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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

ROBERT ARCHER, et al.,

Plaintiffs,

v.

CARNIVAL CORPORATION, et al.,

Defendants.

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

DEFENDANTS' JOINT OPPOSITION TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION

Date: September 28, 2020
Time: 9:00 a.m.
Judge: Hon. R. Gary Klausner
Courtroom: 850

Magistrate: Hon. Steve Kim
Filed: September 4, 2020

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INTRODUCTION

If there is a personal-injury class action that can be certified under Rule 23(b)(3), it is not this case. Plaintiffs are 62 cruise-ship passengers who seek to hold Princess Cruise Lines, Carnival Corporation, and Carnival plc liable for failing to anticipate and prevent a coronavirus outbreak on a February 2020 voyage of the *Grand Princess* cruise ship. But virtually every aspect of Plaintiffs' claims—including injury, causation, and damages—turns on individualized factors that defy adjudication on a common basis and forecloses a finding of predominance. Plaintiffs' claimed injuries vary widely. The vast majority of Plaintiffs do not even allege that they contracted COVID-19. Many allege only common symptoms, from constipation to sore throats, that allegedly are "associated with" COVID-19. Most Plaintiffs make no allegations of any symptoms or infection and concede that they—like most potential class members—would seek only to recover on the discredited theory that they suffered emotional distress from fear of exposure to COVID-19. And for those individuals with a cognizable injury, they will still have to individually prove causation and damages. This is no simple feat. It requires proving that they contracted COVID-19 as a result of Defendants' conduct, as opposed to contracting it before boarding the vessel or while en route to or during the government-maintained quarantine.

Plaintiffs' motion does not grapple with any of these issues—it is a case study in why federal courts almost uniformly refuse to certify personal-injury class actions. Nor do Plaintiffs explain how their alternative requests for issue certification under Rule 23(c)(4) or joinder under Rule 42(b) will simplify matters when every Plaintiff and every class member will require an individualized mini-trial on whether they suffered any injury and whether Defendants were in fact the cause. But this Court need not even reach those questions. All 62 Plaintiffs agreed to a Passage Contract before boarding the *Grand Princess*, which expressly waived their rights to resolve disputes through a class action. That waiver forecloses class certification, full stop.

BACKGROUND

Plaintiffs are 62 of the more than 2,000 passengers who sailed on the *Grand Princess* when it departed San Francisco for Hawaii on February 21, 2020. (SAC 2-3).[1] Among the passengers were several dozen who had embarked on the *Grand Princess*'s previous trip to Mexico and remained on board for the Hawaii trip. (*Id.* ¶ 137). Some of those passengers had been potentially exposed to COVID-19. (*Id.* ¶ 142). On March 4, Princess informed passengers that they were potentially exposed to COVID-19 and that the *Grand Princess* would be returning to San Francisco instead of continuing to other scheduled destinations. (*Id.* ¶ 145). On March 5, all passengers were requested to remain isolated in their staterooms. (*Id.* ¶ 153). Plaintiffs allege that of the more than 2,000 people on board, there were "11 passengers and 10 crew members who were experiencing symptoms" during the voyage (*Id.* ¶ 152). The *Grand Princess* was allowed entry to California on March 9, at which point passengers disembarked. (*Id.* ¶ 154). Disembarkation was controlled by state and federal government entities. (Taylor Decl. ¶¶ 4-12). Those entities then transported passengers to military bases in 3 states where they were quarantined before being allowed to return to their homes. (*Id*. ¶¶ 9-12). Defendants played no role in deciding which passengers would be sent to each base and how, or in managing the quarantine itself. (*Id*. ¶ 12).

Plaintiffs' alleged injuries vary widely. Only 3 allege that they tested positive for COVID-19 and suffered more than *de minimis* symptoms of the disease. (SAC ¶¶ 173, 176, 191). Of the remaining Plaintiffs, the largest share do not allege that they contracted COVID-19 or had any symptoms, while 7 allegedly contracted COVID-19 but developed only *de minimis* symptoms, (SAC ¶¶ 169–72, 178–79, 198), and 21 suffered symptoms "associated with" COVID-19 but fail to allege they actually contracted the disease. (SAC ¶¶ 174–75, 177, 180–88, 190, 192, 194–97, 199, 200–01). There is, however, one fact common to every Plaintiff. All 62 Plaintiffs accepted the

[1] The CDC subsequently determined that community transmission of COVID-19 began in California in January 2020. (*See* Defs.' Request for Judicial Notice).

terms of a Passage Contract prior to boarding the *Grand Princess*, which expressly waived their rights to resolve any disputes through a class action. (Steinke Decl. ¶ 16).

LEGAL STANDARD

"The class action is 'an exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only.'" *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quoting *Califano v. Yamasaki*, 442 U.S. 682, 700-01 (1979)). Plaintiffs bear the burden to "affirmatively demonstrate" compliance with Rule 23 before proceeding as a class action. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (citation omitted). A district court must undertake "a rigorous analysis" of Rule 23's prerequisites. *Gen. Tel. Co. of the Sw. v. Falcon*, 457 U.S. 147, 161 (1982). This rigorous analysis goes far beyond applying a "mere pleading standard"; rather Rule 23 imposes "stringent requirements for certification that in practice exclude most claims." *Am. Express Co. v. Italian Colors Rest.*, 570 U.S. 228, 234 (2013).

ARGUMENT

I. Plaintiffs Waived Their Right to Certify a Class Action.

Plaintiffs' motion fails because they accepted a Passage Contract with a class-action waiver, which was both "reasonably communicated" and is "fundamentally fair." *Oltman v. Holland Am. Line, Inc.*, 538 F.3d 1271, 1276 (9th Cir. 2008).

A. The Passage Contract's class-action waiver was reasonably communicated.

The Ninth Circuit employs a two-pronged "reasonable communicativeness test" to "determine under federal common law and maritime law when the passenger of a common carrier is contractually bound by the fine print of a passenger ticket." *Oltman*, 538 F.3d at 1276. The Passage Contract satisfies both prongs.

1. "The first prong of the test focuses on the physical characteristics of the ticket and requires courts to assess features such as size of type, conspicuousness and clarity of notice on the face of the ticket, and the ease with which a passenger can read the provisions in question." *Id.* Plaintiffs' Passage Contracts clearly meet that standard.

Its first lines clearly, in all-capital letters and boldface type, emphasize the binding nature of its terms and direct the passengers' attention to the specific provision at issue here—the class-action waiver:

> **IMPORTANT NOTICE TO GUESTS: PLEASE CAREFULLY READ THE FOLLOWING PASSAGE CONTRACT TERMS THAT GOVERN ALL DEALING BETWEEN YOU AND CARRIER, AFFECT YOUR LEGAL RIGHTS AND ARE BINDING ON YOU … PARTICULARLY … SECTION 15 LIMITING YOUR RIGHT TO SUE … .**

(Steinke Decl. ¶ 12). Section 15 then provides, again in all-capital letters:

> WAIVER OF CLASS ACTION: THIS PASSAGE CONTRACT PROVIDES FOR THE EXCLUSIVE RESOLUTION OF DISPUTES THROUGH INDIVIDUAL LEGAL ACTION ON YOUR OWN BEHALF INSTEAD OF THROUGH ANY CLASS OR REPRESENTATIVE ACTION. EVEN IF THE APPLICABLE LAW PROVIDES OTHERWISE, YOU AGREE THAT ANY … LAWSUIT AGAINST CARRIER WHATSOEVER SHALL BE LITIGATED BY YOU INDIVIDUALLY AND NOT AS A MEMBER OF ANY CLASS OR AS PART OF A CLASS OR REPRESENTATIVE ACTION, AND YOU EXPRESSLY AGREE TO WAIVE ANY LAW ENTITLING YOU TO PARTICIPATE IN A CLASS ACTION.

(*Id.* ¶ 15 (capitalization altered)).[2]

The Ninth Circuit—along with numerous other courts—has held that virtually identical language in other cruise-ship passenger contracts satisfies the test's first prong. *See, e.g.*, *Oltman*, 538 F.3d at 1276; *Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir. 1992); *McIntosh v. Royal Caribbean Cruises, Ltd.*, 2018 WL 1732177, at *3 (S.D. Fla. Apr. 10, 2018); *DeLuca v. Royal Caribbean Cruises, Ltd.*, 244 F. Supp. 3d 1342, 1349 (S.D. Fla. 2017); *Lankford v. Carnival Corp.*, 2014 WL 11878384, at *4 (S.D. Fla. July 25, 2014). And at least one court in this district has held that a prior version of Princess's Passage Contract—which is virtually identical to the version at issue here—satisfied the first prong. *Loving v. Princess Cruise Lines,*

[2] The class action waiver also applies to Plaintiffs' claims against Carnival. The Passage Contract specifically provides that all affiliated companies of Princess are entitled to all of Princess's rights, exemptions from liability, defenses, and immunities. (Steinke Decl. ¶ 13). Where contract terms are intended to benefit non-signatories, those parties may claim the benefit of a class-action waiver. *See GemCap Lending I, LLC v. Pertl*, 2019 WL 6468580 (C.D. Cal. Aug. 9, 2019); *Santos v. Costa Cruise Lines, Inc.*, 91 F. Supp. 3d 372, 379 (E.D.N.Y. 2015).

Ltd., 2009 WL 7236419, at *3-4 (C.D. Cal. Mar. 5, 2009).[3]

2. "The second prong requires [courts] to evaluate the circumstances surrounding the passenger's purchase and subsequent retention of the ticket/contract," including "the passenger's familiarity with the ticket, the time and incentive under the circumstances to study the provisions of the ticket, and any other notice that the passenger received outside of the ticket." *Oltman*, 538 F.3d at 1276.

Plaintiffs had ample opportunity to study the provisions of the Passage Contract, including the class-action waiver. As part of booking their cruise, all Plaintiffs provided Princess with their contact information and promptly received a "Booking Confirmation Email." (Steinke Decl. ¶¶ 3, 16). The Booking Confirmation Email contains an attached .pdf document which states:

> **IMPORTANT NOTICE** … Upon booking the Cruise, each Passenger explicitly agrees to the terms of the Passage Contract (http://www.princess.com/legal/passage_contract/). Please read all sections carefully as they affect the passenger's legal rights.

(*Id.* ¶ 4). It further directs the passenger to manage their booking online, at which point they are presented the full text of the passage contract and again prompted to both read and accept the Passage Contract. (*Id.* ¶¶ 6-10). At this stage, passengers can read the Passage Contract online (including magnifying it on their screen), and they can print out a copy. They then must both affirmatively click a box accepting the terms of the Passage Contract on behalf of the listed passenger AND must click "PROCEED" to enter their acceptance. Significantly, Plaintiffs all accepted the terms

[3] Plaintiffs do not contest in their certification motion that the class-action waiver was sufficiently conspicuous and clear. But in their opposition to Defendants' motions to dismiss, Plaintiffs argue that "the 'face of the ticket' does not include the Passage Contract," and that the Passage Contract was instead "buried" in the Booking Confirmation E-Mail. (Opp. 5). That is irrelevant. The terms of a passenger ticket contract need not be included on "the face of the ticket" itself to be reasonably communicated. In *Oltman*, the Ninth Circuit held that the terms of a passenger ticket contract were reasonably communicated when they were included in the back of a travel booklet that passengers received at the time of departure. 538 F.3d at 1276. The manner in which the Passage Contract was communicated to passengers here was entirely consistent with *Oltman*, and Plaintiffs cannot contend otherwise. Moreover, Plaintiffs do not dispute that the language of the waiver is sufficiently clear.

of the Passage Contract *at least 2 months* before boarding the vessel. (*Id.* ¶ 16).

Citing declarations from just 10 named Plaintiffs, Plaintiffs assert that "the Passage Contract was *not* made available to passengers for review prior to purchasing tickets for the cruise." (Pls.' Mem. ISO Mot. Class Cert. ("Mem.") at 9).[4] But that is not required. The Ninth Circuit held that the second prong is satisfied even where the passengers received the contract only *at the time of departure* and "may not have read the terms and conditions before departing." *Id.* at 1276-77. *Loving* likewise held that Princess's Passage Contract satisfied the second prong where it "was mailed to Plaintiffs … approximately three weeks prior to embarkation." *Loving*, 2009 WL 7236419, at *4. Other courts, too, have held that cruise-ship passengers had ample opportunity to read the terms under similar circumstances. *McIntosh*, 2018 WL 1732177, at *3; *DeLuca*, 244 F. Supp. 3d at 1349; *Lankford*, 2014 WL 11878384, at *4. This case is no different. All Plaintiffs received and accepted the terms of the Passage Contract at least two months before departure (Steinke Decl. ¶ 16), and most had sailed previously and received similar or identical passage contracts before which also contained the class action waiver. (Steinke Supp. Decl. ¶ 2). Plaintiffs had ample opportunity to review and understand its terms.

B. Enforcement of the class-action waiver would not be unfair.

Class-action waivers are also reviewed for "fundamental fairness." *Oltman*, 538 F.3d at 1277 (quoting *Carnival Cruise Lines v. Shute*, 499 U.S. 585, 595 (1991)). This inquiry turns on "whether the clause was included because of a 'bad-faith

[4] Each of the 10 declarants in support of Plaintiffs' motion also state: "[I]f we canceled the cruise, we would have lost a significant portion of the money we already paid for the cruise." *E.g.*, Graham Decl., Ex. 10 to Pls.' Mot. for Class Cert., ¶ 13. That is simply false. At the time they booked their cruises and were sent the Passage Contract, nine of the ten declarants could have canceled their tickets and received a full refund. (*See* Steinke Decl. ¶ 16; *id.*, Ex. C at 10 (detailing refund policy)). Only one declarant, Raul Panglilinan, would have received less than a full refund (but still half of his money back). (*See ibid.*). Moreover, *all ten* declarants had booked and sailed on prior Princess cruises—including Mr. Panglilinan, who had booked and sailed on *thirty-six* prior Princess cruises—all of which were subject to a materially similar or identical Passage Contract. (Steinke Suppl. Decl. ¶ 2). Any differences among Plaintiffs in this regard counsels against certification.

motive,'" "whether the clause was 'a means of discouraging cruise passengers from pursuing legitimate claims," and whether the cruise line obtained the passenger's agreement "by fraud or overreaching." *Id.* (quoting *Shute*, 499 U.S. at 595).

The SAC references the Passage Contract repeatedly but does not allege any bad-faith motive or that Princess obtained Plaintiffs' accession to the agreement through fraud or overreaching. (SAC ¶¶ 85, 88, 218). Nor can it be said that a class-action waiver discourages passengers from pursuing legitimate claims. Class-action waivers are common in the cruise-ship industry and beyond. And both the U.S. Supreme Court and the Ninth Circuit have affirmed that class-action waivers are enforceable. *See AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Carter v. Rent-A-Center, Inc.*, 718 Fed. Appx. 502, 504 (9th Cir. 2017) ("foreclosing any argument that a class action waiver, by itself, is unconscionable under state law … solely because it contains a class action waiver"). That more than 130 plaintiffs have filed lawsuits against Princess relating to COVID-19 claims shows that a class-action waiver does not discourage such claims. *See, e.g.*, *Weissberger v. Princess Cruise Lines, Ltd*, Nos. 20-cv-2328 *et al.*, 2020 WL 3977938 (C.D. Cal. July 14, 2020).

Plaintiffs assert without any authority or citation—other than to Rule 1 of the Federal Rules of Civil Procedure—that the Passage Contract "is unconscionable, contrary to public policy, and unenforceable" because it "violates Rule 1's duty of cooperation by purporting to foreclose or constrain the court's case management discretion." (Mem. 9 & n.1). They cite no authority for that sweeping argument because there is none. Every day, federal courts enforce waivers of far greater consequence—waivers that not only "constrain [a] court's case management discretion" but implicate constitutional rights, such as the right to a trial *at all*. Rule 1 does nothing to negate Plaintiffs' agreement to the Passage Contract's class-action waiver.[5]

[5] Plaintiffs elsewhere argue that the waiver is unconscionable under California law. (Pls.' Opp. to Carnival Mot. Dismiss ("Opp."), ECF No. 72, at 6). This argument fails. First, the Passage Contract's choice of law provision states that maritime law applies. (Steinke Decl., Ex. C at 1)

II. Plaintiffs Fail to Meet Their Burden to Establish that Rule 23's Enumerated Requirements Are Met.

To certify a class under Rule 23, Plaintiffs must prove that there are *common* questions of law or fact, that their claims are *typical* of the class, that the common questions *predominate* over individualized ones, and that classwide adjudication would be *superior* to individual suits. Because injury-in-fact, causation, and damages require individualized determinations in every personal-injury suit, it is nearly impossible for a personal-injury class action to satisfy these requirements. And courts routinely deny certification on those grounds. *See Ridgell v. Frontier Airlines, Inc.*, 2018 WL 6431876, at *4 (C.D. Cal. Nov. 9, 2018) ("The Ninth Circuit 'has recognized the potential difficulties of "commonality" and "management" inherent in certifying products liability class actions.'"); *Deluca*, 244 F.Supp.3d at 1349 ("[C]ruise passenger personal injury suits are rarely, if ever, amenable to class treatment in the first place."); *Colley v. Procter & Gamble Co.*, 2016 WL 5791658, at *10 (S.D. Ohio Oct. 4, 2016) ("Class actions involving personal injury claims generally do not meet the adequacy requirement."); *DuRocher v. Nat'l Collegiate Athletic Ass'n*, 2015 WL 1505675, at *4 (S.D. Ind. Mar. 31, 2015) ("personal injury claims are generally not

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Second, "[i]t is well settled that the general maritime law of the United States, and not state law, controls the issue of whether a passenger is bound to terms set forth in a cruise ship's ticket and contract of passage," which ensures that these contracts will be enforced uniformly. *McIntosh*, 2018 WL 1732177, at *2. That interest is particularly acute here, as there are proposed COVID-19 class actions filed by cruise-ship passengers in other jurisdictions—Plaintiffs' approach would invite application of different state laws in these actions. *E.g.*, *Lindsay v. Carnival Corp.*, No. 20-cv-00982 (W.D. Wash. June 24, 2020); *Turner v. Costa Crociere S.P.A.*, No. 20-cv-21481 (W.D. Wash. Apr. 7, 2020). Plaintiffs offer no choice-of-law analysis and identify no case where a class-action waiver was held unenforceable under maritime law. There is none. Third, even if California law applied, the Ninth Circuit has repeatedly held that a plaintiff "can't argue that [a] class-action waiver is unenforceable under California law." *Johnmohammadi v. Bloomingdale's, Inc.*, 755 F.3d 1072, 1074 (9th Cir. 2014).

Plaintiffs also argue in their opposition that the Passage Contract is contrary to public policy under *Shute*, 499 U.S. 585. But the Supreme Court has repeatedly held that class-action waivers are enforceable since *Shute* was decided. *E.g.*, *DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463, 470-71 (2015). And Plaintiffs fail to identify a single case where a court has invalidated a class-action waiver as contrary to public policy. *See* (Opp. 7-8).

appropriate for class treatment"); *Morangelli v. Chemed Corp.*, 275 F.R.D. 99, 116 (E.D.N.Y. 2011) ("personal injury actions … are rarely suitable for class treatment"); *Stearns v. Select Comfort Retail Corp.*, 763 F.Supp.2d 1128, 1155 (N.D. Cal. 2010) ("personal injury claims are not appropriate for class treatment"); *Brown v. Southeastern Pa. Transp. Auth'y*, 1987 WL 9273, at *6 (E.D. Pa. Apr. 9, 1987) ("class action inappropriate for personal injury claims"); *Caruso v. Celsius Insulation Resources, Inc.*, 101 F.R.D. 530, 537 (M.D. Pa. 1984) ("Generally, personal injury claims are inappropriate for class actions"). As in those cases, Plaintiffs here have failed to meet their burden to prove commonality, typicality, predominance, and superiority, and their motion must be denied.

A. Plaintiffs fail to prove that the class has common questions of law or fact and that their claims are typical of the class.

Rule 23(a) requires the plaintiff to demonstrate questions of law or fact *common* to the class, and that the representative parties' claims are *typical* of class members' claims. These requirements "tend to merge" and "serve as guideposts for determining whether under the particular circumstances maintenance of a class action is economical and whether the named plaintiff's claim and the class claims are so interrelated that the interests of the class members will be fairly and adequately protected in their absence." *General Telephone Co. of Southwest v. Falcon*, 457 U.S. 147, 157-58, n.13 (1982). To satisfy commonality and typicality, Plaintiffs must prove that the class members "have suffered the same injury." *Dukes*, 564 U.S. at 349-50 (commonality); *Wolin v. Jaguar Land Rover N. Am.*, 617 F.3d 1168, 1175 (9th Cir. 2010) ("The test of typicality is whether other members have the same or similar injury … .").

Plaintiffs' allegations here establish that they have *not* suffered the same injury. Only *three* allege that they tested positive for COVID-19 and suffered more than *de minimis* symptoms. (SAC ¶¶ 173, 176, 191). The remaining Plaintiffs' claims cover a wide range of alleged injuries. Seven allege that they tested positive for COVID-19, but their only alleged symptoms were *de minimis*, including cough, fever, and fatigue.

(*Id.* ¶¶ 169-72, 178-79, 198). Twenty-one Plaintiffs allege that they suffered symptoms "associated with" COVID-19—such as constipation, nausea, and sore throat—but fail to allege they actually contracted the disease. (*Id.* ¶¶ 174-75, 177, 180-88, 190, 192, 194-97, 199-201). And the remaining 31 Plaintiffs did not suffer any symptoms at all and ostensibly seek to recover for emotional distress only. These differences make it impossible for Plaintiffs to prove commonality or typicality. Plaintiffs' proposed class, moreover, would encompass everything from guests who suffered no effects whatsoever from COVID-19 to those that died from the illness.

Beyond the fact that Plaintiffs and class members do not share the *same* injury, numerous Plaintiffs and class members have alleged no cognizable injury *at all*. In their response to Carnival's Motion to Dismiss, the 31 Plaintiffs—exactly half of those named—who fail to allege that they contracted COVID-19 (or even suffered from any symptoms associated with COVID-19) admit that they seek to recover for emotional distress only. (Opp. 13). But those claims—and the claims of all similarly situated class members—fail under the Supreme Court's decision in *Metro-North Commuter Railroad Co. v. Buckley*, 521 U.S. 424, 427 (1997), with this Court's decision in *Weissberger*, 2020 WL 3977938, and with *Maiava v. Princess Cruise Lines Ltd.*, No. 20-cv-4393 (C.D. Cal. Aug. 31, 2020), ECF 24. Plaintiffs also do not dispute in their Motion to Dismiss response that the *de minimis* injury rule and *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135 (2003), preclude recovery by persons who allege only minor symptoms, leaving just three named Plaintiffs who even conceivably have a basis to recover.[6]

Nor are there common questions around causation. Because COVID-19 has an

[6] Plaintiffs cannot cure this defect by attempting to limit the class only to individuals who actually suffered serious COVID-19 symptoms. Such a class definition would require the Court to hold a "mini-trial" as to each potential member to determine whether they actually suffered a cognizable injury—a necessarily individualized inquiry that would turn the purpose of class certification on its head. *See Stockwell v. City & Cty. of San Francisco*, 749 F.3d 1107, 1112 (9th Cir. 2014). Moreover, the fact that only three of the 62 named plaintiffs could even potentially recover suggests that Plaintiffs will be unable to establish numerosity for a narrower class.

incubation period of up to 14 days and was present in California by mid-January 2020, Plaintiffs may have been exposed to or contracted COVID-19 before boarding. Alternatively, some may have been infected after disembarking but ashore in a port-of-call or while en route to or during the quarantine at any one of the multiple locations passengers were sent by government authorities. (Taylor Decl. ¶ 9). And even if some Plaintiffs did contract COVID-19 onboard, individual causation questions still abound. The Court will still have to individually determine how each Plaintiff contracted COVID-19 to determine whether negligent conduct caused the exposure.

Plaintiffs' arguments to the contrary all fail. Plaintiffs assert that whether the Passage Contract's class-action waiver enforceable is a "a quintessential common question." Mem. 11. But that puts the cart before the horse. This Court cannot certify a class to determine whether Plaintiffs agreed to a class-action waiver; rather, the waiver issue must be decided before certification. Plaintiffs also identify a series of supposedly common factual questions, such as "Whether and to what extent Defendants knew the risks of COVID-19." Mem. 12. But these facts are not common to the 31 plaintiffs who never tested positive for COVID-19 nor developed any symptoms. Plaintiffs' typicality arguments fare no better. Plaintiffs assert that they all "suffered the same harm." Mem. 13. But that is simply not what they allege. Half of Plaintiffs allege no cognizable injuries at all, and the rest allege a range of different injuries. The variety of alleged injuries among the named Plaintiffs—from sore throat to fever to stroke—forecloses any argument that their claims are common to or typical of the class. *See Dukes*, 564 U.S. at 349-50; *Wolin*, 617 F.3d at 1175.

B. Plaintiffs fail to prove that common questions predominate.

Class certification under Rule 23(b)(3) requires that "questions of law or fact common to class members predominate over any questions affecting only individual members[.]" The "predominance criterion is far more demanding" than merely determining whether common questions exist." *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 623-24 (1997). It "calls upon courts to give careful scrutiny to the relation

between common and individual question in a case." *Tyson Foods, Inc. v. Bouaphakeo*, 136 S. Ct. 1036, 1045 (2016). The "inquiry asks whether the common, aggregation-enabling, issues in the case are more prevalent or important than the non-common, aggregation-defeating, individual issues." *Id.* (internal quotation marks omitted). "Implicit in the satisfaction of the predominance test is the notion that the adjudication of common issues will help achieve judicial economy." *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). To that end, predominance demands a "showing by Plaintiffs of how the class trial could be conducted." *Id.* Plaintiffs do not come close to satisfying their burden to establish predominance.

1. Plaintiffs' bare assertion that the Court can simply try liability and then damages does not satisfy their "burden of demonstrating a suitable and realistic plan for trial of the class claims." *Zinser v. Accufix Research Inst., Inc.*, 253 F.3d 1180, 1189 (9th Cir.), *opinion amended on denial of reh'g*, 273 F.3d 1266 (9th Cir. 2001) (internal quotation marks omitted). This generic bifurcation proposal could apply to literally every class action. It is not a serious trial plan, and it ignores the numerous individual determinations that will have to be made to determine class members' injury, causation, and damages. Certification fails for this reason alone.

2. Plaintiffs' failure to address the inherently individualized nature of injury and causation forecloses predominance. "[I]f the main issues in a case require the separate adjudication of each class member's individual claim or defense, a Rule 23(b)(3) action would be inappropriate." *Id.* at 1189 (alteration in original). Even if one or two common questions might be decided in a class-wide trial, "the economy and efficiency of class action treatment are lost and the need for judicial supervision and the risk of confusion are magnified." *Id.* These principles are dispositive here.

There is no conceivable way to determine the threshold issue of whether class members were even injured on a classwide basis—rather, consistent with *Metro-North*, *Ayers*, and *Weissberger*, every class member must individually prove that they contracted COVID-19 and suffered actual, serious symptoms of the disease. The

Complaint is clear that most Plaintiffs cannot meet this requirement: only *three* Plaintiffs allegedly contracted COVID-19 and suffered more than *de minimis* symptoms, and even if a mere diagnosis were sufficient (which it is not), *half* of the Plaintiffs admit they seek to recover for exposure alone, as *Weissberger* squarely forecloses. The need to prove injury on an individual basis precludes a finding of predominance. *E.g.*, *Andrews v. Plains All Am. Pipeline, L.P.*, 777 F. App'x 889, 892 (9th Cir. 2019).

Plaintiffs allege that Defendants had a "duty to ensure" that class members "would not be exposed to unreasonable risk of harm." (SAC ¶ 235). But Plaintiffs agree that while some individuals are at a high risk of harm if they contract COVID-19, others experience mild symptoms or no symptoms at all. (SAC ¶¶ 100-01). Given the undisputedly broad spectrum of risk levels among individuals, Plaintiffs simply cannot possibly prove, on a classwide basis, that any one, two, or more of the alleged acts by Defendants exposed *all* class members to an *unreasonable* risk of harm.

For those class members who can establish injury, causation defies classwide adjudication because of the myriad ways—unrelated to Defendants—they may have contracted COVID-19. *E.g.*, *Andrews*, 777 F. App'x at 892 (individualized causation inquiry precludes predominance); *Poulos v. Caesars World, Inc.*, 379 F.3d 654, 666 (9th Cir. 2004) (same). Again, it is entirely possible some individuals contracted the disease before boarding the *Grand Princess*. Others may have fallen ill ashore at a port-of-call or after the vessel's return to San Francisco. Plaintiffs' disembarkation and subsequent quarantine was controlled by state and federal government entities (Taylor Decl. ¶¶ 4-12), who could have negligently exposed Plaintiffs to the disease. These questions are compounded by COVID-19's incubation period of up to 14 days (SAC ¶ 99) and the fact that some people experience no symptoms at all. (SAC ¶ 101). Plaintiffs will have to prove that each class member's COVID-19 diagnosis, or "symptoms associated" with COVID-19, were caused by exposure to the virus while on the *Grand Princess*, not after disembarking, not due to intervening actors, such as government entities, and not due to contributory negligence, such as failing

to follow on-ship quarantine directives. *See In re MTBE Products Liability Litigation*, 209 F.R.D. 323, 350 (S.D.N.Y. 2002) ("Predominance cannot be found because a different intermediate or third party actor … has directly caused harm to each plaintiff"). Plaintiffs thus cannot satisfy predominance by pointing to the fact that class members were on the same *Grand Princess* cruise. In considering whether to certify a class in a similar cruise-ship-illness case, one district court correctly observed that "proximate cause determinations would predominate over the determination of the common issue of Carnival's conduct, due to the numerous sources from which an individual may contract an illness or infection and the need to determine what portion of a plaintiff's injury was fairly traceable to Carnival's conduct." *Lankford*, 2014 WL 11878384, at *10.[7]

Likewise, the medical causation issues here demand individual proof and easily defeat predominance. *See, e.g., Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (no predominance due to complexities surrounding proving medical causation for injury claims arising from chemical plan fire). The complexities of proof are especially pronounced due to uncertainties about how COVID-19 impacts individuals and Plaintiffs' own varied allegations. Many Plaintiffs allege only non-specific symptoms "associated with COVID-19." (SAC ¶¶ 186, 196, 197). While it is unclear how any individuals could prove Defendants are liable for causing a sore throat, headache, constipation, or stroke that happens to be "associated with COVID-19," it *is* clear that such proof could not possibly occur on a classwide basis.[8]

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[7] *See also Conigliaro v. Norwegian Cruise Line Ltd.*, 2006 WL 7346844, at *8 (S.D. Fla. Sept. 1, 2006) ("Here, as is the case in many mass tort cases, the predominance inquiry flounders on the question of proximate causation."); *Neenan v. Carnival Corp.*, 199 F.R.D. 372, 376 (S.D. Fla. 2001) ("Even if the plaintiffs succeeded in establishing the fault or negligence … the personal injury claimants would still have the bulk of their cases to prove, because any successful personal injury claimant will still have to prove injury in fact and causation.").

[8] For Plaintiffs' failure-to-warn allegations, the individualized inquiries needed to determine liability are compounded even further. "A defendant is not liable for an alleged failure to warn if … 'the injury would have occurred even if the defendant had issued adequate warnings.'" *Pooshs*

Plaintiffs cannot brush aside these obstacles with the incantation of "bifurcation." (Mem. 19). There is no way to isolate "common questions of law and fact related to Defendants' liability" (*id*.) from the inherently individualized questions surrounding injury and causation, thus defeating predominance. *See Runyon v. Bostik Inc.*, 2017 WL 5988019, at *3 (C.D. Cal. Mar. 28, 2017) ("The Court concludes that individual questions relating to: (1) injury-in-fact, (2) reliance, (3) causation, (4) expiration of various statutes of limitation, (5) privity of contract, (6) standing to sue, and (7) damages, predominate over the questions common to the putative class.").

3. Plaintiffs claim that "long-term monitoring" is "the focus of the class aspect of the case" (Mem. 2), but one would never know that from their motion, as they make no attempt to explain how the need for monitoring could possibly be determined on a classwide basis. Monitoring for persons with an actual injury requires an individualized determination. Here, moreover, half of the named plaintiffs do not allege that they contracted COVID-19 or suffer any specific symptoms of the disease. Apart from the rule of *Metro-North* and *Weissberger*, Plaintiffs cannot plausibly maintain that individuals who were never ill—likely most of the potential class members—need medical monitoring. Nor is there any suggestion that persons who are merely present near infected persons but who do not themselves contract COVID-19 are at the slightest risk for ongoing harm. Because of the "individualized factual issues involved," the monitoring request underscores Plaintiffs' failure to establish predominance. *Duncan v. Nw. Airlines, Inc.*, 203 F.R.D. 601, 612 (W.D. Wash. 2001) (denying certification for medical monitoring).

4. Uncommon issues relating to damages also defeat predominance because Plaintiffs allege a broad spectrum personal injuries and emotional distress on behalf of class members. Plaintiffs admit that the potential physical injuries that can result

v. Philip Morris USA, Inc., 904 F.Supp.2d 1009, 1028 (N.D. Cal. 2012) (quoting *Huitt v. So. Cal. Gas. Co.*, 188 Cal. App.4th 1585, 1604 (2010)). Whether any individual class member's injuries would have occurred regardless of warnings cannot be proven on a classwide basis.

from COVID-19 include a mild cough, sore throat, extreme fatigue, fever, diarrhea, vomiting, gastro-intestinal illness, liver failure, kidney damages, neurological deficits, and blood clots. (SAC ¶¶ 100, 104, 169). Cases alleging these types of physical illnesses require expert testimony at both the causation and damages stages. *See Rivera v. Royal Caribbean Cruises Ltd.*, 711 Fed. App'x 952, 954-55 (11th Cir. 2017). This is in addition to the emotional distress damages sought for "suffering, anguish, fright, horror, nervousness, grief, anxiety, worry, shock, humiliation, and shame." (SAC ¶ 249). These highly individualized damages questions preclude certification. *See Saavedra v. Eli Lilly & Co.*, 2014 WL 7338930, at *10 (C.D. Cal. Dec. 18, 2014).[9]

5. Plaintiffs' remaining arguments fail. *Amchem* does not green light class certification in mass tort cases "arising from a common cause or disaster." Mem. 16. Rather, *Amchem* cautioned that "mass accident" cases are "ordinarily not appropriate" for certification, 521 U.S. at 625, and due to the myriad ways Plaintiffs' alleged injuries could have occurred, this is not a case with a "common cause" but rather with a multitude of causes. This is why courts routinely find predominance lacking in cases alleging mass accidents on *cruise ships*. *See Lankford*, 2014 WL 11878384, at *10; *Congliaro*, 2006 WL 7346844, at *7; *Neenan*, 199 F.R.D. at 376; *see also Vincent v. Hughes Air West, Inc.*, 557 F.2d 759, 768 (9th Cir. 1977); *McDonnell-Douglas Corp. v. U.S. Dist. Ct.*, 523 F.2d 1083, 1085-86 (9th Cir. 1975); *Ridgell*, 2018 WL 6431876.

Second, Plaintiffs assert that "courts frequently certify classes where a litigation centers on a single incident or course of conduct, if the incident or conduct is common to all class members." Mem. 16. The cited cases are nothing like this one. *Petersen v. Costco Wholesale Co., Inc.* was a strict products liability case related to

[9] Similarly, plaintiffs "must establish at the certification stage that damages can feasibly and efficiently be calculated once the common liability questions are adjudicated." *Lilly v. Jamba Juice Co.*, 308 F.R.D. 231, 244 (N.D. Cal. 2014). Where a defendant "can make at least a *prima facie* showing that damage calculations are likely to be more complex, expert reports or at least some evidentiary foundation may have to be laid to establish the feasibility and fairness of damage assessments." *Id.* Plaintiffs offer *no proposal* of any kind for calculating class members' damages, let alone one supported by expert reports or evidence.

contaminated fruit mix sold at defendant's stores. 312 F.R.D. 565, 570-73 (C.D. Cal. 2016). In light of that factual scenario—"a single, specific lot of allegedly defective organic pomegranate seed"—causation and injury were easily determined on a class-wide basis. *Id.* at 579. And, unlike here, the plaintiffs had a detailed proposal for calculating class members' damages, and defendants had no affirmative defenses. *Id.* at 580, 583.

In re Oil Spill by Oil Rig Deepwater Horizon in Gulf of Mexico, On Apr. 20, 2010, 910 F.Supp.2d 891 (E.D. La. 2012), is further afield. It was a *settlement class*, and the 1,000-page settlement figured prominently in the predominance analysis. *Id.* at 921. The court noted "damages [could] be fairly calculated through various common methodologies or formulaic calculations by means of the comprehensive frameworks contained in the Settlement Agreement." *Id.* at 926. But this is not a settlement class and Plaintiffs here have no proposal for determining damages on a class-wide basis. "Questions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 35 (2013).[10]

C. Plaintiffs fail to prove superiority.

Rule 23(b)(3) also requires "that a class action is superior to the other available methods for fairly and efficiently adjudicating the controversy," considering (A) the class members' interests in individually controlling the prosecution of separate

[10] The few other cases Plaintiffs reference are further afield. In *Exxon Shipping Co. v. Baker*, class certification was not even at issue. 554 U.S. 471, 479 (2008). *Wolin v. Jaguar Land Rover N. Am., LLC*, was a products-liability case that, unlike this case, did not allege any personal injuries or emotional distress and instead claimed merely that defective tires sold by the defendant caused drivers to have to "replace their tires prematurely." 617 F.3d 1168, 1170 (9th Cir. 2010). *In re USC Student Health Center Litigation* was a settlement class where the requirements of Rule 23 were not meaningfully disputed and where the court expressly held that "the requirements of Rule 23(a) and Rule 23(b)(3) are satisfied *for the certification of the Class for settlement purposes only*." No. 18-cv-4258, (C.D. Cal. Feb. 25, 2020) ECF No. 172 (emphasis added). The plaintiffs in *Andrews v. Plains All Am. Pipeline, L.P.* sought certification of property-damages claims arising from an oil spill in a residential area. 2020 WL 3105425, at *1-2 (C.D. Cal. Jan. 16, 2020). But unlike here, the plaintiffs offered the testimony of two liability experts at the class-certification stage, demonstrating a common theory for all class members by showing "that all of them lost the reasonable use of their beach amenity," and presenting additional "common proof." *Id.* at *10.

actions; (B) the extent and nature of any litigation concerning the controversy already begun by class members; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and (D) the likely difficulties in managing a class action. With the exception of (C), which is not relevant or does not weigh meaningfully either way, the three other factors weigh against superiority.

First, "[e]ach plaintiff in an action involving claims for personal injury and death has a significant stake in making individual decisions on whether and when to settle." *Amchem*, 521 U.S. at 616 (citations, brackets, and internal quotation marks omitted). Plaintiffs complain that a class action is necessary because otherwise "thousands of passengers likely will be unable to seek relief because the costs of litigation are far greater than the relief potentially available." Mem. 18. Not so. Plaintiffs allege that their purportedly representative "individual claims exceed the required jurisdictional amount of $75,000," (SAC ¶ 233), which is not so low as to eliminate class members' individual incentives to sue, as many have done. In any event, many passengers are likely "exposure-only" claimants and would not be entitled to recover in class *or* individual litigation. *Weissberger*, 2020 WL 3977938, at *3.

Second, numerous individual cases that have already been brought by class members. Plaintiffs agree that there are "over 100 plaintiffs currently litigating this matter in this Court," but assert that these plaintiffs "represent only 5% of the passengers onboard the ship." Mem. 18. But, again, Plaintiffs omit that the vast majority of passengers suffered no cognizable, harmful symptoms and thus do not have claims.

Finally, the likely difficulties of managing a class action in this case weigh against superiority. As explained above, individualized issues will overwhelm this case—a defect that is compounded by Plaintiffs' failure to present the Court with any specific and feasible plan for how to try this case as a class action. But more fundamentally, the barebones explanation Plaintiffs do give—holding a classwide trial for a handful of common factual questions, followed by individual trials for each class member to determine all of the remaining issues (which would include causation,

injury, and damages)—would make this case into an unmanageable "nightmare" scenario. *Risinger v. SOC LLC*, 2019 WL 4752264, at *3 (D. Nev. Sept. 30, 2019).

III. Issue Certification Should Be Denied.

Tacitly conceding that they cannot maintain a class action under Rule 23(b)(3), Plaintiffs alternatively seek certification of a Rule 23(c)(4) issue class, but do not identify *which* issues that the Court should resolve on a classwide basis. (*See* Mem. 19-20). That is reason enough to deny their request. *See Werdebaugh v. Blue Diamond Growers*, 2014 WL 7148923, at *14 n.9 (N.D. Cal. Dec. 15, 2014).

The Court should not permit Plaintiffs to use their reply brief to backfill their deficient request for Rule 23(c)(4) certification. *See Van v. Ford Motor Co.*, 332 F.R.D. 249, 293 (N.D. Ill. 2019) ("To the extent that Plaintiffs raise new issues for certification under Rule 23(c)(4) in their reply brief they waived any argument with respect to those issues."). But even if the Court construes Plaintiff's motion as seeking certification of a liability class, it should deny that request. First, Plaintiffs cannot certify an issue class because they fail to satisfy Rule 23(b)(3)'s predominance requirement.[11] Beyond that, Rule 23(c)(4) certification is appropriate "only if it materially advances the disposition of the litigation as a whole." *Rahman v. Mott's LLP*, 693 Fed. App'x 578, 579 (9th Cir. 2017). Issue certification is thus commonly denied where resolving the proposed common questions would not resolve liability. *See Reitman v. Champion Petfoods USA, Inc.*, 2019 WL 7169792, at *14 (C.D. Cal. Oct. 30, 2019) (issue certification "inappropriate where, as here, there are numerous individualized issues affecting determinations of liability."); *Does v. BHC Fairfax Hospital, Inc.*, 2020 WL 4584228, at *7 (W.D. Wash. Aug. 10, 2020) (denying issue certification where "liability … and the existence, nature, and extent of any damages would

[11] We acknowledge that the Ninth Circuit has held that predominance need only be shown as to the issues identified for common resolution. *Valentino v. Carter-Wallace, Inc.*, 97 F.3d 1227, 1234 (9th Cir. 1996). While we disagree with that holding and preserve our argument to the contrary, it does not matter here because Plaintiffs have not identified any issues for common resolution, other than (charitably) liability, which cannot be shown via classwide proof, as discussed above.

still need to be performed on an individualized basis"); *Adkins v. Facebook, Inc.*, 424 F. Supp. 3d 686, 697 (N.D. Cal. 2019) ("issue certification is not appropriate where the determination of liability itself requires an individualized inquiry").[12]

Liability cannot be resolved on a classwide basis here because exposure, causation, and injury are highly individualized questions that are not amenable to classwide proof. *See supra*, Section II.B. And even if it could be, because the government, third parties, or plaintiffs themselves may bear some share of responsibility in individual cases (*e.g.*, due to non-compliance with safety instructions), any evidence of Defendants' fault will "have to be repeated" in individual trials, resulting in "a waste, not a savings, in judicial resources." *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 749 (5th Cir. 1996). Moreover, Plaintiffs' proposed use of Rule 23(c)(4) to determine "liability"—a common question in every lawsuit—would swallow the rule, making certification the norm for mass torts when it is, in fact, just the opposite.[13]

CONCLUSION

Plaintiffs' motion for class certification should be denied.

DATED: September 4, 2020

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[12] Plaintiffs' cited cases (Mem. 19) are off point. *Tasion Commc'ns, Inc. v. Ubiquiti Networks, Inc.* rejected certification because many of the proposed issues would require individualized inquiries, and "[u]nlike the typical Rule 23(c)(4) case where there is certification of liability … certification here of an issue would resolve only one of many issues necessary to establish only liability." 308 F.R.D. 630, 640 (N.D. Cal. 2015). In *Butler v. Sears Roebuck & Co.*, "the only individual issues concern the amount of harm to particular class members," which is not the case here. 727 F.3d 796 (7th Cir. 2013). In *Mejdrech v. Met-Coil Sys. Corp.*, the court upheld issue certification in a contamination case because the only remaining question would be "the particular harm suffered." 319 F.3d 910 (7th Cir. 2003). And in *Martin v. Behr Dayton Thermal Prod. LLC*, the court noted that Plaintiff sought certification of "only issues capable of resolution with generalized, class-wide proof," which did not include causation or injury. 896 F.3d 405, 414 (6th Cir. 2018).

[13] Plaintiffs noncommittal reference to Rule 42(b) includes no actual argument, making a meaningful response impossible. Their non-proposal, whatever it is, should be rejected.

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