UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:24-cv-21436-WILLIAMS/GOODMAN

LESROY ST. BERNARD CHRISTIAN,

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 Lesroy St. Bernard Christian's ("Plaintiff") Third Amended Complaint ("TAC"). [ECF No. 45 ("Motion")]. Plaintiff filed a response in opposition, and Defendant filed a reply. [ECF Nos. 52; 53]. United States District Judge Kathleen M. Williams referred the Motion to the Undersigned. [ECF No. 50].

For the reasons stated below, the Undersigned **respectfully recommends** that the District Court **deny** Defendant's Motion to Dismiss [ECF No. 49].

I. Background

Plaintiff filed suit against Defendant for damages related to physical injuries he allegedly sustained while aboard the Carnival *Conquest*. [ECF No. 45]. The Court dismissed Plaintiff's Second Amended Complaint ("SAC") because it failed to adequately and plausibly allege actual or constructive notice. [ECF No. 40].[1] Defendant filed a Motion to Dismiss Plaintiff's TAC because it argues (again) the TAC failed to properly plead actual or constructive notice. [ECF No. 49].

Plaintiff's TAC contains two counts: negligence and failure to warn. He alleges that Carnival had notice of the dangerous condition because:

> 9. Plaintiff's wife, Mrs. Christian, had dined in the subject dining room **multiple times** for meals and on each day of the cruise before the fall and had seen *liquid* on the ground in the *exact area* of the fall, in front of the drink and ice cream machine on **each** of the two days before the incident. What Mrs. Christian noticed can be characterized as a propensity for there to be liquid on the ground in front of the self-service drink machine.
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> 10. The intended purpose of the drink station was to express liquids and ice in that very area, making it such that a sophisticated business like Defendant's, which maintained a fleet of cruise ships, each with multiple dining rooms, should have expected spill onto the ground from the machine and glasses being filled up by cruisegoers untrained in dispensing liquids.
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> 11. Defendant had notice of the dangerous condition posed by the drink

[1] Plaintiff voluntarily amended his initial Complaint [ECF No. 1] and filed his Amended Complaint [ECF No. 14] after Defendant filed a motion to dismiss the initial Complaint [ECF No. 10]. The Court consequently denied Defendant's motion to dismiss the initial Complaint as moot when Plaintiff filed the Amended Complaint. [ECF No. 15]. Then, Plaintiff amended *that* version of his Complaint when he filed the SAC [ECF No. 24] and Defendant filed its motion to dismiss his Amended Complaint [ECF No. 17].

machine as it has been **sued previously** for placement of a drink machine in a buffet for negligent maintenance and failure to warn, including in the case of Santana v. Carnival Corp[.], Case No. 09-23113, 2011 WL 13220269 (S.D. Fla. Feb. 17, 2011), in which its Motion for Summary Judgment was denied. (*See* Exhibit 1, Santana opinion).

12. The Santana case involved the same defense attorney, David Horr and his law firm, was in the same judicial district as this case, involved the same cruise line, and also involved a slip and fall on liquid which had been expressed from a **drink machine placed in the buffet area**. Defendant was placed on notice through that action that their [sic] use of self-service beverage stations in the Buffet area was hazardous.

13. Furthermore, Carnival was aware of the propensity for there to be falls inside dining areas on liquids in general because they [sic] have been sued on numerous other occasions by people who claimed to have slipped and fell on liquids in dining areas.

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17. Carnival was also on notice that the area in front of the drink station posed a hazard to cruisegoers as, from at least 2009 through the time of the incident it has had a company **polices** [sic] calling for the use of **warning signs** or cones at the **drink stations in buffet areas**.

18. Defendant was on notice of the danger posed by drink stations in buffet areas, as one example of corporate policy involves a document entitled "2 Minute Trainer – 'OWN THE SPILL'," which reads, in part:

> Spills are **very common** in high traffic area like **Lido Restaurant/Beverage Stations**, public areas like Bars & Lounges, and are **one of the leading causes of Guest Accidents**.

(*See* Exhibit 2, Carnival policies) [ ].

19. The subject incident occurred directly in front of the Lido Deck Restaurant's Beverage Station such that Defendant was on notice of the danger posed to cruisegoers such as [ ] Plaintiff.

20. The hazard posed by the beverage station and the liquid substance

> itself, which was clear and obscured on one side by the drink machine, was not open and obvious.
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> 21. The pooled liquid caused Plaintiff to fall on the floor, causing serious injury.
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> 22. At all times relevant hereto, Defendant owned, operated, occupied, leased, maintained, inspected, cleaned, controlled, supervised, managed, and repaired the 9th floor dining area on which Plaintiff was injured.
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> 23. Specifically, Defendant inspected, cleaned[,] and serviced the ice cream and beverage station **multiple times a day**, including **every night** of the subject cruise, such that it knew or **should have discovered** the liquid that Ms. Christian observed on the **two separate days** prior to the incident which had been expressed onto the floor from the subject beverage machine.
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> 25. Defendant was on notice of the dangers; more specifically, Defendant knew or should have known that the floor did not remain clear of any substances due to the drink machine. However, Defendant failed to take reasonable measures to prevent foreseeable safety hazards.

[ECF No. 45, ¶¶ 9–13; 17–23; 25 (some emphasis added)].

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). 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 v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). *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, the TAC's allegations are solely against Defendant. Plaintiff did not base either claim on vicarious liability. Therefore, in order to proceed under the direct liability claims, Plaintiff must establish actual or constructive notice.

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)).

Defendant argues that Plaintiff did not sufficiently allege notice of the dangerous condition because the TAC "fails to allege sufficient facts which demonstrate that Carnival was on notice of any alleged dangerous condition." [ECF No. 49, p. 3]. "Plaintiff simply does not plead Carnival had actual notice. Plaintiff does not allege a specific length of time the condition existed, nor that a Carnival staff member knew about a dangerous condition. On the contrary, Plaintiff alleges that there was not a Carnival employee in the immediate vicinity." *Id*.[2]

Defendant's argument relies on *Patton v. Carnival Corp*., No. 22-13806, 2024 WL 1886504, at *3 (11th Cir. Apr. 30, 2024), as well as the same cases mentioned in its previous motion to dismiss.[3]

Defendant states that Plaintiff attempts to establish notice in a variety of ways that "closely resemble the argument made by the plaintiff in *Holland*[.]" [ECF No. 49, pp. 6–7]. In *Holland*, the Eleventh Circuit reviewed whether the district court erred in dismissing the plaintiff's complaint for failure to state a claim because the plaintiff "failed to plausibly allege that [the defendant] had actual or constructive notice of the alleged hazardous

[2] These arguments parallel those made in relation to Plaintiff's SAC. *See* [ECF No. 26, pp. 4–10].

[3] *Holland v. Carnival Corp*. 50 F.4th 1088, 1095 (11th Cir. 2022) and *Newbauer v. Carnival Corp*., 26 F.4th 931, 932 (11th Cir. 2022), cert. denied, 143 S. Ct. 212, 214 L. Ed. 2d 83 (2022).

condition." 50 F.4th at 1093. The *Holland* plaintiff "alleged that a hazard occurred on a highly trafficked staircase that was potentially visible to many crewmembers and was subject to the regulation of safety agencies." *Id.* at 1095–96.

As stated in *Holland*, actual notice exists when the defendant knows about the dangerous condition. But if the allegations of actual notice "are indeed more conclusory than factual, then the court does not have to assume their truth." *Newbauer*, 26 F.4th at 934 (quoting *Chaparro*, 693 F.3d at 1337). Here, the TAC alleges that:

> 9. Plaintiff's wife, Mrs. Christian, had dined in the subject dining room multiple times for meals and on each day of the cruise before the fall and had seen liquid on the ground in the exact area of the fall, in front of the drink and ice cream machine on each of the two days before the incident. What Mrs. Christian noticed can be characterized as a propensity for there to be liquid on the ground in front of the self-service drink machine.

[ECF No. 45, ¶ 9].

In *Holland*, the plaintiff alleged that:

> 14. At all material times, the [d]efendant had actual and/or constructive notice of the dangerous condition described above. Specifically, the glass staircase described in paragraph 13 is connects [sic] the Promenade (Deck 5) to the Mezzanine (Deck 4) and is one of the most highly trafficked areas of the ship. The staircase is flanked by shops on either side staffed by dozens of crewmembers and opens up to the Casino (on deck 4) and approximately 6 different bars and dining areas (on deck 5). Several hundred passengers and crewmembers traverse this stairway every day, many of whom are carrying drinks as they browse the various shops on their way to and from the bars and restaurants. Crewmembers in the surrounding shops have a clear unobstructed view of the staircase. There are frequently spills on the staircase, a fact that Carnival is aware of due to the frequent nature of prior slip and fall incidents on this staircase. Crewmembers in the surrounding shops can see spills as they happen and can see foreign substances left on the staircase by spills. At the time of the [p]laintiff's fall referenced in

> paragraph 13 above, the surrounding shops were staffed with crewmembers who had been present in their shops for approximately four hours or more. Therefore, the presence of a large quantity of crewmembers in the area means that the [d]efendant either knew or should have known that the particular wet, foreign or transitory substance upon which the [p]laintiff fell was present prior to the [p]laintiff falling.

[ECF No. 18, ¶ 14 in *Holland v. Carnival Corp.*, Case No. 20-cv-21789-RNS].

In reviewing the plaintiff's complaint, the *Holland* Court found that "Holland's allegations do not cross the line from possibility to plausibility of entitlement to relief." *Holland*, 50 F.4th at 1096 (citing *Iqbal*, 556 U.S. at 678, 129 S. Ct. 1937). Here, Plaintiff's allegation involving his wife provides some of the specificity that the *Holland* plaintiff was lacking. It informs the Court that she had personally seen the liquid on the ground, how often she saw the liquid, and when she saw the liquid. [ECF No. 45, ¶ 9]. As shown in the excerpt above, the *Holland* plaintiff's allegation was more of an assumption (*i.e.*, because of the heavy foot traffic and frequent spills the Defendant had notice), rather than a factual statement (*i.e.*, the Defendant had notice because Plaintiff's wife **saw the liquid in the same spot for multiple days in a row**).

Defendant states that the Complaint "provides no factual allegations [ ] to suggest that either the liquid Plaintiff's wife allegedly saw was the same liquid Plaintiff allegedly slipped on, or that the liquid Plaintiff's wife saw on the first day was the same liquid Plaintiff's wife saw on the second day." [ECF No. 53, p. 4]. Defendant contends that without the specification as to the liquid itself, this allegation is too speculative. *Id*. at 5 (citing *Patton*, 2024 WL 1886504 at *2 ("And we 'may infer from the factual allegations in

the complaint obvious alternative explanations, which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.'" (quoting *Doe v. Samford Univ.*, 29 F.4th 675, 686 (11th Cir. 2022))).

However, the Undersigned will not address this argument because Defendant raised it for the first time in its reply. *See WBY, Inc. v. DeKalb Cty., Ga.*, 695 F. App'x 486, 492 (11th Cir. 2017) ("Because [movant's] current theory of probable cause was raised clearly in his reply brief only, it was within the district court's discretion to decline to address that theory."); *Katchmore Luhrs, LLC v. Allianz Glob. & Corp. Specialty*, No. 15-23420-CIV, 2016 WL 1756911, at *1 (S.D. Fla. May 3, 2016) ("[I]t is improper for a party to raise a new argument in its reply."); *Lipkin v. Norwegian Cruise Line Ltd.*, 93 F. Supp. 3d 1311, 1322 n.3 (S.D. Fla. 2015) (refusing to consider argument raised for the first time in a reply brief).

Defendant also argues that Plaintiff "fails to provide sufficient facts to show how a propensity for water to be on the floor establishes notice of a dangerous condition rather than an unwarranted decision." [ECF No. 49, p. 7 (citing *Patton*, 2024 WL 1886504, at *3)]. In *Patton*, the plaintiff tripped on a metal threshold on one of Defendant's ships and attached pictures of the threshold to her complaint to illustrate how Defendant was on notice of the dangerous condition. 2024 WL 1886504 at *1. The Eleventh Circuit affirmed the district court's dismissal of her complaint, stating that the complaint failed to plausibly allege that the dangerous condition existed for a "sufficient length of time" to

impute notice because it lacked any plausible "allegation as to how long" the dangerous condition existed. *Id*. at *3 (quoting *Holland*, 50 F.4th at 1096).[4]

The *Patton* Court, in rejecting the plaintiff's argument that the attached pictures presented a reasonable inference 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[,]" reasoned that:

> there's not enough in the complaint or the attachments for us to conclude that this inference is reasonable and not 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 [p]laintiff's favor, but we are not required to draw plaintiff's inference. Similarly, unwarranted deductions of fact in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations." (cleaned up)). Ms. Patton 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.

Here, the TAC sufficiently (but *barely*) alleges notice, so the Undersigned **respectfully recommends** that Judge Williams **deny** Defendant's Motion. Unlike the *Patton* complaint, the TAC includes the following allegations that, *together*, sufficiently establish a permissible inference of notice of a dangerous condition (rather than an unwarranted and speculative guess):

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[4] However, based on the allegation involving Plaintiff's wife, the dangerous condition existed for the entirety of Plaintiff's scheduled cruise.

> 8. As [ ] Plaintiff patronized **CARNIVAL CORPORATION**, on the Carnival cruise ship *Conquest*, when Plaintiff approached the ice cream and beverage station on the 9th floor of the ship on the last day of a three (3) day cruise, Plaintiff slipped on a liquid substance on the floor and fell towards the floor.
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> 9. Plaintiff's wife, Mrs. Christian, had dined in the subject dining room multiple times for meals and on each day of the cruise before the fall and had seen liquid on the ground in the exact area of the fall, in front of the drink and ice cream machine on each of the two days before the incident. What Mrs. Christian noticed can be characterized as a propensity for there to be liquid on the ground in front of the self-service drink machine.
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> 20. The hazard posed by the beverage station and the liquid substance itself, which was clear and obscured on one side by the drink machine, was not open and obvious.
>
> 21. The pooled liquid caused Plaintiff to fall on the floor, causing serious injury.
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> ***
>
> 23. Specifically, Defendant inspected, cleaned and serviced the ice cream and beverage station multiple times a day, including every night of the subject cruise, such that it knew or should have discovered the liquid that Ms.(sic) Christian observed on the two separate days prior to the incident which had been expressed onto the floor from the subject beverage machine.

[ECF No. 45, ¶¶ 8-9; 20–21; 23 (some emphasis in original)].[5]

[5] Defendant argues that Plaintiff did not allege that a Carnival staff member knew about the dangerous condition, and that, like the *Holland* plaintiff, the TAC "mistakenly conflate[s] foreseeability with actual or constructive notice." [ECF No. 49, pp. 6–7]. However, unlike the scenario in the *Holland* complaint, Plaintiff's wife noticed the alleged dangerous condition in the same place for multiple days in a row. That allegation,

Additionally, the TAC includes the following allegations related to how Defendant was on constructive notice of the dangerous condition:

> 11. Defendant had notice of the dangerous condition posed by the drink machine as it has been sued previously for placement of a drink machine in a buffet for negligent maintenance and failure to warn, including in the case of Santana v. Carnival Corp[.], Case No. 09-23113, 2011 WL 13220269 (S.D. Fla. Feb. 17, 2011),[6] in which its Motion for Summary Judgment was denied. (*See* Exhibit 1, *Santana* opinion).
>
> 12. The *Santana* case involved the same defense attorney, David Horr and his law firm, was in the same judicial district as this case, involved the same cruise line, and also involved a slip and fall on liquid which had been expressed from a drink machine placed in the buffet area. Defendant was placed on notice through that action that their [sic] use of self-service beverage stations in the Buffet area was hazardous.
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> 13. Furthermore, Carnival was aware of the propensity for there to be falls inside dining areas on liquids in general because they [sic] have been sued on numerous other occasions by people who claimed to have slipped and fell on liquids in dining areas.
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> 17. Carnival was also on notice that the area in front of the drink station posed a hazard to cruisegoers as, from at least 2009 through the time of the incident it has had a company polices [sic] calling for the use of warning signs or cones at the drink stations in buffet areas.
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> 18. Defendant was on notice of the danger posed by drink stations in buffet areas, as one example of corporate policy involves a document entitled "2 Minute Trainer – 'OWN THE SPILL'," which reads, in part: Spills are very common in high traffic area like Lido Restaurant/Beverage Stations, public areas like Bars & Lounges, and are one of the leading causes

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together with Defendant's staff maintaining that area on a daily basis, leads to the conclusion that it is reasonable to infer that the staff observed the at-issue liquid each day.

[6] ("*Santana*").

of Guest Accidents. (*See* Exhibit 2, Carnival policies)(emphasis added).

Id. at ¶¶ 11–13; 17–18 (italics added).

As discussed in my previous Report and Recommendations on Defendant's motion to dismiss the SAC, "for a claim to have facial plausibility related to constructive notice, it must allege that "either (1) the hazardous substance existed on the [surface] for a sufficient length of time, [ ]or (2) substantially similar incidents occurred in which conditions substantially similar to the occurrence in question must have caused the prior accident".[ECF No. 33, p. 8 (internal citations omitted)].

These allegations (¶¶ 11–13; 17–18) relate to the second option[7] -- that "substantially similar incidents occurred in which conditions substantially similar to the occurrence in question must have caused the prior accident." For Plaintiff to adequately plead notice under either option, his TAC must include enough allegations "to plausibly plead that Defendant had notice of the dangerous condition." *Fawcett v. Carnival Corp*., 682 F. Supp. 3d 1106, 1111 (S.D. Fla. 2023). In *Fawcett*, the district court found that the plaintiff adequately alleged the existence of prior similar incidents because his complaint:

> identifie[d] numerous slip-and-fall events, including "fall incidents on wet flooring in the Lido Marketplace dining area on the Lido Deck" of the *Breeze* — a vessel of the same class as the *Magic* — and slip and fall incidents specifically on "wet or slippery areas of the Lido Deck" of the *Magic*. (*Id*. ¶¶ 18–19, 26–27). [The] [p]laintiff also lists specific dates and cites cases associated with these incidents. (*See id*. ¶¶ 19, 27). These factual allegations

[7] The previously-mentioned allegations, including the one related to Plaintiff's wife (¶¶ 8–9; 20–21; 23), relate to the first option – that "the hazardous substance existed on the [surface] for a sufficient length of time[.]"

> push [the] [p]laintiff's claims beyond mere conclusory recitals. *See Green v. Carnival Corp.*, 614 F. Supp. 3d 1257, 1263–65 (S.D. Fla. 2022) (finding the plaintiff adequately pleaded notice where he alleged 15 prior substantially similar incidents).

Id.

Here, Plaintiff's TAC adequately alleges the existence of a prior similar incident. Unlike the SAC, which included "*no* specificity" when alleging the existence of prior similar incidents, the TAC specifically included the *Santana* case and addressed its similarities with the instant action. [ECF No. 33, p. 9 (emphasis in original)]. Additionally, Plaintiff included the specific policy[8] he relies on in arguing that Defendant was on notice of the dangerous condition.[9]

Defendant argues that Plaintiff "fails to articulate any facts regarding the

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[8] The Undersigned notes that "Carnival has an 'own the spill' policy, but this does not **automatically** put it on notice of every transitory substance across all cruise ships at all times. In addition to the vague scope of this policy, nowhere in [the TAC] or Response does Plaintiff allege that the 'puddle of liquid' [ ]he allegedly slipped in was the result of a spilled beverage, which is what Carnival's 'own the spill' policy specifically targets." *Watson v. Carnival Corp.*, No. 1:24-CV-21019, 2024 WL 4137299, at *12 (S.D. Fla. Aug. 21, 2024) (emphasis added), *report and recommendation adopted*, No. 24-21019-CV, 2024 WL 4132931 (S.D. Fla. Sept. 10, 2024). Therefore, Plaintiff's reliance on the policy **alone** is not enough to sufficiently allege the existence of prior similar incidents or notice because it is not appropriately supported with factual assertions.

[9] Neither the specific policy nor the *Santana* discussion were included in the SAC. In my Report and Recommendations on Defendant's motion to dismiss the SAC, I opined that Plaintiff's allegations were "merely conclusory" because they relied on vague language concerning the policy and failed to specifically identify and discuss any previous lawsuits that would have put Defendant on notice. [ECF No. 33, pp. 9–11].

substantial similarity of [*Santana*] to [ ] Plaintiff's alleged incident which would put Carnival on notice of any alleged dangerous condition." [ECF No. 49, p. 8 (citing *Holland*, 50 F. 4th at 1096)]. It additionally contends that "it is clear that *Santana* was not substantially similar and would not put Carnival on notice of any dangerous condition." *Id*.[10]

Both *Santana* and the instant case involve: (1) the same defense attorney; (2) the same Defendant; (3) a slip-and-fall accident involving liquid on a dining room floor; (4) close proximity of the liquid-at-issue with a beverage station; and (5) one of Defendant's ships. *See* [ECF No. 45, ¶ 12]. Unlike the *Holland* complaint, the TAC "alleged [ ] facts concerning a substantially similar incident to the one at issue." *Id*. Additionally, "[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." *Fawcett*, 682 F. Supp. 3d at 1111 (citing *See Lopez v. Carnival Corp*., No. 22-cv-21308, at *3 (S.D. Fla. Sept. 30, 2022); *cf. 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

[10] Like Defendant's argument on Plaintiff's failure to allege how the liquid his wife observed was the same he slipped on, the Undersigned will not consider Defendant's argument that the *Santana* case is "too remote" from the instant action "to plausibly put Carnival on notice of any dangerous condition." [ECF No. 53, p. 6]. *See WBY, Inc.*, 695 F. App'x at 492 (finding that district courts may exercise their discretion and not consider arguments made for the first time in a reply-brief).

Cir. 2010))))).

IV. Conclusion

Plaintiff's allegations as a whole barely clear the necessary pleading requirements. However, the TAC sufficiently alleges, at this motion to dismiss stage, that Defendant was on notice of the dangerous condition because: (1) his wife personally saw the at-issue liquid in the same spot for days; (2) Defendant's daily maintenance of the subject area would have put it on notice due to the liquid Plaintiff's wife consistently observed; and (3) because it was not the first time someone suffered a liquid-related slip-and-fall in one of Defendant's dining rooms (*Santana*).

Therefore, for the above-mentioned reasons, the Undersigned **respectfully recommends** that the District Court **deny** Defendant's Motion to Dismiss [ECF No. 49].

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 the District Judge. 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 the District Judge 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, November 22, 2024.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Kathleen M. Williams
All Counsel of Record