

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:24-cv-24222-WILLIAMS/GOODMAN

JYVONNE LOVE,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

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 Jyvonne Love’s (“Plaintiff” or “Love”) First Amended Complaint (“FAC”). [ECF No. 13].¹ Plaintiff filed a response in opposition, and Defendant filed a reply. [ECF Nos. 25; 26]. United States District Judge Kathleen M Williams referred the motion to the Undersigned. [ECF No. 20].

¹ Plaintiff filed her Complaint [ECF No. 1] and Defendant filed its motion to dismiss [ECF No. 9]. The following month, presumably in response to the motion, Plaintiff voluntarily filed her FAC. [ECF No. 13].

For the reasons outlined below, the Undersigned **respectfully recommends** that Judge Williams **grant in part** and **deny in part** Carnival's Motion to Dismiss [ECF No. 19].

I. Factual Background (*i.e.*, Plaintiff's Allegations)

Plaintiff filed this action against Carnival seeking compensatory damages and alleging physical, emotional, and economic injuries. The FAC includes five counts, the first three alleging direct liability, and the last two alleging vicarious liability: Negligent Failure to Remedy (Count I); Negligent Failure to Warn of a Dangerous Condition (Count II); Negligent Design, Installation, and/or Approval of the Subject Headboard (Count III); Negligence for the Acts of Carnival Crew and/or Agents based on Vicarious Liability (Count IV); and Vicarious Liability for the Negligent Design, Installation, and/or Approval of the Subject Surface and the Vicinity Against Carnival (Count V). [ECF No. 13].

Carnival's motion to dismiss is based on two grounds: (1) Counts I–III fail to sufficiently allege that Carnival was on notice of the purportedly dangerous condition; and (2) Counts IV and V constitute a shotgun pleading. [ECF No. 19].

The following allegations concern **all** five counts of Plaintiff's FAC:

14. On or about November 19, 2023, between approximately 9:00 p.m. and 10:00 p.m., LOVE was getting into the bed in her cabin to go to sleep. As she got under the covers, the headboard, which was made of metal, heavy, broken, unmaintained, loose, old, worn out, was precariously placed over the bed, and had wires (which were exposed) sticking out from it,

which made it an unreasonably dangerous condition, fell on top of her head.

15. As a result, LOVE sustained severe injuries, including, but not limited to, a concussion, headaches, a possible traumatic brain injury, and other injuries.

16. At all relevant times, the risk-creating and/or dangerous condition was the subject headboard that fell on LOVE's head.

17. This dangerous condition caused LOVE'S incident and injuries because it fell on her head.

18. 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. The cabin steward for LOVE's cabin mentioned to LOVE after the incident that cabin headboards had fallen on passengers in other cabins.

b. LOVE observed CARNIVAL's crewmember (the cabin steward) in the subject area within 5-10 feet of the exact location of LOVE's incident prior to her incident when this cabin steward was making the beds. This crewmember had direct line of sight on the exact location of the subject headboard, was within viewing distance thereof, and was close enough to see that the subject headboard was unsecure, that it was hanging multiple inches from the top of the wall, that it looked broken, that it looked unmaintained, loose, old, and worn out, that the headboard was precariously placed over the bed, and had that [sic] it had exposed wires sticking out from it. However, this crewmember failed to secure, remedy, or remove the subject headboard prior to LOVE's incident. Moreover, after the incident, LOVE's husband called this crewmember, who called her supervisor, who then called maintenance, and one of the maintenance personal [sic] said when this person came, that the headboard was metal, too heavy, and had to call for help as a result.

c. CARNIVAL's policies and procedures require its stateroom stewards to check the headboards to ensure that they are adequately

secured prior to every voyage, and to make sure that they are not loose and unsecured such that they are a danger of falling on passengers.

d. CARNIVAL participated in the installation and/or design of the subject area, or alternatively, CARNIVAL accepted the area with its unreasonably defective design present after having been given an opportunity to inspect the ship and materials on it, including the subject area, such that CARNIVAL should have known of the unreasonably defective design of the subject area before providing it for public use.

e. 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 headboards being poorly secured, being made of dangerous materials, and being placed in positions where they could easily hit people on the head if they became unsecured, including CARNIVAL's own policies and procedures. A fact finder is entitled to determine, if it so chooses [sic], that these standards/recommendations/other guidelines show what a reasonable cruise line should have done.

f. CARNIVAL also knew or should have known of this dangerous condition through inspecting it, and if it did not know of this dangerous condition, this was because CARNIVAL failed to adequately inspect the subject area prior to LOVE'S incident.

g. Previous passengers in prior cases suffered incidents involving unreasonably dangerous materials such as headboards falling on their heads 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). Such incidents include, but are not limited to, *Ewing v. Carnival Corp.*, No. 19-20264-CIV, 2022 WL 1719315, at *2 (S.D. Fla. May 27, 2022), aff'd on other grounds, No. 23-10883, 2024 WL 2764391 (11th Cir. May 30, 2024) ("Ewing alleges he was injured when an upper-stowed bunk bed in his cabin suddenly and without warning deployed and struck him on the top of his head. At the time, Ewing was sitting on the lower bed, eating a slice of pizza."), and *Williams v. Carnival Corp.*,

576 F. Supp. 3d 1112, 1115 (S.D. Fla. 2021) (“Plaintiff claims that she “suffered a severe injury to her head and back when the closet door of the cabin suddenly and without warning fell on top of her, resulting from the door being loose from its hinges,” Compl. ¶ 5, which caused her to “sustain[] severe and permanent injuries to her neck, head, and back.” *Id.* ¶ 8.”).

h. Moreover, CARNIVAL knew or should have known of this dangerous condition for other reasons that will be revealed through discovery.

19. At all times relevant, the subject area was unreasonably dangerous, risk-creating, defective, improperly designed, improperly installed, and/or otherwise unsafe.

20. The subject area and the vicinity lacked adequate safety features to prevent or minimize LOVE’S incident and/or injuries.

21. The dangerous condition was known, or should have been known, to CARNIVAL in the exercise of reasonable care.

22. The dangerous condition existed for a period of time before the incident.

[ECF No. 13, ¶¶ 14–22].

II. Applicable Legal Standards

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 direct negligence claims, 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). *Yusko*, 4 F.4th at 1169–70.

Here, Counts I–III are solely based on direct liability. Therefore, in order to proceed under these claims, Plaintiff **must** establish actual or constructive notice—something Defendant argues Plaintiff failed to accomplish.

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)). Defendant’s motion argues that the

FAC should be dismissed because it fails to establish notice and because Counts IV and V improperly commingle direct liability allegations. The Undersigned will address each of Defendant's arguments below.

1. The Cabin Steward

The FAC, in part, seeks to plead notice in the first three counts by alleging that:

LOVE observed CARNIVAL's crewmember (the cabin steward) in the subject area within 5-10 feet of the exact location of LOVE's incident prior to her incident when this cabin steward was making the beds. This crewmember had direct line of sight on the exact location of the subject headboard, was within viewing distance thereof, and was close enough to see that the subject headboard was unsecure, that it was hanging multiple inches from the top of the wall, that it looked broken, that it looked unmaintained, loose, old, and worn out, that the headboard was precariously placed over the bed, and had that it had [sic] exposed wires sticking out from it. However, this crewmember failed to secure, remedy, or remove the subject headboard prior to LOVE's incident. Moreover, after the incident, LOVE's husband called this crewmember, who called her supervisor, who then called maintenance, and one of the maintenance personal [sic] said when this person came, that the headboard was metal, too heavy, and had to call for help as a result.

[ECF No. 13, ¶ 18(b)].

Carnival asserts that Plaintiff's notice allegations regarding the cabin steward are conclusory because "[k]nowledge that the condition exists is not sufficient, the defendant must also know that the condition is dangerous." [ECF No. 19, p. 5 (quoting *Malley v. Royal Caribbean Cruises Ltd.*, 713 F. App'x 905, 908 (11th Cir. 2017))]. It contends that these allegations are similar to the inadequate notice allegations pled in *Patton v. Carnival Corp.*,

where the Eleventh Circuit affirmed Senior United States District Judge Robert N. Scola Jr.'s dismissal of a plaintiff's complaint against Carnival. No. 22-13806, 2024 WL 1886504, at *1 (11th Cir. Apr. 30, 2024).²

In *Patton*, a passenger "tripped over a 'metal threshold' that was not flush with the floor." *Patton v. Carnival Corp.*, No. 22-21158-CIV, 2022 WL 7536256, at *1 (S.D. Fla. Oct. 13, 2022), *aff'd*, No. 22-13806, 2024 WL 1886504 (11th Cir. Apr. 30, 2024). The plaintiff sought to support her claim that Carnival had actual or constructive knowledge of this condition by:

(1) [including] a new, undated photograph (alongside a similar, previously pleaded photograph) of the threshold at issue which [the plaintiff] ple[d] was taken "at or shortly after the time [she] tripped and fell"; (2) [] **argu[ing] by inference that there [was] "a reasonable inference that the gap had developed over time and had been present for some time" and therefore Carnival's employees must have seen the raised metal threshold before the incident because they "routinely do clean the floors in the area";** and (3) [including] minutes from multiple "safety meetings" on the ship indicate[d] that "Carnival was aware of the tripping hazard posed by damaged threshold[s,]" generally.

² As stated, Defendant's argument here relies on the Eleventh Circuit's holding in *Patton*, 2024 WL 1886504, at *1-2. [ECF No. 19, p. 6]. In *Patton*, the defendant filed two motions to dismiss (one for the initial complaint and another for the first amended complaint). The Eleventh Circuit's April 30, 2024 holding relates to the *Patton* plaintiff's **first amended complaint**.

However, the language Carnival repeatedly quotes is *not* from the Eleventh Circuit's discussion regarding the first amended complaint—but from Judge Scola's order regarding the defendant's **initial** motion to dismiss (the initial complaint). *Patton v. Carnival Corp.*, No. 22-21158-CIV, 2022 WL 2982699, at *2 (S.D. Fla. July 28, 2022) ("[plaintiff] appears to allege that the presence of the cleaning staff alone is sufficient to state a claim that Carnival was or should have been on notice.").

Id. at *2 (record citations omitted) (emphasis added).

Judge Scola rejected the plaintiff's "common sense" argument "that Carnival employees would have seen the alleged tripping hazard, as they routinely clean the floors in the area once a day," *id.* (internal quotation marks omitted), for the reasons stated in an earlier dismissal order.³

The Eleventh Circuit affirmed Judge Scola's ruling, finding that the plaintiff's constructive knowledge argument "[e]ll[] short for the same reason it did in *Holland*. *Patton*, 2024 WL 1886504, at *2. As the appellate court explained:

Here, too, [the plaintiff] ha[d]n't plausibly alleged that the dangerous condition existed for a "sufficient length of time" to impute notice to Carnival because **the complaint lack[ed] any plausible "allegation as to how long" the dangerous condition existed.** *See Holland*, 50 F.4th at 1096. Likewise, she hasn't plausibly described the dangerous condition "in a way that would suggest" it had been there "for a sufficient period of time." *See id.* **The photographs don't help her because, as the district court explained, [the plaintiff] "does not even attempt to plead that the photographs . . . represent the state of the metal threshold before the time of the incident."**

[S]he contends that, although the photos attached to the complaint were taken "at or shortly after" she fell, the "reasonable inference[]" to draw is that "the dangerous condition of the threshold was due to wear and developed over a considerable time, much more than just a few minutes, hours or even days." **But there's not enough in the complaint or the attachments for us to conclude that this inference is reasonable and not**

³ Namely that, "at most, *Patton* complain[ed] of a metal threshold that was uneven with the floor by inches, if not less. Therefore, absent any allegations that Carnival employees would have plausibly seen the metal threshold and recognized its potential danger, *Patton* ha[d] not sufficiently alleged notice." 2022 WL 2982699, at *2.

an unwarranted deduction. See *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1260 (11th Cir. 2009) (“In evaluating the sufficiency of a plaintiff’s pleadings, we make reasonable inferences in [the] [p]laintiff’s favor, but we are not required to draw [the] plaintiff’s inference. Similarly, unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of [the] plaintiff’s allegations.” (cleaned up)). **[The plaintiff] never explains (and it’s not self-evident) what in the photos or complaint shows that it’s a reasonable inference that the gap beneath the metal threshold emerged gradually over the course of days due to wear and tear.**

Id. at *3 (emphasis added).

In her response, Love argues that she adequately pled notice pursuant to *Aponte v. Royal Caribbean Cruise Lines Ltd.*, 739 F. App’x 531, 537 (11th Cir. 2018). [ECF No. 25, p. 4 (“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.”)]. She additionally highlights how in *Quiñones v. MSC Cruises*, this Court found that the plaintiff adequately established notice by alleging that a crewmember was in the immediate area and that this crew member “was close enough to the subject area to have seen the danger.” *Id.* at 3 (quoting No. 1:24-CV-20626, 2024 WL 3653076 (S.D. Fla. July 2, 2024), *report and recommendation adopted*, No. 24-20626-CV, 2024 WL 3650097 (S.D. Fla. Aug. 5, 2024)).

In *Quiñones*, the plaintiff alleged

[t]here 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.

Id. at *2. This Court found these allegations “adequate to allege constructive notice.” *Id.* at *6.

Here, like *Quiñones*, Love’s FAC explicitly alleges that the cabin steward was in the immediate area of the dangerous condition prior to the incident, and saw the subject headboard. [ECF No. 13, ¶ 18(b)]. Moreover, the FAC alleges that “[t]he cabin steward for LOVE’s cabin mentioned to LOVE after the incident that cabin headboards had fallen on passengers in other cabins.” *Id.* at ¶ 18(a).

Therefore, at this stage, these allegations provide enough to establish a plausible theory of Defendant’s notice of the dangerous condition and to “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). Consequently, the Undersigned **respectfully recommends** that the Court **deny** Defendant’s motion with regards to this argument.

2. Policies and Procedures

The FAC alleges that Defendant was on notice of the dangerous condition because of its policies and procedures regarding the cabin headboards, together with the relevant safety standards. [ECF No. 13, ¶¶ 18(c); 18(e)]. Defendant argues that “violations of industry standards do not establish notice.” [ECF No. 19, p. 7 (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. First, 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 (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 second, she fails to cite or specify the policies and procedures she relies upon. *Christian v. Carnival Corp.*, No. 1:24-CV-21436, 2024 WL 4350875, at *5 (S.D. Fla. Aug. 22, 2024), *report and recommendation adopted*, No. 24-21436-CV, 2024 WL 4346329 (S.D. Fla. Sept. 30, 2024) (allegations that a defendant violated its policy of using warning signs are vague and contrary to binding case law when the policy relied upon is not cited nor attached to the complaint).

Therefore, Defendant's motion should be **granted** as to this point, and these allegations [ECF No. 13, ¶¶ 18(c); 18(e)] should be **stricken**⁴ because of their 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.”).

3. General Inspections

The FAC alleges that Defendant was on notice because it “knew or should have known of this dangerous condition through inspecting it, and if it did not know of this dangerous condition, this was because Carnival failed to adequately inspect the subject area prior to LOVE’S incident.” [ECF No. 13, ¶ 18(f)].

Defendant contends that this argument is too vague and conclusory to establish notice. [ECF No. 19, pp. 8–9 (*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

⁴ In her response, Plaintiff states that if the Court does not find that *Carroll*, *Holderbaum*, and *Loreda* are persuasive authority, then she “respectfully submits that” this allegation be struck, instead of a “wholesale dismissal” of her FAC. [ECF No. 25, p. 8]. The Undersigned grants the request.

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, ¶ 18(f)] is impermissibly conclusory and should be **stricken**⁵ because it is factually unsupported.

⁵ In accordance with her request for it to be stricken (instead of dismissing the FAC in its entirety). *See* [ECF No. 25, p. 11].

4. Prior Incidents

The FAC alleges that Carnival was on notice because the “cabin steward for LOVE’s cabin mentioned to LOVE after the incident that cabin headboards had fallen on passengers in other cabins.” [ECF No. 13, ¶ 18(a)]. The FAC notes that “[p]revious passengers in prior cases suffered incidents involving unreasonably dangerous materials such as headboards falling on their heads on the same ship and other ships in CARNIVAL’S fleet.” *Id.* at ¶ 18(g).

The FAC proceeds to list eight different cruise lines and cites to two cases: *Ewing v. Carnival Corp.*, No. 19-20264-CIV, 2022 WL 1719315, at *2 (S.D. Fla. May 27, 2022), *aff’d on other grounds*, No. 23-10883, 2024 WL 2764391 (11th Cir. May 30, 2024) (“Ewing alleges he was injured when an upper-stowed bunk bed in his cabin suddenly and without warning deployed and struck him on the top of his head. At the time, Ewing was sitting on the lower bed, eating a slice of pizza.”), and *Williams v. Carnival Corp.*, 576 F. Supp. 3d 1112, 1115 (S.D. Fla. 2021) (“[The] [p]laintiff claims that she ‘suffered a severe injury to her head and back when the closet door of the cabin suddenly and without warning fell on top of her, resulting from the door being loose from its hinges,’ which caused her to ‘sustain[] severe and permanent injuries to her neck, head, and back.’” (internal citations omitted)).

Carnival argues that paragraph 18(g)’s notice allegation is insufficient because “none of the alleged prior incidents occurred on the same vessel, class of vessel, and do

not involve the same or similar alleged dangerous condition. As such, the prior incidents cited by Plaintiff are easily distinguishable.” [ECF No. 19, p. 9].

In response, Plaintiff argues that the “‘substantial similarity’ doctrine does not require identical circumstances[] and allows for some play in the joints depending on the scenario presented and the desired use of the evidence.” [ECF No. 25, p. 9 (quoting *Fawcett, v. Carnival Corp.*, 2023 WL 4424195, at *3–4 (S.D. Fla. July 10, 2023) (citations omitted)]. Further, Plaintiff points out that the *Fawcett* court stated, “[w]hether the allegedly prior similar incidents are indeed so similar as to impute notice to Defendant are questions the Court will not resolve on a motion to dismiss.” *Id.*

However, the *Fawcett* complaint (where the incident occurred on the Lido Deck of the *Magic*) included prior incidents that “occurred on the Lido Deck of the *Magic* or a similarly configured vessel.” *Fawcett*, 682 F. Supp. 3d at 1111. Here, neither of the cases Plaintiff relies upon occurred on the *Radiance*, nor is there any factual support indicating that the vessels involved in *Ewing* or *Williams* were similarly configured. Additionally, in reviewing both cases, *Ewing* and *Williams* are seemingly “too remote in time.”⁶ *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988) (“Under the substantial similarity

⁶ The *Ewing* incident occurred “on or about January 25, 2018 aboard *Carnival Ecstasy*.” [*Ewing v. Carnival Corp.*, 1:19-cv-20264, ECF No. 1, ¶ 10]. 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 “[o]n or about November 19, 2023,” approximately **six** years after the *Ewing* incident, and **six and a half** years after the *Williams* incident. [ECF No. 13, ¶ 14].

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.”)

The Eleventh Circuit has said that “[d]etermining 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 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”).

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[.]”). However, both of the two prior incidents she relies

upon occurred approximately six years before Plaintiff's incident and are too remote for purposes of establishing notice.

As before, Plaintiff requests that the Court strike this allegation [ECF No. 13, ¶ 18(g)] as an alternative to dismissing her FAC. [ECF No. 25, p. 10]. Therefore, the Undersigned **respectfully recommends** that Defendant's motion be **granted** with regards to this argument, and that this allegation [ECF No. 13, ¶ 18(g)] be **stricken**.

5. "Other reasons that will be revealed in discovery"

The FAC alleges that "CARNIVAL knew or should have known of this dangerous condition for other reasons that will be revealed through discovery." [ECF No. 13, ¶ 18(h)]. Defendant argues that this allegation is "insufficient and improper." [ECF No. 19, p. 10]. It 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*, Judge Scola 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, and **strike** this allegation (§ 18(h)) pursuant to Plaintiff's request [ECF No. 25, p. 11].

6. Sufficient Length of Time

Defendant argues that Plaintiff's allegation that the "dangerous condition existed for a period of time before the incident" is vague and conclusory. [ECF No. 19, p. 10 (quoting ECF No. 13, § 22)]. Defendant contends that Plaintiff is obligated, under *Newbauer* and *Holland*, to allege "sufficient facts regarding how long the dangerous condition existed or facts that suggest the dangerous condition had been present for a sufficient period of time." *Id.* at 10–11.

Plaintiff failed to respond to this argument, and consequently waived her response. *See Jones*, 564 F. App'x at 434. Therefore, the Undersigned **respectfully recommends** that the Court **grant** Defendant's motion with regards to this argument, and **strike** this allegation (§ 22) pursuant to Plaintiff's request [ECF No. 25, p. 11].

7. Shotgun Pleading

Finally, Defendant argues that Love “improperly commingled allegations of direct and vicarious liability **within** Counts IV and [V],” and requests that those two Counts “be dismissed as shotgun pleadings.” [ECF No. 19, p. 14 (emphasis added)]. Specifically, Defendant highlights how both Count IV and V “improperly adopt and reallege paragraphs eighteen (18) and twenty-two (22) [of the FAC].” *Id.* at 13. Carnival also states that Count IV improperly adopts and realleges paragraph 27.⁷ *Id.* at 12.

The Eleventh Circuit has stated that the purpose of Federal Rules of Civil Procedure 8 and 10 is to “require the pleader to present his claims discretely and succinctly, so that his adversary can discern what he is claiming and frame a responsive pleading.” *See Barmapov v. Amuial*, 986 F.3d 1321, 1324 (11th Cir. 2021) (quoting *Weiland v. Palm Beach Cnty. Sherriff’s Off.*, 792 F.3d 1313, 1320 (11th Cir. 2015)). Complaints that violate Rule 8 or Rule 10 are termed “shotgun pleadings,” and the Eleventh Circuit has consistently condemned such pleadings for more than three decades. *See Davis v. Coca-Cola Bottling Co. v. Consol*, 516 F.3d 955, 979–80 & n.54 (11th Cir. 2008) (collecting cases) (abrogated on other grounds).

There are four types of shotgun pleadings:

The most common type—by a long shot—is a complaint containing multiple counts where each count adopts the allegations of all preceding

⁷ Paragraph 27 of the FAC alleges “[A]t all times relevant, CARNIVAL participated in the design and/or approved the design of the subject area and the vicinity involved in LOVE’S incident.” [ECF No. 13, ¶ 27].

counts, causing each successive count to carry all that came before and the last count to be a combination of the entire complaint. The next most common type . . . is a complaint that does not commit the mortal sin of re-alleging all preceding counts but is guilty of the venial sin of being replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action. The third type of shotgun pleading is one that commits the sin of not separating into a different count each cause of action or claim for relief. Fourth, and finally, there is the relatively rare sin of asserting multiple claims against multiple defendants without specifying which of the defendants are responsible for which acts or omissions, or which of the defendants the claim is brought against.

Weiland, 792 F.3d at 1321–23 (footnotes omitted).

"The Eleventh Circuit has repeatedly and unequivocally condemned shotgun pleadings as a waste of judicial resources." *Finch v. Carnival Corp.*, No. 23-CV-21704, 2023 WL 7299780, at *4 (S.D. Fla. Nov. 6, 2023). "Shotgun pleadings, whether filed by plaintiffs or defendants, exact an intolerable toll on the trial court's docket, lead to unnecessary and unchanneled discovery, and impose unwarranted expense on the litigants, the court and the court's para-judicial personnel and resources. Moreover, justice is delayed for the litigants who are 'standing in line,' waiting for their cases to be heard." *Id.* (quoting *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1356–57 (11th Cir. 2018)).

A district court's inherent authority to control its docket includes the ability to dismiss a complaint on shotgun pleading grounds. *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018) (citing *Weiland*, 792 F.3d at 1320). The Eleventh Circuit has also noted that district courts should require a plaintiff to replead a shotgun complaint even when the defendant does not seek such relief. *See Hirsch v. Ensurety Ventures, LLC*, No. 19-

13527, 2020 WL 1289094 at *3 (11th Cir. Mar. 18, 2020).

Love concedes that her FAC “inadvertently incorporates paragraphs 27 and 28 into [Count IV]” but asserts that “it is abundantly clear from the allegations within Count IV, including paragraph 86, that the negligence LOVE is alleging in Count IV is solely the negligence of the ‘crewmember discussed in paragraph 18(a)[,] [who failed] to inspect, maintain, secure, and warn of the subject headboard.’” [ECF No. 25, p. 16]. Consequently, Plaintiff submits that her mistake “should not render Count IV subject to dismissal where the crewmember LOVE is seeking to hold CARNIVAL vicariously liable for is made abundantly[sic] in the allegations contained in Count IV itself.” *Id.*

The Undersigned disagrees.

In *Weiland*, the Eleventh Circuit identified four common types of shotgun pleadings. 792 F.3d at 1320–23. Only one category is at issue here: the third type, which “commits the sin of not separating into a different count each cause of action or claim for relief.” *Id.* at 1322–23. “The key inquiry is whether the ‘failure to more precisely parcel out and identify the facts relevant to each claim materially increase[s] the burden of understanding the factual allegations underlying each count.’” [ECF No. 19, p. 15 (citing *Doe v. Carnival Corp.*, 470 F. Supp. 3d 1317, 1323 (S.D. Fla. 2020) (quoting *Weiland*, 792 F.3d at 1324))].

Defendant points to *Goroni v. Carnival Corp.* as being instructive. No. 1:24-CV-22995, 2024 WL 5373964, at *11 (S.D. Fla. Dec. 9, 2024), *report and recommendation adopted*,

No. 24-22995-CV, 2025 WL 587070 (S.D. Fla. Feb. 24, 2025). In *Goroni*, this Court addressed a motion to dismiss which argued that the at-issue complaint was a shotgun pleading because it comingled claims of negligence and vicarious liability. Count I from the *Goroni* complaint asserted a negligence claim but incorporated by reference a paragraph which included the following: “[the defendant] ‘employed the crewmembers assigned to inspect and monitor the area of [the] [p]laintiff's fall (Hotel Stewards), clean the area of [the] [p]laintiff's fall (Housekeeping Team Members), and repair the subject strip/moulding/ledge/ grading (Carpentry Department), and **is vicariously liable for the negligence of these crewmembers[.]**” *Id.* (internal citations omitted) (emphasis in original).

This Court in *Goroni* held that the negligence count’s incorporation of that paragraph with the vicarious liability language “improperly plead both negligence and vicarious liability in the same count.” *Id.* at *12 (citing *Gharfeh v. Carnival Corp.*, No. 17-20499-CIV, 2018 WL 501270, at *6 (S.D. Fla. Jan. 22, 2018) (“Carnival is correct that Count I improperly commingles claims. Count I’s title suggests that it contains only a claim for vicarious liability, based on theories of actual agency/respondeat superior, apparent agency/estoppel, and joint venture. But it also includes allegations of direct negligence. Count I is thus an example of an impermissible shotgun pleading and it needs to be clarified.”)).

The FAC here suffers from a flipped version of the same flaw the *Goroni* complaint contained. Counts IV and V, both based on vicarious liability theories, improperly incorporate the notice paragraphs related to Plaintiff's direct liability claims (Counts I–III). While not a fatal flaw, it does lead to confusion. Therefore, if Judge Williams permits Plaintiff to file a second amended complaint, then Plaintiff should be mindful of cleaning up the language between her direct and vicarious liability counts. *See Kercher v. Carnival Corp.*, No. CV 19-21467-CIV, 2019 WL 1723565, at *1 (S.D. Fla. Apr. 18, 2019) (collecting cases) (“Each theory is a separate cause of action that must be asserted independently and with supporting factual allegations.”).

For these reasons, the Undersigned **respectfully recommends** that the District Court **dismiss without prejudice** Counts IV and V of Plaintiff's FAC.

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 [ECF No. 19]. With regards to Counts I, II, and III, the Undersigned **respectfully recommends** that paragraphs 18(c), 18(e)–(h), and 22 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. [ECF No. 25, pp. 8; 10; 11]. With regards to Counts IV and V, the Undersigned **respectfully recommends** that they be **dismissed without prejudice** because they improperly incorporate allegations related to direct liability.

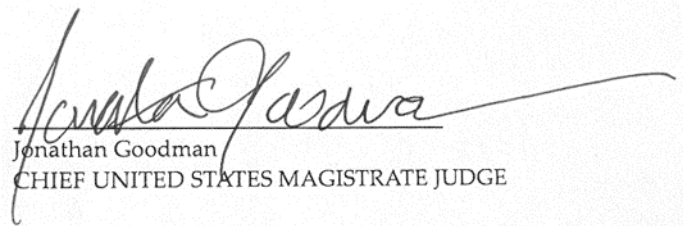
If Plaintiff would rather alternatively amend her complaint again, then she **must** file the appropriate motion with the Court. Her response includes an imbedded request for “leave to amend to correct any remaining deficiencies.” *Id.* at 16. However, this request is impermissible because it is not 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)).

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, April 11, 2025.



Jonathan Goodman
CHIEF UNITED STATES MAGISTRATE JUDGE

Copies furnished to:

The Honorable Kathleen M. Williams
All Counsel of Record