**UNITED STATES DISTRICT COURT**
**SOUTHERN DISTRICT OF FLORIDA**

Case No. 1:19-cv-20836-UU

MARTHA Y. NICHOLS, individually,
and as wife and Personal Representative
of the Estate of LARRY NICHOLS,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

_____/

**ORDER**

THIS CAUSE comes before the Court upon Defendant Carnival Corporation's ("Carnival") Motion to Dismiss Plaintiff's Amended Complaint (D.E. 22) (the "Motion"). The Court has considered the Motion, the pertinent portions of the record and is otherwise fully advised in the premises. For the reasons discussed *infra*, the Motion is GRANTED.

## I. Factual Background

Unless otherwise indicated, the following facts are taken from the Plaintiff's Amended Complaint. D.E. 21 (the "Complaint").

### A. The Parties

Plaintiff Martha Y. Nichols ("Plaintiff") brings this suit individually, as the surviving spouse of decedent Larry Nichols ("Decedent"), and as personal representative of Decedent's estate. Compl. ¶¶ 6–7. Defendant Carnival owns, operates, manages, maintains and/or controls the cruise ship *Breeze* (the "Ship"). *Id.* ¶¶ 9, 13. On or about September 5, 2018, Plaintiff and Decedent

were passengers on the Ship, which was docked in the Roatan, Honduras. *Id.* ¶¶ 10, 14. This action stems from Decedent's participation in a sailing and snorkeling excursion called "Jolly Roger Roatan" (the "Excursion") during their cruise on the *Breeze*. *See id.* ¶¶ 15, 27.

B. Promotional Materials and Advertising of the Excursion

After Plaintiff and her husband booked the subject cruise aboard the Ship, Carnival sent promotional material providing information and descriptions of shore excursions, including the Excursion. *Id.* ¶ 15. Additionally, Carnival's website contained information regarding shore excursions, and the Excursion, and sold tickets for excursions. *Id.* ¶ 16. At some point, Plaintiff "reviewed" Carnival's website and saw that Carnival markets the excursions, including the Excursion, as "Uniquely CARNIVAL." *Id.* ¶ 20 (emphasis in original).

Once Plaintiff and Decedent were aboard the Ship, Carnival made a presentation to passengers, during which Carnival discussed and promoted the excursion options available to passengers during the cruise. *Id.* ¶ 17. Carnival described the excursions, including the Excursion, as "CARNIVAL excursions." *Id.* (emphasis in original). Additionally, at the shore excursion desk and elsewhere aboard the Ship, Carnival had promotional materials with information and descriptions of the Excursion and other excursions. *Id.* ¶ 18. Tickets for the Excursion and other excursions were available for sale on the Ship's shore excursion desk. *Id.*

The information and material Carnival made available and/or distributed to Plaintiff and her husband represented that the excursions offered by Carnival, including the Excursion, were of the highest safety standards and would be safe for passengers like Decedent. *Id.* ¶ 19. Carnival and/or its crewmembers also advised its passengers, including Plaintiff, not to engage in excursions, tours or activities that were not selected and sold by Carnival. *Id.* ¶ 20. Carnival promotional materials and information concerning excursions represented that Carnival "partnered with experts around

the world" and that safe transportation to the excursion locations and back to the Ship was included in the tickets sold by Carnival. *Id.* ¶ 21.

C. The Incident on September 5, 2018

Plaintiff obtained all Excursion-related information from Carnival, purchased a ticket for the Excursion directly from Carnival, and made all reservations through Carnival. *Id.* ¶¶ 22–23. Plaintiff purchased tickets for and participated in the Excursion in reliance "exclusively" on Carnival's presentations as well as "the safety and reputability of the excursions offered by" Carnival. *Id.* ¶¶ 22, 24–25.

Plaintiff understood from Carnival's presentations that Carnival regularly inspected the Excursion, including transportation and the Excursion operators, to ensure that they were reasonably safe. *Id.* ¶ 25. Plaintiff also believed the Excursion was owned or operated by Carnival. *Id.* ¶ 26. However, the Excursion actually was operated by a separate (unnamed) entity.[1] *Id.* ¶ 28.

On or about September 5, 2018, Plaintiff participated in the Excursion in Honduras. *Id.* ¶ 27. The Excursion consisted of participants (including Plaintiff and Decedent) being taken by catamaran to sail, swim, and snorkel. *Id.* ¶ 29. While snorkeling, Decedent began to "suffer from a medical condition with symptoms similar to those of someone suffering from a respiratory and/or cardiac emergency condition." *Id.* ¶ 30. There were no lifeguards, tour guides, and/or crew members supervising the area. *Id.* ¶ 31. After a delay, the tour guides and/or crew members responded to the emergency; due to his condition, Decedent was incapacitated and had to be transported to a local hospital for medical attention. *Id.* ¶ 32.

Once he was aboard the tender, "the agents, tour guides, and/or crew members" failed to

[1] Nevertheless, Plaintiff's Complaint is replete with reference to "JOLLY ROGER ROATAN EXCURSION" (so capitalized) as some kind of fictitious entity with which Carnival maintained an employer-employee, principal-agent (actual or apparent), master-servant, partner or joint venture relationship. *See, e.g., id.* ¶¶ 81, 86–87, 89–90, 92–93, 106–109, 111, 113, 118.

provide any emergency response aid and/or assistance. *Id.* ¶ 33. Carnival also had failed to equip the tender with properly functioning defibrillators and/or any other first aid/first response equipment to provide emergency care. *Id.* ¶ 34. (Plaintiff also alleges, presumably in the alternative, that any first aid equipment was not labeled appropriately and/or not readily accessible for use. *Id.* ¶ 35.) "The agents, tour guides and/or crew members were not properly trained and/or competent to handle any sort of emergency situations." *Id.* ¶ 33; *see also id.* ¶ 36. Additionally, Carnival failed to appropriately inspect (either prior to or after Carnival's approval of the Excursion) "the [E]xcursion's operators and/or their employees and the transportation used for the [E]xcursion." *Id.* ¶¶ 37–41.

Carnival's various alleged failures caused Decedent to die on September 5, 2018. *Id.* ¶ 36.

## II. Procedural Background

On March 4, 2019, Plaintiff filed her original complaint against Carnival, alleging five causes of action against Carnival relating to Decedent's incident on the Excursion: (1) general negligence; (2) negligent hiring and/or retention; (3) negligence "based on apparent agency"; (4) negligence "based on joint venture"; and (5) breach of third party beneficiary contract. D.E. 1. On June 21, 2019, this Court entered its Order dismissing the complaint as, among other reasons, insufficiently pled. D.E. 20. The Court also held that the Death on the High Seas Act ("DOHSA"), 46 U.S.C. §§ 30301 *et seq.*, provided Plaintiff's exclusive remedy and preempted any other negligence claims. *See id.* at 7–10. Plaintiff filed her amended Complaint on June 28, 2019, alleging the following claims: (1) "negligence against Carnival under DOHSA"; (2) "negligent hiring and/or retention against Carnival under DOHSA"; (3) "negligence against Carnival based on apparent agency under DOHSA"; and (4) "negligence against Carnival based on joint venture between Carnival and Jolly Roger Roatan Excursion under DOHSA." *See* Compl. Carnival moved

to dismiss on July 12, 2019. *See* Mot. The Motion is now ripe for disposition.

## III. Legal Standard on a Motion to Dismiss

In order to state a claim, Federal Rule of Civil Procedure 8(a)(2) requires only "a short and plain statement of the claim showing that the pleader is entitled to relief." While a court, at this stage of the litigation, must consider the allegations contained in the plaintiff's complaint as true, this rule "is inapplicable to legal conclusions." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). In addition, the complaint's allegations must include "more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (citing *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007)). Thus, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id*. (citing *Twombly*, 550 U.S. at 555).

In practice, to survive a motion to dismiss, "a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Twombly*, 550 U.S. at 570). 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. *Id.* The plausibility standard requires more than a sheer possibility that a defendant has acted unlawfully. *Id.* Where a complaint pleads facts that are merely consistent with a defendant's liability, it stops short of the line between possibility and plausibility of entitlement to relief. *Id.* Determining whether a complaint states a plausible claim for relief is a context-specific undertaking that requires the court to draw on its judicial experience and common sense. *Id.* at 679.

## IV. The Complaint is Insufficiently Pled

### A. Plaintiff's Complaint Remains a Shotgun Pleading

Plaintiff's original complaint was dismissed without prejudice in its entirety for failure to

comply with Rule 8. *See* D.E. 20 at 6–7. The Court specifically cited two defects that Plaintiff would need to cure in any amended pleading: (1) Plaintiff's failure to tie her factual allegations to her legal claims, including but not limited to her pleading causation in a purely conclusory fashion, and (2) Plaintiff's beginning every Count with a preamble re-alleging and incorporating by reference a group of 55 paragraphs of factual allegations. *See id.* These defects remain uncured in the present Complaint.

As to the second point, Plaintiff removed 10 of the 55 preliminary allegations and plugged them into the apparent agency and joint venture counts, with a few minor revisions. *Compare* D.E. 1 ¶¶ 46–55 *with* Compl. ¶¶ 80–86, 106–108. This cut-and-paste job does not cure the problem of re-alleging and incorporating by reference the other 44 paragraphs, without explaining which of those paragraphs support each cause of action and how.

Likewise, Plaintiff has added a group of nine identical paragraphs to each Count, *compare* Compl. ¶¶ 49–57 *with id.* ¶¶ 67–75, 94–102, *and* 137–145, without regard to whether each paragraph has any bearing on the particular cause of action. For example, in the Negligent Hiring and/or Retention Count (Count II), Plaintiff added one paragraph pertaining to the alleged failures and incompetence of Carnival's "agents, tour guides and/or crew members," *id.* ¶ 68, but also added various paragraphs pertaining to Carnival's failure to inspect the tender and ensure it was equipped with properly functioning defibrillators, first aid equipment, and/or safety gear, *see id.* at ¶¶ 69–70, 72. To bring a claim of *prima facie* negligent selection/retention, a plaintiff must plead that: (1) the contractor was incompetent or unfit to perform the work; (2) the employer knew or reasonably should have known of the particular incompetence or unfitness; and (3) the incompetence or unfitness was a proximate cause of the plaintiff's injury. *Smolnikar v. Royal Caribbean Cruises Ltd.*, 787 F. Supp. 2d 1308, 1318 (S.D. Fla. 2011). Carnival's alleged

negligence vis-à-vis inspecting the tender and ensuring the presence of equipment has nothing to do with these elements; Plaintiff has not alleged, for example, that a particular Carnival employee was responsible for inspecting the tender and ensuring the presence of equipment but was incompetent or unfit to do that job. Again, Plaintiff's broad copy-paste edits violate Rule 8. *See Buckner v. Whitley*, No. 3:18-CV-610-WKW, 2019 WL 1117914, at *1 (M.D. Ala. Mar. 11, 2019) ("Plaintiff's complaint is a shotgun complaint. Each of the three counts adopts and re-alleges every preceding allegation, filling each count with allegations that are not relevant to that particular count.").

More egregious, however, is Plaintiff's failure once again to tie her factual allegations to her legal claims in a non-conclusory manner. For example, in the General Negligence Count (Count I), Plaintiff alleges that the Decedent died due to 28 alleged breaches of Carnival's duty of care. Compl. ¶ 47(a)–(bb). Plaintiff then formulaically recites that "All or some of the above acts and/or omissions by CARNIVAL and/or its agents, servants, and/or employees, caused and/or contributed to the Decedent's death as a result of participating in the subject excursion. Had the Defendant, CARNIVAL, complied with said abovementioned duties, the [Decedent's] death would have been prevented." *Id.* ¶ 48. This is simply too conclusory to establish causation; Plaintiff must allege factual content to support how compliance with an alleged duty would have prevented Plaintiff's death.

Further, and bafflingly, among the alleged breaches are Carnival's "[f]ailure to adequately determine physical limitations which should be associated with the subject excursion" and "[f]ailure to adequately communicate physical limitations which are and/or should be associated with [the] subject excursion." *Id.* ¶ 47(e)–(f). The Court can only speculate as to what "physical limitations" Plaintiff is referencing. The Complaint lacks any factual allegation that the Decedent

was predisposed—perhaps due to age, weight, or some other factor—to suffer the unidentified "medical condition with symptoms similar to those of someone suffering from a respiratory and/or cardiac emergency condition" that came to pass. *See id.* ¶ 30. Because there is no "physical limitation" identified in the Complaint, there simply is no viable claim that Carnival's failure to identify and communicate such "physical limitations" as a risk factor for the Excursion caused the Decedent's death.

The other alleged breaches improperly intermingle theories of liability for failure to supervise, failure to investigate, failure to instruct/train, failure to warn, failure to maintain, failure to provide medical care, and negligent retention. *See generally id.* ¶¶ 47(a)–(bb); *see also Thanas v. Royal Caribbean Cruises Ltd.*, No. 19-21392-Civ-Scola, 2019 WL 1755510, at *2 (S.D. Fla. Apr. 18, 2019) (holding that each distinct theory of liability is a "separate cause[] of action that must be asserted independently and with supporting factual allegations."). As a whole, the 28 alleged breaches render the underlying negligence claim a "shotgun" pleading. *See, e.g., Brown v. Carnival Corp.*, 202 F. Supp. 1332, 1338 (S.D. Fla. 2016) (holding that "Plaintiff has engaged in a shotgun-style of pleading in reciting forty-one alleged breaches"); *Gayou v. Celebrity Cruises, Inc.*, No. 11-23359-Civ, 2012 WL 2049431, at *4–6 & n.2 (S.D. Fla. June 5, 2012) (dismissing negligence count with "laundry list of breaches" for failure to differentiate between theories of liability as well as failure to allege sufficient facts to support those theories).

For all of these reasons, the Complaint still falls short of Rule 8's requirement to plead "a short and plain statement of the claim showing that the pleader is entitled to relief" and Rule 10(b)'s requirement to state claims "in numbered paragraphs, each limited as far as practicable to a single set of circumstances. ... If doing so would promote clarity, each claim founded on a separate transaction or occurrence—and each defense other than a denial—must be stated in a

separate count or defense." The Complaint is due to be dismissed.

B. Plaintiff's Complaint Still Fails to Allege Factual Content to Support the Notice Requirement

Even if the Complaint were not a shotgun pleading, Plaintiff still has failed to allege sufficient factual content to state any claims for negligence under DOHSA. As the Court previously explained, DOHSA negligence claims are analyzed under the traditional maritime negligence framework. *See* D.E. 20 at 10–11 (citing, *inter alia*, *Tello v. Royal Caribbean Cruises, Ltd.*, 939 F. Supp. 2d 1269, 1275 (S.D. Fla. 2013)). "As a prerequisite to imposing liability, a carrier must have had 'actual or constructive notice of the risk-creating condition.'" *Keefe,* 867 F.2d at 1322. This Court held that Plaintiff failed to sufficiently allege notice in her original complaint because Plaintiff "failed to articulate what facts gave Carnival actual or constructive notice about any dangerous condition" by failing to "allege what prior incidents may have occurred, and on what excursions, nor *how* these incidents put Carnival on notice." D.E. 20 at 14 (citing *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1392–93 (S.D. Fla. 2014) and *Polanco v. Carnival Corp.*, No. 10-21716-CIV, 2010 WL 11575228, at *3 (S.D. Fla. Aug. 11, 2010)).

In the amended Complaint, Plaintiff attempts to cure her prior failure by alleging, in each count,

> that CARNIVAL was or should have been on notice, inter alia, of the potential for life-threatening injuries during the JOLLY ROGER ROATAN EXCURSION, because several months before the subject incident, at least two individuals had died due to suffering heart attacks while participating in CARNIVAL'S JOLLY ROGER ROATAN EXCURSION.

Compl. ¶¶ 53, 71, 98, 141. This is still not enough. For one thing, Plaintiff does not allege that the Decedent suffered a heart attack; she merely alleges that he suffered from some unidentified "medical condition with symptoms similar to those of someone suffering from a respiratory and/or

cardiac emergency condition." *See id.* ¶ 30. Thus, the two prior heart attack deaths may not have put Carnival on notice of the risks associated with the unidentified "medical condition" from which the Decedent suffered. Moreover, Plaintiff has not alleged that the two individuals who died due to suffering heart attacks while participating in the Excursion could have been saved had Carnival equipped the tender with a defibrillator, or by the supervision of lifeguards, tour guides, and/or crew members while those individuals were swimming, or by having agents, tour guides and/or crew members that were better trained and/or competent to handle emergencies. *Cf. id.* ¶¶ 49–51, 67–69, 94–96, 137–139.

Plaintiff also alleges, in conclusory fashion, that Carnival "was or should have been on notice that the excursion was not reasonably safe for passengers. This notice was or should have been acquired through CARNIVAL's initial approval process and/or its inspections of the subject excursion." *Id.* ¶¶ 38, 56, 74, 101, 144. Plaintiff alleges that if Carnival's representatives had inspected the Excursion, they would have learned of "the tour operator's unqualified, incompetent and/or unfit employees and/or their hazardous tender with unavailable and/or defective defibrillators and/or emergency medical equipment, and/or their insufficient and/or inadequate policies and procedures and/or instruction for passenger safety." *Id.* ¶¶ 39, 57, 75, 102, 145; *see also id.* ¶¶ 40–41, 58, 76–77, 103, 146. These allegations do not present sufficient facts to establish notice because they do not allege how, factually, Carnival's inspections would have revealed the various allegedly unsafe conditions and what the corresponding unsafe conditions were.

By comparison, in *Mellnitz v. Carnival Corporation*, the plaintiff alleged that she took a snorkeling excursion that included transportation on a high speed boat, advertised by Carnival to be "moderate" (whereas other high speed boat rides were classified by Carnival as "extreme"

or "difficult"). *See* Complaint, No. 1:18-cv-24933-CMA, D.E. 1 ¶¶ 18, 24, 28–30 (S.D. Fla. Nov. 27, 2018). The plaintiff further alleged that the high speed boat ride was unreasonably dangerous because operating the boat "in a high speed manner, over wakes, waves, and other water conditions … caused the Plaintiff to be thrown into the air, repeatedly, and crash to the deck of the boat," causing her to suffer injuries. *See id.* ¶ 30. The plaintiff there, like Plaintiff here, generally alleged that Carnival should have learned of this unreasonable danger by having its representatives take the subject excursion and/or inspect the excursion. *See id.* ¶¶ 31–35, 45, 50, 57. Judge Altonaga found this general allegation to be insufficient, explaining at a hearing on Carnival's motion to dismiss:

> THE COURT: But then you need to -- you would need to allege that, in taking the prior excursions, they were under the same sea conditions and under exactly the same circumstances as your client experienced; hence, they would have been on notice that it's really fast, and you're subject to being bounced around on a -- on a boat on the water, right?
>
> MS. GARCELL: Well, it does say in the last paragraph of paragraph -- the last sentence of paragraph 34, that taking the subject excursion did or should have revealed that the subject excursion was dangerous and/or not suitable to passengers. And that's also in the last sentence of paragraph 35, was dangerous and/or not suitable to passengers due to the inadequate instructions, and the reasons for which we deem it to be dangerous in this case.
>
> THE COURT: Right, but what are the facts? Where are the facts in the complaint that would have revealed the excursion was dangerous? Some -- just because you go on an excursion on day one doesn't mean the excursion on day two was identical. You would have to allege that it was done in the exact same manner as when Carnival went on this excursion, testing out the excursion entity, there would need to be that factual allegation, right?
>
> MS. GARCELL: Understood.

D.E. 22-1, Transcript of Motion Hearing, *Mellnitz v. Carnival Corp.*, No. 1:18-cv-24933-CMA, at 13:2–24.

Judge Altonaga's reasoning applies to the instant case. Plaintiff has not alleged facts to support that the conditions present when the Decedent took the excursion—e.g., the alleged

absence of a functioning defibrillator, and the allegedly unfit employees—were also present at any time Carnival did or should have inspected the Excursion. There are no facts to suggest that an inspection of the Excursion would have included a medical emergency scenario, such that Carnival would have learned of the unavailability or inadequacy of emergency medical care. *Cf.* D.E. 27-1, Order, *Doria v. Royal Caribbean Cruises, Ltd.*, No. 1:19-cv-20179-KMW, D.E. 13 at 7–9 (allegations of notice through "initial approval process and/or…yearly inspections of the subject excursion" and "other cruise ship passengers being injured on [similar] excursions" insufficiently pled).

As to the negligent hiring and/or retention claim, the Court previously held that Plaintiff, in her original complaint, failed to adequately plead that Carnival knew or reasonably should have known of the Excursion operator's incompetence or unfitness. *See* D.E. 20 at 14–15. Plaintiff has failed to cure this deficiency as well. As Judge Altonaga explained in *Mellnitz*:

> So you need to allege that when Carnival tested this excursion with its operator, it knew and experienced inadequate supervision and/or assistance and so could have known that, going forward, passengers would be subjected to the same inadequate supervision or assistance, that's what the motion to dismiss is saying.
>
> You kind of throw it all out there, but you don't link it to what exactly Carnival experienced so that it would have known that this was dangerous.
>
> All right. So I'll dismiss with leave to amend, of course, but tell us how you know that Carnival knew. And it's not just because they cleared the operator and picked them, that doesn't mean that they knew all of the dangers that your client experienced. You would need to have a factual basis for making that assertion.

D.E. 22-1, Transcript of Motion Hearing, *Mellnitz v. Carnival Corp.*, No. 1:18-cv-24933-CMA, at 14:18–15:8 (emphasis added). So too here. Simply alleging that Carnival undertook an initial approval process with the Excursion operator does not rise to the level of sufficient factual content to show that Carnival would have learned of the alleged dangers of insufficient supervision and/or care for those suffering an emergency medical condition "with symptoms

similar to those of someone suffering from a respiratory and/or cardiac emergency condition." *See* Compl. ¶ 30. Plaintiff has not sufficiently alleged the notice element required for each of her four causes of action.

## V. The Complaint is Dismissed With Prejudice

When a litigant, represented by counsel, files a shotgun pleading, a district court must give her one chance to replead before dismissing her case with prejudice on non-merits shotgun pleading grounds. *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1296 (11th Cir. 2018). After that one "opportunity to replead comes and goes," the district court can dismiss with prejudice if the party has still neither filed a compliant pleading nor asked for leave to amend. *Id.*; *see also Eiber Radiology, Inc. v. Toshiba Am. Med. Sys., Inc.*, 673 F. App'x 925, 930 (11th Cir. 2016) ("We have never required district courts to grant counseled plaintiffs more than one opportunity to amend a deficient complaint, nor have we concluded that dismissal with prejudice is inappropriate where a counseled plaintiff has failed to cure a deficient pleading after having been offered ample opportunity to do so."). In this case, Plaintiff was warned of her original complaint's pleading deficiencies. *See* D.E. 20. Plaintiff's amended Complaint—which is only marginally different from the original—falls woefully short of curing these deficiencies. The Court is left with the ineluctable conclusion that Plaintiff cannot state a plausible claim and that a further opportunity to amend will produce only another prolix, but legally insufficient, complaint. The Court, in the exercise of its discretion, finds that dismissal with prejudice is warranted.

Accordingly, it is

ORDERED AND ADJUDGED that the Motion, D.E. 22, is GRANTED. It is further

ORDERED AND ADJUDGED that the Complaint, D.E. 21, is DISMISSED WITH PREJUDICE AND WITHOUT LEAVE TO AMEND in its entirety. It is further

ORDERED AND ADJUDGED that the Clerk of Court SHALL CLOSE this case for administrative purposes. All deadlines and hearings are CANCELLED; all pending motions DENIED AS MOOT.

DONE AND ORDERED in Chambers at Miami, Florida, this _17th__ day of September, 2019.

URSULA UNGARO
UNITED STATES DISTRICT JUDGE

cc:
counsel of record via CM/ECF