added)].[4] As this Court held in *Quiñones*, this

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[3] The plaintiff's complaint in *Cruz* failed to include **any** details "about when the alleged risk-creating condition came into existence or how long the risk-creating condition was present." *Cruz*, 2024 U.S. Dist. LEXIS 210423, at *7. Here, the FAC includes enough details (at this early litigation stage) to allege that the risk-creating condition was present long enough for a crewmember to have seen it before Plaintiff encountered it.

[4] She also alleged that there was a "**significant** amount of clear liquid that had pooled on the floor." [ECF No. 13, ¶ 13 (emphasis added)]. Plaintiff will need to further define what "significant" means within this context if she seeks to overcome a future challenge at summary judgment.

type of allegation sufficiently alleges notice and is the type of allegation the Eleventh Circuit approved of in *Holland*. *Quiñones*, 2024 WL 3653076, at *6; *see Holland*, 50 F.4th at 1096 ("Furthermore, while Holland alleges that there were crewmembers in the surrounding shops**, he does not allege that there were any crewmembers in the immediate area of the glass staircase that could have observed or warned him of the hazard.** Simply put, Holland's allegations do not cross the line from possibility to plausibility of entitlement to relief." (emphasis added)).

Defendant then argues that "Plaintiff's own allegations cast doubt on the plausibility of the crewmember's observation. Plaintiff claims the liquid was clear and difficult to detect due to unreasonably dim lighting, yet simultaneously asserts that a crewmember saw it from fifteen feet away." [ECF No. 17, p. 6]. As I stated in *Quiñones* in response to a similar argument, "the Undersigned's task now is *not* to determine if the allegations are actually true or false. . . . [It] is to see whether the allegations are more than insufficient legal conclusions and threadbare recitals of the cause of action." 2024 WL 3653076, at *6.

Therefore, at *this* stage, these allegations provide **enough** to establish a plausible theory of Defendant's liability, and "raise a reasonable expectation that discovery will reveal evidence" that Defendant had actual or constructive notice. *See Rivell v. Private*

Health Care Sys., Inc., 520 F.3d 1308, 1309 (11th Cir. 2008).[5] The Undersigned consequently **respectfully recommends** that the Court **deny** Defendant's motion with regards to this argument.

Notice Regarding Defendant's Participation in
the Design or Installation of the Subject Surface

"[L]iability based on negligent design requires [the p]laintiff to produce evidence that the [d]efendant 'actually created, participated in or approved' the alleged improper design." *Hoover v. NCL (Bahamas) Ltd.*, 491 F. Supp. 3d 1254, 1257 (S.D. Fla. 2020) (Cooke, J.) (quoting *Groves v. Royal Caribbean Cruises, Ltd.*, 463 F. App'x 837, 837 (11th Cir. 2012)).

Defendant argues only that allegations regarding its participation in the design or installation of the subject surface fail to impute notice because they "does [sic] not fall within the accepted categories of constructive notice and lacks factual support." [ECF No. 17, p. 7 (citing *Cruz*, 2024 U.S. Dist. LEXIS 210423, at *5 ("Here, even if [the] [p]laintiff's conclusory statement that [the] [d]efendant created the dangerous condition is accepted as true, it does not support [the] [p]laintiff's claim that [the] [d]efendant had actual or constructive notice."); and *Everett*, 912 F.2d at 1359 (reversing the district court where jury instructions could have allowed a jury to find a ship operator negligent based only on its "mere creation or maintenance of a defect" without any finding of notice))].

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[5] Defendant seemingly repeats this argument at the end of its motion but focuses the argument on Plaintiff's allegation that the "hazardous condition existed for a period of time before the incident." [ECF No. 17, p. 10 (quoting ECF No. 13, ¶ 21)]. The Undersigned rejects this argument for the same reasons listed in this section.

Defendant's entire challenge to this count is limited to one conclusory paragraph. Defendant did not discuss what "the accepted categories of constructive notice" are, how the FAC lacks the necessary factual support for the related Count,[6] or even what would be *necessary* to sufficiently allege here. At bottom, the Court should **deny** this argument because Defendant failed to sufficiently develop it, and the Court will not do Defendant's work for it. *See Dahdouh v. Rd. Runner Moving & Storage, Inc.*, No. 20-CV-61936-RAR, 2021 WL 1022772, at *1 (S.D. Fla. Mar. 17, 2021) ("'[T]he Court does not serve as counsel's law clerk'—nor is it this Court's job to do [the] [p]laintiffs' counsel's work for him." (quoting *Fed. Ins. Co. v. Cnty. of Westchester*, 921 F. Supp. 1136, 1139 (S.D.N.Y. 1996)).

<u>*Notice Regarding a Violation of Industry Standards*</u>

Defendant highlights how the FAC lists industry standards that Defendant allegedly did not adhere to. [ECF No. 17, p. 7]. It states that "violations of industry standards do not establish notice." *Id.* (citing *Kendall v. Carnival Corp.*, No. 1:23-CV-22921-KMM, 2023 WL 8593669, at *4 (S.D. Fla. Dec. 8, 2023); *Francis v. MSC Cruises, S.A.*, No. 21-12513, 2022 WL 4393188, at *3 (11th Cir. 2022)).

Plaintiff's response fails to overcome Defendant's challenge for two reasons. One, the cases she relies on are unpersuasive because they relate to corrective measures (*i.e.* warning signs, furniture placement), instead of industry standards. [ECF No. 19, pp. 7–8

[6] The FAC lists Count V as Negligent Design, Installation, and/or Approval of the Subject Surface. [ECF No. 13, p. 15].

(citing *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1265–66 (11th Cir. 2020); *Holderbaum v. Carnival Corp.*, 87 F. Supp. 3d 1345, 1356 (S.D. Fla. 2015); and *Loredo v. Carnival Corp.*, Case No. 1:22-cv-23722-CMA, ECF No. 20)]. And two, as Defendant states, Plaintiff "conflates Carnival's alleged failure to adhere to industry design standards with Carnival deviating from internal safety policies and procedures." [ECF No. 20, p. 5]. Additionally, the FAC "does not allege corrective measures or internal safety policies. Instead, Plaintiff claims defects in the ship's construction[.]" *Id*. at 6.

Defendant's motion should be **granted** as to this point and this allegation [ECF No. 13, ¶ 17(c)] should be **stricken**[7] because of its failure to sufficiently allege notice. *See Francis v. MSC Cruises, S.A.,* 546 F. Supp. 3d 1258, 1266 (S.D. Fla. 2021) (Moreno, J.), *aff'd*, 21-12513, 2022 WL 4393188 (11th Cir. Sept. 23, 2022) ("[I]n order for the industry standards to put a defendant on notice of an alleged dangerous condition . . . a plaintiff must put forth evidence of industry standards related to the timing or frequency of a required inspection and such evidence must raise a reasonable inference that the cruise line should have known about an allegedly dangerous condition.").

[7] In her response, Plaintiff states that if the Court does not find that *Carroll, Holderbaum,* and *Loredo* as persuasive authority, then she "respectfully submits that" this allegation be struck instead of a "wholesale dismissal" of her FAC. [ECF No. 19, p. 8]. The Undersigned agrees.

Notice Regarding Defendant's Alleged "Failure to Inspect"

The FAC alleges that Defendant "knew or should have known of this dangerous condition through inspecting the subject area involved in [Plaintiff's] incident, and if it did not know of this dangerous condition, this was because [Defendant] failed to adequately inspect the subject area prior to [her] incident." [ECF No. 13, ¶ 17(d)].

Defendant argues that this allegation/argument is circular and conclusory because it "lack[s] any factual support that would allow this Court to draw a reasonable inference that Carnival had actual or constructive notice of the risk-creating condition." [ECF No. 17, p. 8 (citing *Nichols v. Carnival Corp.*, 423 F. Supp. 3d 1316, 1323 (S.D. Fla. 2019) ("These allegations do not present sufficient facts to establish notice because they do not allege how, factually, Carnival's inspections would have revealed the various allegedly unsafe conditions and what the corresponding unsafe conditions were."))]. Plaintiff did not respond to this argument—consequently waiving any objections to it. *Jones v. Bank of Am., N.A.*, 564 F. App'x 432, 434 (11th Cir. 2014) (noting that "when a party fails to respond to an argument or otherwise address a claim, the Court deems such argument or claim abandoned") (citation omitted).

If a notice allegation is "indeed more conclusory than factual, then the court does not have to assume [its] truth." *Newbauer v. Carnival Corp.*, 26 F.4th 931, 934 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 212, 214 L. Ed. 2d 83 (2022) (quoting *Chaparro*, 693 F.3d at 1337). Here, there is nothing illustrating how the inspections would have given

Defendant notice. This allegation also *assumes* that if Defendant did not know about the dangerous condition, then it must have been because it failed to adequately inspect the subject area.

At bottom, the Undersigned agrees with Defendant and **respectfully recommends** that the Court **grant** Defendant's motion with regards to this argument. Plaintiff's allegation [ECF No. 13, ¶ 17(d)] is impermissibly conclusory and should be **stricken**[8] because it is factually unsupported.

<u>*Notice Regarding Prior Similar Incidents*</u>

The FAC states that "[p]revious passengers in prior cases suffered prior slip and fall incidents involving similar surfaces on the same ship and other ships in [Defendant's] fleet[.]" [ECF No. 13, ¶ 17(e)]. It proceeds to list eight different cruise lines (including Defendant and its subsidiaries) and cites only to *Williams v. Carnival Corp*., 440 F. Supp. 3d 1316, 1318 (S.D. Fla. 2020) ("On June 4, 2017, Williams **slipped and fell** on the **Lido Deck** of Carnival's cruise ship, **<u>the Carnival *Liberty*</u>**. [D.E. 41, ¶¶ 2-3]. Williams claims that she fell after slipping in a **<u>puddle of water</u>** measuring approximately four by two feet.") (emphasis in original)).

Defendant argues that this notice allegation is insufficient because the *Williams* incident "is too remote in time to impute notice on Carnival." [ECF No. 17, p. 9]. Instead

[8] In accordance with her request for it to be stricken instead of dismissing the FAC in its entirety. *See* [ECF No. 19, p. 11].

of responding to Defendant's argument that her allegation is "too remote" to be sufficient, Plaintiff argued that she "pled the only detail she was required to plead in order to sufficiently state her notice allegations." [ECF No. 19, p. 10].[9] The Undersigned finds that Plaintiff waived her response to Defendant's argument because she failed to address it. *See Jones*, 564 F. App'x at 434.

The *Williams* incident occurred on June 4, 2017. [*Williams v. Carnival Corp*., 1:18-cv-21654-EGT, ECF No. 1, ¶ 7]. Plaintiff's incident occurred approximately **seven** years later, "on or about February 27, 2024[.]" [ECF No. 13, ¶ 12]. The Eleventh Circuit has said that "[u]nder the substantial similarity doctrine, such evidence is [only] admissible if: (1) the circumstances of the prior incidents are substantially similar to those at issue in the present action and (2) the prior incidents are not too remote in time." *Jones v. Otis Elevator Co*., 861 F.2d 655, 661–62 (11th Cir. 1988). "Determining the remoteness of evidence is within the trial judge's discretion." *Id*. (citing *Keyes v. School Dist. No. 1*, 521 F.2d 465 (10th Cir. 1975), *cert. denied*, 423 U.S. 1066, 96 S. Ct. 806, 46 L. Ed. 2d 657 (1976)).

Courts within the District have found that incidents occurring five years or less than the one at issue are not "too remote" for purposes of establishing notice. *See, e.g., Spotts v. Carnival Corp*., 711 F. Supp. 3d 1360, 1367 (S.D. Fla. 2024) (denying motion to

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[9] The Undersigned agrees with Plaintiff's argument that she is not obligated to present *identical* circumstances in order to surpass this hurdle because prior similar incidents need not be identical to survive a motion to dismiss. *See Sorrels v. NCL (Bahamas) Ltd*., 796 F.3d 1275, 1287 (11th Cir. 2015) ("The 'substantial similarity' doctrine does not require identical circumstances[.]").

dismiss because the prior incidents were within five years of the incident at issue); *Smith v. Carnival Corp. & PLC*, No. 22-cv-22853, 2023 WL 8370478, at *13 (S.D. Fla. Dec. 4, 2023) (Bloom, J.) (denying motion *in limine* to exclude evidence of a prior incident where the plaintiff's "incident occurred on July 8, 2022, less than four years after Mr. McWilliams' incident, and is therefore not too remote in time").

A single prior incident occurring approximately **seven** years before Plaintiff's is too remote for purposes of establishing notice. Additionally, like with Plaintiff's argument related to whether she sufficiently alleged notice based on a violation of industry standards, she "respectfully submits that" the Court should strike this allegation [ECF No. 13, ¶ 17(e)] instead of dismissing her FAC if we do not find her arguments persuasive on the issue. [ECF No. 19, p. 11]. Therefore, the Undersigned, in accordance with Plaintiff's consequential waiver and lack of support stating otherwise, **respectfully recommends** that Defendant's motion be **granted** with regards to this argument, and that this allegation [ECF No. 13, ¶ 17(e)] be **stricken**.

Notice Revealed Through Future Discovery

Defendant argues that Plaintiff impermissibly alleges notice by stating that Defendant "knew or should have known of this dangerous condition for other reasons that will be revealed through discovery." [ECF No. 17, p. 9 (quoting ECF No. 13, ¶ 17(f))]. Defendant cites *Rygula v. NCL (Bahamas) Ltd.*, No. 18-24535-CIV, 2019 WL 13237012, at *4 (S.D. Fla. Aug. 28, 2019) in support. In *Rygula*, Senior United States District Judge Robert

N. Scola, Jr. discussed why this type of allegation fails to meet the necessary pleading standards:

> Rygula's allegation that Norwegian also breached its duty to him "[i]n other ways which may be revealed through discovery" is also insufficient, as well as improper. The plausibility standard enunciated in *Twombly* "calls for enough fact to raise a reasonable expectation that discovery will reveal evidence" of the defendant's liability. *Twombly*, 550 U.S. at 556. Putting the cart before the horse, through this allegation, Rygula instead seeks discovery so that he can allege facts in his complaint supporting his claim: the very model of a fishing expedition. While a plaintiff need not "allege a specific fact to cover every element or allege with precision each element of a claim, it is still necessary that a complaint contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory." *Fin. Sec. Assur., Inc. v. Stephens, Inc.*, 500 F.3d 1276, 1282–83 (11th Cir. 2007) (quotations omitted). To that end, before drafting a complaint, counsel must exhibit at least some diligence in seeking to ascertain enough facts that could support a court's reasonable inference that a defendant is plausibly liable for the injuries alleged. Here, the Court finds no indication of any such diligence.

Id.

Plaintiff did not respond to this argument. *See Jones*, 564 F. App'x at 434. Aside from noting that Plaintiff waived her response to this argument, the Undersigned finds Judge Scola's discussion persuasive, and agrees that this type of notice allegation is legally insufficient. Therefore, the Undersigned **respectfully recommends** that the Court **grant** Defendant's motion with regards to this argument.

IV. Conclusion

For the above-mentioned reasons, the Undersigned **respectfully recommends** that the District Court **deny in part** and **grant in part** Defendant's Motion to Dismiss **without**

prejudice. Instead of dismissing the FAC, the following paragraphs should be **stricken** in accordance with Plaintiff's failure to provide sufficient factual support and her ***request*** that they be stricken as an alternative to dismissal: 17(c); 17(d); 17(e); and 17(f). *See* [ECF No. 19, p. 11. ("However, to the extent this Honorable Court does desire to address each of [Plaintiff's] other allegations of notice, she respectfully submits that an order striking only those allegations is the better course of action, rather than dismissing [Plaintiff's] entire complaint.")].

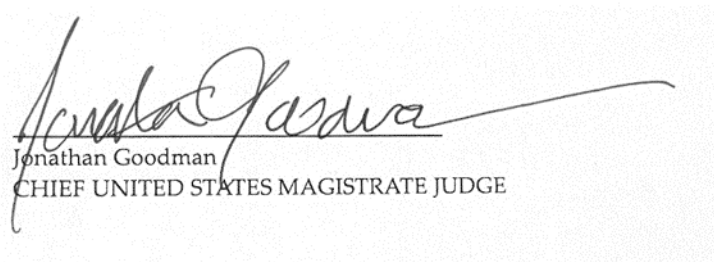
If Plaintiff would rather avoid having these allegations stricken and instead amend her complaint again, then she **must** file the appropriate motion with the Court. Her response includes a request for "leave to amend to correct any remaining deficiencies." *Id*. However, this request is impermissible because it is not properly raised. *See Newton v. Duke Energy Fla., LLC*, 895 F.3d 1270, 1277 (11th Cir. 2018) ("[W]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly."); *Avena v. Imperial Salon & Spa, Inc*., 740 F. App'x 679, 683 (11th Cir. 2018) ("reject[ing] the idea that a party can await a ruling on a motion to dismiss before filing a motion for leave to amend" and noting that "a motion for leave to amend should either set forth the substance of the proposed amendment or attach a copy of the proposed amendment" (quotations omitted)). So, by way of summary, Plaintiff may proceed on her existing, albeit narrowed, FAC or file a separate motion for leave to amend, attaching the proposed Second Amended Complaint. By giving Plaintiff

this choice, the Undersigned is not guaranteeing, predicting or assuming that her Second Amended Complaint will be permitted.

V. Objections

The parties will have 14 days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with Judge Williams. Each party may file a response to the other party's objection within 14 days of the objection. Failure to timely file objections shall bar the parties from a *de novo* determination by Judge Williams of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C. § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, March 31, 2025.



<u>Copies furnished to:</u>
The Honorable Kathleen M. Williams
All Counsel of Record