No. 22-____

IN THE

Supreme Court of the United States

MICHELLE NEWBAUER,

Petitioner,

v.

CARNIVAL CORPORATION, a Panamanian Corporation d/b/a CARNIVAL CRUISE LINES,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

PHILIP M. GERSON
Counsel of Record
EDWARD S. SCHWARTZ
GERSON & SCHWARTZ, P.A.
1980 Coral Way
Miami, FL 33145-2624
(305) 371-6000
pgerson@gslawusa.com
eschwartz@gslawusa.com

Counsel for Petitioner

July 27, 2022

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

QUESTIONS PRESENTED

Whether the Eleventh Circuit required an unnecessary and unrealistic level of detail in pleading factual allegations supporting a facially plausible claim of knowledge or notice, contrary to Rule 8(a)(2), Federal Rules of Civil Procedure as interpreted in *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and *Ashcroft v. Iqbal*, 556 U.S. 662 (2009)?

PARTIES TO THE PROCEEDINGS

The parties to this proceeding are MICHELLE NEWBAUER, Petitioner, and CARNIVAL CORPORATION d/b/a CARNIVAL CRUISE LINES, Respondent.

CORPORATE DISCLOSURE

Petitioner is not a corporation.

RELATED PROCEEDINGS

1. *Newbauer v. Carnival Corp.*, Circuit Court of Appeals, Eleventh Circuit, Case No. 21-10955 – opinion February 28, 2022, rehearing en banc denied April 28, 2022.

2. *Newbauer v. Carnival Corp.*, United States District Court, Southern District of Florida, Case No. 20-cv-23757-SCOLA/Torres – Order of Dismissal February 23, 2021.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OPINIONS BELOW

1. *Newbauer v. Carnival Corp.*, 26 F.4th 931 (11th Cir. 2022). Pet. App. 1a.

2. *Newbauer v. Carnival Corp.*, No. 20-cv-23757-Scola, 2021 U.S. Dist. LEXIS 34240, 2021WL 723164 (S.D. Fla. February 23, 2021). Pet. App. 10a.

BASIS OF JURISDICTION

The Petitioner seeks certiorari review pursuant to 28 U.S.C. § 1254(1). The decision of the United States Court of Appeals for the Eleventh Circuit below conflicts with the decisions of this Court in *Ashcroft v. Iqbal*, 556 U.S. 662 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007), and the decision of the United States Court of Appeals for the First Circuit in *Garcia-Catalan v. United States*, 734 F.3d 100 (1st Cir. 2013).

STATUTORY PROVISIONS INVOLVED

Fed R. Civ. P. 8(a)(2):

> A pleading that states a claim for relief must contain: …
>
> (2) A short and plain statement of the claim showing that the pleader is entitled to relief.

Fed. R. Civ. P. 9(b):

> In alleging fraud or mistake, a party must state with particularity the circumstances constituting fraud or mistake. Malice, intent, knowledge, and other conditions of a person's mind may be alleged generally.

STATEMENT OF THE CASE

Petitioner MICHELLE NEWBAUER is a citizen and resident of Michigan. Respondent CARNIVAL CORPORATION, doing business as CARNIVAL CRUISE LINES, is a Panamanian corporation with its principal place of business in Florida. Subject matter jurisdiction below was hence based on diversity of citizenship pursuant to 28 U.S.C. § 1332.

Ms. NEWBAUER booked a cruise on the passenger cruise vessel "MAGIC," operated by CARNIVAL. (Pet. App. 20a at ¶¶11, 12). In her complaint she alleged that on February 27, 2019, while "walking on the Lido Deck of the vessel, near the Red Frog Bar," she "slipped on a liquid or wet, slippery transitory substance near the bar and fell … ." (*id.* ¶13). She alleged that the area where she fell was located in a "high traffic area," specifically the "Lido Marketplace and adjacent areas," so that "the Defendant knew or should have known of the presence of the liquid or wet, slippery transitory substance … ." (*id.* at 21a ¶17, 23a ¶25). She alleged alternatively that the substance on which she slipped had been present for a "sufficient period of time" to give CARNIVAL actual or constructive knowledge of it, or that CARNIVAL had actual or constructive knowledge of the presence of the substance due to the "regularly and frequently recurring nature of the hazard in that area." (Pet. App. 21a at ¶18; Pet. App. 21a-22a at ¶19; Pet. App. 23a at ¶¶26, 27). She alleged that, on the basis of these facts, CARNIVAL "knew or should have known of the presence of the liquid or wet, slippery transitory substance … " in sufficient time to clean it or warn passengers of it before she fell. (Pet. App. at 21a ¶17, 23a ¶25). Ms. NEWBAUER sustained serious injuries "including a patellar subluxation and

a lateral meniscus tear of the right knee, which was surgically repaired." (*id.* at 21a ¶13).

As required by the CARNIVAL ticket contract, Ms NEWBAUER sued in the United States District Court for the Southern District of Florida to recover for her injuries, alleging negligent maintenance of the deck on which she fell and a negligent failure to warn of the substance on which she slipped. (*id.* at 22a, 23a).

CARNIVAL moved to dismiss the complaint pursuant to Federal Rule of Civil Procedure 12(b)(6), claiming that Ms. NEWBAUER had alleged only legal conclusions lacking sufficient factual detail and accordingly had not adequately pled the element of notice. On February 23, 2021, the district court granted CARNIVAL's motion to dismiss, ruling that the allegations in the complaint recited above were merely conclusory and that at most Ms. NEWBAUER had pled foreseeability only not actual or constructive notice. (Pet. App. 10a-16a). Ms. NEWBAUER appealed to the United States Court of Appeals for the Eleventh Circuit. After briefing and oral argument, a panel of the Eleventh Circuit issued an opinion on February 28, 2022, affirming the dismissal below and holding that Ms. NEWBAUER had not sufficiently pled notice; specifically holding she had only pled conclusions regarding notice, not facts supporting a reasonable inference of notice. (Pet. App. 1a., *Newbauer v. Carnival Corp.*, 26 F.4th 931, 935-36). Ms. NEWBAUER sought rehearing en banc, which was denied by an order of April 28, 2022. (Pet. App. 17a).

ARGUMENT

This Court has specified the standard for the detail of pleading required in a federal civil action. The 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 Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007). *See* Fed. R. Civ. P. 8(a)(2) (requiring pleading of a "short and plain statement of the claim showing that the pleader is entitled to relief"). Pleading "has facial plausibility when the plaintiff alleges factual content which allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678. What is required is *not* a showing of "probability" at the pleading stage, or a detailed recitation of all evidence potentially supporting the claim, but only "enough fact to raise a reasonable expectation that discovery will reveal evidence" supporting the claim. *Twombly*, 550 U.S. at 556. While disregarding purely conclusory allegations, a court ruling on a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6) should "assume" the "veracity" of all "well-pleaded factual allegations" "and then determine whether they plausibly give rise to an entitlement to relief." *Iqbal*, 556 U.S. at 679.

Thus, while pleading mere conclusions or a mere listing of the elements of the cause of action will not suffice, pleading more than what is necessary to state a facially plausible claim for relief is not necessary; allegations are to remain "short" and "plain" as Rule 8(a)(2) provides. *Iqbal* and *Twombly* require a commonsense application of Rule 8(a)(2) so that a defendant has fair notice of the ultimate factual allegations against which it will have to defend.

With regard to allegations of states of mind, such as notice or knowledge, the *Iqbal* Court pointed out that under Rule 9(b) no heightened pleading standard applies; states of mind, specifically including "knowledge," "may be alleged generally," meaning that the facts need be alleged only under the plausibility standard of Rule 8(a)(2) as interpreted in *Iqbal* and *Twombly*; not the heightened "particularity" standard applicable required for allegations of fraud under Rule 9(b). *See* Fed. R. Civ. P. 9(b) ("Malice, intent, knowledge and other conditions of a person's mind may be alleged generally"); *Iqbal*, 556 U.S. at 686 ("Rule 9 merely excuses a party from pleading discriminatory intent under an elevated pleading standard"). Thus, allegations regarding a party's notice or knowledge need only meet the requirements of Rule 8(a)(2) as interpreted in *Iqbal* and, like the other allegations supporting a plaintiff's claim, are expected to be "short" and "plain."

In this case, the Eleventh Circuit improperly required Ms. NEWBAUER's allegations pertaining to notice to reach a heightened pleading standard, inconsistent with the provision for "short" and "plain" pleading in Rule 8(a)(2), inconsistent with the guidance from *Iqbal* and *Twombly* that the facts pled need only state a claim with "facial plausibility" rather than probability; and inconsistent with the guidance that the facts pled need not be a detailed recitation of all potential evidence but merely enough to "raise a reasonable expectation that discovery will reveal evidence" supporting the claim, particularly when the facts alleged are construed as they must be "in the light most favorable to the plaintiff."

The United States Court of Appeals for the First Circuit, in *Garcia-Catalan v. United States*, 734 F.3d

100 (1st Cir. 2013), unlike the Eleventh Circuit, correctly applied Rule 8(a)(2) and the *Iqbal*/*Twombly* pleading standard to allegations of knowledge. The facts in *Garcia-Catalan* are similar in many but not all material respects to the facts in this case; Garcia-Catalan's action, like Ms. NEWBAUER's, arose out of a slip and fall on a liquid foreign substance. In Garcia-Catalan's case, the foreign substance happened to be located in a military commissary, thus the complaint was brought under the Federal Tort Claims Act, 28 U.S.C. § 1346(b). Under the applicable substantive law, (the law of Puerto Rico), she had to prove that the government as operator of the commissary had actual or constructive knowledge of the liquid on which she fell, just as Ms. NEWBAUER in the present case would at trial have to prove that CARNIVAL had actual or constructive notice of the existence of liquid where she fell. *Garcia-Catalan*, 734 F.3d at 102.

Ms. Garcia-Catalan alleged that she "slipped and fell on liquid" present in the commissary and alleged the date and location of her fall. *Garcia-Catalan*, 734 F.3d at 102. After the United States successfully moved to dismiss her complaint on the grounds of insufficient pleading of notice, she appealed. The First Circuit applied Rule 8(a)(2), *Iqbal* and *Twombly*, ruling that the appropriate test for evaluating the sufficiency of Ms. Garcia-Catalan's allegations was whether she had, in "short" and "plain" statements as required by Rule 8(a)(2), alleged factual allegations sufficient to support "the reasonable inference that the defendant is liable for the misconduct alleged" and hence to state a claim "plausible on its face." *Garcia-Catalan*, 734 F.3d at 102-03, *quoting Iqbal*, 556 U.S. at 678, 679. The *Garcia-Catalan* court explained that, in evaluating a complaint to determine whether it met the *Iqbal* standards of plausibility and reasonable

inference, a court was to "draw on its judicial experience and common sense." *Garcia-Catalan*, 734 F.3d at 103, *quoting Iqbal*, 556 U.S. at 679. Furthermore, the complaint should be evaluated "as a whole," considering all of its allegations together and recognizing that allegations may provide "circumstantial" as well as direct support for a claim. *Garcia-Catalan*, 734 F.3d at 103.

The *Garcia-Catalan* court noted that Ms. Garcia-Catalan had alleged the date and location of her injury, "described [the] condition" resulting in her slip, fall and injury, attributed the presence of the condition to the government's negligence, and "linked the condition" to her injuries. The court held that these allegations, when considered as required "holistically" and in light of "common sense," sufficed to support "a plausible inference that the defendant had actual or constructive knowledge of the condition," and thus to "create a reasonable expectation that discovery may yield evidence of the government's allegedly tortious conduct," so First Circuit ruled the complaint should not have been dismissed. *Garcia-Catalan*, 734 F.3d at 103.

As additional support for its holding, the Garcia-Catalan court noted that "it cannot reasonably be expected that the appellant, without the benefit of discovery, would have any information about either how long the liquid was on the floor or whether any employees of the commissary were aware of the spill." 734 F.3d at 104. The court explained that in cases where a "material part of the information needed is likely to be within the defendant's control," "the plausibility inquiry properly takes into account whether discovery can reasonably be expected to fill any holes in the pleader's case." *Id.* In light of the

available facts that Ms. Garcia-Catalan had been able to allege, it was indeed reasonable to expect that discovery would provide the required further evidence of notice for her to proceed. *Id.* at 105.

The *Garcia-Catalan* court thus applied Rule 8(a)(2) and the plausibility standard of *Iqbal* and *Twombly* as intended; the court read *Iqbal* and *Twombly* to require pleading factual support for claims, but only to the extent that factual support was reasonably available to the pleader at the outset of litigation, and to require interpreting the facts pled in a commonsense manner, drawing reasonable inferences in favor of the pleader. Pleading factual matters reasonably known to the pleader, such as the date and location of an injury and the nature and location of the injurious condition, sufficed to give the adverse party reasonable notice of the claim and a reasonable opportunity to defend, and to raise the requisite reasonable expectation that discovery would fill in the details for both parties. Under Rule 8(a)(2) and *Iqbal / Twombly* as interpreted in *Garcia-Catalan*, plaintiffs must allege sufficient factual support for their claims to give the adverse party reasonable notice of the factual claims against which it must defend but at the initial pleading stage are not expected to and need not go beyond this; they need not plead matters of which they cannot reasonably know in advance of discovery or matters as to which the defendant likely has much greater knowledge at the initial stages of litigation.

Ms. NEWBAUER alleged factual material in her complaint, giving even greater factual detail than what was in the complaint in *Garcia-Catalan*. Ms. NEWBAUER alleged the date and location of her injury, the location of the hazardous condition, and the nature of the condition, just as Ms. Garcia-Catalan

did. However, she went beyond Ms. Garcia-Catalan's allegations by describing the presence of the liquid hazard in an identified area where food and beverages were served, that being the Lido Marketplace (large cafeteria) near the Red Frog Bar. She specifically described this area as a "high traffic" area. The reasonable inferences plausibly drawn from these allegations are that a bar and food service area, such as the one Ms. NEWBAUER identified in her Complaint, will be highly trafficked not only by customers carrying food and beverage items but also by crewmembers working in the bars and restaurants, who will be present during their shifts and have the opportunity, if performing their tasks with reasonable care, to observe and clean spills in a timely manner. Under the *Iqbal/Twombly* standards and Rule 8(a)(2) as properly interpreted in *Garcia-Catalan*, Ms. NEWBAUER's complaint contained more than sufficient factual allegations to give CARNIVAL reasonable notice of the claims and factual assertions against which it would have to defend, without unnecessary prolixity and without departing from the short and plain pleading style required by Rule 8(a)(2).

Even more than in cases involving land-based injuries such as *Garcia-Catalan*, in cases of cruise passenger injuries such as Ms. NEWBAUER's the defendant at the outset will almost always have much greater knowledge of the factual background of the claim than the claimant herself, and much material evidence is in the possession of the adverse party, unavailable to the claimant until discovery begins. This is so because the cruise ship is a closed environment fully controlled and maintained and operated by the cruise line. The cruise vessel controls all operations of the vessel, promulgates both written and nonwritten policies, maintains records of crew

activities such as cleaning and inspection, and monitors activities on the ship through various means including video cameras placed in many public areas of the ship. Moreover, the cruise line has identification data for all passengers and crew on board while passengers generally do not. When an adverse incident occurs, the vessel operator can and routinely does conduct an investigation, which includes reviewing available video, taking photographs, interviewing both crewmembers and passengers with knowledge, and collecting relevant data such as records of inspection and cleaning. Even passenger onboard medical records are available to the cruise line at all times. On the other hand, before filing suit and obtaining discovery, the injured passenger has no access to video, photographic or written records. After disembarking, passengers have no access to the vessel, no means of identifying much less interviewing crewmembers, and no opportunity to inspect, photograph, or conduct tests at the location of injury. Even if some crewmembers could be located, ethical considerations would prevent ex parte communications with a defendant's employees. Before discovery, including production of relevant records and video and a vessel inspection, all an injured passenger can reasonably know about the cause of his or her injury is whatever observations that passenger can recall from the time of the injury, while understandably distracted by having to deal with the often serious effects of the injury, which not infrequently require on shore hospitalization for surgery and palliative treatment. Indeed, it is unrealistic to expect a passenger with broken bones, in excruciating pain, to identify witnesses, inspect and document the area or otherwise conduct an investigation prior to bringing suit.

In light of the inherent limitations on passenger claimant's access to evidence, details such as the precise length of time a substance was present before the passenger fell on it or the occurrence of potential prior similar incidents are unavailable to a passenger until a complaint has survived a motion to dismiss and discovery has been undertaken. The cruise line will usually possess much if not all of the relevant evidence from its own preserved video and photos, witness interviews and other investigation of the incident. Likewise the cruise line possesses records of prior incidents. Until discovery has been undertaken injured passengers will have no access to any of this evidence.

In framing a complaint, passengers can allege only what they can know from their own contemporaneous observations as passengers, including matters such as the location of the injury, the general types of activities conducted at that location, and the cause of injury from a lay perspective. As explained above and in *Garcia-Catalan*, allegations such as these, with reasonable inferences drawn in favor of the passenger as they should be, suffice under Rule 8(a)(2) as interpreted in *Iqbal* and *Twombly* to state a facially plausible claim. In the opinion below the Eleventh Circuit requires injured passengers to allege substantively more than is required under Rule 8(a)(2), *Iqbal* and *Twombly*, thus imposing burdens on injured cruise ship passengers not imposed on other classes of plaintiffs by requiring them to allege facts they cannot reasonably be expected to possess in advance of litigation and potentially prejudicing many thousands of current and potential future litigants.

The Eleventh Circuit's unduly rigid and mechanistic interpretation of Rule 8(a)(2), *Iqbal* and *Twombly*, if allowed to stand, will deprive the majority of injured passengers of the opportunity even to plead a plausible claim for relief, and will create unnecessary confusion and lack of uniformity regarding the appropriate pleading standard. The Court should accept review and resolve the conflict between the common-sense interpretation of Rule 8(a)(2) and the *Iqbal*/*Twombly* pleading standard adopted in *Garcia-Catalan* and the unrealistic and rigid standard adopted below. The Court should clarify that the *Garcia-Catalan* court got it right, that the *Iqbal*/*Twombly* plausibility standard means what this Court said it meant in *Iqbal* and *Twombly*, and that the plausibility standard requires pleading only those factual details reasonably available to the pleader and reasonably necessary to give the adverse party fair notice of the claims against which it must defend and their factual basis.

CONCLUSION

The Eleventh Circuit held Ms. NEWBAUER to an unattainable and unwarranted level of detailed factual pleading, inconsistent with the governing plausibility standard required by Rule 8(a)(2), explained by this Court in *Iqbal* and *Twombly* and realistically intepreted by the First Circuit in *Garcia-Catalan*. The Eleventh Circuit has imposed on thousands of current and future potential litigants injured on cruise ships an unrealistic and unnecessary burden to plead evidentiary details of matters they cannot possibly know in advance of litigation. The Court should accept review, reaffirm *Iqbal* and *Twombly*, and resolve the intercircuit conflict by clarifying that the plausibility standard requires

plaintiffs to plead only those facts reasonably available to them at the outset of litigation.

Respectfully submitted,

PHILIP M. GERSON
Counsel of Record
EDWARD S. SCHWARTZ
GERSON & SCHWARTZ, P.A.
1980 Coral Way
Miami, FL 33145-2624
(305) 371-6000
pgerson@gslawusa.com
eschwartz@gslawusa.com

Counsel for Petitioner

July 27, 2022

APPENDIX

APPENDIX A

PUBLISH

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

No. 21-10955

MICHELLE M. NEWBAUER,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION, A PANAMANIAN CORPORATION DOING BUSINESS AS CARNIVAL CRUISE LINES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida D.C.
Docket No. 1:20-cv-23757-RNS

Before WILSON, LUCK, and LAGOA, Circuit Judges.

LAGOA, Circuit Judge:

Michelle Newbauer appeals from the district court's dismissal of her complaint against Carnival Corporation for failure to state a claim. Newbauer contends that the district court erred in its dismissal because she pleaded sufficient facts to support the constructive notice element of her negligence claims. Alternatively, Newbauer argues that the district court erred in dismissing her complaint without first giving her an opportunity to amend. After careful review, and with

the benefit of oral argument, we affirm the district court's dismissal.

I. FACTUAL AND PROCEDURAL BACKGROUND[1]

Carnival, a Panamanian corporation with its principal place of business in Miami, Florida, operates a number of cruise ships, including the *Magic.* Newbauer, a passenger onboard the *Magic, "*was walking on the Lido Deck of the vessel, near the Red Frog Bar, when she slipped on a liquid or wet, slippery transitory substance near the bar and fell." As a result of this fall, she sustained "serious injuries including a patellar subluxation and a lateral meniscus tear of the right knee, which was surgically repaired."

Newbauer filed a complaint against Carnival in the Southern District of Florida, asserting claims for negligent failure to maintain and negligent failure to warn. She alleged that "the liquid or wet, slippery transitory substance" she slipped on "was located in an area of the ship that was a high traffic dining area" such that Carnival "knew or should have known of the presence of the . . . substance." Newbauer further alleged that the substance "had existed for a sufficient period of time before [her] fall" such that Carnival had actual or constructive knowledge of its presence and the opportunity to correct or warn about the hazard. In the alternative, Newbauer alleged that Carnival had actual or constructive knowledge of the substance

[1] Because the procedural posture of this case involves a Federal Rule of Civil Procedure 12(b)(6) motion, we must accept the allegations of plaintiffs complaint as true. *See Chaparro v. Carnival Corp.,* 693 F.3d 1333, 1335 (11th Cir. 2012). The facts set forth in this section of the opinion therefore are taken from the complaint and construed in the light most favorable to the plaintiff.

because of "the regularly and frequently recurring nature of the hazard in that area."

Carnival filed a motion to dismiss pursuant to Rule 12(b)(6), arguing that Newbauer failed to properly plead a negligence claim. Carnival contended that Newbauer's allegations were "insufficient, without more, to put Carnival on notice of the specific alleged dangerous condition" and did "not put forward any allegations as to the open and obvious nature of the hazard pled." Instead, Carnival argued that Newbauer's allegations were "nothing more than a boilerplate recitation of the elements [of a negligence claim] followed by mere conclusory statements," which were "wholly insufficient." Newbauer opposed Carnival's motion.

The district court granted Carnival's motion to dismiss. The district court found that Newbauer "failed to allege that Carnival was on either actual or constructive notice of the hazard in question" and thus failed to satisfy the pleading standards set forth in *Bell Atlantic Corp. v. Twombly,* 550 U.S. 544 (2007), and *Ashcroft v. Iqbal,* 556 U.S. 662 (2009). The district court noted that Newbauer had not alleged any facts in support of her claim that there were prior slip and fall incidents where she fell. As to her allegation about the highly trafficked dining area, the district court found that Newbauer mistakenly conflated foreseeability with actual or constructive notice and that she had not sufficiently pled that the high trafficked area gave Carnival actual or constructive notice of the wet substance at issue. And, as to her allegation about the length of time the hazard had been present, the district court determined that it was impossible to tell, based on Newbauer's sole conclusory statement, if the condition was present for seconds, minutes, or hours. Thus, the district court explained that while

Newbauer's complaint made clear that it was *"possible"* Carnival was on notice, the complaint did not allege sufficient facts to state a claim that were '*plausible* on [their] face sufficient to survive a motion to dismiss." This appeal ensued.

II. STANDARD OF REVIEW

"We review *de novo* the district court's grant of a Rule 12(b)(6) motion to dismiss for failure to state a claim, accepting the complaint's allegations as true and construing them in the light most favorable to the plaintiff." *Chaparro v. Carnival Corp.,* 693 F.3d 1333, 1335 (11th Cir. 2012) (quoting *Cinotto v. Delta Air Lines Inc.,* 674 F.3d 1285, 1291 (11th Cir. 2012)).

III. ANALYSIS

On appeal, Newbauer contends that the district court erred in dismissing her complaint for failure to state a claim. Newbauer asserts that she pleaded sufficient facts under Rule 8(a)(2) to support the constructive notice element of her negligence claims. She also asserts that the district court applied a heightened pleading standard in contravention of Rule 8(a)(2).

Federal Rule of Civil Procedure 8(a)(2) requires a complaint to provide "a short and plain statement of the claim showing that the pleader is entitled to relief." The pleading standard in Rule 8 "does not require 'detailed factual allegations,' but it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Chaparro,* 693 F.3d at 1337 (quoting *Iqbal,* 556 U.S. at 678). Thus, "[a] complaint that provides 'labels and conclusions' or 'a formulaic recitation of the elements of a cause of action' is not adequate to survive a Rule 12(b)(6) motion to dismiss." *Id.* (quoting *Twombly,* 550 U.S. at 555). Instead, the complaint "must contain sufficient factual matter,

accepted as true, to 'state a claim to relief that is plausible on its face.'" *Id.* (quoting *Iqbal,* 556 U.S. at 678). To do so, "[a] facially plausible claim must allege facts that are more than merely *possible,"* and a plaintiffs factual allegations that are "'merely consistent with' a defendant's liability" will not be considered facially plausible. *Id.* (emphasis added) (quoting *Iqbal,* 556 U.S. at 678). Indeed, "[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." *Iqbal,* 556 U.S. at 678. And "if allegations are indeed more conclusory than factual, then the court does not have to assume their truth." *Chaparro,* 693 F.3d at 1337.

While "[t]he plausibility standard is not akin to a 'probability requirement,' . . . it asks for more than a sheer possibility that a defendant has acted unlawfully." *Iqbal, 556* U.S. at 678 (quoting *Twombly,* 550 U.S. at 556). This analysis is not formulaic; instead, "[d]etermining whether a complaint states a plausible claim for relief [is] . . . a context-specific task that requires the reviewing court to draw on its judicial experience and common sense" in reviewing the plaintiffs allegations. *Id.* at 679. Additionally, "[t]hreadbare recitals of the elements of a cause of action" and "conclusory statements" are insufficient. *Id.* at 678 (citing *Twombly,* 550 U.S. at *555).* When evaluating a motion to dismiss, the first step is to "eliminate any allegations in the complaint that are merely legal conclusions." *Am. Dental Assn v. Cigna Corp.,* 605 F.3d 1283, 1290 (11th Cir. 2010). The second step is to assume the veracity of well-pleaded factual allegations and "then determine whether they plausibly give rise to an entitlement to relief." *Id.*

"Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters," and we "'rely on general principles of negligence law'" in analyzing those actions. *Guevara v. NCL (Bahamas) Ltd.,* 920 F.3d 710, 720 (11th Cir. 2019) (quoting *Chaparro,* 693 F.3d at 1336). The elements of a negligence claim are well settled: "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 plaintiffs injury; and (4) the plaintiff suffered actual harm." *Franza v. Royal Caribbean Cruises, Ltd.,* 772 F.3d 1225, 1253 (11th Cir. 2014) (quoting *Chaparro,* 693 F.3d at 1336). "With respect to the duty element in a maritime context, 'a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew.'" *Guevara,* 920 F.3d at 720 (quoting *Kermarec v. Compagnie Generale Transatlantique,* 358 U.S. 625, 630 (1959)). "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.'" *Id.* (alteration in original) (quoting *Keefe v. Bahama Cruise Line, Inc.,* 867 F.2d 1318, 1322 (11th Cir. 1989)); *see also Kornberg v. Carnival Cruise Lines, Inc.,* 741 F.2d 1332, 1334 (11th Cir. 1984) (explaining that a shipowner "is not liable to passengers as an insurer, but only for its negligence"). In order to survive Carnival's motion to dismiss, Newbauer therefore had to plead sufficient facts to support each element of her claim, including that Carnival had actual or constructive notice about the dangerous condition. *Amy v. Carnival Corp.,* 961 F.3d 1303, 1308 (11th Cir. 2020).

Actual notice exists when the defendant knows about the dangerous condition, and constructive notice exists where "the shipowner ought to have known of the peril to its passengers." *Keefe,* 867 F.2d at 1322. A plaintiff "can establish constructive notice with evidence 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)). "Alternatively, a plaintiff can establish constructive notice with evidence of 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)).

This appeal requires us to determine whether Newbauer alleged a facially plausible claim that Carnival knew or "ought to have known of the hazardous wet surface that caused her to slip. *Keefe,* 867 F.2d at 1322. Reviewing Newbauer's complaint and accepting her allegations as true, we conclude that Newbauer failed to include any factual allegations that were sufficient to satisfy the pleading standard set forth in *Iqbal* and *Twombly* such that it is facially plausible that Carnival had actual or constructive notice of the dangerous condition. Rather, her complaint contains only conclusory allegations as to actual or constructive notice. For example, Newbauer alleged in her complaint that Carnival had constructive notice of the wet substance on the deck because it was in a "high traffic dining area," but she failed to provide any factual allegations supporting the notion that high traffic in the area gave Carnival notice of the condition. Similarly, while Newbauer alleged in her complaint that the substance "had existed for a sufficient

period of time before [her] fall" such that Carnival had constructive notice of its presence, she failed to allege any facts in support of this conclusory allegation. Likewise, Newbauer failed to allege a sufficient factual basis to support her conclusory allegation that Carnival had actual or constructive knowledge of the hazard based on the "regularly and frequently recurring nature of the hazard in that area." And "[w]hile legal conclusions can provide the framework of a complaint, they must be supported by factual allegations," which are noticeably absent from Newbauer's complaint. *Iqbal,* 556 U.S. at 679.

Newbauer argues, however, that her allegation that the wet substance was in a high traffic area supports the following series of inferences: (1) because the area was highly trafficked, crewmembers working in the nearby bars and restaurants would be present there; (2) before and at the time of her fall, crewmembers were staffing the surrounding bar and dining areas; and (3) those crew-members had a clear, unobstructed view of the area in which she fell. Based on these inferences, Newbauer contends that Carnival had constructive notice of the wet substance on the deck.

Newbauer's argument is unpersuasive because she failed to allege any facts suggesting the amount of time the hazard existed on the deck before she fell or that there were crewmembers monitoring the area. Indeed, Newbauer's complaint did not allege any facts supporting the conclusions that the substance had been on the floor for a sufficient period of time to create constructive notice, that this was a recurring issue, or that there may have been employees in the area who observed the hazard and failed to take corrective action.

Additionally, we conclude that Newbauer's reliance on this Court's decision in *Yusko v. NCL (Bahamas),*

Ltd., 4 F.4th 1164 (11th Cir. 2021), is misplaced. *Yusko* reaffirmed that where, as here, a plaintiff is proceeding on a theory of direct liability against the shipowner for the negligent maintenance of the premises, the plaintiff must establish notice as part of her negligence claim. *Id.* at 1167-69. Here, Newbauer sued Carnival directly for negligent maintenance and failure to warn and has not raised any negligence claims under the theory of vicarious liability.

Finally, Newbauer asserts that the district court erred by not granting her leave to amend *sua sponte* before dismissing the complaint. But our precedent is clear that "[a] district court is not required to grant a plaintiff leave to amend [her] complaint sua sponte when the plaintiff, who is represented by counsel, never filed a motion to amend nor requested leave to amend before the district court." *Wagner v. Daewoo Heavy Indus. Am. Corp.,* 314 F.3d 541, 542 (11th Cir. 2002) (en banc). Because Newbauer never sought leave to amend the complaint, we conclude that there was no error.

IV. CONCLUSION

Accordingly, for the reasons stated, we conclude that the district court did not err in dismissing Newbauer's complaint, and we affirm the district court's dismissal of Newbauer's complaint for failure to state a claim.

AFFIRMED.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA

Civil Action No. 20-23757-Civ-Scola

MICHELLE M. NEWBAUER,

Plaintiff,

v.

CARNIVAL CORPORATION,

Defendant.

ORDER ON MOTION TO DISMISS

This matter is before the Court upon the Defendant Carnival Corporation's motion to dismiss Plaintiff Michelle Newbauer's complaint. For the reasons stated below, the Court grants the Defendant's motion. (ECF No. 8.)

1. Background

The Plaintiff, Michelle Newbauer, was a passenger abord the *Carnival Magic*. (ECF No. 1, at 1 10.) On February 27, 2019, Ms. Newbauer claims she was walking on the "Lido Deck of the vessel, near the Red Frog Bar, when she slipped on a wet, slippery transitory substance near the bar and fell." (ECF No. 1, at 1 13.) As a result of her accident, the Plaintiff argues Carnival is liable for negligent failure to maintain (Count I) and negligent failure to warn (Count II).

In support of Count I, the Plaintiff maintains that the area where she slipped and fell was a "high traffic

dining area" such that the Defendant "knew or should have known of the presence of the liquid or wet, slippery or transitory substance." (ECF No. 1, at 1 17.) She also alleges the substance existed "for a sufficient period of time before the Plaintiffs fall" such that the Defendant was on actual or constructive notice. (ECF No. 1, at 1 18.) The Plaintiff alleges in the alternative that the Defendant was on notice of the hazard causing the Plaintiffs injury because of the regular and frequently recurring nature of the hazard in that area.

In support of Count II, the Plaintiff similarly alleges that the hazard was in a high traffic area, that the substance existed for a sufficient period of time such that the Defendant was on actual or constructive notice, or alternatively that that Defendant was on notice due to the frequent and recurring nature of the hazard that caused the Plaintiffs injury. (ECF No. 1, at ¶¶ 25-27.)

The Defendant states that the Plaintiffs complaint must be dismissed as it is fact-barren and conclusory, and therefore fails to satisfy federal pleading standards.

2. Legal Standard

When considering a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6), the Court must accept all of the complaint's allegations as true, construing them in the light most favorable to the plaintiff. *Pielage v. McConnell,* 516 F.3d 1282, 1284 (11th Cir. 2008). Under Federal Rule of Civil Procedure 8, a pleading need only contain "a short and plain statement of the claim showing that the pleader is entitled to relief." Fed. R. Civ. P. 8(a)(2). The plaintiff must nevertheless articulate "enough facts to state a claim to relief that is plausible on its face." *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007). "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." *Ashcroft v. Iqbal,* 129 S. Ct. 1937, 1949 (2009). "Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.* Thus, a pleading that offers mere "labels and conclusions" or "a formulaic recitation of the elements of a cause of action" will not survive dismissal. *Id.*

In applying the Supreme Court's directives in *Twombly* and *Iqbal,* the Eleventh Circuit has provided the following guidance to the district courts:

> In considering a motion to dismiss, a court should 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, assume their veracity and then determine whether they plausibly give rise to an entitlement to relief. Further, courts may infer from the factual allegations in the complaint obvious alternative explanation[s], which suggest lawful conduct rather than the unlawful conduct the plaintiff would ask the court to infer.

Kivisto v. Miller, Canfield, Paddock & Stone, PLC, 413 F. App'x 136, 138 (11th Cir. 2011) (citations omitted). "This is a stricter standard than the Supreme Court described in *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957), which held that a complaint should not be dismissed for failure to state a claim 'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Mukamal v. Bakes,* 378 F. App'x 890, 896 (11th

Cir. 2010). These precepts apply to all civil actions, regardless of the cause of action alleged. *Kivisto,* 413 F. App'x at 138.

3. Analysis

To plead negligence, "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 plaintiffs injury; and (4) the plaintiff suffered actual harm." *Franza v. Royal Caribbean Cruises, Ltd.,* 772 F.3d 1225, 1253 (11th Cir. 2014). The duty of care owed by a cruise operator to its passengers is ordinary reasonable care under the circumstances, "which requires, as a prerequisite to imposing liability, that the carrier have actual or constructive notice of the risk-creating condition." *See Keefe v. Bahama Cruise Line, Inc.,* 867 F.2d 1318, 1322 (11th Cir. 1989); *Thomas v. NCL (Bahamas), Ltd.,* 203 F.Supp.3d 1189, 1192 (S.D. Fla. 2016) (Williams, J.). A defendant can be deemed to be on actual notice where the "defendant knows of the risk creating condition" and on constructive notice "when a dangerous condition has existed for such a period of time that the shipowner must have known the condition was present and thus would have been invited to correct it." *Bujarski v. NCL (Bahamas) Ltd.,* 209 F. Supp. 3d 1248, 1250-51 (S.D. Fla. 2016) (Otazo-Reyes, Mag. J.).

While the Plaintiff claims her complaint sets forth sufficient facts for the Court to find that Carnival was on actual or constructive notice of the hazardous condition which caused the Plaintiff to fall, from a review of the complaint and taking the Plaintiffs allegations in the light most favorable to the Plaintiff, the Court finds that the Plaintiff has failed to allege that Carnival was on either actual or constructive

notice of the hazard in question. In support of her contention that Carnival was on actual or constructive notice, the Plaintiff states that Carnival must have been aware of the danger on its ship because the substance was in a high traffic area, because it existed for a sufficient period of time, or because of the frequent nature of similar incidents. None of the Plaintiffs allegations suggest Carnival was on constructive notice, let alone actual notice, of the hazard complained of because the Plaintiffs complaint fails to satisfy applicable federal pleading standards under Federal Rule 8 and the *Iqbal/Twombly* standard.

The Court first finds that the Plaintiffs assertion of prior slip and fall incidents is conclusory and therefore insufficient to establish that Carnival was on notice of the hazard which allegedly led to the Plaintiffs injury. In her complaint, the Plaintiff provides no facts at all in support of this claim. *See Prather v. NCL Bahamas Ltd.,* No. 19-21832-Civ, 2020 WL 4501809, at *4 (S.D. Fla. June 19, 2020) (Louis, Mag, J.) ("a plaintiff can establish constructive notice by . . . submitting evidence of substantially similar incidents in which conditions substantially similar to the occurrence in question must have caused the prior incident."), *report and recommendation adopted,* 2020 WL 4381412 (S.D. Fla. July 31, 2020) (Moreno, J.); *see also Navarro v. Carnival Corp.,* No. 19-21072-Civ, 2020 WL 1307185, at *3 (S.D. Fla. March 19, 2020) (Moreno, J.) (discussing cases granting motions to dismiss where there were no allegations of prior incidents or injuries). The Plaintiff states in her briefing that "[b]efore discovery has commenced, Ms. Newbauer cannot go further and detail a specific number and frequency of previous liquid spills near the onboard bar" (ECF No. 10, at 3) but this statement impermissibly seeks to flip the sequence of litigation. A plaintiff cannot make conclusory

assertions in the hopes that it may learn during the course of discovery that such assertions have merit. *Sovereign Bonds Exch. v. Fed. Republic of Ger.,* No. 10-21944-Civ., 2011 WL 13100214, at *1 (S.D. Fla. Aug. 9, 2011) (Altonaga, J.); *see also Christie v. Royal Caribbean Cruises, Ltd.,* No. 20-22439-Civ, 2020 WL 6158815, at *7 (S.D. Fla. Oct. 21, 2020) (Scola, J.).

The Court turns next to the Plaintiffs allegations that the area in question was a high traffic dining area. This allegation too fails to establish Carnival was on notice. As currently alleged, the Plaintiff "mistakenly conflates foreseeability with actual or constructive notice." *Navarro,* 2020 WL 1307185, at *3 (S.D. Fla. March 19, 2020) (Moreno, J.). As the Court suggested in *Navarro,* the fact that an event is foreseeable, i.e. that a wet substance could end up in a highly trafficked dining area is foreseeable, does not mean Carnival was on actual or constructive notice of that condition. Plaintiff must plead facts to support that claim, but the Plaintiff fails to do so. Accordingly, the Court finds this unsupported allegation does not establish Carnival was on actual or constructive notice of the hazard which allegedly led to the Plaintiffs injury.

Finally, the Court turns to the Plaintiffs allegation that Carnival was on constructive notice by virtue of the length of time the adverse condition was present. As with the Plaintiffs prior allegations, the Court finds that the Plaintiff provides no factual allegations at all to support a conclusion that Carnival *should have known* of the wet substance that allegedly caused Ms. Newbauer's injury. The totality of Plaintiffs is a conclusory statement that the condition "had existed for a sufficient period of time before the Plaintiffs fall." (ECF No. 1, at ¶¶ 18, 26.) As plead, it is impossible for

the Court to tell if the hazardous condition the Plaintiff complains of was present for five second, five minutes, or five hours. While the Plaintiffs complaint makes clear it is *possible* that Carnival was on notice, the Plaintiffs complaint does not state a claim that is *plausible* on its face sufficient to survive a motion to dismiss. *See Road Space Media, LLC v. Miami Dade Cty.,* No. 19-21971-Civ, 2020 WL 434929, at *4 (S.D. Fla. Jan. 28, 2020) (Scola, J.).

In light of the above, the Court finds that the Plaintiff has failed to allege that Carnival was on actual or constructive notice of the hazard which allegedly caused Ms. Newbauer's injury. Accordingly, the Court finds that both of the Plaintiffs claims against the Defendant fail. Allowing the Plaintiffs claim to proceed as alleged would endorse a "'general foreseeability theory of liability'—a theory that has been 'roundly rejected by federal courts because it would essentially convert a carrier into an insurer of passenger safety." *Navarro,* 2020 WL 1307185, at *4 (internal citations omitted).

4. Conclusion

In sum, the Court grants the Defendant Carnival's motion to dismiss. (ECF No. 8.) The Clerk is directed to close this case. All pending motions, if any, are denied as moot.

Done and ordered, in chambers at Miami, Florida, on February 23, 2021.

/s/ Robert N. Scola, Jr.
Robert N. Scola, Jr.
United States District Judge

APPENDIX C

IN THE UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

[Filed April 28, 2022]

No. 21-10955-DD

MICHELLE M. NEWBAUER,

Plaintiff-Appellant,

versus

CARNIVAL CORPORATION, A PANAMANIAN CORPORATION DOING BUSINESS AS CARNIVAL CRUISE LINES,

Defendant-Appellee.

Appeal from the United States District Court
for the Southern District of Florida

ON PETITION(S) FOR REHEARING AND
PETITION(S) FOR REHEARING EN BANC

BEFORE: WILSON, LUCK, and LAGOA, Circuit Judges.

PER CURIAM:

The Petition for Rehearing En Banc is DENIED, no judge in regular active service on the Court having requested that the Court be polled on rehearing en banc. (FRAP 35) The Petition for Rehearing En Banc is also treated as a Petition for Rehearing before the panel and is DENIED. (FRAP 35, IOP2)

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

Case No.

MICHELLE M. NEWBAUER,

Plaintiff,

vs.

CARNIVAL CORPORATION, A PANAMANIAN CORPORATION D/B/A CARNIVAL CRUISE LINES,

Defendant.

COMPLAINT AND DEMAND FOR JURY TRIAL

Plaintiff, MICHELLE M. NEWBAUER, a citizen and resident of the state of Michigan sues Defendant CARNIVAL CORPORATION, a Panamanian corporation with its principal place of business in Miami-Dade County, Florida, and alleges:

JURISDICTION, VENUE AND PARTIES

1. This is an action for damages in excess of seventy-five thousand ($75,000.00) dollars, exclusive of interest and costs.

2. Plaintiff MICHELLE M. NEWBAUER is sui juris and is a resident and citizen of the State of Michigan.

3. Defendant CARNIVAL CORPORATION (CARNIVAL) is a Panamanian corporation doing business as CARNIVAL CRUISE LINES, with its principal place of business in Miami, Miami-Dade County, Florida.

CARNIVAL is therefore a citizen both of Panama and of Florida for purposes of this action.

4. This Court has subject matter jurisdiction over this action pursuant to 28 U.S.C. § 1332, based on diversity of citizenship. The Plaintiff is a citizen and resident of the State of Michigan, while the Defendant is deemed a citizen of Florida and Panama for federal jurisdictional purposes, so there is complete diversity of citizenship between the parties. The amount in controversy exceeds $75,000.00, the minimum jurisdictional amount for diversity cases. The injuries and damages alleged in Paragraphs 13 and 14 below support an award of damages exceeding $75,000.00.

5. At all material times, Defendant has conducted ongoing substantial and not isolated business activities in Miami-Dade County, Florida, in the Southern District of Florida, so that in personam jurisdiction over the Defendant exists in the United States District Court for the Southern District of Florida.

6. At all material times, the Defendant has engaged in the business of operating maritime cruise vessels for paying passengers, including the Plaintiff.

7. In the operative ticket contract, the Defendant requires fare paying passengers such as the Plaintiff to bring any lawsuit against the Defendant arising out of injuries or events occurring on the cruise voyage in this federal judicial district. Accordingly, venue is proper in this Court.

8. Venue is also proper in this district because the Defendant's principal place of business is located within this district.

9. Plaintiff has complied with all conditions precedent to bringing this action. The Plaintiff gave the

Defendant a timely written notice of claim as required by the ticket contract in the form of a letter dated April 15, 2019, a copy of which is attached as Exhibit 1 and incorporated by reference.

LIABILITY AND DAMAGE ALLEGATIONS COMMON TO ALL COUNTS

10. At all material times, the Defendant was engaged in the business of operating maritime cruise vessels for fare paying passengers and for this purpose operated, among other vessels, the "MAGIC."

11. At all material times, the Defendant operated, managed, maintained and was in exclusive control of the "MAGIC."

12. At all material times, including the injury date of February 27, 2019, the Plaintiff was a fare paying passenger aboard the "MAGIC" and in that capacity was lawfully present aboard the vessel.

13. On or about February 27, 2019, while on board the "MAGIC" as a fare paying passenger of the Defendant, the Plaintiff was walking on the Lido Deck of the vessel, near the Red Frog Bar, when she slipped on a liquid or wet, slippery transitory substance near the bar and fell, thereby sustaining serious injuries including a patellar subluxation and a lateral meniscus tear of the right knee, which was surgically repaired.

14. As a direct and proximate result of the fall described above, the Plaintiff was injured in and about her body and extremities, sustaining injuries including a including a patellar subluxation and a lateral meniscus tear of the right knee, suffered pain therefrom, sustained mental anguish, disfigurement, disability, and the inability to lead a normal life. Furthermore, she sustained loss of earnings and a loss

of earning capacity in the past and future, and incurred medical, hospital, and other out of pocket and health care expenses in the past and future as a result of her injuries. These damages are permanent or continuing in their nature and the Plaintiff will continue to sustain and incur these damages in the future.

COUNT I - NEGLIGENT FAILURE TO MAINTAIN

15. Plaintiff adopts, realleges and incorporates by reference all allegations of Paragraphs 1 through 14 above and further alleges the following matters.

16. At all material times, the Defendant owed the Plaintiff, as a fare paying passenger on board a cruise passenger vessel it operated, a duty of reasonable care for her safety.

17. At all material times, the liquid or wet, slippery transitory substance referred to in Paragraph 13 above was located in an area of the ship that was a high traffic dining area, the Lido Marketplace and adjacent areas, so that the Defendant knew or should have known of the presence of the liquid or wet, slippery transitory substance, but failed to undertake reasonable safety measures for passenger safety.

18. The liquid or wet, slippery transitory substance in the area where the Plaintiff fell had existed for a sufficient period of time before the Plaintiff's fall that the Defendant had actual or constructive knowledge of its presence and an opportunity to correct it.

19. As an alternative to the allegations in the preceding paragraph, the Defendant at all material times had actual or constructive knowledge of the liquid or wet, slippery transitory substance in the area

where the Plaintiff fell due to the regularly and frequently recurring nature of the hazard in that area.

20. Notwithstanding its actual or constructive notice of the wet, foreign or transitory substance in the subject area, and consequent hazard to passengers, the Defendant failed to maintain its vessel adequately by correcting the dangerous condition before Plaintiff fell. The Defendant thereby failed to exercise reasonable care for the safety of its passengers and was negligent.

21. The Defendant's specific acts or omissions of negligent maintenance of its vessel consist of or more of the following:

a. Failing to maintain the deck surface in the area where Plaintiff fell in a reasonably safe condition;

b. Failing to conduct routine inspections of the area where Plaintiff fell;

c. Failing to clean and dry the area where Plaintiff fell on a reasonably timely basis;

d. Failing to cordon off or otherwise isolate the area where the Plaintiff fell pending cleaning and drying of the hazardous area.

22. As a direct and proximate result of one or more of the negligent acts described above, Plaintiff slipped, fell and has sustained and will continue in the future to sustain the damages described in Paragraph 14.

WHEREFORE, the Plaintiff demands judgment against the Defendant for compensatory damages and the costs of this action.

COUNT II - NEGLIGENT FAILURE TO WARN

23. Plaintiff adopts, realleges and incorporates by reference all allegations of Paragraphs 1 through 14 above and further alleges the following matters.

24. At all material times, the Defendant owed the Plaintiff, as a fare paying passenger on board a cruise passenger vessel it operated, a duty of reasonable care for her safety.

25. At all material times, the liquid or wet, slippery transitory substance referred to in Paragraph 13 above was located in an area of the ship that was a high traffic dining area, the Lido Marketplace and adjacent areas, so that the Defendant knew or should have known of the presence of the liquid or wet, slippery transitory substance, but failed to undertake reasonable safety measures for passenger safety.

26. The liquid or wet, slippery transitory substance in the area where the Plaintiff fell had existed for a sufficient period of time before the Plaintiff's fall that the Defendant had actual or constructive knowledge of its presence and an opportunity to warn of it.

27. As an alternative to the allegations in the preceding paragraph, the Defendant at all material times had actual or constructive knowledge of the liquid or wet, slippery transitory substance in the area where the Plaintiff fell due to the regularly and frequently recurring nature of the hazard in that area.

28. Notwithstanding its actual or constructive notice of the wet, foreign or transitory substance in the subject area, and consequent hazard to passengers, the Defendant failed adequately to warn passengers traversing the area of the hazard through the use of appropriate signs or warning cones, cordoning off the

area pending its cleaning and drying, or otherwise. The Defendant thereby failed to exercise reasonable care for the safety of its passengers and was negligent.

29. As a direct and proximate result of Defendant's negligent failure to warn described above, Plaintiff was not timely alerted to the hazardous condition in the area where she fell and thereby slipped, fell and has sustained and will continue in the future to sustain the damages described in Paragraph 14.

WHEREFORE, the Plaintiff demands judgment against the Defendant for compensatory damages and the costs of this action.

DEMAND FOR JURY TRIAL

The Plaintiff hereby demands trial by jury of all issues so triable as of right. Executed this September 9, 2020.

/s Philip M. Gerson
PHILIP M. GERSON
Florida Bar No. 127290
pgerson@gslawusa.com
NICHOLAS I. GERSON
Florida Bar No. 0020899
ngerson@gslawusa.com
EDWARD S. SCHWARTZ
Florida Bar No. 346721
eschwartz@gslawusa.com
DAVID L. MARKEL
Florida Bar No. 78306
dmarkel@gslawusa.com
GERSON & SCHWARTZ, P.A.
1980 Coral Way
Miami, Florida 33145
Telephone: (305) 371-6000
Facsimile: (305) 371-5749
Attorneys for Plaintiffs

April 15, 2019

Certified Mail Return Receipt Requested
7017 2620 0001 0364 2665

Carnival Corporation
Carnival Cruise Lines
3655 NW 87 Avenue
Miami, FL 33178

RE: Our Client: Michelle Newbauer
Vessel: Carnival Dream
Date of Loss: February 27, 2019

Dear Sir or Madam:

Please be advised that the undersigned represents the above referenced individual, who was injured aboard your vessel which occurred on February 27, 2019. At the time and place referenced herein, our client slipped on the main walkway of the Lido deck due to wet substance on the floor between the lounge chairs and the Red Frog Bar. As a result, my client suffered a right patellar retinacular injury (subluxation) avulsion fracture, torn meniscus and other injuries.

Liability for this incident is based on failing to maintain the floor surface of the main walkway on the Lido Deck (deck 10) between the lounge chairs and the Red Frog Bar, in a reasonably safe condition and failure to warn. This includes failing to use mats and other slip resistant materials to prevent slip and falls from occurring. In addition, there was a failure to implement safe practices, policies and procedures which if followed would have prevented this incident from occurring. This letter shall serve as my client's notice of intent to file a claim pursuant her passenger ticket contract. Request is made that all future

correspondence concerning her claim is directed to the undersigned.

This letter shall also serve as our formal request to provide all shipboard and shore side medical records, bills, reports, medical forms, passenger injury and other witness statements; accident scene photographs any and all cctv video of the incident and copy of the stateroom account for the entire voyage.

Moreover, please provide a copy of United States Coast Guard Form 2692, together with all other accident and investigative records in your possession.

Request is made that you provide us with this information within (20) days from the date of this letter. Failure to comply with this request within the time stated herein may result in a lawsuit filed against you. A signed Patient Authorization for the Release of Protected Health Information is enclosed.

Should you have any questions or comments, kindly notify me at once.

Very Truly Yours,

/s/ Nicholas I. Gerson
Nicholas I. Gerson

NIG/si
Enclosure

CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. *(SEE INSTRUCTIONS ON NEXT PAGE OF THIS FORM.)* **NOTICE: Attorneys MUST Indicate All Re-filed Cases Below.**

I. (a) PLAINTIFFS MICHELLE M. NEWBAUER,

DEFENDANTS CARNIVAL CORPORATION, a Panamanian Corporation d/b/a Carnival Cruise Lines

(b) County of Residence of First Listed Plaintiff *(EXCEPT IN U.S. PLAINTIFF CASES)*

County of Residence of First Listed Defendant Miami-Dade *(IN U.S. PLAINTIFF CASES ONLY)*

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE TRACT OF LAND INVOLVED.

(c) Attorneys *(Firm Name, Address, and Telephone Number)*

Nicholas Gerson, Esq., Gerson & Schwartz, P.A., 1980 Coral Way, Miami, FL 33145; Tel 305-371-6000

Attorneys *(If Known)*

(d) Check County Where Action Arose: ☐ MIAMI- DADE ☐ MONROE ☐ BROWARD ☐ PALM BEACH ☐ MARTIN ☐ ST. LUCIE ☐ INDIAN RIVER ☐ OKEECHOBEE ☐ HIGHLANDS

II. BASIS OF JURISDICTION *(Place an "X" in One Box Only)*

☐ 1 U.S. Government Plaintiff
☐ 3 Federal Question *(U.S. Government Not a Party)*
☐ 2 U.S. Government Defendant
☐ 4 Diversity *(Indicate Citizenship of Parties in Item III)*

III. CITIZENSHIP OF PRINCIPAL PARTIES *(Place an "X" in One Box for Plaintiff and One Box for Defendant)*

(For Diversity Cases Only)

	PTF	DEF		PTF	DEF
Citizen of This State	☐ 1	☐ 1	Incorporated *or* Principal Place of Business In This State	☐ 4	☑ 4
Citizen of Another State	☑ 2	☐ 2	Incorporated *and* Principal Place of Business In Another State	☐ 5	☐ 5
Citizen or Subject of a Foreign Country	☐ 3	☐ 3	Foreign Nation	☐ 6	☐ 6

IV. NATURE OF SUIT *(Place an "X" in One Box Only)*

Click here for: Nature of Suit Code Descriptions

CONTRACT
☐ 110 Insurance
☐ 120 Marine
☐ 130 Miller Act
☐ 140 Negotiable Instrument
☐ 150 Recovery of Overpayment & Enforcement of Judgment
☐ 151 Medicare Act
☐ 152 Recovery of Defaulted Student Loans (Excl. Veterans)
☐ 153 Recovery of Overpayment of Veteran's Benefits
☐ 160 Stockholders' Suits
☐ 190 Other Contract
☐ 195 Contract Product Liability
☐ 196 Franchise

TORTS

PERSONAL INJURY
☐ 310 Airplane
☐ 315 Airplane Product Liability
☐ 320 Assault, Libel & Slander
☐ 330 Federal Employers' Liability
☐ 340 Marine
☐ 345 Marine Product Liability
☐ 350 Motor Vehicle
☐ 355 Motor Vehicle Product Liability
☒ 360 Other Personal Injury
☐ 362 Personal Injury - Med. Malpractice

PERSONAL INJURY
☐ 365 Personal Injury - Product Liability
☐ 367 Health Care/ Pharmaceutical Personal Injury Product Liability
☐ 368 Asbestos Personal Injury Product Liability

PERSONAL PROPERTY
☐ 370 Other Fraud
☐ 371 Truth in Lending
☐ 380 Other Personal Property Damage
☐ 385 Property Damage Product Liability

FORFEITURE/PENALTY
☐ 625 Drug Related Seizure of Property 21 USC 881
☐ 690 Other

LABOR
☐ 710 Fair Labor Standards Act
☐ 720 Labor/Mgmt. Relations
☐ 740 Railway Labor Act
☐ 751 Family and Medical Leave Act
☐ 790 Other Labor Litigation
☐ 791 Empl. Ret. Inc. Security Act

BANKRUPTCY
☐ 422 Appeal 28 USC 158
☐ 423 Withdrawal 28 USC 157

PROPERTY RIGHTS
☐ 820 Copyrights
☐ 830 Patent
☐ 835 Patent – Abbreviated New Drug Application
☐ 840 Trademark

SOCIAL SECURITY
☐ 861 HIA (1395ff)
☐ 862 Black Lung (923)
☐ 863 DIWC/DIWW (405(g))
☐ 864 SSID Title XVI
☐ 865 RSI (405(g))

FEDERAL TAX SUITS
☐ 870 Taxes (U.S. Plaintiff or Defendant)
☐ 871 IRS—Third Party 26 USC 7609

OTHER STATUTES
☐ 375 False Claims Act
☐ 376 Qui Tam (31 USC 3729 (a))
☐ 400 State Reapportionment
☐ 410 Antitrust
☐ 430 Banks and Banking
☐ 450 Commerce
☐ 460 Deportation
☐ 470 Racketeer Influenced and Corrupt Organizations
☐ 480 Consumer Credit
☐ 490 Cable/Sat TV
☐ 850 Securities/Commodities/ Exchange
☐ 890 Other Statutory Actions
☐ 891 Agricultural Acts
☐ 893 Environmental Matters
☐ 895 Freedom of Information Act
☐ 896 Arbitration
☐ 899 Administrative Procedure Act/Review or Appeal of Agency Decision
☐ 950 Constitutionality of State Statutes

REAL PROPERTY
☐ 210 Land Condemnation
☐ 220 Foreclosure
☐ 230 Rent Lease & Ejectment
☐ 240 Torts to Land
☐ 245 Tort Product Liability
☐ 290 All Other Real Property

CIVIL RIGHTS
☐ 440 Other Civil Rights
☐ 441 Voting
☐ 442 Employment
☐ 443 Housing/ Accommodations
☐ 445 Amer. w/Disabilities - Employment
☐ 446 Amer. w/Disabilities - Other
☐ 448 Education

PRISONER PETITIONS
Habeas Corpus:
☐ 463 Alien Detainee
☐ 510 Motions to Vacate Sentence
Other:
☐ 530 General
☐ 535 Death Penalty
☐ 540 Mandamus & Other
☐ 550 Civil Rights
☐ 555 Prison Condition
☐ 560 Civil Detainee – Conditions of Confinement

IMMIGRATION
☐ 462 Naturalization Application
☐ 465 Other Immigration Actions

V. ORIGIN *(Place an "X" in One Box Only)*

☐ 1 Original Proceeding ☐ 2 Removed from State Court ☐ 3 Re-filed **(See VI below)** ☐ 4 Reinstated or Reopened ☐ 5 Transferred from another district *(specify)* ☐ 6 Multidistrict Litigation Transfer ☐ 7 Appeal to District Judge from Magistrate Judgment ☐ 8 Multidistrict Litigation – Direct File ☐ 9 Remanded from Appellate Court

VI. RELATED/ RE-FILED CASE(S)

(See instructions): a) Re-filed Case ☐YES ☐ NO b) Related Cases ☐YES ☐ NO

JUDGE: **DOCKET NUMBER:**

VII. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing and Write a Brief Statement of Cause ***(Do not cite jurisdictional statutes unless diversity)***:
28 U.S.C. §1332 - Passenger injury on cruise ship

LENGTH OF TRIAL via 4-5 days estimated (for both sides to try entire case)

VIII. REQUESTED IN COMPLAINT:

☐ CHECK IF THIS IS A **CLASS ACTION** UNDER F.R.C.P. 23

DEMAND $

CHECK YES only if demanded in complaint:

JURY DEMAND: ☐ Yes ☐ No

ABOVE INFORMATION IS TRUE & CORRECT TO THE BEST OF MY KNOWLEDGE

DATE September 9, 2020

SIGNATURE OF ATTORNEY OF RECORD /s Nicholas Gerson

FOR OFFICE USE ONLY

RECEIPT # AMOUNT IFP JUDGE MAG JUDGE

Save As... Print Reset

This page intentionally left blank.

INSTRUCTIONS FOR ATTORNEYS COMPLETING CIVIL COVER SHEET FORM JS 44

Authority For Civil Cover Sheet

The JS 44 civil cover sheet and the information contained herein neither replaces nor supplements the filings and service of pleading or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. Consequently, a civil cover sheet is submitted to the Clerk of Court for each civil complaint filed. The attorney filing a case should complete the form as follows:

I. (a) **Plaintiffs-Defendants.** Enter names (last, first, middle initial) of plaintiff and defendant. If the plaintiff or defendant is a government agency, use only the full name or standard abbreviations. If the plaintiff or defendant is an official within a government agency, identify first the agency and then the official, giving both name and title.

(b) County of Residence. For each civil case filed, except U.S. plaintiff cases, enter the name of the county where the first listed plaintiff resides at the time of filing. In U.S. plaintiff cases, enter the name of the county in which the first listed defendant resides at the time of filing. (NOTE: In land condemnation cases, the county of residence of the "defendant" is the location of the tract of land involved.)

(c) Attorneys. Enter the firm name, address, telephone number, and attorney of record. If there are several attorneys, list them on an attachment, noting in this section "(see attachment)".

II. Jurisdiction. The basis of jurisdiction is set forth under Rule 8(a), F.R.C.P., which requires that jurisdictions be shown in pleadings. Place an "X" in one of the boxes. If there is more than one basis of jurisdiction, precedence is given in the order shown below.

United States plaintiff. (1) Jurisdiction based on 28 U.S.C. 1345 and 1348. Suits by agencies and officers of the United States are included here.

United States defendant. (2) When the plaintiff is suing the United States, its officers or agencies, place an "X" in this box.

Federal question. (3) This refers to suits under 28 U.S.C. 1331, where jurisdiction arises under the Constitution of the United States, an amendment to the Constitution, an act of Congress or a treaty of the United States. In cases where the U.S. is a party, the U.S. plaintiff or defendant code takes precedence, and box 1 or 2 should be marked. Diversity of citizenship. (4) This refers to suits under 28 U.S.C. 1332, where parties are citizens of different states. When Box 4 is checked, the citizenship of the different parties must be checked. (See Section HI below; federal question actions take precedence over diversity cases.)

III. Residence (citizenship) of Principal Parties. This section of the JS 44 is to be completed if diversity of citizenship was indicated above. Mark this section for each principal party.

IV. Nature of Suit. Nature of Suit. Place an "X" in the appropriate box. If there are multiple nature of suit codes associated with the case, pick the nature of suit code that is most applicable. Click here for: Nature of Suit Code Descriptions.

V. Origin. Place an "X" in one of the seven boxes.

Original Proceedings. (1) Cases which originate in the United States district courts.

Removed from State Court. (2) Proceedings initiated in state courts may be removed to the district courts under Title 28 U.S.C., Section 1441. When the petition for removal is granted, check this box.

Refiled (3) Attach copy of Order for Dismissal of Previous case. Also complete VI.

Reinstated or Reopened. (4) Check this box for cases reinstated or reopened in the district court. Use the reopening date as the filing date.

Transferred from Another District. (5) For cases transferred under Title 28 U.S.C. Section 1404(a). Do not use this for within district transfers or multidistrict litigation transfers.

Multidistrict Litigation. (6) Check this box when a multidistrict case is transferred into the district under authority of Title 28 U.S.C. Section 1407. When this box is checked, do not check (5) above.

Appeal to District Judge from Magistrate Judgment. (7) Check this box for an appeal from a magistrate judge's decision.

Remanded from Appellate Court. (8) Check this box if remanded from Appellate Court.

VI. Related/Refiled Cases. This section of the JS 44 is used to reference related pending cases or re-filed cases. Insert the docket numbers and the corresponding judges name for such cases.

VII. Cause of Action. Report the civil statute directly related to the cause of action and give a brief

description of the cause. **Do not cite jurisdictional statutes unless diversity.**

Example: U.S. Civil Statute: 47 USC 553

Brief Description: Unauthorized reception of cable service

VIII. Requested in Complaint. Class Action. Place an "X" in this box if you are filing a class action under Rule 23, F.R.Cv.P.

Demand. In this space enter the dollar amount (in thousands of dollars) being demanded or indicate other demand such as a preliminary injunction.

Jury Demand. Check the appropriate box to indicate whether or not a jury is being demanded.

Date and Attorney Signature. Date and sign the civil cover sheet.