

1 JONATHAN W. HUGHES (SBN: 186829)
jonathan.hughes@arnoldporter.com
2 ARNOLD & PORTER KAYE SCHOLER LLP
3 Three Embarcadero Center, 10th Floor
4 San Francisco, CA 94111
5 Telephone: (415) 471-3100
6 Facsimile: (415) 471-3400
Attorneys for Defendants CARNIVAL CORPORATION and CARNIVAL PLC

7 JEFFREY B. MALTZMAN (SBN: 131758)
jeffreym@maltzmanpartners.com
8 MALTZMAN & PARTNERS, P.A.
9 681 Encinitas Boulevard, Suite 315
10 Encinitas, CA 92024
11 Telephone: (760) 942-9880
12 Facsimile: (760) 942-9882
Attorneys for Defendant PRINCESS CRUISE LINES, LTD.
(additional counsel on signature page)

13
14 UNITED STATES DISTRICT COURT
15 CENTRAL DISTRICT OF CALIFORNIA

16 ROBERT ARCHER, et al.,
17
18 Plaintiffs,
19
20 v.
21 CARNIVAL CORPORATION, et al.,
22
23 Defendants.

Case No. 2:20-CV-04203-RGK-SK
Action Filed: April 8, 2020

**MEMORANDUM OF POINTS AND
AUTHORITIES IN SUPPORT OF
DEFENDANTS' MOTION TO
STRIKE JURY DEMAND**

Date: May 3, 2021
Time: 9:00 a.m.
Judge: Hon. R. Gary Klausner
Courtroom: 850

Magistrate: Hon. Steve Kim
Filed: April 5, 2021

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

INTRODUCTION

In maritime actions where there is no basis for federal jurisdiction other than admiralty, there is no right to a jury trial. Rather, a right to a jury trial only attaches if there is an independent, non-admiralty basis for federal jurisdiction.

These established principles foreclose Plaintiffs from demanding a jury trial. There is no dispute that there is admiralty jurisdiction over Plaintiffs’ claims— Plaintiffs all allege injuries arising from the same *Grand Princess* cruise. But Plaintiffs and Defendants are not completely diverse, so there is not federal jurisdiction under 28 U.S.C. § 1332. The only other possible basis for federal jurisdiction, minimal diversity under the Class Action Fairness Act of 2005 (CAFA), 28 U.S.C. § 1332(d), does not apply because Plaintiffs contractually waived their right to bring or participate in any class actions. The jurisdictional consequence of Plaintiffs’ class action waivers, which this Court has held are binding, is that they never properly invoked CAFA’s minimal diversity jurisdiction in the first place. Because admiralty is the only basis for federal jurisdiction, Plaintiffs are not entitled to a jury trial and the Court should strike their demand for a jury trial under Federal Rules of Civil Procedure 9(h) and 39(a)(2).

BACKGROUND

Plaintiffs are 62 of the approximately 2,000 cruise ship passengers who sailed on the *Grand Princess* when it departed San Francisco for Hawaii on February 21, 2020. Before embarking on the *Grand Princess*, each Plaintiff accepted the terms of Princess’s Passage Contract as part of the cruise booking process. (Order Denying Class Cert., ECF No. 92, at 6-8 (Oct. 20, 2020).) That Contract contained a waiver stating that Plaintiffs agreed not to litigate any cases against Princess or its corporate affiliates as a class action:

1 WAIVER OF CLASS ACTION: THIS PASSAGE CONTRACT
2 PROVIDES FOR THE EXCLUSIVE RESOLUTION OF DISPUTES
3 THROUGH INDIVIDUAL LEGAL ACTION ON YOUR OWN
4 BEHALF INSTEAD OF THROUGH ANY CLASS OR
5 REPRESENTATIVE ACTION. EVEN IF THE APPLICABLE LAW
6 PROVIDES OTHERWISE, YOU AGREE THAT ANY
7 ARBITRATION OR LAWSUIT AGAINST CARRIER
8 WHATSOEVER SHALL BE LITIGATED BY YOU
9 INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR
10 AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND
11 YOU EXPRESSLY AGREE TO WAIVE ANY LAW ENTITLING
12 YOU TO PARTICIPATE IN A CLASS ACTION.

13 (ECF No. 92 at 8 (quoting Passage Contract § 15).)

14 Despite this waiver, Plaintiffs filed this putative class action on April 8, 2020.
15 After several amendments, Plaintiffs on August 31 filed a motion for class
16 certification. They then filed a Third Amended Complaint, which contains a jury
17 demand (*see* ECF No. 84 at 1, 81), and remains the operative pleading.

18 On October 20, 2020, this Court denied class certification. (ECF No. 92.)
19 The Court based its denial of certification solely on Plaintiffs’ contractual agreement
20 not to litigate claims on a class-wide basis. (*Id.* at 12.) The Court explained that this
21 case could not proceed as a class action “because Plaintiffs entered into a passage
22 contract ... which includes a class-action waiver.” (*Id.* at 5.) Applying the Ninth
23 Circuit’s standards governing ticket contracts, this Court held that the Passage
24 Contract and its class-action waiver were valid and enforceable because the
25 contract’s terms were reasonably communicated to Plaintiffs, fundamentally fair,
26 not unconscionable, and consistent with public policy. (*Id.* at 8-12.)

27 Plaintiffs filed a petition for permission to appeal this Court’s denial of class
28 certification under Federal Rule of Civil Procedure 23(f). *See* Pet., No. 20-80152
(9th Cir. Nov. 3, 2020). Plaintiffs argued that this Court’s decision warranted
immediate interlocutory review because class-action waivers are categorically
unenforceable. In particular, Plaintiffs contended that “[t]he Federal Rules of Civil

1 Procedure, including Rule 23, apply to all civil cases pending in federal court, with
2 no exception for private agreements providing otherwise.” *Id.* at 15. Defendants
3 responded that, under binding precedent, a class-action waiver is no more than “an
4 agreement not to bring suit as a class action,” and that nothing in the Federal Rules
5 restricted private parties from voluntarily “agree[ing] prospectively that they will
6 not bring class claims.” Defs.’ Answer, No. 20-80152, Dkt. 10, at 18-19. The Ninth
7 Circuit denied interlocutory review on February 17, 2021. Order, No. 20-80152,
8 Dkt. 20.

9 LEGAL STANDARD

10 Federal Rule of Civil Procedure 39(a) provides for a trial by jury when one is
11 demanded, “unless...the court, on motion or on its own, finds that on some or all of
12 those issues there is no federal right to a jury trial.” When a court concludes that
13 there is no federal right to a jury trial, it will strike the jury demand. *See, e.g., Keller*
14 *v. Golden Corral Franchising Sys.*, No. 07-CV-03143-RGK-AJW, 2010 WL
15 11519571, at *1 (C.D. Cal. Mar. 19, 2010) (Klausner, J.); *Voisine v. Odebrecht*
16 *Constr., Inc.*, 2011 WL 5085095, at *1-2 (E.D. La. 2011); *Nat’l Union Fire Ins. Co.*
17 *of Pittsburgh, P.A. v. Vinardell Power Sys., Inc.*, 2019 WL 1440383, at *4 (S.D. Fla.
18 Apr. 1, 2019). “[A] defendant may move to strike a jury demand at any time.”
19 *Ackner v. PNC Bank, Nat’l Ass’n*, 2017 WL 7355329, at *2 (S.D. Fla. Dec. 22,
20 2017).

21 ARGUMENT

22 **I. There Is No Right to A Jury Trial In Cases For Which The Only Basis** 23 **For Federal Jurisdiction Is Admiralty Jurisdiction**

24 There is no right to a jury trial for claims brought exclusively under federal
25 admiralty jurisdiction. *See Ghotra by Ghotra v. Bandila Shipping, Inc.*, 113 F.3d
26 1050, 1056 (9th Cir. 1997); *Craig v. Atl. Richfield Co.*, 19 F.3d 472, 475 (9th Cir.
27 1994); Fed. R. Civ. P. 38(e). Admiralty cases are not “suits at common law” and
28 thus the Seventh Amendment does not apply to such cases. *See Ghotra*, 113 F.3d at

1 1056 & n.4. Even if a plaintiff does not expressly invoke admiralty jurisdiction in
2 his complaint, the Federal Rules of Civil Procedure expressly provide that a case is
3 considered an admiralty case—meaning, among other things, that there is no right to
4 a jury trial—if it is “cognizable only in the admiralty or maritime jurisdiction.” Fed.
5 R. Civ. P. 9(h)(1).

6 These principles have a clear-cut meaning for whether maritime cases can be
7 tried to a jury. If the parties are not completely diverse, and there is no other
8 colorable basis for federal jurisdiction, then the case is “cognizable only in the
9 admiralty or maritime jurisdiction,” *id.*, and there is no right to a jury trial, even if
10 the complaint cites diversity as a basis for jurisdiction or demands a jury. *See, e.g.,*
11 *Barry v. Shell Oil Co., Arctia Offshore, Ltd.*, 175 F. Supp. 3d 1147, 1151-52 (D.
12 Alaska 2016).

13 By contrast, both the plaintiff and defendant have a right to demand a jury
14 trial “where a federal court has an independent basis of jurisdiction over cases
15 involving admiralty claims, ... so long as the suit is one that could traditionally have
16 been brought ‘at common law.’” *Craig*, 19 F.3d at 476. For example, if “[d]iversity
17 jurisdiction exist[s] and [is] asserted,” and the plaintiff demands a jury trial in his
18 complaint, then the case can be tried by a jury, even if there is also admiralty
19 jurisdiction. *Ghotra*, 113 F.3d at 1055-56.

20 **II. Plaintiffs Have Not Properly Invoked Any Non-Admiralty Basis For**
21 **Federal Jurisdiction Over This Case**

22 There is only one proper basis for federal jurisdiction in this case—admiralty
23 jurisdiction under 28 U.S.C. § 1333(1). Because Plaintiffs do not have any non-
24 admiralty basis for federal jurisdiction, they are not entitled to demand a jury trial.

25 **A. Plaintiffs Have Not Properly Invoked Diversity Jurisdiction**

26 *First*, Plaintiffs have not (and cannot) invoke diversity jurisdiction under 28
27 U.S.C. § 1332(a) because there is not “complete diversity between the parties”—*i.e.*,
28 each defendant is not “a citizen of a different state from each plaintiff.” *In re*

1 *Digimarc Corp. Derivative Litigation*, 549 F.3d 1223, 1234 (9th Cir. 2008). Nearly
2 50 of the named plaintiffs claim to be California residents and one Defendant,
3 Princess Cruise Lines Ltd., maintains its principal place of business in California.
4 (*See* ECF No. 84 ¶¶ 1-11, 18-23, 26-30, 32-33, 37-60, 65.) Because complete
5 diversity is a strict requirement for diversity jurisdiction under § 1332(a), courts
6 have properly held that in cases where there is no non-admiralty basis for federal
7 jurisdiction and complete diversity is lacking, no plaintiff can demand a jury trial,
8 regardless of that individual plaintiff’s citizenship. *See Barry*, 175 F. Supp. 3d at
9 1152. Diversity jurisdiction is not “an independent basis of jurisdiction” here. *Craig*,
10 19 F.3d at 475.

11 **B. Plaintiffs Have Not Properly Invoked Jurisdiction Under the Class**
12 **Action Fairness Act**

13 Plaintiffs’ attempt to invoke jurisdiction under the Class Action Fairness Act
14 of 2005 (CAFA) (*see* ECF No. 84 ¶ 85) does not create an independent basis for
15 jurisdiction that gives Plaintiffs a right to a jury trial.

16 This Court properly held that Plaintiffs prospectively waived their right to file
17 a class action and therefore denied their motion for class certification. Specifically,
18 this Court held that this case could not proceed as a class action “because Plaintiffs
19 entered into a passage contract ... which includes a class-action waiver.” (ECF No.
20 92 at 5.) That waiver provided in relevant part that “even if the applicable law
21 provides otherwise, you agree that any arbitration or lawsuit against carrier
22 whatsoever *shall be litigated by you individually and not as a member of any class*
23 *or as part of a class or representative action.*” (*Id.* at 8 (capitalization altered).) This
24 Court held the waiver was valid and enforceable under the Ninth Circuit’s standards
25 governing ticket contracts. (*Id.* at 8-12.) And despite Plaintiffs’ attempted
26 interlocutory appeal, the Ninth Circuit declined to review that ruling. Order, No. 20-
27 80152, Dkt. 20 (9th Cir. Feb. 17, 2021).

28

1 Plaintiffs’ pre-filing contractual agreement to waive proceeding or
2 participating in a class action means that they never had a basis to invoke
3 jurisdiction under CAFA in the first place. While it is true that courts retain CAFA
4 jurisdiction following the denial of class certification, that is true only where
5 “jurisdiction was properly invoked as of the time of filing.” *United Steel, Paper &*
6 *Forestry, Rubber, Mfg., Energy, Allied Indus. & Serv. Workers Int’l Union v. Shell*
7 *Oil Co.*, 602 F.3d 1087, 1091-92 (9th Cir. 2010); *see also, e.g., Cunningham*
8 *Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 807 (7th Cir. 2010) (no continued
9 jurisdiction “if after the case is filed it is discovered that there was no jurisdiction at
10 the outset” (citation omitted)). Even assuming that CAFA jurisdiction can support a
11 jury-trial right, Plaintiffs’ agreement before embarking on the *Grand Princess* to
12 forgo bringing or participating in a class action—in a contract referenced in the
13 operative complaint (ECF No. 84 ¶¶ 73(d), 90, 93)—means that CAFA jurisdiction
14 was never “properly invoked” and admiralty was always the only proper basis for
15 federal jurisdiction. *United Steel*, 602 F.3d at 1092.

16 That conclusion accords with the Ninth Circuit’s conception of class waivers.
17 Waivers are not just a reason to deny class certification; they are “a promise to forgo
18 a procedural right to pursue class claims”—in other words, an “agreement *not to*
19 *pursue class litigation.*” *Laver v. Credit Suisse Secs. (USA), LLC*, 976 F.3d 841,
20 846-47 (9th Cir. 2020) (emphasis added); *see also Shady Grove Orthopedic Ass’n,*
21 *P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 400 (2010) (“The discretion suggested by
22 Rule 23’s ‘may’ is discretion residing in the plaintiff: He may bring his claim in a
23 class action if he wishes.”); *Am. Exp. Co. v. Italian Colors Restaurant*, 570 U.S.
24 228, 234 (2013) (rejecting that Rule 23 creates a substantive “entitlement to class
25 proceedings”).

26 Holding that CAFA provides no support for a jury right also accords with the
27 principle that federal jurisdiction is unavailable when the plaintiff has entered a
28 binding stipulation agreeing to facts that preclude federal jurisdiction. *See St. Paul*

1 *Mercury Indemnity Co. v. Red Cab Co.*, 303 U.S. 283, 294 (1938) (“If [a plaintiff]
2 does not desire to try his case in the federal court he may resort to the expedient of
3 suing for less than the jurisdictional amount, and though he would be justly entitled
4 to more, the defendant cannot remove.”). For example, as this Court recently
5 concluded, when a plaintiff stipulates that he seeks to recover less than \$75,000, the
6 defendant cannot establish diversity jurisdiction under § 1332(a). *See Martinez v.*
7 *Johnson & Johnson Cons. Inc.*, 471 F. Supp. 3d 1003, 1009-10 (C.D. Cal. 2020); *cf.*
8 *Standard Fire Ins. Co. v. Knowles*, 568 U.S. 588, 595 (2013) (different where
9 stipulation not binding). Agreeing to a binding class waiver, which promises not to
10 pursue class-based litigation, is no different. The waiver is effectively a stipulation
11 the parties agreed to in advance of litigation and carries the same jurisdictional
12 consequences—no party can establish federal jurisdiction that is contrary to the
13 stipulation or class waiver.

14 Moreover, the concerns that cause courts to retain jurisdiction over class
15 actions after they deny class certification do not apply to this case. When courts
16 sustain CAFA jurisdiction over putative class actions notwithstanding denial of
17 certification, they do so primarily to avoid “jurisdictional ping-pong”—where the
18 case is filed in federal court, class issues are litigated, and certification denied, only
19 to have the case sent to state court for renewed litigation under state class-action
20 standards. *Ramirez v. C&J Well Serv., Inc.*, No. 20-CV-535-PSG-SS, 2020 WL
21 6802021, at *4 (C.D. Cal. Nov. 19, 2020) (citing *United Steel*, 602 F.3d at 1091-92).
22 But courts in this district have held that when these “ping-ponging” concerns do *not*
23 apply—for example, when a plaintiff “has agreed to voluntarily dismiss his class
24 claims based on [a class-action] waiver”—then there is no reason that the federal
25 court should maintain exercise of CAFA jurisdiction over the case. *Id.*; *see also*
26 *Nevarez v. Costco Wholesale Corp.*, No. 19-CV-03454-SVW-SK, 2020 WL
27 1139810, at *1 (C.D. Cal. Mar. 9, 2020) (“Although the precise limits of the holding
28 of *United Steel* have been subject to much debate in the district courts, the fact that

1 all class-wide claims have been completely dismissed render the ‘jurisdictional
2 ping-pong’ concerns raised by the Ninth Circuit irrelevant here.”).

3 Here, there is no plausible concern about “jurisdictional ping-pong.” No
4 matter whether CAFA was properly invoked, this Court retains admiralty
5 jurisdiction over this case. And because there is admiralty jurisdiction over this case,
6 there is no possibility that this case could properly be filed in state court: The
7 Passage Contract that this Court has held binding and enforceable requires that all
8 personal-injury suits be filed in federal court so long as there is federal jurisdiction,
9 and cases improperly filed in state court are removable to federal court. *See Maa v.*
10 *Carnival Corp. & PLC*, No. 20-CV-6341-DSF-SK, 2020 WL 5633425, at *6-7
11 (C.D. Cal. Sept. 21, 2020) (enforcing Passage Contract to deny plaintiffs’ motion to
12 remand). The only question is whether plaintiffs, in a case that was filed and will
13 remain in federal court, can bootstrap CAFA to invoke a right to a jury trial they
14 would otherwise lack.

15 Allowing Plaintiffs here to demand a jury trial notwithstanding their
16 agreement to waive class claims and this Court’s enforcement of the waiver would
17 lead to absurd and arbitrary results. If this case were *not* filed as a class action, there
18 would be no colorable basis for allowing plaintiffs to demand a jury trial—the case
19 lacks complete diversity, and admiralty jurisdiction is all that remains. That is the
20 situation for a host of COVID-19-related cases filed against the Carnival entities and
21 Princess by plaintiffs who, consistent with the class-action waiver, filed their claims
22 as individual actions. Plaintiffs in these cases lacking complete diversity cannot
23 have a jury trial. There is no conceivable reason to treat those individuals differently
24 from these Plaintiffs when it comes to their jury rights. If these Plaintiffs
25 nonetheless get to demand a jury trial, it not only rewards these plaintiffs for
26 ignoring the class waiver, but incentivizes future plaintiffs to do the same. In this
27 case and future ones, even if certification is promptly denied under the class waiver,
28 the mere styling of the case as a class action would allow non-diverse plaintiffs to

1 manufacture a right to a jury trial. This problem is not hypothetical: Despite this
2 Court’s denial of class certification, parties have continued to file putative class
3 actions against the Carnival entities and Princess in connection with voyages on the
4 *Grand Princess*, invoking CAFA and demanding a jury trial even though there is not
5 complete diversity. *See Compl., Leuenhagen v. Carnival Corp.*, No. 21-cv-1187-
6 RGK-SK (C.D. Cal. Feb. 9, 2021).

7 Because the sole proper basis for federal jurisdiction over this case is
8 admiralty jurisdiction under 28 U.S.C. § 1333, Plaintiffs have no right to demand a
9 jury trial. *See Craig*, 19 F.3d at 476. This Court accordingly should strike Plaintiffs’
10 demand for a jury trial. Fed. R. Civ. P. 39(a)(2).

11 **CONCLUSION**

12 For the foregoing reasons, the Court should strike Plaintiffs’ jury demand.

13 DATED: April 5, 2021

ARNOLD & PORTER KAYE SCHOLER LLP

14 By: s/ Jonathan W. Hughes

15 Jonathan W. Hughes

16 Angel Tang Nakamura (SBN: 205396)

17 angel.nakamura@arnoldporter.com

ARNOLD & PORTER KAYE SCHOLER LLP

18 777 South Figueroa Street, 44th Floor

Los Angeles, CA 90017

19 Telephone: (213) 243-4000

20 Facsimile: (213) 243-5999

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

David J. Weiner (SBN: 219753)
david.weiner@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
601 Massachusetts Ave., NW
Washington, D.C. 20001
Telephone: (202) 942-5000
Facsimile: (202) 942-5999

Andrew Johnson (SBN: 322069)
andrew.johnson@arnoldporter.com
ARNOLD & PORTER KAYE SCHOLER LLP
Three Embarcadero Center, 10th Floor
San Francisco, CA 94111
Telephone: (415) 471-3100
Facsimile: (415) 471-3400

*Attorneys for Defendants
Carnival Corporation and Carnival plc*

MALTZMAN & PARTNERS

By: s/ Jeffrey B. Maltzman
Jeffrey B. Maltzman
Edgar R. Nield, (SBN: 135018)
Gabrielle De Stantis Nield (SBN: 110930)
Rafaela P. Castells (SBN: 290828)
681 Encinitas Blvd., Suite 315
Encinitas, CA 92024
Telephone: (760) 942-9880
Facsimile: (760) 942-9882
jeffreym@maltzmanpartners.com
edn@maltzmanpartners.com
gabn@maltzmanpartners.com
rafaelac@maltzmanpartners.com

*Attorneys for Defendant
Princess Cruise Lines, Ltd.*