UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 20-cv-25269-COOKE/DAMIAN

ARLEAN GULLEY,

Plaintiff,

vs.

ROYAL CARIBBEAN CRUISES, LTD.,
a Liberian Corporation,

Defendant.
_____/

REPORT AND RECOMMENDATION AS TO
PLAINTIFF'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

THIS CAUSE came before the Court on Plaintiff, Arlean Gulley's ("Plaintiff" or "Gulley"), Motion to Strike Affirmative Defenses and Memorandum of Law in Support Thereof [ECF No. 17] (the "Motion"). This matter was referred for a Report and Recommendation by the Honorable Marcia G. Cooke, United States District Judge. [ECF No. 4]. *See* 28 U.S.C. § 636.

THIS COURT has considered Plaintiff's Motion, Defendant's Response [ECF No. 18], Plaintiff's Reply [ECF No. 19], and the pertinent portions of the record. For the following reasons, it is recommended that Plaintiff's Motion to Strike Affirmative Defenses [ECF No. 17] be GRANTED IN PART and DENIED IN PART in accordance with this Report and Recommendation.

I. BACKGROUND

On December 28, 2020, Plaintiff brought this maritime personal injury action seeking damages for injuries she allegedly sustained after she slipped or tripped on a ramp/gangway

while disembarking the Defendant's cruise ship *Mariner of the Seas*. [*See* ECF No. 1]. Plaintiff's complaint alleges negligence (Count 1) and failure to warn (Count 2). [*Id.* at 3–6]. Defendant answered the complaint and asserted eighteen affirmative defenses and a reservation of the right to amend its affirmative defenses. [ECF No. 15].

Plaintiff moved to strike thirteen of Defendant's eighteen affirmative defenses: the Second, Fourth, Fifth, Sixth, Eighth, Ninth, Tenth, Eleventh, Twelfth, Thirteenth, Fourteenth, Fifteenth, and Sixteenth affirmative defenses. [ECF No. 17]. In response, Defendant agreed to withdraw its Tenth affirmative defense but argues that the other challenged affirmative defenses should not be stricken because each defense provides the basic notice required by law and relates directly to Plaintiff's claims. Alternatively, Defendant requests that it be given leave to amend any affirmative defenses that are stricken. [ECF No. 18].

II. APPLICABLE LEGAL STANDARDS

"An affirmative defense is generally a defense that, if established, requires judgment for the defendant even if the plaintiff can prove his case by a preponderance of the evidence." *Wright v. Southland Corp.*, 187 F.3d 1287, 1303 (11th Cir. 1999). "Affirmative defenses 'are subject to the general pleading requirements of Rule 8(a)' of the Federal Rules of Civil Procedure." *Mushilla Holdings, LLC v. Scottsdale Ins. Co.*, No. 20-20832, 2020 WL 6135804, at *1 (S.D. Fla. June 16, 2020) (quoting *Home Mgmt. Sols., Inc. v. Prescient, Inc.*, No. 07-20608, 2007 WL 2412834, at *2 (S.D. Fla. Aug. 21, 2007)); *see also Melaih v. MSC Cruises, S.A.*, No. 20-61341, 2021 WL 3731272, at *3 (S.D. Fla. July 27, 2021) (discussing pleading standards

and collecting cases).[1]

Federal Rule of Civil Procedure 12(f) provides that a court "may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f). Although a court has broad discretion when reviewing a motion to strike, such motions are considered "a drastic remedy" and are often "disfavored by the courts." *Simmons v. Royal Caribbean Cruises, Ltd.*, 423 F. Supp. 3d 1350, 1352 (S.D. Fla. 2019). Motions to strike are generally denied "unless the matter sought to be omitted has no possible relationship to the controversy, may confuse the issues, or otherwise prejudice a party." *Id.* (quoting *Bank of Am., N.A. v. GREC Homes IX, LLC*, No. 13-21718, 2014 WL 351962, at *4 (S.D. Fla. Jan. 23, 2014)).

"[A]n affirmative defense must be stricken when the defense is comprised of no more than 'bare-bones, conclusory allegations' or is 'insufficient as a matter of law.'" *Birren v. Royal Caribbean Cruises, Ltd.*, 336 F.R.D. 688, 692 (S.D. Fla. 2020) (quoting *Northrop & Johnson Holding Co. v. Leahy*, No. 16-63008, 2017 WL 5632041, at *3 (S.D. Fla. Nov. 22, 2017)). "A defense is insufficient as a matter of law if, on the face of the pleadings, it is patently frivolous, or if it is clearly invalid as a matter of law." *Morrison v. Exec. Aircraft Refinishing, Inc.*, 434 F.

[1] There is a split among the courts regarding the pleading standard required for affirmative defenses. *See generally McLendon v. Carnival Corp.*, No. 20-24939, 2021 WL 848945, at *3 (S.D. Fla. Mar. 4, 2021) (explaining some courts in the Eleventh Circuit have concluded that affirmative defenses are subject to the heightened *Twombly-Iqbal* pleading standard of Rule 8(a) and others have held that affirmative defenses are subject to a less stringent standard under Rules 8(b) and 8(c) under which affirmative defenses "need only provide fair notice of the nature of the defense and the grounds upon which its rests"). *See also Vazquez v. Maya Publ'g Grp., LLC*, No. 14-20791, 2015 WL 5317621, at *1 (S.D. Fla. Sept. 14, 2015) ("Affirmative defenses in an answer must provide a 'short and plain statement of the claim showing the pleader is entitled to relief.' Fed. R. Civ. P. 8(a)(2). While Rule 8 does not require that a defendant set forth his defense with particularity, the defendant must plead enough facts to state a claim to relief that is plausible on its face." (citing *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 553 (2007))).

Supp. 2d 1314, 1318 (S.D. Fla. 2005) (citation omitted). Therefore, "when considering a motion to strike affirmative defenses, the court must look at whether the defense is legally sufficient to provide 'fair notice' of the nature of the defense." *Mushilla*, 2020 WL 6135804, at *1 (quoting *Grovenor House, L.L.C. v. E.I. Du Pont De Nemours & Co.*, No. 09-21698, 2010 WL 3212066, at *2 (S.D. Fla. Aug. 12, 2010)).

III. DISCUSSION

Plaintiff moves to strike twelve of Defendant's eighteen affirmative defenses. Each of the challenged affirmative defenses is discussed below as they were grouped in the parties' briefing.

A. *Defendant's Second, Fifth, Eleventh, Thirteenth, and Fifteenth Affirmative Defenses*

Plaintiff asserts the following affirmative defenses should be stricken because they are merely denials of the allegations in the complaint and not affirmative defenses:

> Second Affirmative Defense. There is no cause of action for negligence as to [Royal Caribbean] because it did not create or maintain any dangerous or defective condition, and had no actual or constructive notice of any dangerous condition which was the cause of Plaintiff's alleged incident.
>
> Fifth Affirmative Defense. Royal Caribbean had no actual or constructive notice of any dangerous condition, and therefore, owed no duty to warn Plaintiff of same.
>
> Eleventh Affirmative Defense. The allegedly dangerous condition(s) described in Plaintiff's Complaint was/were open and obvious, and therefore Plaintiff cannot recover damages for the alleged accident.
>
> Thirteenth Affirmative Defense. The condition(s) and/or instrumentality that Plaintiff claims caused the incident alleged in the Complaint was/were not dangerous, defective, or improperly designed.
>
> Fifteenth Affirmative Defense. [Royal Caribbean] alleges that Plaintiff sustained no injuries or damages caused by the alleged incident. To the extent that Plaintiff sustained injuries or damages, they were caused either in whole or in part by her own acts of negligence, including but not limited to failure to

> exercise reasonable care for her own safety, and any award should be reduced accordingly by the principles of comparative fault.

Defendant argues that if the Court finds that any of these affirmative defenses are more properly considered denials rather than affirmative defenses, the proper remedy is to treat them as mere denials and not to strike them. Defendant further argues that its Eleventh and Fifteenth affirmative defenses should not be stricken because they are valid affirmative defenses. [ECF No. 18, at 3–5].

As for the Second, Fifth, and Thirteenth affirmative defenses, the Court finds these are not affirmative defenses but, rather, are merely specific denials of elements of Plaintiff's failure to warn cause of action. Indeed, "[a] defense that simply points out a defect or lack of evidence in the plaintiff's case is not an affirmative defense." *McLendon*, 2021 WL 848945, at *3 (citing *Flav-O-Rich, Inc. v. Rawson Food Serv., Inc.*, 846 F.2d 1343, 1349 (11th Cir. 1988)). "In attempting to controvert an allegation in the complaint, a defendant occasionally may label his negative averment as an affirmative defense rather than as a specific denial." *Prescient*, 2007 WL 2412834, at *3 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice & Procedure* § 1269 (3d ed. 2004)). "When this occurs, the proper remedy is not [to] strike the claim, but rather to treat is as a specific denial." *Id.*; *see also Berry v. Diamond Resorts Mgmt., Inc.*, No. 09-22740, 2010 WL 11504802, at *1 (S.D. Fla. Oct. 4, 2010) ("Because it is apparently an element of a claim, this alleged affirmative defense will be treated as a denial of an element of the cause of action rather than as an affirmative defense."); *Grovenor House*, 2010 WL 3212066, *3 ("Where a defendant mislabels a denial as an affirmative defense, the proper remedy is not to strike the claim, but rather to treat it as a specific denial."). Accordingly, the undersigned finds that Defendant's Second, Fifth, and Thirteenth affirmative defenses are not proper affirmative defenses but are mere denials and that the

appropriate remedy is not to strike them but to treat these defenses as denials rather than affirmative defenses.

As for Defendant's Eleventh affirmative defense, an argument that an allegedly dangerous condition was open and obvious is a valid affirmative defense. *See generally Gray v. L.B. Foster Co.*, 761 F. App'x 871, 873 (11th Cir. 2019) ("An argument that a danger was open and obvious is an affirmative defense for which the invitor bears the burden of proof." (citation omitted)); *Johnson v. NCL (Bah.) Ltd.*, No. 16-21762, 2017 WL 1293770, at *4 (S.D. Fla. Feb. 3, 2017) ("A jury may find the danger of the wet floor was an open and obvious condition and choose to reduce or deny any claims of negligence against Norwegian consistent with Norwegian's first and second Affirmative Defenses."). Here, the undersigned finds that Defendant's Eleventh affirmative defense is a proper affirmative defense that provides sufficient notice to Plaintiff and, therefore, should not be stricken.

Defendant's Fifteenth affirmative defense asserts Plaintiff's comparative fault. This too is a valid affirmative defense. *See Birren*, 336 F.R.D. at 693 (noting that defendant's affirmative defense regarding plaintiff's comparative fault "is essentially a contributory or comparative negligence defense which is specifically enumerated in Rule 8(c)(1)") (cleaned up). Plaintiff, however, argues that this affirmative defense should be stricken as redundant or duplicative of Defendant's Third affirmative defense which states, "Plaintiff's damages were caused in whole or in part by Plaintiff's own negligence, and any award should be reduced accordingly or, in the alternative, dismissed altogether." [ECF No. 15, at 4]. Indeed, Defendant's Third affirmative defense, which Plaintiff does not challenge and, in fact, concedes is appropriate, clearly asserts a contributory or comparative negligence defense. [ECF No. 19, at 2]. Accordingly, the undersigned finds that Defendant's Third and Fifteenth affirmative defenses

are redundant because both are contributory negligence or comparative fault defenses. Therefore, the Fifteenth affirmative defense should be stricken on the grounds it is redundant.

B. ***Defendant's Fourth, Fourteenth, and Sixteenth Affirmative Defenses***

Plaintiff next argues the following affirmative defenses should be stricken because they assert the negligence of third parties and are not cognizable under maritime law:

> Fourth Affirmative Defense. Plaintiff's damages, if any, were caused either in whole or in part by the acts and/or omissions of third persons for whom Royal Caribbean is not responsible and that amount to a superseding cause that cuts off any causal connection between Royal Caribbean's alleged negligence and Plaintiff's injuries.
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> Fourteenth Affirmative Defense. To the extent that an actionable incident occurred, [Royal Caribbean] alleges that the alleged incident resulted from the unforeseeable acts of third parties, and/or the Plaintiff herself, and that these acts are the sole proximate cause of any loss, injury, or damage to Plaintiff, and therefore her claims are barred as a matter of law.
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> Sixteenth Affirmative Defense. [Royal Caribbean] alleges that Plaintiff's damages, if any, were caused either in whole or in part by the acts and/or omissions of Plaintiff and/or third persons whom [Royal Caribbean] did not control.

Defendant's Fourth affirmative defense asserts a superseding cause defense. This is a valid affirmative defense. *Wiegand v. Royal Caribbean Cruises Ltd.*, 473 F. Supp. 3d 1348, 1352 (S.D. Fla. 2020) ("Under general federal maritime law, a superseding cause defense, if successful, completely exculpates the defendant of any liability in the matter."). The Fourteenth and Sixteenth affirmative defenses provide fair notice of Defendant's intent to raise the issue of Plaintiff's comparative fault in different situations and are both valid affirmative defenses.[2]

[2] *See Lebron v. Royal Caribbean Cruises, Ltd.*, No. 16-24687, 2017 WL 7792720, at *8 (S.D. Fla. Aug. 18, 2017) (denying motion to strike affirmative defenses regarding comparative fault and reasoning: "[A]lthough both Affirmative Defenses refer to comparative culpability of the Plaintiff, each defense does, in fact, suggest a different scenario of relative culpability. Affirmative Defense One only asserts that the Plaintiff was the sole and proximate cause of

Therefore, the undersigned concludes that the striking of Defendant's Fourth, Fourteenth, and Sixteenth affirmative defenses is not warranted.

C. ***Defendant's Sixth Affirmative Defense***

Defendant's Sixth affirmative defense seeks a set-off of Plaintiff's recovery by the amounts received by Plaintiff for her medical care from collateral sources.[3] Plaintiff asserts this affirmative defense should be stricken pursuant to the Eleventh Circuit's decision in *Higgs v. Costa Crociere, S.P.A. Co.*, 969 F.3d 1295 (11th Cir. 2020), in which the appellate court held that "the appropriate measure of past medical expense damages in a maritime tort case is the amount determined to be reasonable by the jury upon its consideration of all relevant evidence, including the amount billed, the amount paid, and any expert testimony and other relevant evidence the parties may offer." *Id.* 1317.

Defendant acknowledges the *Higgs* decision and agrees that "it is not entitled to a dollar-for-dollar set off of amounts written off by Plaintiff's insurers." [ECF No. 18, at 6]. Defendant asserts, however, that its Sixth affirmative defense should not be stricken in its entirety because Defendant is entitled to challenge the reasonableness and amount of Plaintiff's medical expenses.

The Court finds that Defendant's Sixth affirmative defense is improper because, as written, it seeks "to circumvent the collateral source rule, which prohibits a tortfeasor from

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the injuries or damages, whereas the Sixteenth Affirmative Defense contemplates a lesser level of comparative fault by the Plaintiff for his damages. As such, although both affirmative defenses likely could have been sufficiently plead in one defense, the undersigned concludes that striking Affirmative Defense Sixteen is not warranted.").

[3] Specifically, the Sixth affirmative defense states: "Royal Caribbean is entitled to a set-off for any monies paid on behalf of Plaintiff for her medical care as well as any monies received from collateral sources." [ECF No. 15, at 5].

reducing its liability by any amount the plaintiff has received from other sources." *Najmyar v. Carnival Corp.*, No. 17-22448, 2017 WL 7796327, at *3 (S.D. Fla. Aug. 28, 2017). Courts often strike such defenses as clearly invalid as a matter of law. *Birren*, 336 F.R.D. at 696 (striking affirmative defense alleging defendant's purported entitlement to a set-off for any amounts paid by third parties as contrary to collateral source rule); *see also Hillenburg v. Carnival Corp.*, No. 16-22091, 2016 WL 5922756, at *1–2 (S.D. Fla. Sept. 21, 2016) (striking an affirmative defense contrary to the collateral source rule but noting, "[t]his result does not absolve [plaintiff] of her burden of demonstrating the reasonableness and necessity of her medical expenses. Nor does it preclude [defendant] from challenging the reasonableness and amount of medical expenses sought").

Here, Defendant has requested leave to amend its Sixth affirmative defense as to the portion addressing an entitlement to a set-off which is clearly contrary to *Higgs*. [ECF No. 18, at 7]. Therefore, the undersigned finds that Defendant's Sixth affirmative should be stricken without prejudice to replead.

D. ***Defendant's Eighth Affirmative Defense***

Defendant's Eighth affirmative defense provides:

> Royal Caribbean invokes and alleges the terms and conditions of the Cruise/Cruisetour Ticket Contract applicable to Plaintiff's passage aboard the subject cruise, and asserts that Plaintiff's action is subject to the limitations, terms and conditions contained therein. Royal Caribbean adopts and incorporates the entirety of the Cruise/Cruisetour Ticket Contract herein by reference.

Plaintiff argues this affirmative defense should be stricken because no part of Plaintiff's complaint sounds in contract. Defendant counters that numerous provisions of the ticket contract apply to Plaintiff's negligence claims. The undersigned disagrees. "Limitations of liability in cruise-ship tickets are not enforceable against negligence claims." *Iskandar v. Royal*

Caribbean Cruises, Ltd., No. 18-23812, 2018 WL 7463362, at *2 (S.D. Fla. Nov. 20, 2018) (citing *Johnson v. Royal Caribbean Cruises, Ltd.*, 449 F. App'x 846, 848 (11th Cir. 2011)). Indeed, although certain provisions, such as venue and forum selection clauses, are enforceable, "those provisions are irrelevant as to Defendant's liability and therefore cannot serve as affirmative defenses." *Id.*; *see also Barrios v. Carnival Corp.*, No. 19-20534, 2019 WL 1876792, at *2 (S.D. Fla. Apr. 26, 2019) (striking affirmative defense asserting ticket contract provisions as irrelevant because "those contractual terms have no bearing on the central question of liability, and instead are, at their essence, procedural devices merely laying the ground rules for the location and timing of a negligence claim"). Accordingly, Defendant's Eighth affirmative defense should be stricken with prejudice.

E. ***Defendant's Ninth and Twelfth Affirmative Defenses***

Plaintiff also challenged Defendant's Ninth and Twelfth Affirmative Defenses (failure to mitigate damages and pre-existing condition) in the Motion, but in her Reply, Plaintiff agreed to withdraw her objections to these defenses without prejudice to reassert those objections later in the litigation. Accordingly, the undersigned finds that Defendant's Ninth and Twelfth affirmative defenses should not be stricken.

IV. CONCLUSION

Accordingly, the undersigned recommends that this Court grant in part and deny in part Plaintiff's Motion to Strike Affirmative Defenses.

RECOMMENDATION

Based on the foregoing, the undersigned hereby RESPECTFULLY RECOMMENDS that Plaintiff's Motion to Strike Affirmative Defenses [ECF No. 17] be **GRANTED IN PART and DENIED IN PART** as follows:

1. **DENIED** as to the Fourth, Ninth, Eleventh, Twelfth, Fourteenth, and Sixteenth affirmative defenses;
2. **DENIED** as to the Second, Fifth, and Thirteenth affirmative defenses, but these affirmative defenses should be **TREATED AS DENIALS**;
3. **GRANTED** as to the Sixth affirmative defense, and this affirmative defense should be **STRICKEN WITHOUT PREJUDICE** to replead; and
4. **GRANTED** as to the Eighth and Fifteenth affirmative defenses, and these affirmative defenses should be **STRICKEN WITH PREJUDICE**.

The parties will have fourteen (14) days from the date of receipt of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Marcia G. Cooke, United States District Court Judge. Failure to file objections timely shall bar the parties from a *de novo* determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in the Report except upon grounds of plain error if necessary in the interest of justice. *See* 28 U.S.C § 636(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY SUBMITTED in Chambers at Miami, Florida this 11th day of February 2022.

MELISSA DAMIAN
UNITED STATES MAGISTRATE JUDGE