UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.: 1:23-24857-WILLIAMS/GOODMAN

NICHOLAS VOLK,

Plaintiff,

v.

CARNIVAL CORPORATION d/b/a
CARNIVAL CRUISE LINES, and
ITM GROUP MX,

Defendants.
_____/

REPORT AND RECOMMENDATIONS ON MOTION TO DISMISS

Nicholas Volk ("Volk" or "Plaintiff") was a passenger on the Carnival *Celebration.* On January 25, 2023, he got off the ship when it was docked in port at Costa Maya, Mexico. According to his Complaint, Volk was walking along the walkway designated for passengers to use to gain access to Costa Maya when he was "struck by flying debride [sic] (believed to be a steal [sic] grate and/or pylon) which was tossed about due to a surge of water." [ECF No. 1, ¶ 17]. Volk alleges that the "hazardous nature" of the debris was not open and obvious, there were no warning or caution signs and that he no way of knowing about the hazardous condition. *Id.* at ¶ 18.

Alleging severe injuries, including a torn rotator cuff requiring surgery, Volk filed

a three-count Complaint against Carnival and Codefendant ITM Group MX ("ITM"), a Mexican entity he says entered into an agreement with Carnival to operate port services and attractions in Costa Maya. All three counts are asserted against both defendants. Count I is for negligent failure to warn; Count II is for negligent failure to maintain; and Count III is for General Negligence. Carnival[1] filed a motion to dismiss, Plaintiff filed a response and Carnival filed a reply. [ECF Nos. 13; 19; 21]. United States District Judge Kathleen M. Williams referred [ECF No. 17] the motion to the Undersigned for a report and recommendations.

Carnival's motion is based on two arguments: (1) the Complaint fails to adequately plead actual or constructive notice (because the allegations are merely vague and conclusory statements which are only labels, conclusions, and formulaic recitals of the elements of a cause of action) and (2) the Complaint is an impermissible shotgun pleading, as it asserts allegations against both Defendants without specifying which did what.

For the reasons outlined below, the Undersigned **respectfully recommends** that Judge Williams **grant** the motion and dismiss the Complaint (albeit **without** prejudice

[1] The docket sheet does not reflect proof of service on ITM Group MX or Holistica Destinations Ltd., which is not a named Defendant but is, according to the Complaint, a Miami-headquartered entity which was created in a 50-50 partnership between "Royal Caribbean Cruises, Ltd." (sic) and ITM Group MX. *Royal Caribbean* is not a Defendant in the Complaint, however. The Complaint alleges that Holistica owns and operates destinations in various ports, including Costa Maya. It does not allege any *Carnival* involvement in the creation, ownership, management, or operation of Holistica, however.

and with **leave** to file an amended complaint). At bottom, though, the Complaint is problematic and inadequate because it is, from a substantive perspective, overly conclusory and devoid of sufficient specific factual allegations. It is also an impermissible shotgun pleading (*i.e.*, it brings multiple claims against two defendants without specifying which of the defendants are responsible for which acts or omissions).

I. Factual Background (*i.e.*, Plaintiff's Allegations)

The following allegations concern all three counts of Plaintiff's Complaint:

> 14. Defendants CARNIVAL and/or ITM own and control the Costa Maya port in Mexico.
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> 15. Defendants CARNIVAL and/or ITM are aware that improper maintenance and inspection of the port can create a hazardous condition, and lead to injuries. Defendants CARNIVAL and/or ITM, therefore developed detailed rules, policies, and procedures (SMS policies and procedures) for these purposes, to minimize the risk of the very injury suffered by Plaintiff as alleged.
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> ***
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> 18. The hazardous nature of the debris was not open and obvious, there were no warning or caution signs present, and Plaintiff had no way of knowing the existence of the hazardous condition.
>
> 19. The subject area constituted a dangerous condition for reasons that include, but were not limited to:
>
> a. The subject area was prone to a surge of water due to the cruise ship pulling into port that made this area of the port unreasonably dangerous;
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> b. The subject area had loose debris which was not properly secured and/or disposed of;

c. Defendants failed to place signs and/or warnings in or around the subject area, which could have reasonably communicated to Plaintiff the danger of the steal [sic] grate and/or pylon shooting off the ground and creating a hazard.

20. Prior to the subject incident, Defendants knew and/or should have known of the dangerous condition(s) outlined above for reasons that include, but were not limited to:

a. Prior to and/or at the time of Plaintiff's injury-producing incident, outlined above, Defendants [sic] crewmembers, agents, and/or employees were standing within a close distance to the subject area and/or were actively monitoring same for hazards, per Defendants [sic] policies and procedures, and did and/or should have observed the dangerous condition(s) outlined above which caused [ ] Plaintiff's injuries, but did not take appropriate remedial measures to prevent [ ] Plaintiff's incident;

b. Prior to and/or at the time of Plaintiff's injury-producing incident, outlined above, Defendants had installed video cameras to monitor the subject area, and had Defendants reasonably monitored the subject area via those cameras, Defendants did and/or would have observed the dangerous condition(s) outlined above which caused [ ] Plaintiff's injuries, but Defendant [sic] did not take appropriate remedial measures to prevent [ ] Plaintiff's incident; and/or

c. As per Defendant's policies and procedures, Defendants [sic] crewmembers, agents, and/or employees did and/or should have continuously monitored the subject area of the port to identify and remedy hazardous conditions; had Defendant's crewmembers, agents, and/or its [sic] employees reasonably complied with those policies and procedures, Defendants would have observed the dangerous condition(s) outlined above which caused [ ] Plaintiff's injuries, but Defendants did not take appropriate remedial measures to prevent [ ] Plaintiff's incident.

[ECF No. 1, ¶¶ 14; 15; 18–20].

The following allegations concern Count I's negligent failure to warn:

24. On or about the above date, [ ] Plaintiff was walking at the [p]ort in Costa Maya, which is a place that Plaintiff was invited to by Defendants and a place Defendants reasonably expected Plaintiff to be during the cruise.

25. On or about the above date, Defendants and/or their agents, servants, and/or employees breached their duty to provide [ ] Plaintiff with reasonable care under the circumstances, through the following acts and/or omissions:

a. Failure to warn [ ] Plaintiff of the hazardous and/or dangerous condition of the subject area;

b. Failure to adequately warn [ ] Plaintiff of the poorly maintained steal [sic] grate and/or orange pylon located in the subject area;

c. Failure to adequately warn [ ] Plaintiff of the poorly maintained subject area causing a surge of water to force a steal [sic] grate and orange pylon off the ground;

d. Failure to warn [ ] Plaintiff of the risks and/or dangers associated with the unreasonably hazardous nature of the subject area, including but not limited to the hazardous condition of the area where the steal [sic] grate and pylon were located;

e. Failure to warn [ ] Plaintiff of other similar accidents previously occurring in same area;

f. Failure to warn [ ] Plaintiff that Defendant did not have proper procedures in place to adequately inspect and monitor the area to detect and correct hazardous conditions such as the steal [sic] grate and/or orange pylon posing a danger to passengers; and/or

g. Other negligent acts and/or omissions that may be revealed in discovery.

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27. At all times material hereto, Defendants knew of the foregoing dangerous conditions causing Plaintiff's incident and failed to warn Plaintiff about them, or the conditions existed for a sufficient length of time so that Defendants, in the exercise of reasonable care under the circumstances, should have learned of them and warned about them. This knowledge was or should have been acquired through Defendant's [sic] maintenance and/or inspections of the walking path area and/or through prior incidents involving passengers injured due to the hazardous subject area at the port.

Id. at ¶¶ 24, 25, 27.

The following allegations concern Count II's negligent maintenance claim:

32. On or about the above date, Defendants and/or its [sic] agents, servants, and/or employees breached its [sic] duty to provide [ ] Plaintiff with reasonable care under the circumstances, through the following acts and/or omissions:

a. Failure to adequately and regularly inspect the subject area where [ ] Plaintiff was injured, to determine whether the subject area posed a hazardous and/or dangerous condition;

b. Failure to maintain the subject area where Plaintiff was struck in a reasonably safe condition in light of the anticipated traffic in the area;

c. Failure to maintain the subject area in a reasonably safe condition if/when there was a surge of water, including, but not limited to, closing off the subject area that posed a danger, and/or placing signage to warn passengers of hazardous areas;

d. Failure to adequately and reasonably correct a hazardous condition which the Defendants knew or should have known about; and/or

e. Other negligent acts and/or omissions that may be revealed in discovery.

33. The above acts and/or omissions caused and/or contributed to [ ] Plaintiff being severely injured because Plaintiff's incident would not have occurred but for Defendants' failure to adequately inspect and/or maintain the subject area.

34. At all times material hereto, Defendants knew of the foregoing dangerous conditions causing Plaintiff's incident and failed to warn Plaintiff about them, or the conditions existed for a sufficient length of time so that Defendants, in the exercise of reasonable care under the circumstances, should have learned of them and warned about them. This knowledge was or should have been acquired through Defendant's maintenance and/or inspections of the subject area and/or through prior incidents involving passengers injured due to hazardous conditions at the subject port, reported within the cruise industry.

Id. at ¶¶ 32–34.

The following allegations concern Count III's Claim for General Negligence:

37. On or about the above date, Defendants and/or its [sic] agents, servants, and/or employees breached its [sic] duty to provide [ ] Plaintiff with reasonable care under the circumstances, through the following acts and/or omissions:

a. Failure to adequately and regularly monitor the subject area to maintain it free of hazardous and/or dangerous conditions;

b. Failure to adequately inspect the port at reasonable and adequate intervals so as to discover hazardous and/or dangerous conditions;

c. Failure to close off and/or place warning signs/cones on or around the hazardous and/or dangerous subject area;

d. Failure to promulgate and/or enforce adequate policies and procedures to ensure that the subject area is adequately and regularly inspected, monitored, cleaned and maintained free of hazardous and/or dangerous conditions;

e. Failure to promulgate and/or enforce adequate policies and procedures to ensure that warnings signs are placed on

> or around hazardous and/or dangerous areas and/or that such hazardous and/or dangerous areas are closed off;
>
> f. Failure to comply with safety codes and standards designed and promulgated to reduce the risk of the type of accident [ ] Plaintiff suffered from happening;
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> g. Failure to have adequate risk management procedures in place designed to reduce the occurrence of the type of accident suffered by [ ] Plaintiff;
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> h. Failure to analyze prior accidents involving surges of water at the port causing injury occurring in the same area so as to remedy such hazardous conditions;
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> i. Failure to correct hazardous conditions following other similar accidents in the same area;
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> j. Failure to test and/or adequately evaluate dangerous and/or hazardous conditions at the subject port in light of the anticipated traffic and anticipated purpose of the area; and/or
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> k. Other acts or omissions constituting a breach of the duty to use reasonable care under the circumstances which are revealed through discovery.
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> ***
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> 39. At all times material hereto, Defendants knew of the foregoing dangerous conditions causing Plaintiff's incident and failed to warn Plaintiff about them, or the conditions existed for a sufficient length of time so that Defendants, in the exercise of reasonable care under the circumstances, should have learned of them and warned about them. This knowledge was or should have been acquired through Defendants' maintenance and/or inspections of the subject area and/or through prior incidents involving passengers injured due a surge of water at the port causing a dangerous and/or hazardous condition at the subject port.

Id. at ¶¶ 37, 39.

II. Applicable Legal Standards and Analysis

To survive a motion to dismiss under Rule 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, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007)). 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.* (citing *Twombly*, 550 U.S. at 556). The standard "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (quoting *Twombly*, 550 U.S. at 555).

"[T]he standard 'simply calls for enough fact to raise a reasonable *expectation* that *discovery* will reveal evidence' of the required element." *Rivell v. Private Health Care Sys., Inc.*, 520 F.3d 1308, 1309–10 (11th Cir. 2008) (quoting *Twombly*, 550 U.S. at 545) (emphasis supplied). "The plausibility standard is not akin to a 'probability requirement,' but it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal*, 556 U.S. at 678.

On a motion to dismiss, "the court must accept all factual allegations in a complaint **as true** and take them in the light most favorable to plaintiff." *Dusek v. JPMorgan Chase & Co.*, 832 F.3d 1243, 1246 (11th Cir. 2016) (emphasis added).

Federal Rule of Civil Procedure 8(a) requires only "a short and plain statement of

the claim showing that the pleader is entitled to relief." It does not "require that a plaintiff specifically plead every element of a cause of action." *Balaschak v. Royal Caribbean Cruises, Ltd.*, No. 09-21196, 2009 WL 8659594, at *6 (S.D. Fla. Sept. 14, 2009) (citing *Roe v. Aware Woman Ctr. for Choice, Inc.*, 253 F.3d 678, 683 (11th Cir. 2001), which, in turn, cited Jack H. Friedenthal, et al., Civil Procedure, § 5.7 (2d ed. 1993) for the view that "[w]hat the pleader need not do is worry about the particular form of the statement or that it fails to allege a specific fact to cover every element of the substantive law involved.").

To properly plead a claim for negligence under the General Maritime Law of the United States, 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." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012).

To survive a motion to dismiss, a plaintiff must plead sufficient facts to support each element of his direct liability negligence claims, including that [the defendant] had "actual or constructive notice of [a] risk-creating condition," at least where the risk is one commonly encountered on land and not clearly linked to nautical adventure. *See Holland v. Carnival Corp.*, 50 F.4th 1088, 1094 (11th Cir. 2022); *Newbauer v. Carnival Corp.*, 26 F.4th 931, 935 (11th Cir. 2022), *cert. denied*, 143 S. Ct. 212 (2022).

The plausibility standard "calls for enough fact to raise a reasonable expectation that **discovery will reveal evidence**" of the defendant's liability. *Chaparro*, 693 F.3d at

1337 (emphasis added) (reversing order dismissing claim against cruise ship operator and citing *Twombly*, 550 U.S. at 556). But if allegations are indeed more conclusory than factual, then the court does not have to assume their truth. *See Mamani v. Berzain*, 654 F.3d 1148, 1153–54 (11th Cir. 2011) (emphasis supplied).

Chaparro's holding about the link between discovery and the pleadings standard is consistent with some later, post-*Holland*/ post-*Newbauer* district court cases which factor in discovery when evaluating the sufficiency of a complaint in a dismissal motion forum. *See generally Spotts v. Carnival Corporation*, No. 23-cv-22906, 2024 WL 111921, at *5 (S.D. Fla. Jan. 10, 2024) (denying Carnival's motion to dismiss negligent training claim and noting that "[s]ince the [p]laintiff **hasn't had the chance to take any discovery**, we can't imagine asking a plaintiff to provide more detail than that [*i.e.*, allegations about failing to properly train crew members to inspect, clean, dry and warn passengers about the dangerous conditions aboard the vessel] (emphasis added)); *see also Harper v. Vilsack*, No. 23-22590, 2024 WL 776022, at *7 (S.D. Fla. Feb. 26, 2024) (denying motion to dismiss disability discrimination count, explaining that "the fact that **discovery may be needed** by [the] [p]laintiff to demonstrate the truth of her specific, plausible factual allegations does not make the allegations **conclusory**" and noting that the need for discovery "make[s] any factual disputes inappropriate for resolution on a motion to dismiss" (emphasis supplied)).

At bottom, Carnival's motion challenges the factual sufficiency of the three counts

asserting negligence claims, but a plaintiff like Volk is "not required to demonstrate that they can prove their allegations at the pleading stage." *Perricone v. Carnival Corp.*, No. 15-20309, 2016 WL 1161214 (S.D. Fla. Mar. 24, 2016) (denying cruise ship operator's motion to dismiss passenger's negligence claims and citing *In re Bill of Lading Transmission & Processing Sys. Patent Litig.*, 681 F.3d 1323, 1339 (Fed. Cir. 2012)).

The alleged injury here occurred *off the ship*. Under general maritime law, "a cruise line owes its passengers a duty to warn of known dangers beyond the point of debarkation in places where passengers are invited or reasonably expected to visit." *Chaparro*, 693 F.3d at 1336); *Carlisle v. Ulysses Line Ltd., S.A.*, 475 So. 2d 248, 251 (Fla. 3d DCA 1985); *Carmouche v. Carnival Corp.*, 13-62584-CV, 2014 WL 12580521, at *5 (S.D. Fla. May 15, 2014); *Thompson v. Carnival Corp.*, 174 F. Supp. 3d 1327, 1340 (S.D. Fla. 2016).

Where cruise ship passengers are invitees or expected visitors at offshore locations, such as at excursions operated by others, *some* Courts in our District have held that "a ship operator's duty of care is **limited** to the duty to warn." *Thompson*, 174 F. Supp. 3d at 1340 (emphasis added) (citing *Aronson v. Celebrity Cruises, Inc.*, 30 F. Supp. 3d 1379, 1394–95 (S.D. Fla. 2014) (granting, in part, cruise ship operator's motion to dismiss negligence theories beyond the scope of its duties to passengers).

As noted in *Thompson*, 174 F. Supp. 3d at 1342, the issue of whether a plaintiff is trying to impose heightened duties of care on a cruise ship operator that are inconsistent with general maritime law has "been bandied about the Southern District of Florida over

the past several years." Some courts have opted *not* to dismiss claims beyond the duty to warn in "line-item fashion," while others "have struck attempts to impose heightened duties beyond the duty to warn of known dangers in known settings." *Id.*

The *Thompson* Court found the latter approach to be "the more prudent approach" because, otherwise, "the imposition of heightened duties would effectively render cruise line operators like Carnival the all-purpose insurers of their passengers' safety." *Id.*

On the other hand, "[a]lthough generally the duty to warn is the most relevant duty regarding off-vessel excursions, a cruise ship might have additional obligations under the reasonable care standard, if, for example, there is an agency relationship between the cruise ship and the excursion operator." *Dudley v. NCL (Bahamas) Ltd.*, No. 23-cv-21041, 2023 WL 5275191, at *3 (S.D. Fla. Aug. 16, 2023) (citing *Bailey v. Carnival Corp.*, 369 F. Supp. 3d 1302, 1310 (S.D. Fla. 2019)). "The duty to warn of known dangers beyond the ship is, in fact, a subset of the general duty of reasonable care that a shipowner owes to its passengers." *Id.* (citing *Blow v. Carnival Corp.*, No. 22-22587-CIV, 2023 WL 3686840, at *8 (S.D. Fla. May 26, 2023)).

The alleged injury here occurred off the ship -- but not during an *excursion.* But both sides here agree that the appropriate standard is ordinary reasonable care under the circumstances -- which, under the scenario at issue here, means that Carnival had actual or constructive notice of the dangerous condition (*i.e.*, an unsecured grate or pylon being tossed up onto a walkway by severe sea conditions).

As quoted above from actual excerpts from the lawsuit, Plaintiff's Complaint asserts several allegations which he says are sufficient for actual and constructive notice. Confronted with these allegations, Carnival's dismissal motion classifies them as being based solely on "mere speculation and conclusory allegations" and simply "recit[ing] [] legal conclusions without accompanying factual support" -- which means the Court need not accept them as true.

Carnival argues that the allegations are "extremely vague and broad" and "formulaic" and are not "stated with specificity." It contends that Plaintiff's Complaint does "not articulate[] a single **fact** that gives Carnival notice, nor that any dangerous condition existed, where it existed, or for how long it existed." [ECF No. 13, p. 11 (emphasis supplied)].

Not surprisingly, Plaintiff disagrees and contends that his Complaint contains sufficient facts to support the allegations about actual or constructive notice. For example, Plaintiff notes that his Complaint alleges that Carnival, as the owner and operator of the Mexican port, failed to adequately secure the metal grate/pylon that is a part of the pier and had been moving from the sea conditions and ultimately struck Plaintiff. Further, Plaintiff alleges that Carnival failed to adequately place warning signs or adequately close off the area where the incident occurred to prevent injury to passengers like Plaintiff. Moreover, he alleged that Carnival knew or should have known as the owner of the port and through its role of controlling the port that the unsecured grate/pylon could become

loose due to sea water surge and pose a danger to passengers.

Analysis of the allegations reveals that they lack a sufficient amount of specific factual allegations and are based largely on either vague assertions or mere speculation.[2]

In an attempt to establish Carnival's actual notice of the dangerous condition, Plaintiff alleges that "Defendants [sic] crewmembers, agents, and/or employees were standing within a close distance to the subject area[.]" [ECF No. 1, ¶ 20(a)]. But this does not adequately allege actual notice. Plaintiff does not cite to authority deeming that type of nebulous allegation to be sufficient to allege *actual* notice.

Therefore, our analysis now shifts to the sufficiency of the constructive notice type of knowledge, which means that: (1) the hazardous condition existed 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 accidents." *Holland*, 50 F.4th at 1096.

But, unlike the plaintiff in *Spotts (*and other cases where a complaint withstood a

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[2] In his reply [ECF No. 19, pp. 5–6], Plaintiff attempts to argue that improper maintenance of the port "including the metal grate/pylon, can create a hazardous condition in combination of [sic] severe sea conditions, and lead to injuries, which is why Carnival placed barriers near the metal grate/pylon on the date of the subject incident." However, these points are **not made in the Complaint** and therefore should not be considered when deciding a motion to dismiss. *See Hayes v. U.S. Bank Nat'l Ass'n*, 648 F. App'x 883, 887 (11th Cir. 2016) ("In evaluating whether a complaint should be dismissed under Rule 12(b)(6) for failure to state a claim, [a] court is generally limited to reviewing what is within the four corners of the complaint." (internal citation omitted)).

motion to dismiss challenging the sufficiency of the constructive notice allegations), Plaintiff here did not assert any specific factual allegations about prior similar incidents.[3] Given that Plaintiff did not mention specific prior similar incidents, the inquiry shifts to whether the hazardous condition existed for a sufficient length of time to establish constructive notice.

In an effort to address this theory of establishing knowledge, Plaintiff alleged that Carnival's crewmembers, agents and/or employees were "standing within a close distance to the subject area and/or were actively monitoring same for hazards, per Defendants [sic] policies and procedures[.]"

This allegation is similar to the one made in *Holland,* where the plaintiff alleged

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[3] In *Spotts,* the complaint noted that Carnival identified more than 40 prior instances where a passenger slipped and fell on the wet floor on the same deck as the deck at issue, with more than half of those occurring on the same ship. It even named some of the passengers who slipped and fell on the same deck of the same ship. The *Spotts* Court held that "[c]ourts in this district consistently find similar allegations sufficient to establish constructive notice on a motion to dismiss." 2024 WL 111921, at *2.

It also cited to *Fawcett v. Carnival Corp.,* No. 23-21499,2023 WL 4424195, at *3 (S.D. Fla. July 10, 2023), where Chief Judge Cecilia M. Altonaga held that "whether 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." *Cf. Pride v. Carnival Corp*., No. 23-cv-22121, 2023 WL 6907813, at *5 (S.D. Fla. Oct. 19, 2023) (Bloom, J.) ("[The] [p]laintiff has provided **full names and dates of passengers** who also allegedly fell on the same ship . . . and on the **same deck material** prior to [the] [p]laintiff's incident . . . . Those allegations support the inference that a substantially similar incident occurred due to a substantially similar condition. Accepting the allegations as true, [the] [p]laintiff plausibly alleges that [the] [d]efendant had constructive notice based on substantially similar incidents and conditions." (emphasis added)).

"that there were crewmembers in the surrounding [area]." But the *Holland* Court held that the plaintiff failed to adequately allege constructive notice because he did "not allege that there were any crewmembers in the *immediate* area of the glass staircase that could have observed or warned [the plaintiff] of the hazard." 50 F. 4th at 1096 (emphasis supplied). Therefore, the *Holland* Court held, the allegations did "not cross the line from possibility to plausibility of entitlement to relief." *Id.*

Plaintiff's Complaint does not plausibly allege notice (actual or constructive) and therefore fails to state a claim for negligence on a direct liability theory. *See generally Foley v. Carnival Corp.*, No. 23-cv-23025, 2024 WL 361189 at *5 (S.D. Fla. Jan. 31, 2024) (ruling that the plaintiff's allegation that "Carnival knew or should have known that the dangerous condition . . . on which [the] [p]laintiff tripped and fell posed a tripping hazard for passengers walking over it due to its condition . . . and the length of time the uneven surface had existed in a high-traffic area of the ship" was conclusory and did not establish the defendant's constructive notice).

The Complaint is flawed in yet another way: it fails to adequately explain *which* of the two Defendants did *what*.

Plaintiff's Complaint should be dismissed as a shotgun pleading under the fourth type of shotgun pleading set out in *Weiland v. Palm Beach Cnty. Sheriff's Off.*, 792 F.3d 1313, 1321–23 (11th Cir. 2015). The fourth shotgun pleading exists when the plaintiff brings "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 1323.

Plaintiff does exactly this in his Complaint -- he fails to separate his counts for each Defendant: Carnival and ITM. Specifically, Plaintiff brings counts for negligent failure to warn, negligent failure to maintain, and general negligence against Defendants *together. See Magluta v. Samples*, 256 F.3d 1282, 1284 (11th Cir. 2001) ("The complaint is replete with allegations that 'the defendants' engaged in certain conduct, making no distinction among the fourteen defendants charged, though geographic and temporal realities make plain that all of the defendants could not have participated in every act complained of.").[4]

To be sure, it is permissible to plead multiple causes of action against multiple defendants -- as long as "each Defendant is specifically identified and the complained of conduct is pointedly attributed to each Defendant." *State Farm Mut. Auto. Ins. Co. v. Health & Wellness Services, Inc.*, 389 F. Supp. 3d 1137, 1147 (S.D. Fla. 2018) ("[n]one of the [d]efendants should be confused about the wrongful conduct State Farm is accusing them of"). That did not occur here, though.

[4] The Complaint in *Magluta* violated the shotgun pleading rule in several other material ways, including the incorporation of all prior allegations into each subsequent count. The violation here is far-less serious. Nevertheless, given that Plaintiff will be filing an Amended Complaint, he might as well be more precise in clarifying what each of the two Defendants did to trigger liability.

III. Conclusion

The Undersigned **respectfully recommends** that Judge Williams **grant** Carnival's dismissal motion -- but **without prejudice** and with leave to file an amended complaint within ten (10) days of issuance of an Order approving this Report and Recommendations.

IV. Objections

The parties will have fourteen (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 fourteen (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, April 15, 2024.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

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