UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-22956-CIV-ALTONAGA/Goodman

COLLEEN CONDEN,

Plaintiff,

v.

ROYAL CARIBBEAN CRUISES LTD.; *et al.*,

Defendants.
_______________________________/

ORDER

THIS CAUSE came before the Court on Defendants, Royal Caribbean Cruises, Ltd. ("Royal Caribbean") and Scootaround, Inc.'s ("Scootaround['s]") Joint Motion to Dismiss Plaintiff's Second Amended Complaint for Damages and Demand for Jury Trial [ECF No. 51], filed on December 2, 2020. Plaintiff, Colleen Conden, filed a Response in Opposition [ECF No. 56] to the Motion; to which Defendants filed a Reply [ECF No. 57]. The Court has carefully considered the Second Amended Complaint for Damages and Demand for Trial by Jury ("Second Amended Complaint" or "SAC") [ECF No. 45], the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

This is a maritime personal injury action. (*See generally* SAC). Plaintiff is a citizen and resident of Pennsylvania. (*See id.* ¶ 5). Royal Caribbean is a foreign corporation with its principal place of business in Miami-Dade County, Florida. (*See id.* ¶¶ 7–8). Scootaround is a Florida corporation with its principal place of business in Broward County, Florida. (*See id.* ¶ 12). Scootaround operates a motorized scooter and handicap accessible rental business and provides

motorized scooters to Royal Caribbean's passengers "to enable them to move about the ship and in ports of call with greater ease." (*Id.* ¶ 11).

On September 20, 2019, Plaintiff was a passenger on Royal Caribbean's vessel, *Adventure of the Seas*. (*See id.* ¶ 16). Plaintiff is disabled and requires the use of a mobility scooter. (*See id.* ¶ 17). Royal Caribbean permitted Plaintiff to use her personal mobility scooter for the duration of the cruise and agreed to recharge her scooter's power each night. (*See id.*). One night, however, Royal Caribbean failed to charge Plaintiff's scooter despite promising her and agreeing to do so. (*See id.*).

Plaintiff states:

> Because of [Royal Caribbean]'s failure to charge Plaintiff's personal scooter, [Royal Caribbean] provided her with another scooter it had in its possession aboard the ship, and delivered this scooter to her cabin. . . . [U]nbeknownst to Plaintiff, . . . this scooter was . . . owned by [Scootaround]. . . . [T]his scooter was bigger, faster, different, and much more dangerous than Plaintiff's personal scooter, and controlled differently, including by having an unreasonably dangerously sensitive and powerful acceleration/throttling mechanism. Moreover, [Royal Caribbean] provided no instruction on how to use the subject mobility scooter. As a result, while off the ship and when using the subject mobility scooter while the ship was docked in Nova Scotia, Plaintiff was violently thrown off the scooter when it suddenly accelerated, causing Plaintiff to suffer severe injuries that included, but are not limited to, multiple fractures to Plaintiff's ribs and clavicle, a torn rotator cuff, and injuries to [her] head, and/or other injuries.

(*Id.* (alterations added)).

Plaintiff sought and received medical treatment while ashore in Nova Scotia. (*See id.* ¶ 18). Although Plaintiff was receiving treatment, Royal Caribbean "rushed Plaintiff back to the ship by . . . having a[] [Royal Caribbean] agent inform her . . . that she had to get her luggage off the ship[.]" (*Id.* (alterations added)). A Royal Caribbean crewmember, who "appeared . . . to be a member of [its] medical staff[,]" asked Plaintiff how she was feeling and if she had any broken bones; to which Plaintiff responded "she was hurting a lot and in a lot of pain[.]" (*Id.* (alterations

added)).

The crewmember advised Plaintiff that Royal Caribbean "would be checking up on her (to see if she was OK)." (*Id.*). Royal Caribbean did not "check up" on Plaintiff, and as a result, Plaintiff's "pain and other injuries were not addressed[;]" her "pain medicine [was used] more conservatively for fear of running out[;]" and her "injuries were [] not reasonably treated nor treated in a reasonable amount of time[.]" (*Id.* (alterations added)).

Defendants knew or should have known of the danger of mobility scooters. (*See id.* ¶ 19). They possessed the scooter for a period of time, were familiar with the scooter, and were aware the scooter was an older scooter with issues. (*See id.*). Defendants knew the scooter was "substantially different and handled differently to" Plaintiff's personal scooter. (*Id.*). They "knew or should have known of prior incidents/complaints involving this type of scooter, lack of adequate instructions/warnings regarding scooters, and/or these types of hazards[.]" (*Id.* (alteration added; citations omitted)).

At the time of the incident, Scootaround owned the scooter provided to Plaintiff by Royal Caribbean. (*See id.* ¶ 20). Defendants inspected, operated, maintained, and/or controlled the scooter involved in Plaintiff's incident. (*See id.*). The scooter "was unreasonably dangerous, risk-creating, defective, outdated, improperly designed, improperly installed, and/or otherwise unsafe[;]" and "lacked adequate safety features to prevent Plaintiff's incident." (*Id.* ¶¶ 22–23 (alteration added)).

These hazardous conditions existed for a length of time before the incident and thus were known to Defendants; these conditions were neither open nor obvious to Plaintiff. (*See id.* ¶¶ 24–26). Defendants failed (1) "to adequately inspect the subject [] scooter for dangers[;]" (2) "to adequately warn Plaintiff of the dangers[;]" (3) "to eliminate the hazards[;]" and (4) "to maintain

the subject mobility scooter in a reasonably safe condition." (*Id.* ¶¶ 27–29 (alterations added)). Defendants participated (1) "in the design and/or approved the design of [the] subject [] scooter[;]" (2) "in the assembly and/or approved the assembly of the subject [] scooter[;]" and (3) "in the distribution and/or approved the distribution of the subject [] scooter[.]" (*Id.* ¶¶ 30–32 (alterations added)).

The Second Amended Complaint asserts the following seven claims: negligence against Royal Caribbean (Count I); negligence against Scootaround (Count II); breach-of-implied-warranty against Royal Caribbean (Count III); breach-of-implied-warranty against Scootaround (Count IV); strict liability against Scootaround (Count V); assumption-of-duty-negligent-failure-to-check-up against Royal Caribbean (Count VI); and dangerous instrumentality against Scootaround (Count VII). (*See generally id.*). Defendants move to dismiss Counts II, III, IV, V, VI, and VII for failure to state claims for relief under Federal Rule of Civil Procedure 12(b)(6). (*See generally* Mot.; Reply).

II. STANDARD

"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.'" *Iqbal*, 556 U.S. at 678 (alteration added; quoting *Twombly*, 550 U.S. at 570). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do[.]" *Twombly*, 550 U.S. at 555 (alteration added; citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (alteration added; citing *Twombly*, 550 U.S. at 556).

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.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), *abrogated on other grounds by Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012).

When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations therein as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. ANALYSIS

Defendants contend the Court must dismiss Count II (negligence against Scootaround); Count III (breach-of-implied-warranty claim against Royal Caribbean); Count IV (breach-of-implied-warranty claim against Scootaround); Count V (strict liability claim against Scootaround); Count VI (assumption-of-duty-negligent-failure-to-check-up claim against Royal Caribbean); and Count VII (dangerous instrumentality claim against Scootaround). (*See generally* Mot.; Reply). The Court addresses each count in turn.

A. Count II – Negligence against Scootaround

Count II asserts a negligence claim against Scootaround. (*See* SAC ¶¶ 44–54). To properly state a negligence claim under federal maritime law, a plaintiff must allege four elements: "(1) a legal duty on the defendant to protect the plaintiff from particular injuries; (2) the defendant's breach of that duty; (3) the plaintiff's injury being actually and proximately caused by the breach; and (4) the plaintiff suffering actual harm from the injury." *Heller v. Carnival Corp.*, 191 F. Supp.

3d 1352, 1357 (S.D. Fla. 2016) (quotation marks and citation omitted). The duty in a maritime negligence case is one "of exercising reasonable care under the circumstances[.]" *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959) (alteration added; footnote call number omitted). "[T]he determination of whether a party owes a duty to another depends on a variety of factors, most notably the foreseeability of the harm suffered by the complaining party." *Canal Barge Co. v. Torco Oil Co.*, 220 F.3d 370, 377 (5th Cir. 2000) (alteration added; quotation marks and citation omitted); *see also id.* ("Duty is measured by the scope of the risk that negligent conduct foreseeably entails." (alteration adopted; quotation marks and citations omitted)).

Scootaround contends the negligence claim "must be dismissed because it has not been alleged — nor can it be alleged — that Scootaround was under a legal duty to protect Plaintiff from an unreasonable risk of harm." (Mot. 5). According to Scootaround, the only allegation as to the relationship between Plaintiff and Scootaround is that Royal Caribbean provided Plaintiff a scooter. (*See id.* 7). Scootaround insists "[u]nder these circumstances, there was no relationship between Plaintiff and Scootaround from which a duty may arise." (*Id.* (alteration added)). The Court disagrees.

Plaintiff alleges: (1) Scootaround operates a motorized scooter rental business and provides motorized scooters to Royal Caribbean's passengers (*see* SAC ¶ 11); (2) Scootaround owned the scooter which injured Plaintiff (*see id.* ¶ 17); (3) Scootaround undertook certain responsibilities regarding the scooter on Royal Caribbean's vessel — namely, inspecting, maintaining, managing, and controlling the scooter (*see id.* ¶¶ 19–20); (4) Scootaround was aware of prior incidents and complaints involving this type of scooter but did not adequately warn Plaintiff of the scooter's dangerous, risk-creating, and hazardous conditions (*see id.* ¶¶ 19, 45); and (5) Scootaround knew or should have known, based on inspections and its ownership of the scooter, of the possible

dangers involved in having Royal Caribbean provide scooters to cruise passengers without adequate warnings and safety features (*see id.* ¶¶ 19, 23–24, 27). Given Scootaround's significant participation and involvement with the rental of mobility scooters on Royal Caribbean's vessel — and given Scootaround could reasonably foresee (and indeed knew) its participation and involvement could contribute to an injury of the type Plaintiff allegedly suffered — Scootaround owed to Plaintiff a duty of exercising reasonable care under the circumstances. (*See id.* ¶¶ 11, 17, 19–20, 23–24, 27, 44–48).

The Court finds Plaintiff pleads enough facts at this stage to allow her negligence claim against Scootaround to proceed.[1]

B. Counts III and IV – Breach-of-implied-warranty claims against Defendants

Counts III and IV assert breach-of-implied-warranty claims against Defendants. (*See* SAC ¶¶ 55–68). To start, Defendants contend maritime law does not permit recovery under theories of breach of the warranties of merchantability and fitness for a particular purpose. (*See* Mot. 7). "Maritime law does not . . . allow a claim for breach of implied warranty of fitness and merchantability." *Berger v. Celebrity Cruise Lines, Inc.*, No. 15-21113-Civ, 2015 WL 12711585, at *1 (S.D. Fla. Aug. 18, 2015) (alteration added; citation omitted); *see also Bird v. Celebrity*

[1] Aside from general rule statements in the Motion (*see* Mot. 6–7), Scootaround primarily relies on *Mahoney v. Wells Fargo Bank, N.A.*, No. 8:19-cv-118, 2019 WL 1901011 (M.D. Fla. Mar. 20, 2019), for the proposition that Plaintiff "must describe [the] relationship with [] Defendant that would give rise to a legally recognized duty" (Mot. 6 (alterations added; quotation marks omitted)). *Mahoney* involved a state-law negligence claim brought by a non-customer against a bank. *See generally* 2019 WL 1901011; *see also Chang v. JPMorgan Chase Bank, N.A.*, 845 F.3d 1087, 1094 (11th Cir. 2017) ("Florida, like other jurisdictions, recognizes that as a general matter, a bank does not owe a duty of care to a noncustomer with whom the bank has no direct relationship." (quotation marks and citations omitted)). The circumstances in *Mahoney* are not analogous to the circumstances presented here.

In its Reply, Scootaround contends "Plaintiff admits she was not Scootaround's customer and did not have a contract with Scootaround[,]" citing excerpts of Plaintiff's deposition testimony. (Reply 5 n.5 (alteration added)). The Court cannot consider deposition testimony when ruling on the instant Motion.

Cruise Line, Inc., 428 F. Supp. 2d 1275, 1279–80 (S.D. Fla. 2005) (dismissing claim against the defendant-cruise line for breach of an implied warranty of merchantability and noting this "Circuit's clear reluctance to imply warranties in claims brought by a cruise ship passenger against the ship's owner or operator." (emphasis omitted)).

In response, Plaintiff contends — in a perfunctory manner — maritime law "is not the controlling law here[.]"[2] (Resp. 7 (alteration added); *see also* Reply 2 n.1 (noting "Plaintiff has not cited to any cases addressing this issue.")). Plaintiff clarifies she is pursuing state law claims for breach of implied warranties against Defendants.[3, 4] (*See* Resp. 7–8).

Under Florida law, "[i]mplied in every contract for the sale of goods, unless otherwise excluded, is a warranty that the goods are merchantable — i.e., 'fit for the ordinary purpose for which such goods are used' — if the seller is a merchant[5] with respect to goods of that kind."

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[2] Defendants aptly observe Plaintiff's Response is not "responsive to [] Defendants' arguments[.]" (Reply 6 (alterations added)). This is true. Indeed, Plaintiff's Response to Defendants' breach-of-implied-warranty and strict liability contentions is largely (if not entirely) recycled from an opposition brief in a separate case, involving a different plaintiff, plaintiff's counsel, motion to dismiss, and amended complaint. *Compare Strong v. Carnival Corp.*, No. 19-cv-25247, Pl.'s Resp. in Opp'n to Def.'s Mot. to Dismiss Am. Compl. [ECF No. 46] 12 (S.D. Fla. Sept. 8, 2020) ("The Amended Complaint alleges that Defendant Scootaround is negligent for breach of implied warranty or strictly liable to the Plaintiff because it provided him with a scooter which was defective and not fit for its intended purpose which was to use for travel aboard and on and off the vessel."); *id.* 11–13 (discussing claims for breach of implied warranty and strict liability and citing authority), *with* (Resp. 7 ("The Amended Complaint alleges that Defendants are negligent for breach of implied warranty or strictly liable to the Plaintiff because they provided her with a scooter which was defective and not fit for its intended purpose which was to use for travel aboard and on and off the Vessel."); *id.* 6–8 (using the exact same citations to cases, quotations, and analysis from the opposition brief in *Strong*)).

[3] To be sure, Plaintiff withdraws her allegation (*see* Resp. 3 n.1) that "the causes of action asserted are maritime torts" (SAC ¶ 2). (*See also* Resp. 7 (relying on authority applying Florida law in support of her breach-of-implied-warranty claims)).

[4] Defendants insist that "[m]aritime law applies to the entirety of Plaintiff's case." (Reply 2 (alteration added)). The discussion of which law applies is academic because even if Florida law applies, Plaintiff fails to state claims for relief. The Court thus assumes without deciding that Florida law applies to Plaintiff's breach-of-implied-warranty claims against Defendants.

[5] Section 672.104(1), Florida Statutes defines a "Merchant" as a "person who deals in goods of the kind or otherwise by occupation holds himself or herself out as having knowledge or skill peculiar to the practices

Zoom Tan, LLC v. Heartland Tanning, Inc., No. 2:12-cv-684, 2013 WL 5720140, at *3 (M.D. Fla. Oct. 21, 2013) (alterations added; quoting Fla. Stat. § 672.314). "A cause of action for breach of implied warranty of merchantability requires allegations that (1) the plaintiff was a foreseeable user of the product, (2) the product was used in the intended manner at the time of the injury, (3) the product was defective when transferred from the warrantor, and (4) the defect caused the injury." *Jovine v. Abbott Labs., Inc.*, 795 F. Supp. 2d 1331, 1340 (S.D. Fla. 2011) (citation omitted). "Florida law also provides that there is an implied warranty of fitness for a particular purpose 'where the seller at the time of contracting has reason to know any particular purpose for which the goods are required and that the buyer is relying on the seller's skill or judgment to select or furnish suitable goods.'" *Vision Power, LLC v. Midnight Express Power Boats, Inc.*, No. 18-61700, 2019 WL 5291042, at *3 (S.D. Fla. July 26, 2019) (alteration adopted; quoting Fla. Stat. § 672.315).

"A cause of action for breach of implied warranty of merchantability or fitness for a particular purpose cannot exist in the absence of privity." *Ohio State Troopers Ass'n, Inc. v. Point Blank Enters., Inc.*, No. 17-cv-62051, 2018 WL 3109632, at *6 (S.D. Fla. Apr. 5, 2018) (citations omitted); *see also Padilla v. Porsche Cars N. Am., Inc.*, 391 F. Supp. 3d 1108, 1116 (S.D. Fla. 2019) (recognizing "[t]ime and again, Florida courts have dismissed breach of implied warranty claims under Florida law for lack of contractual privity where the plaintiff purchaser did not purchase a product directly from the defendant." (alteration added; collecting cases)). The privity requirement can be satisfied "when a manufacturer directly provides a warranty to, or otherwise has direct contact with, a buyer who purchases from a third party." *Glob. Quest, LLC v. Horizon*

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or goods involved in the transaction or to whom such knowledge or skill may be attributed by his or her employment of an agent or broker or other intermediary who by occupation holds himself or herself out as having such knowledge or skill." Fla. Stat. § 672.104(1) (quotation marks omitted).

Yachts, Inc., 849 F.3d 1022, 1032 (11th Cir. 2017) (citations omitted). A plaintiff can also "pursue a claim of breach of implied warranty through third-party beneficiary law." *Sanchez-Knutson v. Ford Motor Co.*, 52 F. Supp. 3d 1223, 1233–34 (S.D. Fla. 2014).

Defendants first contend the Second Amended Complaint "is devoid of any allegation concerning privity between Plaintiff and Scootaround or Scootaround and [Royal Caribbean]." (Reply 7 (alteration added)). Defendants insist Plaintiff was not in privity with Scootaround. (*See* Mot. 8; Reply 7). To this, Plaintiff argues she alleges privity between her and Scootaround in that Royal Caribbean "may have provided, leased, or bailed the subject mobility scooter to her[.]" (Resp. 6 (alteration added)). Plaintiff maintains she "is in privity of contract with Scootaround through [Royal Caribbean]'s privity with Scootaround." (*Id.* (alteration added; capitalization omitted)). The Court sides with Defendants.

Plaintiff fails to allege any facts that would place her in privity with Scootaround. (*See* SAC ¶¶ 62–68). Plaintiff neither alleges she purchased the scooter from Scootaround, nor pleads Scootaround either directly provided Plaintiff with a warranty or had any other direct contact with her. Nor does Plaintiff allege privity as a third-party beneficiary. Simply stating Royal Caribbean may have "provided, leased, or bailed" the scooter is not enough to establish privity with Scootaround. (*Id.* ¶ 65; *see also* Resp. 6). In short, Plaintiff fails to allege an essential element of her breach-of-implied-warranty claim against Scootaround, and thus, the claim is dismissed.

Defendants next maintain Plaintiff "plead[s] no facts that would support an allegation [] [Royal Caribbean] was a 'merchant' and thus Count III must be dismissed." (Mot. 10 (alterations added)). Plaintiff elects not to respond to this contention. (*See* Resp. 5–9; Reply 7–8); *cf. U.S. ex rel. Osheroff v. Tenet Healthcare Corp.*, No. 09-22253-Civ, 2012 WL 2871264, at *9 (S.D. Fla. July 12, 2012) ("The failure to defend a claim in responding to a motion to dismiss results in the

abandonment of that claim." (citations omitted)). Either way, the Court agrees Plaintiff does not sufficiently allege Royal Caribbean was a "merchant" with respect to the scooter involved in this accident to state a claim for breach of an implied warranty of merchantability. *See Vision Power, LLC*, 2019 WL 5291042, at *3 ("To state an implied warranty of merchantability claim in Florida, a plaintiff must allege that the seller is a merchant with respect to goods of the kind." (citation omitted)); *Kuhlman v. Louisville Ladder, Inc.*, No. 8:12-cv-1238, 2012 WL 5989435, at *3 (M.D. Fla. Nov. 30, 2012) (dismissing claim for breach of an implied warranty of merchantability where the plaintiff failed to allege the defendant qualified as a "merchant" (quotation marks omitted)).

In sum, Counts III and IV are dismissed.[6]

C. Count V – Strict liability claim against Scootaround

In Count V, Plaintiff asserts Scootaround is strictly liable in its role as a commercial lessor and product designer for the injuries she sustained when using the mobility scooter. (*See* SAC ¶¶ 11, 69–84). "[P]roducts liability, including strict liability, [i]s part of the general maritime law." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 865 (1986) (alterations added). To state a strict liability claim under federal maritime law, a plaintiff must allege: "(1) that the defendant manufactured or sold the product; (2) that the product was defective; (3) that the defect caused injury to the plaintiff; and (4) that the product was defective when it left the custody of the defendant[.]" *Christensen Abbraci, LLC v. Comfort Marine Inc.*, No. 17-cv-60271, 2017 WL

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[6] Defendants note the Second Amended Complaint "does not specifically name the 'implied warranty' on which Plaintiff is attempting to sue[,]" and explain "it appears she is attempting to plead a claim for breach of the implied warranty of merchantability." (Mot. 8 (alteration added)). The Court agrees — and Plaintiff does not dispute this characterization. (*See generally* Resp.). Plaintiff alleges "[t]he scooter failed in its normal and ordinary use[.]" (SAC ¶¶ 57, 64 (alterations added)). "A particular purpose differs from the ordinary purpose for which the goods are used in that it envisages a specific use by the buyer which is peculiar to the nature of his business." *Thermoset Corp. v. Bldg. Materials Corp. of Am.*, No. 14-60268-Civ, 2014 WL 11775929, at *3 (S.D. Fla. June 4, 2014) (alteration adopted; quotation marks omitted; quoting Fla. Stat. § 672.315 cmt. 2). Given the allegation that the scooter failed its ordinary purpose, the Court, like Plaintiff in her Response, will not address whether the Second Amended Complaint states a claim for breach of the implied warranty of fitness for a particular purpose.

7803802, at *7 (S.D. Fla. Apr. 10, 2017) (alteration added; citing *E. River S.S. Corp.*, 476 U.S. at 860).

"It is fundamental that a claim for strict products liability requires a seller 'engaged in the business of selling' the product." *Lalonde v. Royal Caribbean Cruises, Ltd.*, No. 1:18-cv-20809, 2019 WL 144129, at *2 (S.D. Fla. Jan. 9, 2019) (quoting Restatement (Second) of Torts § 402A(1); other citation omitted). It is also "settled law that entities upstream from the seller, including manufacturers and entities within the distribution chain which profit from its sale, are liable." *Id.* (citation omitted). "[A] strict liability theory may apply to . . . retailers, wholesalers, distributors, and . . . commercial lessors." *Williams v. Nat'l Freight, Inc.*, 455 F. Supp. 2d 1335, 1337 (M.D. Fla. 2006) (alterations added; citing *Samuel Friedland Family Enters. v. Amoroso*, 630 So. 2d 1067, 1068 (Fla. 1994)).[7]

Scootaround contends Count V "must be dismissed because Plaintiff fails to allege that Scootaround is in the business of selling mobility scooters or otherwise manufactures the mobility scooter that Plaintiff alleges she was injured with." (Mot. 11). Certainly, it is undisputed the Second Amended Complaint contains no such allegations. (*See generally* SAC). Plaintiff, however, alleges Scootaround "operate[s] a motorized scooter and handicap accessible equipment rental business [and] provide[s] motorized scooters to [Royal Caribbean]'s passengers." (SAC ¶ 11 (alterations added)). Scootaround neither addresses whether it fits the description of a commercial lessor nor discusses whether Plaintiff pleads enough facts to state a strict liability

[7] The Court acknowledges that *Williams* relies on Florida law for this rule statement. *See* 455 F. Supp. 2d at 1337 (citation omitted). Again, Scootaround insists that "[m]aritime law applies to the entirety of Plaintiff's case." (Reply 2 (alteration added)). Yet, Scootaround fails to cite any authority supporting the proposition that maritime law does not extend strict liability to commercial lessors of defective products. (*See generally* Mot.; Reply). One of the leading maritime and admiralty treatises explains "[t]he scope of persons subject to liability in a maritime strict products liability case is very broad," and notes that "[t]he liability of commercial bailors and lessors has been raised and unanswered." Thomas J. Schoenbaum, Admiralty & Maritime Law § 5:13 (6th ed. 2020) (alterations added; footnote call numbers omitted).

claim under this theory. (*See* Mot. 11–13; Reply 8–9).

Simply put, because Scootaround has not offered, much less demonstrated, a basis to dismiss Plaintiff's claim that Scootaround is strictly liable in its role as a commercial lessor of mobility scooters, the Court will not dismiss Count V. Count V may proceed.

D. Count VI – Assumption-of-duty-negligent-failure-to-check-up claim against Royal Caribbean

Count VI asserts an assumption-of-duty-negligent-failure-to-check-up claim against Royal Caribbean. (*See* SAC ¶¶ 85–98). "Federal courts have recognized that the assumption of duty doctrine, as set forth in [section] 323 of the Second Restatement of Torts, is applicable in maritime cases." *Noon v. Carnival Corp.*, No. 18-23181-Civ, 2019 WL 3886517, at *7 (S.D. Fla. Aug. 12, 2019) (alteration added; quotation marks and citations omitted). Section 323 of the Second Restatement of Torts outlines the assumption-of-duty doctrine:

> One who undertakes, gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other's person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if
>
> (a) his failure to exercise such care increases the risk of such harm, or
>
> (b) the harm is suffered because of the other's reliance upon the undertaking.

Disler v. Royal Caribbean Cruise Ltd., No. 17-23874-Civ, 2018 WL 1916614, at *4 (S.D. Fla. Apr. 23, 2018) (quoting Restatement (Second) of Torts § 323). Stated succinctly, "one who voluntarily assumes a duty and then breaches that duty becomes liable to one who is injured because of the breach." *Noon*, 2019 WL 3886517, at *7 (collecting cases).

Plaintiff alleges Royal Caribbean assumed a duty to act — particularly, to "check[] up on her (to see if she was OK)" — when a member of Royal Caribbean's medical staff informed Plaintiff that Royal Caribbean would do so. (SAC ¶ 18 (alteration added)). She states the staff

member "appeared to know [her] medical condition" and knew "some information" regarding the accident. (*Id.* (alteration added)). Plaintiff claims Royal Caribbean "did not check up on" her and is therefore responsible for the attendant damages that followed. (*Id.*; *see also id.* ¶¶ 85–98).

Royal Caribbean launches a wave of arguments to support its position Plaintiff fails to state an assumption-of-duty claim. (*See* Mot. 13–16 (discussing Plaintiff's Amended Complaint (*see* [ECF No. 15]), her retention of medical negligence allegations, and a prior hearing on Defendants' motion to dismiss (*see* [ECF No. 43]))). As relevant to the Court's analysis, Royal Caribbean contends Plaintiff "has not pled any facts that demonstrate an undertaking by [Royal Caribbean] that would support a claim for assumption of duty[.]" (*Id.* 16 (alterations added)). The Court agrees.

Quite simply, Plaintiff's allegations are far too bare or conclusory to state an assumption-of-duty claim against Royal Caribbean. (*See* SAC ¶¶ 18, 85–98). Plaintiff does not provide any *factual* allegations supporting her claim Royal Caribbean undertook a duty to provide medical care to her but then negligently denied her (or failed to provide her with) medical care or monitoring. (*See id.* ¶ 18). Similarly, the allegations in Count VI amount to little more than conclusions couched as factual allegations. (*See id.* ¶¶ 85–98). The Court is unpersuaded the vague allegation that a crewmember, who "appeared" to know "some information" about Plaintiff's injuries and accident, offered to "check[] up on [Plaintiff] (to see if she was OK)" is enough to state a claim for assumption of duty.[8, 9] (*Id.* ¶ 18 (alterations added)). Count VI is dismissed.

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[8] Although Plaintiff alleges she advised the crewmember "she was hurting a lot and in a lot of pain" (SAC ¶ 18), Plaintiff does not allege sufficient facts that the crewmember — and by extension, Royal Caribbean — voluntarily assumed or undertook any duty to provide medical care (*see id.* ¶¶ 18, 85–98).

[9] Plaintiff's block quotation from *Rojas v. Carnival Corp.*, No. 1:13-cv-21897, 2015 WL 7736475 (S.D. Fla. Nov. 30, 2015), does not save her claim. (*See* Resp. 9–10). In *Rojas*, the plaintiffs "telephoned a [defendant-cruise line] employee and informed the cruise line that an air-ambulance was necessary to save" one plaintiff's life; the defendant-cruise line then "agreed to make the arrangements for an air ambulance[.]"

E. Count VII – Dangerous instrumentality claim against Scootaround

Count VII seeks to hold Scootaround liable under Florida's dangerous instrumentality doctrine. (*See* SAC ¶¶ 99–109). "Florida's dangerous instrumentality doctrine imposes strict vicarious liability upon the owner of a motor vehicle who voluntarily entrusts that motor vehicle to an individual whose negligent operation causes damage to another." *Aurbach v. Gallina*, 753 So. 2d 60, 62 (Fla. 2000) (citation omitted). "The doctrine is not based on respondeat superior or agency, but on the practical fact that the owner of an instrumentality which has the capability of causing death or destruction should in justice answer for misuse of this instrumentality by anyone operating it with his knowledge and consent." *Saullo v. Douglas*, 957 So. 2d 80, 86 (Fla. 5th DCA 2007) (alteration adopted; emphasis, quotation marks, and citations omitted).

Plaintiff alleges because Scootaround owned the mobility scooter, it is "vicariously liable for the negligence of [Royal Caribbean], as a permissive user, operator, and/or provider of the subject mobility scooter" under the dangerous instrumentality doctrine. (SAC ¶ 108 (alteration added); *see also id.* ¶¶ 99–107, 109). Yet, Plaintiff does not explain how she can impose liability on Scootaround under this doctrine when *she was injured* while *she was operating and using* the alleged dangerous instrumentality. (*See id.* ¶ 103 ("Plaintiff was operating the . . . mobility scooter[.]" (alterations added)). As Scootaround correctly notes, "[d]angerous instrumentality liability requires three parties: the owner, the operator, and the injured party[;] the [Second Amended Complaint] is misplaced because . . . Plaintiff does not allege that Scootaround entrusted the subject scooter to a person who then injured [] Plaintiff." (Mot. 19 (alterations added; footnote

2015 WL 7736475, at *3 (alterations added). The court held "the first element of [the p]laintiffs' negligence claim [was] clearly established[,]" stating the defendant-cruise line "assumed the duty to secure medical transport" when it agreed to provide such medical transportation. *Id.* at *6 & n.4 (alterations added). Plaintiff, here, alleges no such agreement. Plaintiff's invocation of *Rojas* thus fails to persuade.

call number omitted)). The Court agrees with Scootaround.[10, 11] *See Vaughn v. 21st Century Sec. Ins. Co.*, No. 3:12-cv-410, 2013 WL 500238, at *3 (N.D. Fla. Jan. 8, 2013), *report and recommendation adopted*, 2013 WL 500244 (N.D. Fla. Feb. 11, 2013) ("[T]he scope of responsibility of the owner of a[] [dangerous instrumentality] extends only to damages suffered by a third person as a result of the negligent operation of the [motor vehicle] while being driven with the owner's knowledge or consent." (alterations added; citing *S. Cotton Oil Co. v. Anderson*, 86 So. 629 (Fla. 1920))); *Burch v. Sun State Ford, Inc.*, 864 So. 2d 466, 470 (Fla. 5th DCA 2004) (explaining the plaintiff in a dangerous instrumentality action "must prove some fault, albeit on the part of the operator, which is then imputed to the owner under vicarious liability principles." (citation omitted)).

Perhaps aware of the weakness of her position, Plaintiff "requests that [] [C]ount [VII] be construed as a negligent entrustment count[,]" citing a "technical deficiency in [] labeling th[e] count [] a dangerous instrumentality count[.]" (Resp. 13 (alterations added)). Although the substance of the claim is more important than its title, Plaintiff's allegations clearly seek to assert a stand-alone claim under the dangerous instrumentality doctrine, not a negligent entrustment claim. (*See* SAC ¶¶ 100, 104–07). Plaintiff's Response is not the proper avenue to attempt to

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[10] Plaintiff also agrees; in her words: "Under Florida's Dangerous Instrumentality Doctrine, *the owner* of a dangerous instrumentality who voluntarily entrusts that instrumentality to *an individual whose negligent operation* causes damage *to another* can be held vicariously liable for damage *caused by the person operating the dangerous instrumentality*." (SAC ¶ 105 (emphasis added)).

[11] As noted, Plaintiff alleges Scootaround is "vicariously liable for the negligence of [Royal Caribbean], as a . . . provider of the subject mobility scooter." (SAC ¶ 108 (alterations added); *see also* Resp. 13 (emphasizing this allegation)). Plaintiff, however, cites no authority showing the dangerous instrumentality doctrine applies in this circumstance. (*See* Resp. 13). Simply bolding and underlining an allegation in the Second Amended Complaint is not enough to support an expansion of the dangerous instrumentality doctrine.

assert a new theory of recovery against Scootaround.[12, 13] *See Fernau v. Enchante Beauty Prod., Inc.*, No. 18-20866-Civ, 2020 WL 2569300, at *3 (S.D. Fla. May 21, 2020) (noting a plaintiff "cannot amend the complaint by invoking a new theory of liability in response to the motion to dismiss.").

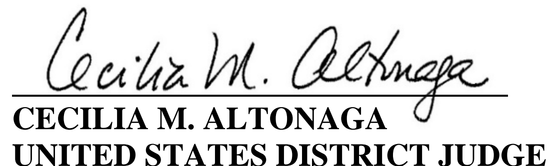
In short, Count VII is dismissed.

IV. CONCLUSION

For the foregoing reasons, it is **ORDERED AND ADJUDGED** that Defendants, Royal Caribbean Cruises, Ltd. and Scootaround, Inc.'s Joint Motion to Dismiss Plaintiff's Second Amended Complaint for Damages and Demand for Jury Trial **[ECF No. 51]** is **GRANTED in part** and **DENIED in part**. The Motion is **DENIED** as to Counts II and V. The Motion is **GRANTED in part** as to Counts III, IV, VI, and VII.

Defendants have until and including **March 5, 2021** to file answers to Plaintiff's Second Amended Complaint **[ECF No. 45].**

DONE AND ORDERED in Miami, Florida, this 22nd day of February, 2021.



CECILIA M. ALTONAGA
UNITED STATES DISTRICT JUDGE

cc: counsel of record

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[12] Plaintiff has amended her complaint twice already. (*See generally* Compl. [ECF No. 1]; Am. Compl.).

[13] Even if the Court ignores Plaintiff's improper attempt to reconfigure her claim, Plaintiff's Response does not address whether the Second Amended Complaint's allegations are sufficient to state a claim for negligent entrustment. (*See* Resp. 13). Instead, in conclusory fashion, Plaintiff writes that "her allegations equally support a claim of negligent entrustment," referring to a block quotation from *Seale v. Ocean Reef Club, Inc.*, No. 13-21515-Civ, 2013 WL 4647218 (S.D. Fla. Aug. 29, 2013). (Resp. 11–13).