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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

ROBERT ARCHER; et al.,

Plaintiffs,

v.

CARNIVAL CORPORATION; CARNIVAL PLC and PRINCESS CRUISE LINES LTD.,

Defendants.

Case No. 2:20-cv-04203-RGK

CLASS ACTION

Hon. R. Gary Klausner

PLAINTIFFS' RESPONSE IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS OR STRIKE THE THIRD AMENDED COMPLAINT

Date: November 16, 2020

Time: 9:00 a.m.

Courtroom: 850

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Plaintiff Robert Archer *et al.* ("Plaintiffs") submit this Response in Opposition to Defendants' Motion to Dismiss and Strike the Third Amended Complaint ("TAC").

I. INTRODUCTION

The federal pleading system is one of "notice pleading" rather than "fact pleading." *See Edwards v. Marin Park, Inc*., 356 F.3d 1058, 1062 (9th Cir. 2004). Therefore, the Federal Rules require pleadings be sufficient to give defendants fair notice of (1) plaintiff's claims, (2) the grounds upon which the claims rest, and (3) a plausible right to recovery. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Plaintiffs' TAC satisfies this standard. Plaintiffs have clearly put Defendants on notice of the claims against them and the grounds upon which the claims rest, and they have demonstrated a plausible right to recovery for each claim.

Defendants, however, demand more than fair notice. They insist that Plaintiffs must allege numerous, specific facts to prove their case at the pleadings stage. For example, Defendants argue that Plaintiffs cannot adequately allege causation unless they allege that Plaintiffs tested positive for COVID-19. This argument is not supported by the scientific research on COVID-19 or by the Federal Rules. Because of the unavailability and unreliability of COVID-19 diagnostic tests during the relevant time, many passengers likely contracted the virus without receiving a positive test. Recognizing this reality, the CDC established a set of clinical, epidemiological, and laboratory criteria for identifying "probable cases" of COVID-19. *See* TAC ¶¶ 171-180. All of the Plaintiffs who allege that they contracted COVID-19 allege that they either tested positive for COVID-19 soon after disembarking from the *Grand Princess* or that they met the CDC's definition of a probable case while still aboard the *Grand Princess* or soon after disembarking.[1] Ultimately, the question of whether a particular Plaintiff contracted

[1] A redline version of the TAC, showing the differences between the TAC and the Second Amended Complaint, is attached as Exhibit 1.

COVID-19 aboard the *Grand Princess* will require expert medical testimony and should be decided by the jury. At the pleadings stage, all that is required is that Plaintiffs plausibly allege that they were injured as a direct and proximate result of Defendants' negligence. They have done so.

Similarly, Defendants demand that Plaintiffs plead more facts to support their alter ego allegations, without the benefit of any discovery, and simply ignore the multiple plausible, factual alter ego allegations in the TAC. For example, Plaintiffs detail how Carnival stepped into Princess's shoes in a federal criminal case resulting in the largest criminal penalty ever involving deliberate vessel pollution. TAC ¶ 74. Carnival signed the plea agreement, despite not being a named defendant in the case, and agreed to fund and implement an Environmental Compliance Plan ("ECP") across all of its brands, not just Princess. *Id.* ¶ 76. Indeed, when Carnival and Princess later admitted to violating probation for failing to implement the ECP, Carnival's CEO issued a statement stating that he "personally accepts management responsibility for the probation violations …." *Id.* ¶ 78. This is hardly the behavior of a remote parent company toward its subsidiary. Instead, it supports Plaintiffs' allegations that Carnival totally dominated the operational conduct of Princess. These allegations, plus the allegations that Defendants share the same board of directors and almost all of the same executive officers, *id.* ¶ 73(a); that Defendants commingle assets, *id.* ¶ 73(b); that Carnival determines the compensation of Princess executives, *id.* ¶ 73(e); and that Carnival promulgates the safety policy for Princess and promised to ensure Princess's compliance with it, *id.* ¶ 73(f), constitute plausible allegations that Carnival and Princess acted as alter egos of each other.

Defendants also argue that Plaintiffs have failed to adequately allege that they have standing to seek injunctive relief because "they have not alleged facts establishing the likelihood that they will be sailing during a pandemic." Doc. 89-1 at 2. Multiple Plaintiffs allege that they "have booked and intend to take" various

Princess cruises in 2021. TAC ¶¶ 277-284. For example, while they were onboard the *Grand Princess*, Plaintiffs Robert Archer, Marlene Archer, Michael Giusti, Pamela Giusti, Jacqueline Graham, Robert Graham, and Vaerie Willsea "booked and intend to take a Princess cruise to Australia and New Zealand in February 2021." *Id.* ¶ 277. These are more than "some day" intentions; these are allegations of concrete plans that support a finding of actual or imminent injury required to establish standing for injunctive relief.

Finally, Defendants renew two arguments that the Court deferred deciding in its ruling on Defendants' prior motions to dismiss. First, Defendants dispute the myriad factual allegations in the TAC that they had actual or constructive knowledge of the risk of an outbreak of COVID-19 on the *Grand Princess* by essentially asking "how could we have known?" This is a question for the jury, not for the Court at the pleadings stage. Plaintiffs plausibly allege that Defendants knew or should have known of the risks to Plaintiffs. At the time Defendants loaded up Plaintiffs on the *Grand Princess*, Defendants knew that one passenger on the immediate prior voyage of the *Grand Princess* was suffering from symptoms of COVID-19 and that dozens of passengers and over 1,000 crew members who had been exposed to—and were likely carrying—the virus remained onboard from that voyage to continue to Hawaii. *Id.* ¶ 143. Defendants were also already dealing with an outbreak of the virus on another of their ships, the *Diamond Princess*, in which two passengers had died and ultimately 700 passengers and crew were infected. TAC ¶ 120-121. They knew that the World Health Organization (WHO) and the U.S. Department of Health and Human Services had weeks before declared COVID-19 a global health emergency and that the European Union and the CDC had issued specific cruise industry guidelines to prevent the spread of the virus aboard cruise ships. *Id.* ¶¶ 96-97, 118-119. And Defendants knew that, unlike land-based businesses, the particular conditions on cruise ships—confined public spaces with thousands of passengers and shared, frequently-touched surfaces, limited air

flow and low ventilation—make the ships uniquely dangerous for the spread of viruses like COVID-19. *Id.* ¶¶ 135-141.

Second, Defendants argue that punitive damages are not available under federal maritime law. This is simply incorrect. Punitive damages are available under maritime law "where defendant's conduct is outrageous, owing to gross negligence, willful, wonton, and reckless indifference to the rights of others." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 493 (2008) (internal citations and quotations omitted). Plaintiffs have plausibly alleged outrageous conduct by Defendants. Defendants' motion should be denied.

II. ARGUMENT

A. Plaintiffs Have Adequately Alleged That Defendants' Negligence Caused Them Damage.

Defendants argue that Plaintiffs cannot adequately allege causation unless they allege that they tested positive for COVID-19. Though Defendants base their argument on the Court's ruling partially dismissing Plaintiffs' Second Amended Complaint, *Archer v. Carnival Corp.*, 2:20-cv-04203-RGK-SK, slip. op. at 8 (C.D. Cal. Sept. 22, 2020), Plaintiffs respectfully submit that the argument is not supported by the scientific research on COVID-19 or by the Federal Rules.

At the motion to dismiss stage in a maritime negligence case, "it is enough if one can reasonably infer actual and proximate causation for plaintiff's injuries from Defendant's alleged negligence." *Marabella v. NCL (Bahamas), Ltd.*, 437 F. Supp. 3d 1221, 1229 (S.D. Fla. 2020) (citation omitted). Here, all of the Plaintiffs who allege that they contracted COVID-19 allege that: (1) they were not exhibiting symptoms of COVID-19 nor had they been exposed to anyone exhibiting symptoms of COVID-19 prior to boarding the *Grand Princess*; (2) they attended events and activities where they were in close proximity to numerous other passengers and crew members while aboard the *Grand Princess*, where Plaintiffs allege there was sustained, ongoing community transmission of COVID-19 due to

Defendants' negligence; and (3) they either tested positive for COVID-19 soon after disembarking from the *Grand Princess* or that they met the CDC's definition of a probable case of COVID-19 while still aboard the *Grand Princess* or soon after disembarking. TAC ¶¶ 182-271. These allegations are sufficient to "allow[] the court to draw the reasonable inference" that Defendants' negligence caused the alleged harm. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Defendants criticize Plaintiffs' use of the CDC probable case definition, noting that the guidance itself states that it is not a diagnostic tool. Doc. 89-1 at 7. This is a red herring. Plaintiffs are not healthcare providers attempting to diagnose a patient to determine the proper course of treatment, nor do the rules require such expert testimony at the pleadings stage. The CDC's probable case definition provides a set of uniform criteria for determining whether it is *probable* that an individual has or had COVID-19, even in the absence of a positive test result.[2] Public health authorities, governmental agencies, and private health systems make life and death decisions impacting millions of Americans using probable case data[3]; to use it also as one potential threshold guideline in the context of plaintiffs seeking redress in a court is comparatively a modest use of the concept. The Plaintiffs who alleged that they contracted COVID-19 aboard the *Grand Princess* all met the

[2] Centers for Diease Control and Prevention, Coronovirus Disease 2019 (COVID-19) 2020 Interim Case Definition (April 5, 2020), *available at* https://bit.ly/3144ige.

[3] Establishing uniform case definitions, such as the definition of a "probable case" of COVID-19, is critical for the effective functioining of the U.S. public health system, because it "necessary to provide consistent case identification and classification, measure the potential burden of illness, characterize the epidemiology of medically attended and moderate to severe COVID-19 in the United States, detect community transmission, and inform public health response to clusters of illness and efficacy of population based non-pharmaceutical interventions on the epidemic." Council of State and Territorial Epidemiologists, Standardized surveillance case definition and national notification for 2019 novel coronavirus disease, *available at* https://bit.ly/ 3dYGejU.

CDC's probable case criteria, and Defendants do not argue otherwise. This is sufficient to state a claim at the intitial pleadings stage.

As to those Plaintiffs who do not allege that they experienced symptoms of COVID-19 and seek to recover solely for emotional distress, Defendants argue that the Supreme Court's decision in *Metro-North Commuter R. Co. v. Buckley*, 521 U.S. 424, 427 (1997), as interpreted by this Court in *Weissberger v. Princess Cruise Lines, Ltd.*, No. 2:20-CV-02328-RGK-SK, 2020 WL 3977938 (C.D. Cal. July 14, 2020), precludes recovery. Respectfully, Plaintiffs contend that *Metro-North* did not address the central question at bar and does support dismissal at the pleadings stage.

A plaintiff seeking to recover for the negligent infliction of emotional distress must satisfy the "zone of danger" test set forth in *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532 (1994). *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033, 1035 (9th Cir. 2010). This test limits recovery for emotional injury to two categories of plaintiffs: "plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or those who are placed in immediate risk of physical harm by that conduct." *Gottshall*, 512 U.S. at 547-48. In *Metro-North*, the Court only addressed the first prong of the zone of danger test. There, a federal worker was exposed to asbestos for about one hour per day. After two years on the job, he attended an "asbestos awareness" class and became afraid that he would develop cancer in the future. He brought a claim for negligent infliction of emotional distress based on his fear of developing cancer. The "critical question" before the Court was whether the plaintiff's exposure to asbestos amounted to a "physical impact" under the first prong of the zone of danger test. 521 U.S. at 429. The Court held that physical impact does not include exposure "to a substance that poses some future risk of disease and which contact causes emotional distress only because the worker learns that he may become ill *after a substantial period of*

time." *Id*. at 432 (emphasis added). The Court did not address the second prong of the zone of danger test.

Here, Plaintiffs allege claims under the second prong of the zone of danger test, which was not at issue in *Metro-North* (and consequently not addressed in *Weissberger)*. Plaintiffs allege that Defendants exposed them to COVID-19 and placed them at "actual risk of immediate physical injury." TAC ¶ 271. The governmental response to the outbreak of COVID-19 on the *Grand Princess* supports their allegations. When the *Grand Princess* was returning from Hawaii, the State of California refused to allow it into port in San Francisco, forcing the vessel to anchor off the coast for five days. *Id.* ¶ 163. When the ship was finally allowed to sail into San Francisco Bay, escorted by the U.S. Coast Guard, and dock at the Port of Oakland, it was met by ambulances and medical personnel in biohazard suits. A CDC employee in full hazmat gear went through the ship knocking on cabin doors asking passengers if they had symptoms of COVID-19. *Id.* ¶ 166. Once passengers were allowed to disembark the following day, they were taken under guard to various military bases for further quarantine in a secure facility. *Id.* ¶ 167. One need not look beyond this response by federal and state authorities to conclude that the entire *Grand Princess* was plausibly a zone of danger and all passengers were at immediate risk of contracting COVID-19.

Allowing Plaintiffs who do not exhibit symptoms of COVID-19 to recover under the second prong of the zone of danger test is not "sneak[ing] in through the back door what the Court [in *Metro-North*] expressly forbade from coming in through the front." *Weissberger*, 2020 WL 3977938, at *4. *Metro-North* does not stand for the broad holding that "a plaintiff must allege either that they contracted the disease or that they exhibit symptoms of it." *Id.* This is an unsupported extension of *Metro-North* that impermissibly writes the second prong of the *Gottshall*'s zone of danger test out of the law.

Plaintiffs here allege that Defendants' conduct placed them at risk of contracting COVID-19, not "after a substantial period of time," but immediately. As a result, they allege that they suffered emotional distress. This is all that is required at the pleadings stage. *See, e.g.*, *Stacy*, 609 F.3d at 1035 ("Stacy alleged that he was within the zone of danger and that he suffered emotional distress from the fright caused by the negligent action of the defendants. Nothing more was required to assert a cause of action cognizable under maritime law.").

As to the public policy concerns about unlimited liability expressed in *Weissberger*, it is true that "[t]he risk of exposing individuals to COVID-19 is not unique to cruise ships." *Weissberger*, 2020 WL 3977938, at *4. Cruise ships, however, are "a unique mode of transportation. Cruise ships are self-contained floating communities." *Deck v. Am. Hawaii Cruises, Inc.*, 51 F. Supp. 2d 1057, 1061 (D. Haw. 1999). Unlike restaurants, bars, and other similar shore-side businesses, these self-contained floating communities "create a particular risk of viral outbreak," TAC ¶ 311; *see also id.* ¶ 128 (quoting the article co-authored by Defendants' Chief Medical Officer Dr. Tarling that cruise ships are "a potential source for introduction of novel or antigenetically drifted influenza strains" and that cruise ship characteristics, such as "close quarters and prolonged contact among travelers on ships . . . increase the risk of communicable disease transmission."). Given this increased risk of contracting communicable diseases unique to cruise ships and well-known to Defendants, cruise ship owners/operators owe passengers an enhanced duty of care unlike most ordinary shore-side businesses. *Schoenfeldt v. Schoenfeldt*, No. C13-5468 RJB, 2014 WL 1910808, at *3 (W.D. Wash. May 13, 2014) ("The degree of care that is reasonable increases in tandem with an increased risk that is unique to maritime travel.").

This increased duty of care for cruise ships undermines Defendants' argument that allowing Plaintiffs' claims to proceed would "risk opening the floodgates for claims against every business owner, university, and even state and federal

governments because they may have exposed individuals and allegedly failed to implement sufficient safety measures." Doc. 89-1 at 5 n. 1. Rather than leading to a flood of trivial lawsuits, allowing Plaintiffs to proceed under the second prong of the zone of danger test would incentivize cruise ship owners/operators to fulfill their increased duty to take reasonable steps to protect their passengers from COVID-19. Given Defendants' alarming record of deadly outbreaks of COVID-19 aboard their cruise ships, this is a far more pressing public policy concern. But, leaving aside whether plaintiffs in hypothetical other lawsuits can make viable legal claims against potential defendants in other contexts, the narrow question before the Court is whether the *Archer* Plaintiffs have satisfied the notice pleading standard set forth in Rule 12. They have.

B. Plaintiffs Have Adequately Pleaded Claims Against Carnival.

Plaintiffs have plausibly alleged that Carnival and Princess acted as alter egos of each other such that their separate corporate forms should be disregarded. To avail themselves of the alter ego doctrine, Plaintiffs must establish that "the controlling corporate entity exercise[s] total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own and functions solely to achieve the purposes of the dominant corporation." *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 859 (9th Cir. 1986) (internal quotation marks omitted).

In dismissing Plaintiffs' Second Amended Complaint (SAC), the Court held that "Plaintiffs' allegations do not suggest anything beyond a typical parent-subsidiary relationship." *Archer*, No. 2:20-cv-04203-RGK-SK, slip. op. at 7. The Court allowed Plaintiffs to file an amended complaint plausibly alleging Carnival's alter ego status. In response, Plaintiffs filed the TAC, which included, in addition to the allegations in the SAC, the following new allegations that support Carnival's total domination of Princess:

- In 2016, Princess pleaded guilty to federal felony charges stemming from its illegal dumping of waste into the seas and intentional acts to cover it up, agreeing to pay a $40 million penalty—the largest criminal penalty ever involving vessel pollution. Though Carnival was not a defendant in the action, Carnival signed the plea agreement and bound itself to its terms. TAC ¶¶ 74, 76.
- In 2019, the U.S. sought to revoke Princess's probation. At the revocation hearing, the court required members of Carnival's Board of Directors (including the CEO and Chairman) be present. *Id.* ¶ 77. Carnival admitted to violating probation and agreed to issue a statement that Carnival's CEO "personally accepts management responsibility for the probation violations …." The settlement agreement was signed "on behalf of Defendant" by three members of the "Executive Committees of the Boards of Directors of Carnival Corporation and Carnival plc," but no representative of Princess. *Id.* ¶ 78.
- Prior to the government investigation that led to the plea agreement, Carnival had "undertaken steps to strengthen and enhance its oversight and compliance structure" by, for example, creating the position of Chief Maritime Officer, placing "the responsibility for overall environmental, safety, and security compliance in one individual," *id.* ¶ 75, by promulgating Health, Environmental, Safety, and Security (HESS) policies for Princess, and by promising to the federal government that it would ensure Princess's compliance with the HESS policy. *Id.* ¶ 73(f).
- In 2019, Carnival announced that it was creating a new Chief Ethics and Compliance Officer "to further develop our ethics and compliance program across the entire corporation" and to "shape and implement the program initiatives in each of the operating companies." *Id.* ¶ 79.
- In March 2020, Carnival announced that it was implementing a temporary pause of Princess cruises as a result of the COVID-19 pandemic. To address

the costs of this pause, the CEO of Carnival stated: "I've directed our brand leaders to reduce or eliminate non-critical cash expenditures, but of course never cutting anything that would impact compliant, environmentally sound and safe operations." *Id.* ¶ 80.

- In September 2020, Carnival announced that it was selling two Princess cruise ships. Princess announced that the sale of the ships "is in line with parent company Carnival Corporation's plan to accelerate the removal of less efficient ships from its fleet." *Id.* ¶ 81.
- Carnival determines the bonuses paid to Princess executives through its Management Incentive Plan. *Id.* ¶ 73(e).

These allegations show that Carnival exercised such total domination over Princess —from determining the compensation of Princess executives to deciding which assets Princess sells to promulgating and ensuring compliance with Carnival's health and safety policies aboard Princess cruises—that Carnival even took responsibility for Princess's criminal violations and Carnival's CEO took "personal responsibility" for Princess's probation violations. This is hardly the behavior of a typical parent company toward its subsidiary. Plaintiffs have plausibly alleged that Carnival and Princess acted as alter egos of each other such that their separate corporate forms should be disregarded,[4] just as they appear to have been in the federal criminal case.

Moreover, Plaintiffs added allegations to the TAC that plausibly allege that Carnival undertook an independent duty of care to Plaintiffs. The Restatement (Second) of Torts § 324A (1965) provides:

[4] If the Court determines that Plaintiffs have not alleged sufficient facts to establish alter ego liability, the Court should not dismiss Carnival but instead should allow Plaintiffs to take discovery on the interrelationship and control among the companies. *See Hay v. Seadream Yacht Club Ltd. Corp.*, No. 14-21454-CIV, 2014 WL 11961970 (S.D. Fla. July 29, 2014) (holding that dismissing a complaint where the relationship between defendants "remains ambiguous, a dismissing [the corporate parent] . . . without allowing Plaintiff to take discovery would be premature").

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

Here, Plaintiffs allege that Carnival undertook to render services for Princess which it should have recognized as necessary for the protection of Princess's passengers, namely, the development, implementation, and enforcement of safety policies. Contrary to Defendants' argument, courts have routinely held that an entity that undertakes to develop and implement safety policies for another party for the benefit of a third party owes a duty to that third party. *See, e.g.*, *Haines v. Get Air Tucson Inc.*, No. CV1500002TUCRMEJM, 2018 WL 5118640 (D. Ariz. Oct. 22, 2018) (citing Restatement (Second) of Torts § 324A) (holding that a company that undertook to develop safety rules for a second company owed a duty of care to the second company's customers); *Onsager v. Frontera Produce Ltd.*, No. CV 13-66-BU-DWM-JCL, 2014 WL 3828374 (D. Mont. Aug. 4, 2014) (citing Restatement (Second) of Torts § 324A) (holding that a company contracted to perform a food safety audit by a second company owed a duty of care to the second company's customers); *Rountree v. Ching Feng Blinds Indus. Co.*, 393 F. Supp. 2d 942 (D. Alaska 2005) (holding that a trade association whose functions included promulgating safety standards for the industry owed a duty of care to consumers). Moreover, the question of whether a party undertook to render services that imposed a duty is a question of fact that should not be resolved on a motion to dismiss. *See, e.g., Olson v. United States,* 306 F. App'x 360 (9th Cir. 2008)

(holding that whether an undertaking to render services imposed a duty to third parties is a factual inquiry).

Here, Plaintiffs allege that Carnival undertook an independent duty to develop, promulgate, and enforce adequate safety standards and procedures aboard the *Grand Princess*. Plaintiffs allege that (1) Carnival promulgated HESS policies for Princess and stated publicly that it would ensure Princess's compliance with its HESS policy, TAC ¶ 73(f); (2) Carnival placed overall responsibility for ensuring Princess's compliance with Carnival's HESS policy in Carnival's own Chief Maritime Officer, *id.* ¶ 75; and (3) Carnival "monitor[ed] and supervis[ed]" safety requirements for Princess. *Id.* Moreover, Carnival claims for itself all of Princess's purported rights, exemptions from liability, defenses and immunities included in Princess's Passage Contract, despite not being a signatory to that contract. *Id.* ¶ 73(d). These allegations are sufficient to state a plausible claim that Carnival had an independent duty of care to Plaintiffs.

Finally, Plaintiffs allege that Princess was an apparent agent of Carnival, such that Carnival owed a duty of care to Princess's passengers. TAC ¶ 131-134. "[A]pparent authority to do an act is created as to a third person by written or spoken words or any other conduct of the principal which, reasonably interpreted, causes the third person to believe that the principal consents to have the act done on his behalf by the person purporting to act for him." Restatement (Second) of Agency § 27. Not only did Carnival prominently display the Princess name and logo on its website and state that Carnival would ensure Princess's compliance with Carnival's HESS policy, TAC ¶¶ 131-134, but it publicly accepted responsibility for Princess's criminal violations and for ensuring the implementation of the ECP by Princess. *Id.* ¶¶ 74-79. This conduct by Carnival could have caused a reasonable person to believe that Princess was an agent of Carnival.

In the TAC, Plaintiffs have plausibly alleged three separate grounds for Carnival's duty to plaintiffs: that Princess was an alter ego of Carnival; that

Carnival undertook an independent duty of care to Plaintiffs; and that Princess was Carnival's apparent agency. Plaintiffs' negligence claims against Carnival should not be dismissed.

C. Plaintiffs Have Standing to Seek Injunctive Relief.

The Court previously dismissed Plaintiffs' request for injunctive relief without prejudice, holding that Plaintiff "ha[d] not adequately alleged that the threat of *future injury* is imminent." *Archer*, No. 2:20-cv-04203, slip op. at 10 (citing *Lujan v. Defs. Of Wildlife*, 504 U.S. 555, 560 (1992)). In the TAC, Plaintiffs have adequately alleged the threat of a future injury to establish standing to seek injunctive relief.

Defendants argue that Plaintiffs have failed to satisfy this requirement because they do not allege that they are "certain" to take future Princess cruises. But such certainty is not required to establish standing to seek injunctive relief. In *Davidson v. Kimberly-Clark Corp.*, 889 F.3d 956, 971 (9th Cir. 2018), the Ninth Circuit held that a consumer's "inability to rely on the validity of the information advertised" constituted a concrete harm sufficient to establish standing to seek injunctive relief. *See* also, *e.g.*, *Milan v. Clif Bar & Co.*, No. 18-CV-02354-JD, 2020 WL 5760450 (N.D. Cal. Sept. 28, 2020) (plaintiffs' "express allegations that they would buy Clif products again if the company were honest in its health and wellness claims" were sufficient to establish standing to seek injunctive relief). There, the court set forth two examples of when that harm would arise. First, the court explained that a plaintiff may show a threat of future harm because they plausibly allege that they "will be unable to rely on the product's advertising or labeling in the future, and so will not purchase the product although [they] would like to." *Davidson*, 889 F.3d at 969-70. Second, in some cases, the threat of future injury will arise because a plaintiff can plausibly allege that they "might purchase the product in the future, despite the fact that it was once marred by false advertising or labeling, as [they] may reasonably, but incorrectly, assume the

product was improved." *Id*. at 970. In either instance, the threat of future injury arises when a plaintiff's inability to rely on advertising is combined with a desire or intent to purchase the product again. Thus, the plaintiff would face "the similar injury of being unable to rely on [defendant's] representations of its product in deciding whether or not she should purchase the product in the future." *Id*. at 971-72.

Plaintiffs have standing to seek injunctive relief, including under *Davidson*, because thirteen of them—Robert and Marlene Archer, Michael and Pamela Giusti, Robert and Jacqueline Graham, Valerie Willsea, Suzanne Suwanda, Katherine Hinton, Allen and Patricia McFadden, and Gary and Shannon Pilgram—alleged that they have already "booked and intend to take" various Princess cruises in 2021. TAC ¶¶ 277-284. These are more than the kind of "some day" intentions of which the Court disapproved in its ruling on the previous motions to dismiss; these are allegations of concrete plans. Given these concrete plans to take Princess cruises again, the threat of future injury to Plaintiffs arises from their inability to rely on Defendants' representations of the safety of such cruises. Plaintiffs allege that, prior to taking the subject cruise on the *Grand Princess*, Defendants held themselves out as being committed to ensuring the health and safety of their passengers. TAC ¶ 126. Specifically, Defendants described their "commitment to: Protecting the health, safety and security of our passengers, guests, employees and all others working on our behalf, thereby promoting an organization that always strives to be free of injuries, illness and loss . . . [and] assigning health, environment, safety, security (HESS) and sustainability matters the same priority as other critical business matters." *Id.* Despite these assurances, Defendants loaded passengers on a ship they knew was infested with a potentially-lethal virus without warning them of the risks of contracting and spreading the virus, without providing appropriate personal protective equipment ("PPE"), and without taking other effective measures to prevent the spread of the virus. Given their past experiences on the *Grand*

Princess, Plaintiffs are understandably unsure if they can rely on Defendants' assurances about the safety of their cruise ships in the future. TAC ¶¶ 212-217.

Defendants also argue that Plaintiffs' allegations are still insufficient because "any threat of injury these Plaintiffs face is entirely conjectural." Doc. 89-1 at 14. Defendants argue that the TAC "nowhere alleges that COVID-19 will remain a pandemic at the time of these future cruises, that a vaccine or therapeutic treatment will not be available, or that the additional policies which Princess will enact before resuming cruising would fail to prevent them from contracting the virus." *Id.* But right now, COVID-19 remains a pandemic, there is no vaccine or therapeutic treatment for the virus, and Defendants have not enacted any "additional policies" to prevent passengers from contracting the virus. It is Defendants' arguments, not Plaintiffs' allegations, that are "entirely conjectural."

D. Plaintiffs Have Adequately Pleaded That Defendants Had Actual or Constructive Knowledge of the Risk of a COVID-19 Outbreak Aboard the *Grand Princess*.

1. Defendants Owed a Duty of Care to Plaintiffs.

An operator of a vessel in navigable waters owes its passengers "a duty of reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959). "The degree of care considered reasonable in a particular circumstance depends upon the 'extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger.'" *Samuels v. Holland America Line–USA Inc.*, 656 F.3d 948, 953 (9th Cir. 2011) **(**quoting *Rainey v. Paquet Cruises, Inc*.,709 F.2d 169, 172 (2d Cir. 1983). Where the condition leading to the plaintiff's claim is one that is commonly encountered and not unique to the maritime context, a carrier must have "'actual or constructive notice of the risk-creating condition' before it can be held liable." *Id.* (quoting *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989). By contrast, a heightened degree of care is required where the risk-creating condition is peculiar to the

maritime context. *See Catalina Cruises v. Luna*, 137 F.3d 1422, 1425–26 (9th Cir. 1998) (concluding that "where the risk is great because of high seas, an increased amount of care and precaution is reasonable"); *Kirk v. Holland American Line*, 616 F.Supp.2d 1101, 1105 (W.D. Wash. 2007) (declining to conclude that risks associated with disembarkation are not unique to cruises); *Kearns v. Celebrity Cruises, Inc.*, 1997 WL 729108, at *2 (S.D.N.Y. 1997) (holding that "given the rough weather attending plaintiff's injury, [the defendant cruise line] owed an enhanced duty of care to its passengers"). "The degree of care that is reasonable increases in tandem with an increased risk that is unique to maritime travel." *Schoenfeldt*, 2014 WL 1910808, at *3 (citing *Galentine v. Holland America Line-Westours, Inc.*, 333 F. Supp. 2d 991, 995-96 (W.D. Wash. 2004)).

Cruise ships create a particular risk of viral outbreak that increases their duty of care to passengers. According to an article co-authored by Defendants' Chief Medical Officer, Dr. Grant Tarling, cruise ships "represent a potential source for introduction of novel or antigenetically drifted influenza strains" and that cruise ship characteristics, such as "close quarters and prolonged contact among travelers on ships . . . increase the risk of communicable disease transmission." *Id.* ¶ 125. Thus, while the risk of exposing individuals to COVID-19 is not unique to cruise ships, the *increased risk* of exposing individuals to COVID-19 is unique to the maritime context. Thus, cruise ship owners' duty of care to passengers is increased in tandem with this increased risk and danger of communicable disease transmission on cruise ships. *Schoenfeldt*, 2014 WL 1910808, at *3.

E. Plaintiffs Have Adequately Pleaded That Defendants Knew or Should Have Known of the Risks of Setting Sail and of Failing to Take Reasonable Precautions to Protect Passengers from COVID-19.

Contrary to Defendants' argument, Plaintiffs' negligence claims are not based on a generalized theory of foreseeability. In addition to alleging that Defendants knew that the specific characteristics of cruise ships increase the risk of

communicable disease transmission, Plaintiffs allege that Defendants knew or should have known that COVID-19 specifically posed a risk to its cruise ship passengers before they allowed Plaintiffs to embark on the *Grand Princess* and set sail for Hawaii on February 21, 2020, and well before early March 2020 when Defendants finally began to take some belated measures to contain the spread of the virus among passengers on the *Grand Princess*. Specifically, the TAC alleges that Defendants knew or should have known all of the following before February 21, 2020:

- On January 30, 2020, the WHO declared COVID-19 a "Public Health Emergency of International Concern," which WHO defines as "an extraordinary event which is determined to constitute a public health risk to other States through the international spread of disease and to potentially require a coordinated international response." TAC ¶ 96.
- On January 31, 2020, HHS declared COVID-19 a public health emergency for "the entire United States." *Id.* ¶ 97.
- On February 3, 2020, the European Union issued specific guidelines for the cruise industry on responding to the COVID-19 global health emergency. *Id.*¶ 112. Specifically, the guidelines advised that, in the event of a COVID-19 case, "close contacts" of the individuals believed to have COVID-19 should be quarantined in their cabin or on shore, and "casual contacts" should be disembarked from the ship. *Id.* ¶ 118.
- On February 12, 2020, the CDC issued guidance for ships on managing COVID-19 noting that commercial shipping, including cruise ships, "involves the movement of large numbers of people in closed and semi-closed settings. Like other close-contact environments, ships may facilitate transmission of respiratory viruses from person to person through exposure to respiratory droplets or contact with contaminated surfaces." The guidance recommended "[i]dentifying and isolating passengers and crew with possible symptoms of

COVID-19 as soon as possible" and that "[p]assengers and crew members who have had high-risk exposures to a person suspected of having COVID-19 should be quarantined in their cabins." *Id.* ¶ 119.

- In early February 2020, an outbreak of COVID-19 occurred aboard the cruise ship *Diamond Princess*, which is owned and/or operated by Defendants. *Id.* ¶ 120. At least two people died as a result of COVID-19 outbreak on the *Diamond Princess* prior to February 19, 2020 and ultimately more than 700 passengers and crew contracted COVID. *Id.*
- In a February 18, 2020, advisory issued by the CDC in response to the outbreak aboard the *Diamond Princess*, the CDC stated that "the rate of new reports of positives [now] on board, especially among those without symptoms, highlights the high burden of infection on the ship and potential for ongoing risk." *Id.*¶ 122.
- On or around February 19, 2020, Defendants became aware of at least one passenger onboard the *Grand Princess* Mexico trip who was suffering from COVID-19 symptoms. *Id.*¶ 132.

Together, these allegations, accepted as true and construed in the light most favorable to the Plaintiffs, establish that Defendants had actual or constructive knowledge of a risk-creating condition at the time the Grand Princess set sail on February 21, 2020.

Defendants' arguments to the contrary take one of two forms. Defendants argue either (1) Plaintiffs have failed to allege specific facts to show Defendants' actual or constructive knowledge of the risks of COVID-19, or (2) Plaintiffs' allegations are wrong. Both forms of argument are unavailing here. As to the first, Defendants claim that the TAC contains no allegations that Defendants knew or should have known "that community transmission (especially among asymptomatic persons) was taking place" or "that an outbreak of COVID-19, specifically, would be difficult to contain." Doc. 89-1 at 18. Plaintiffs specifically allege, however, that

Defendants were already dealing with a deadly uncontained outbreak of COVID-19 aboard the *Diamond Princess*. TAC ¶ 120. Moreover, on February 18, 2020, the CDC issued a statement about the COVID-19 outbreak on the *Diamond Princess* stating that "the rate of new reports of positives [now] on board, *especially among those without symptoms*, highlights the high burden of infection on the ship and *potential for ongoing risk*." *Id.* ¶ 122 (emphasis added). The same allegations undermine Defendants' argument that the TAC "fails to allege facts establishing . . . what knowledge [Defendants] should have had as a result of the quarantine of" the *Diamond Princess* and the *Ruby Princess.* Doc. 62-1 at 9. Defendants should have known, at least, "that community transmission (especially among asymptomatic persons) was taking place" and "that an outbreak of COVID-19, specifically, would be difficult to contain" based on their experience dealing with the outbreak on the *Diamond Princess* and the CDC's response.

Similarly, Defendants ignore the numerous allegations in the TAC regarding their knowledge of COVID-19 and claim that "the TAC contains no allegation that Carnival knew or should have known . . . that pre-boarding measures designed to screen exposed passengers might not be sufficient." Doc. 89-1 at 18. But the TAC alleges that "[d]espite their knowledge regarding COVID-19, Defendants had no effective passenger medical screening methods in place at the time of boarding. . . . Plaintiffs and other passengers were not asked to check their temperatures, and were not subject to any medical screening upon boarding the ship other than a questionnaire that asked if they had felt ill or recently traveled to China." TAC ¶ 152. The allegations, in the context of a TAC replete with allegations about Defendants' actual or constructive knowledge of the risk of COVID-19, are more than sufficient to put Defendants on notice of the grounds of Plaintiffs' claims and establish a plausible right to recovery.

Defendants' second form of argument is that Plaintiffs' allegations are wrong, because "how could we have known?" Defendants selectively quote a statement

from the TAC that the *Grand Princess* sailed "in the early days of the pandemic, before the general public and treating physicians became more informed." Doc. 89-1 at 8, 18, 20 (quoting TAC ¶ 108). But that statement concerns knowledge about the symptomology of COVID-19,[5] not Defendants' or anyone else's knowledge of the risk of an outbreak aboard a cruise ship.

Defendants further argue that Plaintiffs are alleging that Defendants "had (or should have had) more knowledge about COVID-19 than states and the federal government, but provide no foundation for that charge." Doc. 62-1 at 9. At the time the *Grand Princess* set sail on February 21, however, the WHO had already declared COVID-19 a "Public Health Emergency of International Concern," TAC ¶ 96; the U.S. Secretary for Health and Human Services ("HHS") declared COVID-19 a public health emergency, *id.* ¶ 97; the European Union and the CDC had already issued guidelines for the cruise industry on responding to the COVID-19 global health emergency, *id.*¶¶ 118, 119; and Defendants were already dealing with a COVID-19 outbreak aboard the *Diamond Princess* where two passengers had already died of the virus. *Id.*¶¶ 120-122. Moreover, Defendants' actual knowledge of the specific risks that COVID-19 posed to its cruise ship passengers is evidenced by a video message posted by Defendants on FaceBook and YouTube on February 13, 2020, from Dr. Grant Tarling, Defendants' Chief Medical Officer, regarding the COVID-19 outbreak on the *Diamond Princess*. TAC ¶ 73(c). In the video, Dr. Tarling stated that Defendants were working with "public health experts from around the world," including the Japanese Ministry of Health, the CDC, the WHO, and the Red Cross, to deal with the outbreak on the *Diamond Princess*. Dr. Tarling stated "health authorities expected additional cases to be identified given the original case likely exposed others and their close contacts" and recommended that

[5] The full allegation is: "The multiple presentations of the disease made it difficult for a patient to immediately attribute their symptoms to COVID-19, especially in the early days of the pandemic, before the general public and treating physicians became more informed as to the myriad manifestations of the disease." TAC ¶ 108.

passengers "remain in your room until the quarantine has been lifted, and if leaving your room please wear your mask." [6] Also, limit close contact by maintaining a 6 feet or 2 meter distance away from others. The allegations in the TAC are more than sufficient to state a plausible claim that Defendants knew or should have known of the specific risk of COVID-19 to their cruise ship passengers, including Plaintiffs.

F. Plaintiffs Have Adequately Stated a Claim For Punitive Damages.

Whether a plaintiff can recover punitive damages under maritime law depends "on the particular claims involved." *The Dutra Grp. v. Batterton*, 139 S. Ct. 2275, 2278 (2019). The Court explained that, where there is no federal statute authorizing punitive damages, courts must determine "whether punitive damages have traditionally been awarded" for similar legal claims. *Id.* at 2283. Defendants argue that Plaintiffs cannot recover punitive damages because they are "aware of no binding precedent supporting the imposition [of punitive damages] in any case remotely similar to the one presented here." Doc. 89-1 at 21. First, *Batterton* does not require "binding precedent." It only requires that there be some "tradition" of awarding punitive damages for "the particular claims involved." 139 S. Ct. at 2278, 2283. Similarly, the question is not whether punitive damages have been awarded in a "similar case," but whether punitive damages have been awarded for similar legal claims. *See Birkenholz v. Princess Cruise Lines, Ltd.*, No. 2:20-cv-03167-DSF-JC (C.D. Cal. Aug. 21, 2020), slip op. at 10.

Plaintiffs bring claims for gross negligence and the intentional infliction of emotional distress. Numerous maritime cases have recognized the availability of punitive damages in such cases "where defendant's conduct is outrageous, owing to gross negligence, willful, wonton, and reckless indifference to the rights of others." *Exxon Shipping Co.*, 554 U.S. at 493; *see, e.g.*, *id.* at 476, 490, 515 (affirming an award of punitive damages to plaintiffs against a tanker that caused an oil spill);

[6] The Facebook video cited in the TAC is available at https://bit.ly/2J5ggjr.

Churchill v. F/V Fjord, 892 F.2d 763, 772 (9th Cir. 1988) (declining to award punitive damages on the merits, but noting that "[p]unitive damages are available under general maritime law and may be imposed for conduct which shows manifest recklessness or callous disregard for the rights of others or for conduct which shows gross negligence…."); *Noon v. Carnival Corp.*, No. 18-23181-CIV, 2019 WL 3886517, at *13 (S.D. Fla. Aug. 12, 2019) ("[T]he Supreme Court has repeatedly recognized that punitive damages are available for traditional negligence claims that arise in the maritime context"). Indeed, in *Birkenholz*, a case involving the COVID-19 outbreak aboard Defendants' *Ruby Princess* cruise ship, Judge Fischer denied Princess's motion to strike plaintiffs' punitive damages request, noting that punitive damages have been awarded in cases where a defendant's conduct is "outrageous" or "deplorable." Slip. Op. at 10. Plaintiffs have plausibly alleged outrageous and deplorable conduct by Defendants. Thus, their punitive damages claims are not foreclosed by law.

III. CONCLUSION

The TAC satisfies Rule 8(a). It contains 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the ...claim is and the grounds upon which it rests.'" *Twombly*, 550 U.S. at 555. It puts Defendants on clear notice of the claims against them, the factual and legal grounds on which they are based, and plausible rights of recovery. Plaintiffs respectfully submit that Defendants' Motion to Dismiss should be denied.

Respectfully submitted,

Dated: October 26, 2020

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CERTIFICATE OF SERVICE

I, Elizabeth J. Cabraser, hereby certify that on October 26, 2020, I caused to be electronically filed Response in Opposition to Defendants' Motion to Dismiss or Strike the Third Amended Complaint with the Clerk of the United States District Court for the Central District of California using the CM/ECF system, which shall send electronic notification to all counsel of record.

/s/ Elizabeth J. Cabraser
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