UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:24-cv-22926-WILLIAMS/GOODMAN

DEBRA BENSON,

Plaintiff,

v.

NCL (BAHAMAS) LTD, d/b/a
NORWEGIAN CRUISE LINES, a Bermuda
Corporation,

Defendant.

_____/

REPORT AND RECOMMENDATIONS ON MOTION TO DISMISS

In this maritime personal injury action, Defendant NCL (Bahamas) Ltd., ("Defendant") filed a motion to dismiss Plaintiff Debra Benson's ("Plaintiff") Amended Complaint. [ECF No. 20]. Plaintiff filed a response in opposition, and Defendant filed a reply. [ECF Nos. 24; 25]. United States District Judge Kathleen M. Williams referred the motion to the Undersigned. [ECF No. 22].

For the reasons stated below, the Undersigned **respectfully recommends** that the District Court **grant in part and deny in part** Defendant's motion to dismiss **without prejudice** and with leave to file a second amended complaint.

I. Background

Plaintiff filed suit against Defendant for damages related to physical injuries she allegedly sustained while aboard Defendant's ship, the *M/S Norwegian Encore*. [ECF No. 18]. Defendant filed a Motion to Dismiss Plaintiff's Amended Complaint because it says the Amended Complaint: (1) is a shotgun pleading and (2) fails to properly plead actual or constructive notice. [ECF No. 20].

Plaintiff's Amended Complaint contains one count of negligence. She alleges that:

> 7. On or about August 6, 2023, Plaintiff was a passenger and/or guest on one of NCL's cruise ships—the M/S Norwegian Encore (hereinafter the "Ship")—and was on the first day of a cruise to Alaska.
>
> 8. At or around 2:00[ ]PM, prior to the Ship disembarking, Plaintiff was watching the views from Deck 17 when she decided to go down to Deck 16; and as she was traversing a set of stairs (hereinafter the "subject stairs") between the decks, suddenly and without warning, she slipped on very wet steps, causing her body to fall forcefully to the ground. [ ]
>
> 9. Decks 16 and 17 feature what NCL refers to as an ["]Aqua Park,["] which is advertised as follows:
>
> > Slide into the time of your life. With two multistory waterslides on board, Norwegian Encore keeps the thrills coming over and over again. Make it the best of three on Aqua Racer, our tandem waterslide at sea. And then get a thrill as you whoosh over the side of the ship on the double loop, Ocean Loops. Or call it a lazy day and lounge by the pool with a frozen drink in hand. However you like to **make a splash**, the Aqua Park is overflowing with excitement.
>
> 10. More specifically, as part of the Aqua Park, Deck 16 contains pools (including a swim-up bar), a Kids' Aqua Park (including a small slide, tipping buckets, squirting jets/water cannons, and a climbing frame), hot tubs, and lounge chairs; and from Deck 17, thrill seeking patrons can climb stairs to access the two above-mentioned multistory, amusement park-style

water slides, Ocean Loops and Aqua Racer (hereinafter the "subject slides").

11. Before and after Plaintiff's violent fall, she and members of her party observed kids, teenagers, and various other patrons of the Ship trapsing [sic], in wet bathing suits, up and down the subject stairs as they were alternating between utilizing the pools/hot tubs and other Deck 16 amenities, and the subject slides accessed from Deck 17; and not surprisingly, with pools and slides, the Aqua Park and the areas in and around Decks 16 and 17 can get particularly crowed and populated with guests[.]

12. Additionally, before and after the incident, Plaintiff and members of her party noticed pool attendants and lifeguards working within proximity and eyesight of the subject stairs, and certainly in a position to observe the flood of wet guests using the subject stairs (and the wet condition of the subject stairs).

13. One of NCL's primary competitors has described some of the job responsibilities of a pool/aquatic attendant as follows:

- While being assigned to **open deck areas**, you must be alert and vigilant to ensure the **facilities are being used safely**

- Be alert to controlling crowd behavior, ensuring **safe and orderly use of the facilities**

- Be responsible to correct and report any horse-play or inappropriate behavior to supervisors as necessary

- Report any safety or repairs/maintenance that may be needed in your assigned areas

- Maintain **constant surveillance of guests in and around the pool**, act immediately and appropriately to secure safety of guests in the event of emergency

14. Further, in job postings for shipboard lifeguards, NCL explained an 'essential function' of lifeguarding: "Assume personal responsibility for **safety and the environment**. Be accountable for themselves and others in the **vicinity**. **Environmental consciousness** forms one part of this

accountability."

15. The M/S Norwegian Encore was delivered to NCL on October 30, 2019, and debuted in the Caribbean on November 24, 2019. The condition of wet guests walking up and down the subject stairs continuously existed for the almost four (4) years between that debut of the Ship and Plaintiff's accident; and during that entire time, NCL staff were positioned such that this dangerous condition could be easily observed and remedied. Industry and NCL safety protocols mandated that NCL staff vigilantly watch over the areas and vicinity in and around the pool by way of constant surveillance – this would have and should have included observing guests utilizing the subject stairs.

16. Accordingly, at all times relevant, and at the time of the subject incident, NCL knew, or in the exercise of ordinary care, should have known, that the subject stairs would be and were wet. However, NCL did nothing to remedy the condition.

17. NCL owed a duty to its passengers and/or guests, including Plaintiff, to provide a safe deck and steps for pedestrian traffic.

18. NCL, by and through its agents and employees, breached this duty when it failed to identify the dangerous wet surface described above, notify its passengers and/or guests, and timely remove said dangerous condition, which ultimately caused Plaintiff's injuries and the subsequent damages stemming therefrom.

19. All facts, direct and circumstantial, lead to the conclusion that the wet surface was not cleared up or remedied for an unreasonable length of time; and the wet condition of the subject stairs was a condition that existed from cruise-to-cruise, over the course of years.

20. As a direct and proximate result of NCL's negligence, Plaintiff was injured in and about her body and extremities; suffered pain therefrom; incurred medical expenses in the treatment of her injuries; and suffered physical handicap. These injuries are either permanent or continuing in nature, and Plaintiff will suffer losses and impairment in the future.

[ECF No. 18, ¶¶ 7–20 (emphasis in original, footnotes omitted)].

II. Legal Standard

In reviewing a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), a court must take all well-pleaded facts in the plaintiff's complaint and all reasonable inferences drawn from those facts as true. *Jackson v. Okaloosa Cnty., Fla.*, 21 F.3d 1531, 1534 (11th Cir. 1994). To state a claim for relief, a pleading must contain: "(1) a short and plain statement of the grounds for the court's jurisdiction[;] . . . (2) a short and plain statement of the claim showing that the pleader is entitled to relief; and (3) a demand for the relief sought[.]" Fed. R. Civ. P. 8(a). Thus, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

III. Analysis

"Personal-injury claims by cruise ship passengers, complaining of injuries suffered at sea, are within the admiralty jurisdiction of the district courts." *Caron v. NCL (Bahamas), Ltd.*, 910 F.3d 1359, 1365 (11th Cir. 2018) (citing *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 587–88, 111 S. Ct. 1522, 1524, 113 L. Ed. 2d 622 (1991)). "Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters." *Guevara v. NCL (Bah.) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) (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 Amended Complaint's allegations are solely against Defendant. Plaintiff did not base her claim on vicarious liability. Therefore, in order to proceed under the direct liability claim of negligence, Plaintiff must establish actual or constructive notice.

Shotgun Pleading

Defendant argues that Plaintiff's Amended Complaint is a shotgun pleading because it contains the single count of negligence yet includes multiple theories of negligence (*i.e.*, failure to inspect/maintain and failure to warn). [ECF No. 20, p. 2]. [Plaintiff's Amended Complaint does not expressly allege that Defendant breached a duty to warn, but it asserts a duty-to-warn theory with different words -- it alleges, in ¶ 18, that Defendant "breached this duty when it failed to. . . notify its passengers and/or guests . . ." of the dangerous condition].

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 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).

Courts in this District have recognized that each alleged breach of the duty of care must be pled separately. It is not sufficient to cast a wide net of purported breaches in an attempt to keep one negligence claim afloat. *See Dunn v. NCL (BAHAMAS) Ltd.,* No. 23-cv-20083, 2023 WL 4186418, at *3 (S.D. Fla. June 26, 2023); *Al-Hindi v. Royal Caribbean Cruises, Ltd*., No. 22-24032-CIV, [ECF No. 16] (S.D. Fla. March 14, 2023); *see also Reed v. Royal Caribbean Cruises, Ltd*., No. 19-24668-CIV, 2021 WL 2592914, at *10 (S.D. Fla. Apr. 23, 2021) (collecting cases).

In response to Defendant's argument, Plaintiff states that "[t]here should be no confusion in this single-count action as to how the facts shake out in relation to specific causes of action." [ECF No. 24, p. 4]. Plaintiff additionally states that "shotgun pleadings make it 'virtually impossible to know which allegations of fact are intended to support which claims for relief,' almost invariable involving multi-count complaints." *Id*. (*quoting Anderson v. Dist. Bd. of Trs. of Cent. Fla. Cmty. Coll*., 77 F. 3d 364, 366 (11th Cir. 1996)).

In Count I, Plaintiff alleges that Defendant "owed a duty to its passengers and/or guests, including Plaintiff, to provide a safe deck and steps for pedestrian traffic." [ECF No. 24, ¶ 17]. Defendant allegedly breached that duty by:

> 18. NCL, by and through its agents and employees, breached this duty when it **failed to identify** the dangerous wet surface described above,

> **notify** its passengers and/or guests, and **timely remove** said dangerous condition, which ultimately caused Plaintiff's injuries and the subsequent damages stemming therefrom.
>
> 19. All facts, direct and circumstantial, lead to the conclusion that the wet surface was not cleared up or remedied for an unreasonable length of time; and the wet condition of the subject stairs was a condition that existed from cruise-to-cruise, over the course of years.
>
> 20. As a direct and proximate result of NCL's negligence, Plaintiff was injured in and about her body and extremities; suffered pain therefrom; incurred medical expenses in the treatment of her injuries; and suffered physical handicap. These injuries are either permanent or continuing in nature, and Plaintiff will suffer losses and impairment in the future.

Id. at ¶¶ 18–20 (emphasis added).

Defendant contends that Plaintiff improperly mingles different types of negligence causes of action within this one count of negligence (*i.e.*, failure to inspect/maintain, and failure to warn). However, it fails to explain how those alleged causes of action are **distinct** negligence claims with **distinct** elements. If Plaintiff had (improperly) included a negligent failure to warn claim within the same count as a negligent failure to maintain claim, then that would be a shotgun pleading under *Weiland* because both types of claims involve **distinct** causes of action.

But because Defendant failed to properly support[1] its argument, the Undersigned will not consider it. *See Sapuppo v. Allstate Floridian Ins. Co.*, 739 F.3d 678, 681 (11th Cir.

[1] The Undersigned notes that Defendant's legal support for its shotgun theory argument discusses shotgun pleadings only as they generate negative ramifications on judicial economy.

2014) (collecting cases) ("We have long held that an appellant abandons a claim when he either makes only passing references to it or raises it in a perfunctory manner without supporting arguments and authority.").

So the Undersigned rejects Carnival's "shotgun pleading" argument and **respectfully recommends** that Judge Williams **deny** that portion of the dismissal motion.

Actual or Constructive Notice

Defendant argues that Plaintiff failed to "allege any **facts** to show that [Defendant] had notice, actual or constructive, of the **specific condition upon which she slipped**." [ECF No. 20, p. 6 (emphasis in original)]. Defendant additionally argues that the "Amended Complaint talks generally about the vessel's Aqua Park . . . and alleges that [it] knew or should have known about the dangerous condition that caused her to fall because of how long the vessel has been in service (almost four years)." *Id*.

Defendant cites two cases which are instructive – and binding – on this issue: *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).

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 condition." 50 F.4th at 1093. The Court explained that:

> [a]ctual notice exists when the defendant knows about the dangerous condition. *See Keefe*, 867 F.2d at 1322; *Guevara*, 920 F.3d at 720. Constructive

> notice exists where "the shipowner ought to have known of the peril to its passengers, the hazard having been present for a period of time so lengthy as to invite corrective measures." *Keefe*, 867 F.2d at 1322. A plaintiff can establish constructive notice by alleging "that the 'defective condition exist[ed] for a sufficient period of time to invite corrective measures.'" *Guevara*, 920 F.3d at 720 (alteration in original) (quoting *Monteleone v. Bahama Cruise Line, Inc.*, 838 F.2d 63, 65 (2d Cir. 1988)). A plaintiff can also establish constructive notice by alleging "substantially similar incidents in which 'conditions substantially similar to the occurrence in question must have caused the prior accident.'" *Id*. (quoting *Jones v. Otis Elevator Co.*, 861 F.2d 655, 661–62 (11th Cir. 1988)).

Id. at 1095. 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, Plaintiff alleges that Defendant had notice of the dangerous condition because:

> The *M/S Norwegian Encore* was delivered to [Defendant] on October 30, 2019, and debuted in the Caribbean on November 24, 2019. The condition of wet guests walking up and down the subject stairs continuously existed for the almost four (4) years between that debut of the Ship and Plaintiff's accident; and during that entire time, [Defendant's] staff were positioned such that this dangerous condition could be easily observed and remedied. Industry and [Defendant's] safety protocols mandated that [Defendant's] staff vigilantly watch over the areas and vicinity in and around the pool by way of constant surveillance – this would have and should have included observing guests utilizing the subject stairs.

[ECF No. 18, ¶ 15].

Plaintiff's allegation **assumes** that Defendant had notice of the dangerous condition because (1) she slipped and fell on the subject stairs, (2) this specific vessel has been in use for four years, (3) previous patrons have had access to the staircase, and (4) Defendant's employees **could have seen** the dangerous condition. These allegations suffer from the same faults mentioned in *Holland* because the allegations are not factually supported. Additionally, the Amended Complaint did not include anything specifically indicating that Defendant ***knew*** of the dangerous condition or what "safety protocols" were in place. *Holland*, 50 F.4th at 1095 ("Actual notice exists when the defendant **knows** about the dangerous condition." (emphasis added)). Therefore, without any factual support or specificity, Plaintiff's allegations are merely conclusory and fail to sufficiently plead actual notice.[2]

Regarding constructive notice, the *Holland* Court found that for a claim to have facial plausibility related to constructive notice, it must allege that "either (1) the hazardous substance existed on the staircase for a sufficient length of time, *see Keefe*, 867 F.2d at 1322, or (2) substantially similar incidents occurred in which 'conditions substantially similar to the occurrence in question must have caused the prior accident,' *Guevara*, 920 F.3d at 720 (quoting *Jones*, 861 F.2d at 661–62)." 50 F. 4th at 1096. The

[2] The Amended Complaint alleges both actual and constructive notice. [ECF No. 18, ¶ 16 ("Accordingly, at all times relevant, and at the time of the subject incident, [Defendant] knew, or in the exercise of ordinary care, should have known, that the subject stairs would be and were wet.")].

Amended Complaint fails to address either option.

Plaintiff contends that "[t]he allegations and facts show, with significant detail, that the area where Plaintiff fell had a **reasonable tendency to become slippery**." [ECF No. 24, p. 3 (emphasis in original)]. She highlights how the proximity of the subject stairs to the water-based features of the ship, the positioning and roles of the lifeguards and aquatic staff, together with the fact that she and members of her party observed people using the subject stairs, sufficiently alleged constructive notice. *Id*. The Undersigned disagrees.

First, Plaintiff's allegations concerning the roles of the lifeguards and aquatic staff are factually unsupported, speculative, and conclusory. These allegations include descriptions from one of Defendant's *competitors* but does not cite to (nor include) anything tethering the competitor's job descriptions with Defendant's. Plaintiff apparently wants the Court to conclude that Defendant uses the **same** job descriptions as its competitors, but without factual support, we will not do so.

She also highlights a description from one of Defendant's job postings for shipboard lifeguards, but, again, fails to cite or attach the job posting itself to her Amended Complaint. She additionally omits a link between the lifeguard job description and the actual/constructive notice requirement for direct liability negligence claims. Plaintiff's vague language concerning the job descriptions makes it impossible for the Undersigned to determine whether they were even in effect (and applicable) at the time

of Plaintiff's fall.

Second, she never describes the dangerous condition, such as what kind of substance she slipped on, what it looked like (*i.e.*, color, size, etc.), what kind of floor the substance was on, how often did she (or members of her party) notice the dangerous condition, and whether it changed throughout her trip. If Plaintiff seeks to successfully allege that Defendant had notice of a dangerous condition, then Plaintiff must describe the dangerous condition. *See Rafie v. NCL (Bahamas) Ltd*., No. 23-23972-CIV, 2024 WL 112006, at *3 (S.D. Fla. Jan. 10, 2024) ("Indeed, other than mentioning that the *Spirit* was navigating through rough seas on the day of her fall down the stairs, Rafie fails to even concretely describe the dangerous condition that NCL should have known about.").

Plaintiff's Amended Complaint does not properly allege notice with enough specificity because there is *no* specificity. As previously stated, to sufficiently allege constructive notice, Plaintiff is "required to plausibly allege that either (1) the hazardous substance existed on the staircase 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[.]" *Holland*, 50 F.4th at 1096 (internal citations omitted). However, there is nothing indicating how long the dangerous condition existed nor whether Plaintiff is aware of any prior similar incidents.

Here, Plaintiff merely assumes that Defendant had constructive notice but fails to include anything specifically supporting why. Without more, Plaintiff's allegations are

merely conclusory.

She continually makes "inferential leap[s]" that are "too great" for this Court to follow. *Holland*, 50 F.4th at 1096 (holding that "the inferential leap from Holland's premise -- that the staircase is highly visible and well-trodden -- to his conclusion -- that the hazard existed for a sufficient length of time – [was] too great.").

For example, Plaintiff wants the Court to accept as true her allegation that because Defendant's competitor described job responsibilities a certain way, that Defendant used those same job descriptions at the time of her accident -- without including any information as to where she got that information, whether it was still in effect, whether it was ever amended, and, most importantly, whether Defendant had the same policy.

These sorts of barebones and conclusory allegations are often found inadequate in the Eleventh Circuit. *See*, *e.g.*, *Foley v. Carnival Corp*., No. 23-cv-23025, 2024 WL 361189, at *5 (S.D. Fla. Jan. 31, 2024) ("[The] [p]laintiff's statements that [a] defendant had notice of the dangerous condition because of the 'length of time' it existed and because of the 'high traffic nature of the Lido Deck,' with nothing more, are insufficient to allege notice." (quoting *Fawcett v. Carnival Corp*., 682 F. Supp. 3d 1106, 1110 (S.D. Fla. 2023)).

Defendant cites to *Arouza-Pai v. Carnival Corp*., No. 21-CV-23511, 2022 WL 18673999, at *4 (S.D. Fla. Dec. 16, 2022), *report and recommendation adopted*, No. 21-CIV-23511, 2023 WL 1965958 (S.D. Fla. Jan. 3, 2023) in its motion. In *Arouza-Pai*, the Court denied the defendant's motion to dismiss based on the scope mentioned in *Brady v.*

Carnival Corp., 33 F.4th 1278, 1281 (11th Cir. 2022). *Id*. ("Rather, the salient issue is whether Carnival knew, more generally, that the area of the deck where Brady fell had a reasonable tendency to become slippery—and thus dangerous to passengers—due to wetness from the pool."). The *Arouza-Pai* Court concluded that the complaint sufficiently alleged notice because it included: (1) more than forty prior substantially similar incidents; (2) allegations related to the placement of caution signs; and (3) copies of the **actual** policies the defendant relied on at the time of the incident. *Id* at *4–5. These factors provided the Court with enough specificity to determine the issue of notice. But they are missing from Plaintiff's Amended Complaint here.

Plaintiff relies on *Brady v. Carnival Corp*. to highlight how her Amended Complaint "show[s], with significant detail, that the area where Plaintiff fell had a **reasonable tendency to become slippery**." [ECF No. 24, p. 3 (emphasis in original) (citing *Brady*, 33 F.4th at 128)]. However, Plaintiff's reliance on *Brady* is misplaced because the *Brady* Court addressed a motion for summary judgment and relied on the parties' development of the factual record. But here, the Court is addressing a dismissal motion without the benefit of a developed factual record. *See Fawcett*, 682 F. Supp. 3d at 1111 ("But the cases the parties discuss are mostly inapplicable here because they were decided either at summary judgment or on a directed verdict — after the factual record had been developed."). Additionally, as previously discussed, the Amended Complaint lacks any specific information that would allow the Court to determine whether Defendant was on

notice.

Therefore, the Undersigned **respectfully recommends** that Judge Williams **grant** Defendant's Motion and give Plaintiff **leave to amend** (because the Amended Complaint fails to adequately and plausibly allege actual or constructive notice).

IV. Conclusion

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

If Plaintiff files a second amended complaint, then any legal conclusions that form the basis for those claims must be supported by specific, applicable, non-conclusory factual allegations. *See* Fed. R. Civ. P. 11(b); *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359, 2012 WL 2049431 at *6 (S.D. Fla. June 5, 2012) ("Upon re-pleading, however, [plaintiff] is reminded that any alleged breaches, and the duties associated therewith, must be consistent with federal maritime law and must be supported by underlying factual allegations" -- and noting that "conclusory allegations grounded in thin air will not do.").

Therefore, if Plaintiff decides to file a second amended complaint, then she should separate her negligence claims (failure to inspect and maintain and failure to warn of a dangerous condition) into separate counts, to avoid the shotgun pleading argument.

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, December 3, 2024.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

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