UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 22-23183-CIV-ALTONAGA/Damian

KARA LEMQUIST,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.
_____/

ORDER

THIS CAUSE came before the Court on Defendant, Carnival Corporation's Motion to Dismiss Plaintiff's Second Amended Complaint [ECF No. 38], filed on January 13, 2023. Plaintiff, Kara Lemquist filed a Response [ECF No. 39], to which Defendant filed a Reply [ECF No. 43]. The Court has carefully considered Plaintiff's Second Amended Complaint [ECF No. 34], the parties' written submissions, and applicable law. For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

Plaintiff was a passenger aboard the Carnival cruise ship *Magic* on October 4, 2021, when she disembarked for a scheduled visit to Half Moon Cay, a private island owned by Defendant. (*See* Second Am. Compl. ("SAC") ¶¶ 3, 19–20). Upon making her way back to the ship, Plaintiff was on an authorized and designated walkway adjacent to a wedding chapel on the island. (*See id.* ¶ 21). Next to the walkway was a ramp "designated and intended for use by persons entering and exiting the chapel." (*Id.*). Plaintiff states that "[t]he ramp was designed and installed so that a portion of its surface was a smooth inclined ramp and the other portion, adjacent to the smooth portion, contained divided steps, with a corresponding change in elevation between the smooth

and stepped portions of the ramp." (*Id.* (alteration added)).

While walking past the chapel, Plaintiff stepped aside to make room for people descending the ramp to exit the chapel. (*See id.* ¶ 22). As she stepped aside, Plaintiff fell off the smooth portion of the ramp onto the adjacent steps. (*See id.*). Plaintiff's fall was "[d]ue to inadequate marking of the divisions between the smooth portion of the ramp and the adjacent stepped portion," which made her "unable to detect the change in elevation between the smooth and stepped portions of the ramp." (*Id.* (alteration added)). The fall caused Plaintiff "permanent or continuing" injuries "in and about her body and extremities[;]" and she "suffered pain therefrom, mental anguish, disfigurement, and the inability to lead a normal life[;]" as well as "aggravation or acceleration of preexisting conditions." (*Id.* ¶ 23 (alterations added)).

Plaintiff brings claims against Defendant for negligent inspection and maintenance of the ramp and adjacent steps and walkway (Count I), negligent failure to warn (Count II), and negligent design of the ramp and adjacent steps and walkway (Count III). (*See id.* ¶¶ 24–47). In each count, Plaintiff alleges that Defendant "owned, operated, and controlled" the area and had actual or constructive notice of the dangerous condition because of

> prior use of the same or substantially similar ramps and steps, prior fall instances on the same or similarly configured ramps and steps, industry standards regarding ramps and steps [], the recurring nature of the dangerous conditions on the ramp and steps, and the length of time the ramp and steps had been in an unsafe condition before [] Plaintiff fell, a length of time sufficient to invite corrective measures.

(*Id.* ¶¶ 25, 28, 33, 36, 41, 44 (alterations added)). Plaintiff states the unsafe condition has been in place since at least 2015 and points to two other incidents involving dangerous walkways in Half Moon Cay. (*See id.* ¶¶ 28, 36, 44).

Defendant moves to dismiss the SAC under Federal Rule of Civil Procedure 12(b)(6) for failing to state claims for relief. (*See generally* Mot.). According to Defendant, Plaintiff has not plausibly alleged actual or constructive notice nor adequately pleaded the elements of a negligent

design claim. (*See id.*).

II. LEGAL STANDARD

"To survive a motion to dismiss [under Federal Rule of Civil Procedure 12(b)(6)], 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) (alteration added; quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id*. (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Twombly*, 550 U.S. at 555 (alteration added; citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (alteration added; citing *Twombly*, 550 U.S. at 556).

To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take its factual allegations as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. DISCUSSION

Defendant asserts that Plaintiff has failed to adequately plead that Defendant had actual or

constructive notice of the dangerous ramp, steps, and walkway. (*See* Mot. 3–12). Defendant also argues that the claim for negligent design in Count III should be dismissed because Plaintiff fails to adequately plead that Defendant created, participated in, or approved the negligent design. (*See id.* 12–13).[1] Plaintiff alleges Defendant had a duty of reasonable care that included inspecting, properly maintaining, and warning Plaintiff of the danger posed by the unsafe ramp, steps, and walkway. (*See* SAC ¶¶ 24–47). Plaintiff maintains she has sufficiently alleged Defendant's notice in all three counts and has adequately pleaded Defendant approved the unsafe design. (*See generally* Resp.).

The Court finds that Plaintiff adequately pleads notice of the dangerous condition, but she fails to plead all the elements of a negligent design claim.

A. Notice

Federal maritime law applies. A tort falls within admiralty jurisdiction if (1) "the incident occurred on navigable water, or the injury was caused by a vessel on navigable water[,]" and (2) if the incident has a connection to maritime activity. *Buland v. NCL (Bah.) Ltd.*, 992 F.3d 1143, 1149 (11th Cir. 2021) (alteration added; quotation marks and citation omitted); *see generally Foremost Ins. Co. v. Richardson*, 457 U.S. 668 (1982). The "outer boundaries of admiralty jurisdiction over torts" include nearby offshore locations during a cruise. *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901–02 (11th Cir. 2004) (citations omitted). Additionally, courts have recognized that maritime jurisdiction extends to the means of ingress and egress to a vessel. *See Curry v. Boh Bros. Const. Co., L.L.C.*, No. 4:04-cv-474, 2006 WL 517650, at *2 (N.D. Fla. Mar. 2, 2006) (citing *White v. United States*, 53 F.3d 43, 47 (4th Cir. 1995)). Here, where Plaintiff alleges her injury occurred as she was traveling back to the ship along the only safe means of

[1] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

ingress and egress (*see* SAC ¶¶ 27, 35, 43), federal maritime jurisdiction is proper.

In maritime negligence actions, "a plaintiff must allege that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Franza v. Royal Caribbean Cruises, Ltd.*, 772 F.3d 1225, 1253 (11th Cir. 2014) (quotation marks and citation omitted). To impose a duty in a maritime context, the shipowner must "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." *Newbauer v. Carnival Corp.*, 26 F.4th 931, 935 (11th Cir. 2022) (alteration adopted; quotation marks and citation omitted).

"Actual notice exists when the defendant knows about the dangerous condition." *Holland v. Carnival Corp.*, 50 F.4th 1088, 1095 (11th Cir. 2022) (citations omitted). Constructive notice — "where the shipowner ought to have known" (*id.* (quotation marks and citation omitted)) — may be demonstrated when "the defective condition existed for a sufficient period of time to invite corrective measures . . . [or by] evidence of substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior accident," *Guevara v. NCL (Bah.) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (alterations added; other alteration adopted; quotation marks and citation omitted).

Plaintiff's allegations of notice in all three claims are identical (*see* SAC ¶¶ 24–47), and the parties do not differentiate between counts when discussing notice in their briefing (*see generally* Mot.; Resp.; Reply). The Court addresses notice as it relates to the three claims together.

According to Plaintiff, Defendant had notice of the dangerous ramp and walkway that harmed her because they "had been in place in substantially the same condition [] since at least

2015," which provided "a length of time sufficient to invite corrective measures." (SAC ¶¶ 28, 36, 44). In addition, Plaintiff alleges Defendant had notice of the dangerous condition from its prior use of the area, the recurring nature of the dangerous condition, and industry standards regarding safe design features for such structures. (*See id.* ¶¶ 21, 28, 36, 44). Plaintiff additionally cites two specific cases, as "documented prior instances of [] passengers visiting Half Moon Cay injured by defective walkways and steps on the island." (*Id.* ¶¶ 28, 36, 44 (alteration added; citing *Moseley v. Carnival Corp.*, No. 1:20-cv-20419, 2020 WL 9209743 (S.D. Fla. July 15, 2020); *Manukian v. Carnival Corp.*, No. 1:15-cv-21437, 2015 WL 9660017 (S.D. Fla. June 19, 2015))).

Defendant first argues that Plaintiff's allegations about Defendant's notice are "generic, conclusory, and speculative" and cites a string of cases where notice allegations similar to those here were ultimately dismissed. (*See* Mot. 5–6 (collecting cases)). The cases are distinguishable. Importantly, none of the cited cases included factual allegations about the length of time during which the dangerous condition existed. *See Holland*, 50 F.4th at 1096; *Newbauer*, 26 F.4th at 935–36; *Navarro v. Carnival Corp.*, No. 19-21072-Civ, 2020 WL 1307185, at *3 (S.D. Fla. Mar. 19, 2020); *Nichols v. Carnival Corp.*, 423 F. Supp. 3d 1316, 1323–24 (S.D. Fla. Sept. 17, 2019); *Patton v. Carnival Corp.*, No. 22-21158-Civ, 2022 WL 2982699, at *2 (S.D. Fla. July 28, 2022); *Donaldson v. Carnival Corp.*, 2020 WL 6801883, at *3 (S.D. Fla. Nov. 19, 2020); and *Polanco v. Carnival Corp.*, No. 10-21716-Civ, 2010 WL 11575228, at *3 (S.D. Fla. Aug. 11, 2010). And many of the cases also included no facts about prior incidents, merely alleging such incidents had occurred. *See, e.g.*, *Holland*, 50 F.4th at 1096; *Newbauer*, 26 F.4th at 936; *Donaldson*, 2020 WL 6801883, at *3.

By contrast, Plaintiff specifically alleges that the dangerous condition has existed since at least 2015. (*See* SAC ¶¶ 28, 36, 44). Plaintiff also points to specific prior incidents rather than

making general allegations that such incidents exist. (*See id.*). The Court disagrees that Plaintiff's allegations are impermissibly conclusory.

Defendant then argues that while Plaintiff asserts the dangerous condition has existed for years, "knowledge that the condition exists alone is not sufficient," and Plaintiff fails to allege Defendant knew the condition was dangerous. (Mot. 7 (alteration adopted; quotation marks omitted; citing *Malley v. Royal Caribbean Cruises Ltd.*, 713 F. App'x 905, 908 (11th Cir. 2017))). Defendant insists Plaintiff's allegations that Defendant regularly visits Half Moon Cay are like those found insufficient in *Patton*, where the plaintiff claimed the defendant had notice because cleaning staff had regularly cleaned the alleged tripping hazard. (*See* Mot. 7–8 (citing *Patton*, 2022 WL 2982699, at *3)). In *Patton*, the court found that the plaintiff did not explain how the staff would have "plausibly seen the metal threshold and recognized its potential danger." 2022 WL 2982699, at *2.

In contrast to *Patton*, Plaintiff alleges that Defendant's notice was in part derived from both its frequent visits to the area and its knowledge that the ramp violated applicable industry standards. (*See* SAC ¶¶ 21, 28, 44). Evidence that an allegedly dangerous condition failed to comply with industry standards can supplement other evidence to establish constructive notice. *See Sorrels v. NCL (Bah.) Ltd.*, 796 F.3d 1275, 1282 (11th Cir. 2015) ("evidence of custom within a particular industry, group, or organization is admissible as bearing on the standard of care in determining negligence." (alteration adopted; quoting *Muncie Aviation Corp. v. Party Doll Fleet, Inc.*, 519 F.2d 1178, 1180 (5th Cir. 1975)); *Andersen v. Royal Caribbean Cruises Ltd.*, 543 F. Supp. 3d 1346, 1357 (S.D. Fla. June 14, 2021).

Plaintiff's reference to industry standards effectively supplements her notice allegations. Contrary to Defendant's characterization (*see* Reply 6–7), Plaintiff directly connects the industry

standards to her allegations that Defendant should have known the ramp, steps, and walkway were dangerous. Plaintiff alleges the condition was unsafe because the ramp was too smooth and there was an inconspicuous change in elevation between the ramp and the steps. (*See* SAC ¶¶ 21–22). Plaintiff then cites industry standards concerning general design requirements, friction, changes in elevation, and slip resistance. (*See id.* ¶ 21). Plaintiff's reference to these standards explains how Defendant would have "recognized [the] potential danger." *Patton*, 2022 WL 2982699, at *2 (alteration added).

Lastly, Defendant asserts that Plaintiff has not properly pleaded that the Half Moon Cay incidents in *Moseley* and *Manukian* are substantially similar to Plaintiff's incident because Plaintiff does not allege that the steps at issue in those cases are the same as those upon which Plaintiff was injured. (*See* Mot. 10). This contention also fails to persuade. As an initial matter, Defendant improperly raises the argument that the steps in *Moseley* and *Manukian* are in a completely different part of the island and differently configured. (*See id.* 10–11); *Jumbo v. Ala. State Univ.*, 229 F. Supp. 3d 1266, 1269 (M.D. Ala. Jan. 23, 2017) ("A Rule 12(b)(6) motion tests the sufficiency of a complaint; it is not a vehicle to litigate questions of fact." (citing *Harper v. Lawrence Cty., Ala.*, 592 F.3d 1227, 1232 (11th Cir. 2010))). In any event, Plaintiff clearly alleges that the falls in *Moseley* and *Manukian* occurred on "similarly configured ramps and steps." (SAC ¶¶ 28, 36, 44). Whether these prior incidents are substantially similar so as to provide Defendant with notice is an issue of fact that the Court will not resolve on a motion to dismiss. *See Lopez v. Carnival Corp.*, No. 22-cv-21308, 2022 WL 4598657, at *3 (S.D. Fla. Sept. 30, 2022).

Taken together, Plaintiff's allegations about the length of time the dangerous condition existed, applicable industry standards, and prior similar incidents are sufficient to support an inference that Defendant plausibly had notice of the defective ramp, steps, and walkway that

injured Plaintiff.

B. Count III: Negligent Design

Plaintiff asserts that Defendant is liable for negligent design because it "failed before the time of Plaintiff's injury to take reasonable measures to design and install the ramp, steps, and walkway so that they are reasonably safe[.]" (SAC ¶ 46 (alteration added)). Defendant contends this is insufficient because the pleading is "devoid of any factual allegations to support an allegation that [Defendant] created, participated in, approved of, or had any role whatsoever in the design of the subject dangerous condition." (Mot. 14 (alteration added)). The Court agrees with Defendant.

"Liability based on negligent design requires proof that the ship-owner or operator actually created, participated in or approved the alleged improper design." *Diczok v. Celebrity Cruises, Inc.*, 263 F. Supp. 3d 1261, 1264 (S.D. Fla. 2017) (quoting *Groves v. Royal Caribbean Cruises, Ltd.*, 463 F. App'x 837, 837 (11th Cir. 2012); quotation marks omitted). Actual participation in the design is a crucial element of a negligent design claim; otherwise, a negligent design claim would be nearly indistinguishable from a negligent maintenance claim.

Here, Plaintiff alleges only that Defendant "owned, operated, and controlled" Half Moon Cay and its facilities. (SAC ¶ 41). Plaintiff argues that this allegation, alongside her allegation that Defendant regularly uses and visits Half Moon Cay, gave Defendant "ample time to approve or not the designs of the facilities on the island." (Resp. 6–7). But Plaintiff nowhere pleads that Defendant "specified, approved and/or accepted" the design of these facilities; that Defendant "participated in the design process[;]" that Defendant retained any "contractual right to participate, review, modify, and/or reject the design plans[;]" or that Defendant was in any way implicated in the unsafe design. *Donaldson*, 2020 WL 6801883, at *4 (alterations added; other alterations

adopted; quotation marks omitted; detailing allegations that, while "not well developed . . . withstand scrutiny at the motion to dismiss stage" (alteration added)).

While courts have differed on whether the bare allegation that a defendant participated in the design of a condition is sufficient to withstand a motion to dismiss, the Court could find no case where mere ownership, operation, or control sufficiently established that a defendant participated in the design of a subject condition. *Compare Canyes v. Carnival Corp.*, No. 22-cv-20858, 2022 WL 4270001, at *3–4 (S.D. Fla. Sept. 15, 2022) (declining to dismiss negligent design claim where the plaintiff alleged only that Defendant "actively participated in the design and construction" of the dangerous condition (quotation marks omitted)) *with Liles v. Carnival Corp. & PLC*, No. 22-cv-22977, 2023 WL 34644, at *2–3 (S.D. Fla. Jan. 4, 2023) (dismissing negligent design claim where plaintiff merely alleged that the defendant "participated in the design process" and generated design specifications for the vessel, tender, and ramp). Without any description of how Defendant was involved in the design of the ramp, steps, and walkway, Plaintiff fails to plead sufficient facts to establish a claim of negligent design.

IV. CONCLUSION

In sum, the Second Amended Complaint "contain[s] sufficient factual matter . . . to state . . . claim[s] to relief that [are] plausible on [their] face" in Count I for negligent inspection and maintenance and Count II for negligent failure to warn. *Iqbal*, 556 U.S. at 678 (alterations added; citation and quotation marks omitted). But Plaintiff fails to plead all the elements of a negligent design claim. Accordingly, it is

ORDERED AND ADJUDGED that Defendant, Carnival Corporation's Motion to Dismiss Plaintiff's Second Amended Complaint **[ECF No. 38]** is **GRANTED in part and DENIED in part**. Count III for negligent design is dismissed. Counts I and II remain.

DONE AND ORDERED in Miami, Florida, this 27th day of February, 2023.

CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record