UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-22262-CIV-WILLIAMS/SANCHEZ

MICHAEL MOORS,

Plaintiff,

v.

CARNIVAL CORPORATION,
A Panamanian Corporation d/b/a
CARNIVAL CRUISE LINES,

Defendant.
_____/

REPORT AND RECOMMENDATION ON
DEFENDANT'S MOTION TO DISMISS

This matter is before the Court on the motion to dismiss (ECF No. 14) of Carnival Corporation ("Carnival") seeking dismissal of Plaintiff Michael Moors' First Amended Complaint (ECF No. 10). The Honorable Kathleen M. Williams referred the motion to dismiss to the undersigned on January 24, 2023 for a report and recommendation, ECF No. 32; *see also* ECF No. 15, and the matter is now fully briefed and ripe for disposition, *see* ECF No. 17 (response); ECF No. 18 (reply); ECF No. 22 (notice of supplemental authority). After careful consideration of the parties' filings and relevant authority, and for the reasons discussed below, it is hereby recommended that Carnival's motion to dismiss be **GRANTED IN PART** and **DENIED IN PART**.

I. FACTUAL AND PROCEDURAL BACKGROUND

In his amended complaint, Plaintiff alleges that he was a passenger onboard the *Magic*, a cruise ship "owned, leased, chartered, operated, maintained, managed, and/or controlled" by

Carnival, and that he "was standing in the viewing area on Deck 12 . . . watching the ship dock. The ship was very crowded with passengers in the area he was standing. When he turned to walk away, he tripped over a push up bar permanently affixed to the deck and fell." ECF No. 10 at ¶¶ 11, 14. As a result, Plaintiff "suffered severe injuries, including, but not limited to, injuries to both arms, which require surgery(ies)." *Id.* at ¶ 15. According to Plaintiff's allegations, someone from the ship's medical center thereafter took Plaintiff in a wheelchair to the medical center. *Id.* at 25 n.6. Plaintiff further alleges that, while at the medical center, "the ship's doctor failed to adequately treat his injuries and failed to properly control his pain, and instead told him to travel back to his home state for treatment, but failed to prescribe adequate pain medicine for [Plaintiff's] trip home." *Id.* at ¶ 16. More specifically, Plaintiff alleges that the ship's doctors prescribed him "only one pill, 5mg, of Oxycodone for his trip home," which he asserts "was an insufficient amount of pain medicine to last him all the way home" and led him to "suffer[] additional pain" later. *Id.* at 25 n.6.

In his amended complaint, Plaintiff alleges that the dangerous and/or risk-creating conditions he experienced while aboard the *Magic* were:

> a. The subject push up bar's unreasonable protrusion, which made the push up bar unreasonably easy for passengers such as [Plaintiff] to trip over.
> b. The unreasonable placement of the push up bar in a location where its presence was obstructed by the surroundings, including, but not limited to, the nearby walls.
> c. The unreasonable placement of the push up bar in a location where passengers could reasonably be expected to walk and therefore be likely to trip over it.
> d. The push up bar, walls, and surrounding area lacked adequate visual cues (such as conspicuous tape/signs/stickers/proper coloring/other visual cues) to help passengers see the push up bar.
> e. The area lacked adequate safety features to prevent or minimize passenger injury in the event of a fall, such as padding on the floor.
> f. The unreasonable passenger crowding in the subject area, caused by Carnival's unreasonable lack of reasonable crowd control.

ECF No. 10 at ¶ 17 (emphasis and footnotes omitted). Plaintiff further alleges that Carnival "knew

or should have known of these risk-creating and/or dangerous conditions" because, among other reasons, "[a]fter his incident, a passenger . . . told [Plaintiff] that a woman had previously tripped and fallen on the same push up bar the previous day"; Carnival "installed and/or refitted similar push up bars on the *Magic* and other ships in [Carnival's] fleet in areas where they were more easily visible, where passengers could reasonably be expected to walk, and with visual cues that made them more visible[]"; and Carnival "participated in the installation and/or design of the subject area, or alternatively, . . . accepted the area with its design defects present after having been given an opportunity to inspect the ship and materials on it, including the subject push up bar." ECF No. 10 at ¶ 19.

Counts I through VI of Plaintiff's nine-count amended complaint seek to hold Carnival liable for negligence concerning his fall under several alternative theories: negligence for failing to inspect the subject area in which Plaintiff tripped and fell (Count I); negligence for failing to maintain the subject area (Count II); negligence for failing to remedy the subject area (Count III); negligence for failing to warn of dangerous conditions (Count IV); negligence in designing, installing, and/or approving of the subject area (Count V); and vicarious liability (Count VI). Counts VII through IX seek to hold Carnival liable for alleged negligence concerning his post-fall medical treatment by the ship's medical staff under three alternative theories: vicarious liability (Count VII), apparent agency (Count VIII), and assumption of duty (Count IX).

Carnival filed a motion to dismiss, arguing that Counts I though V of Plaintiff's amended complaint constitute a shotgun pleading because Plaintiff incorporates generally applicable factual allegations from the preliminary paragraphs of the amended complaint by reference into his separate negligence causes of action, rather than repeating those specific factual allegations within each separate count, and because the factual allegations are ostensibly vague and conclusory. ECF

No. 14 at 4-7. Carnival, however, does not otherwise challenge that those counts and their specific theories of liability fail to assert claims upon which relief can be granted. Carnival further alleges that Count VI fails to state a claim for vicarious liability premised on the negligence of any Carnival crewmember. *Id.* at 7-10. Lastly, Carnival alleges that Counts VII through IX fail to state claims for medical negligence. *Id.* at 10-12.

II. LEGAL STANDARD

To state a claim for relief under Rule 8(a) of the Federal Rules of Civil Procedure, a complaint must contain a short and plain statement of the claim showing that the pleader is entitled to relief. Fed. R. Civ. P. 8(a)(2). To survive a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), the plaintiff must allege facts that make out a facially plausible claim and raise the right to relief beyond a speculative level. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "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." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). Conclusory allegations are insufficient. *See Twombly*, 550 U.S. at 555. When evaluating a motion to dismiss, the court must draw "all reasonable inferences" in favor of the plaintiff, *St. George v. Pinellas Cnty.*, 285 F.3d 1134, 1337 (11th Cir. 2002), and must limit its consideration to the four corners of the complaint and any attached exhibits, *see, e.g.*, *Grossman v. Nationsbank, N.A.*, 225 F.3d 1228, 1231 (11th Cir. 2000).

As an action arising from torts allegedly committed aboard a vessel sailing in navigable waters, this suit is governed by general maritime law. *See Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989). To state a claim of negligence under federal maritime law, a plaintiff must allege four elements: "(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." *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1253 (11th Cir. 2014) (quoting *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012)). A cruise line operator owes its passengers a duty of reasonable care under the circumstances. *See Keefe*, 867 F.2d at 1322. To demonstrate a breach of this duty, a plaintiff must establish that: (1) a dangerous condition existed that caused the claimed injury, and (2) a defendant had actual or constructive notice of the dangerous condition. *See id.*; *see also, e.g.*, *Fuentes v. Classica Cruise Operator Ltd, Inc.*, 32 F.4th 1311, 1317 (11th Cir. 2022); *Adams v. Carnival Corp.*, 2009 WL 4907547, at *3 (S.D. Fla. Sept. 29, 2009).

III. LEGAL ANALYSIS

A. The Allegations in Counts I Through V Do Not Amount to a Shotgun Pleading.

Carnival argues that Counts I through V amount to a shotgun pleading that should be dismissed because those counts adopt factual allegations from the preliminary paragraphs of the amended complaint by reference, specifically paragraphs 17 and 19, and because the counts are "a hodge-podge of vague factual allegations and legal conclusions." ECF No. 14 at 5.

A complaint is a shotgun pleading when it "fail[s] to identify claims with sufficient clarity to enable the defendant to frame a responsive pleading." *Beckwith v. Bellsouth Telecomms., Inc.*, 146 F. App'x 368, 371 (11th Cir. 2005) (citing *Byrne v. Nezhat*, 261 F.3d 1075, 1129-30 (11th Cir. 2001)). The Eleventh Circuit has identified four general types of shotgun pleadings: (1) pleadings that "contain[] multiple counts where each count adopts the allegations of all preceding counts"; (2) pleadings that are "replete with conclusory, vague, and immaterial facts not obviously connected to any particular cause of action"; (3) pleadings that do not separate each cause of action or claim into separate counts; and (4) pleadings that assert multiple claims against multiple defendants but do not specify which defendant is responsible for which acts or omissions.

Barmapov v. Amuial, 986 F.3d 1321, 1324-25 (11th Cir. 2021) (quoting *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321-23 (11th Cir. 2015)).

Here, Carnival argues that "[t]he Counts contain no specific factual allegations supporting each individual claim for negligence," ECF No. 14 at 4, and that the amended complaint's efforts to supply those factual allegations by cross-references to paragraphs 17 and 19 are improper and ineffective and convert the amended complaint into a shotgun pleading, *see id.* at 5-7. Plaintiff's cross-references in Counts I through V to paragraphs 17 and 19 and the factual allegations contained therein are neither improper nor a basis for dismissal. To avoid repetition, a plaintiff may adopt previous factual allegations in a complaint by reference. *See* Fed. R. Civ. P. 10(c) ("A statement in a pleading may be adopted by reference elsewhere in the same pleading or in any other pleading or motion.").

While it is true that "[a] complaint incorporating a long list of general allegations into each claim for relief will . . . constitute a shotgun pleading if it fails to specify which facts are relevant to each claim," this generally justifies dismissal only when a count incorporates all the general allegations, legal and factual, of a preceding count. *See Small v. Amgen, Inc.*, 2 F. Supp. 3d 1292, 1296-97 (M.D. Fla. 2014) (citing *Johnson Enters. of Jacksonville, Inc. v. FPL Group, Inc.*, 162 F.3d 1290, 1333 (11th Cir. 1998)); *see also, e.g.*, *Great Fla. Bank v. Countrywide Home Loans, Inc.*, 2011 WL 382588, at *2 (S.D. Fla. Feb. 3, 2011) ("[T]he basic form of Plaintiff's Third Amended Complaint is the same as those criticized by the Eleventh Circuit. Each cause of action 'realleges the foregoing allegation as if fully set forth herein,' such that the Second Cause of Action incorporates the First, the Third Cause of Action incorporates the First and the Second Causes of Action, and so on, through five causes of action.").

Although Plaintiff's amended complaint may not be exemplary and although Counts I

through V all refer to some general allegations from the preliminary paragraphs of the amended complaint, those references are insufficient to justify dismissal. Here, Plaintiff did not incorporate the allegations from any cause of action into the following causes of action, as typically required for dismissal as a shotgun pleading. *See Moore v. Am. Fed'n of Television & Radio Artists*, 216 F.3d 1236, 1240, 1247 (11th Cir. 2000) (dubbing the complaint a shotgun pleading because it was "96 pages long with 232 numbered paragraphs; [and] each count incorporate[d] by reference all previous paragraphs"); *BMC Indus., Inc. v. Barth Indus., Inc.*, 160 F.3d 1322, 1326 n.6 (11th Cir. 1998) (describing as "a quintessential example" of a shotgun pleading a complaint in which each successive count incorporated by reference both the factual and legal allegations of the previous counts). Plaintiff also did not include all general allegations in each cause of action. To the contrary, Plaintiff adopted by reference only those general allegations he deemed pertinent to a particular claim. *See* ECF No. 10 at ¶¶ 35 ("MOORS hereby adopts and re-alleges each and every allegation in paragraphs 1 through 23, and 25 through 26, as if set forth herein."), 46 ("paragraphs 1 through 23, and 26 through 27"), 57 ("paragraphs 1 through 23, and 26"), 68 ("paragraphs 1 through 23, 24, and 26"), 84 ("paragraphs 1 through 23, 26, and 28 through 29").

Carnival nonetheless argues that Counts I through V should be dismissed for lack of specific factual allegations because Plaintiff incorporates paragraph 17 into each claim to allege that a dangerous condition existed. *See, e.g.*, ECF No. 14 at 5-7. This argument fails. The fact that Plaintiff listed his factual allegations concerning the existence of dangerous conditions in paragraph 17 does not mean that those allegations, whether examined individually or collectively, lack sufficient factual specificity to warrant dismissal. Indeed, Carnival's filings indicate that Carnival was able to sufficiently discern from paragraph 17 of the amended complaint that the dangerous conditions giving rise to Plaintiff's negligence claims were the existence of a push up

bar that was permanently affixed to the ship's deck and allegedly amounted to an "unreasonable protrusion" that created a tripping hazard, that this alleged tripping hazard was obscured by nearby walls, that the tripping hazard was placed where passengers were likely to trip over it, that there were inadequate visual cues or warnings to alert passengers to the hazard, that there were inadequate safety measures to prevent or minimize falls caused by the push up bar hazard, and that the allegedly unreasonable crowding that Carnival permitted around the push up bar contributed to the tripping hazard. *See* ECF No. 14 at 1, 5-7 (quoting and discussing ¶ 17 of the amended complaint); ECF No. 18 at 2. Although Plaintiff's amended complaint could certainly have benefitted from additional factual specificity and from a more tailored pleading that individually linked the dangerous conditions to the respective counts, the Plaintiff's failure to do so does not render the amended complaint's allegations vague allegations nor give rise to a shotgun pleading. The allegations within paragraph 17 present a plausible basis for claims that the defendant is liable for negligence and thus satisfy the pleading requirement of Rule 8(a)(2) of the Federal Rules of Civil Procedure.

The same analysis applies to Carnival's argument, *see* ECF No. 14 at 5, that Plaintiff's allegations about notice and Carnival's knowledge are vague and conclusory. Again, the fact that Plaintiff included nearly all of its allegations concerning Carnival's knowledge of the allegedly dangerous conditions in paragraph 19 of the amended complaint and then adopted that paragraph by reference in Counts I through V does not make the allegations either vague or conclusory. For instance, Plaintiff alleged that "[a]fter the incident, a passenger came to MOORS . . . and told him that a woman had previously tripped and fallen on the same push up bar the previous day," ECF No. 10 at ¶ 19(a), and a plaintiff may establish constructive notice through "substantially similar incidents in which 'conditions substantially similar to the occurrence in question must have caused

the prior accident,'" *Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661-62 (11th Cir. 1988)). Plaintiff's allegations in paragraph 19(c), which state that Carnival "installed and or refitted similar push up bars on the *Magic* . . . in areas where they were more easily visible, where passengers could reasonably be expected to walk, and with visual cues that made them more visible," ECF No. 10 at ¶ 19(c), similarly adequately alleged notice. *See, e.g.*, *Carroll v. Carnival Corp.*, 955 F.3d 1260, 1265 (11th Cir. 2020) (recognizing that a ship owner's "corrective action can establish notice of a dangerous or defective condition"); *Guevara*, 920 F.3d at 720-22 (recognizing that a plaintiff can establish constructive notice based on a "defective condition [that] exist[ed] for a sufficient period of time to invite corrective measures" or the existence of warnings concerning the dangerous condition) (quoting *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988)). Additionally, Plaintiff alleged that Carnival "participated in the installation and/or design of the subject area, or alternatively, . . . accepted the area with its design defects present after having been given an opportunity to inspect the ship and materials on it, including the subject push up bar." ECF No. 10 at ¶ 19(d). These allegations regarding Carnival's involvement in and control over the installation of the allegedly dangerous push up bar, which Plaintiff specifically alleged was "permanently affixed to the deck," ECF No. 10 at ¶ 14, further suffice to allege that Carnival had actual knowledge of the push up bar's existence and the potential dangers it posed to passengers aboard the *Magic*. *See* ECF No. 10 at ¶ 19 ("CARNIVAL . . . knew . . . of these risk-creating and/or dangerous conditions").

For the foregoing reasons, Carnival's motion to dismiss Counts I through V should be **DENIED**.

B. ***Count VI Fails to State a Vicarious Liability Claim for the Actions of Carnival's Employees.***

Next, Carnival argues that Plaintiff failed to state a vicarious liability negligence claim against Carnival for the actions of its crewmembers. Specifically, Carnival maintains that Plaintiff's allegations in Count VI of the amended complaint are conclusory, vague, and an attempt to bypass the notice requirement of direct liability claims under maritime law by pleading under a theory of vicarious liability without any allegations identifying any crewmember's underlying negligence. ECF No. 14 at 7-10.

In *Holland v. Carnival Corp.*, 50 F.4th 1088 (11th Cir. 2022), the Eleventh Circuit held that the plaintiff failed to state a claim that Carnival was vicariously liable for a specific employee's negligence where:

> First, [the plaintiff] did not identify any specific crewmember whose negligence caused [the plaintiff's] injury . . . . Second, in each count, [the plaintiff] alleged that Carnival owed him, "as a fare paying passenger lawfully on board its vessel, a duty of reasonable care for his safety," and that Carnival "had actual and/or constructive notice of the dangerous condition" . . . . Finally, . . . [the plaintiff] focused his argument on the sufficiency of his allegations regarding Carnival's actual or constructive notice of the allegedly dangerous condition . . ., allegations only relevant to the duty element of a claim seeking to hold Carnival directly liable for its own negligence.

50 F.4th at 1094-95. Under those circumstances, the Court held that, despite what the *Holland* plaintiff labeled his claim, the plaintiff actually sought to hold Carnival directly liable for its own negligence rather than vicariously liable for a specific employee's negligence. *Id.* at 1095.

Here, Plaintiff's allegations in Count VI are analogous to the allegations highlighted in *Holland*. Plaintiff alleges that Carnival "is vicariously liable for the acts of its staff, employees, and/or agents" for "unreasonable passenger crowding in the subject area, caused by CARNIVAL'S unreasonable lack of reasonable crowd control." ECF No. 10 at ¶ 106 & n.5. As in *Holland*, however, Plaintiff does not identify a specific crewmember whose negligence caused Plaintiff's

injury. Indeed, Plaintiff does not allege that any Carnival crewmember owed him a duty to control the crowd in the vicinity of the push up bar, that any crewmember breached a duty, or that any crewmember's breach of a duty caused Plaintiff's injuries. *Id.* Instead, Plaintiff only states that "crewmembers who were working in and/or who were and/or should have been responsible for inspecting, maintaining, cleaning, and/or securing the subject area" were agents of Carnival, *id.* at ¶ 105, and he then attributes all negligence directly to Carnival, alleging that it was "CARNIVAL [that] owed a duty to exercise reasonable care under the circumstances," *id.* at ¶ 104, that "CARNIVAL'S breach" was the cause of Plaintiff's injuries, *id.* at ¶ 107, and that Plaintiff's injuries and damages were the "result of CARNIVAL'S negligence," *id.* at ¶ 110. Without any allegations of negligence by a crewmember, there is no liability to impute to Carnival. As in *Holland*, Plaintiff's Count VI allegations seek to hold Carnival directly liable for its own negligence, not for the negligence of any crewmember, despite what Plaintiff labeled the cause of action. Thus, Carnival's motion to dismiss Counts VI should be **GRANTED**.

C. Counts VII Through IX Adequately State Medical Negligence Claims.

Finally, Carnival argues that Counts VII through IX of Plaintiff's First Amended Complaint should be dismissed for failure to comply with the federal pleading standard because those counts contain nothing more than boilerplate allegations and do not contain any factual allegations specifying what Carnival's medical staff did wrong that amounted to negligence. *See* ECF No. 14 at 10-12.

Here, however, Plaintiff alleged that the medical staff breached a duty by "fail[ing] to adequately treat his injuries and fail[ing] to properly control his pain, and . . . t[elling] him to travel back to his home state for treatment" without "prescribe[ing] adequate pain medicine for [Plaintiff's] trip home." ECF No. 10 at 24 n.6; *see also id.* at ¶ 16; *id.* at 29 n.7, 31 n.8. More

specifically, Plaintiff alleges that that the ship's doctors prescribed him "only one pill, 5mg, of Oxycodone for his trip home," which he alleges "was an insufficient amount of pain medicine to last him all the way home" and led him to "suffer[] additional pain" later. *Id.* at 25-26 n.6 (alleging that "the failure to prescribe adequate pain medicine for [Plaintiff's] trip home caused him to suffer additional pain"); *see also id.* at 29 n.7, 31 n.8. These factual allegations—although unconventionally asserted in footnotes—are sufficient to plead facially plausible medical negligence claims. *See Twombly*, 550 U.S. at 570 (holding that plaintiff must allege "enough facts to state a claim for relief that is plausible on its face."). Thus, Carnival's motion to dismiss Counts VII through IX should be **DENIED**.

Given that these factual allegations of medical negligence are contained within footnotes rather than within numbered paragraphs within the pertinent counts of the amended complaint, the undersigned nonetheless recommends that the Plaintiff be required to file a **CORRECTED** amended complaint in which the factual allegations that are contained within and cross-referenced by footnotes 6, 7, and 8 of the amended complaint are transferred from those footnotes into numbered paragraphs within Counts VII through IX of a corrected amended complaint in accordance with Federal Rule of Civil Procedure 10(b).

IV. CONCLUSION AND RECOMMENDATION

Based on the foregoing, I **RESPECTFULLY RECOMMEND** that the Defendant's Motion to Dismiss Plaintiff's First Amended Complaint (ECF No. 14) be **GRANTED IN PART AND DENIED IN PART**. More specifically, I recommend that the Court dismiss Count VI, deny dismissal of Counts I through V and VII through IX, and require Plaintiff to file a corrected first amended complaint in which the factual allegations contained within footnotes 6, 7, and 8 are transferred into numbered paragraphs within Counts VII through IX.

No later than fourteen days from the date of this Report and Recommendation the parties may file any written objections to this Report and Recommendation with the Honorable Kathleen M. Williams, who is obligated to make a *de novo* review of only those factual findings and legal conclusions that are the subject of objections. Only those objected-to factual findings and legal conclusions may be reviewed on appeal. *See Thomas v. Arn*, 474 U.S. 140 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 28 U.S.C. § 636(b)(1); 11th Cir. R. 3-1.

RESPECTFULLY RECOMMENDED in chambers in Miami, Florida, this 9th day of February, 2023.

EDUARDO I. SANCHEZ
UNITED STATES MAGISTRATE JUDGE

cc: Hon. Kathleen M. Williams
Counsel of Record