UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 20-CV-21997-JAL

FRED KANTROW and MARLENE KANTROW, on their own behalves and on behalf of all other similarly situated passengers who sailed aboard the CELEBRITY ECLIPSE between March 1 and March 30, 2020,

Plaintiffs,

v. **CLASS ACTION**

CELEBRITY CRUISES INC.,

Defendant.
_____/

PLAINTIFFS' RESPONSE IN OPPOSITION TO CELEBRITY'S MOTION TO DISMISS, [D.E. 7]

Plaintiffs, FRED KANTROW and MARLENE KANTROW, on their own behalves and on behalf of all other similarly situated passengers who sailed aboard the CELEBRITY ECLIPSE between March 1 and March 30, 2020, by and through undersigned counsel, hereby respond in opposition to Defendant, CELEBRITY CRUISES INC.'s (hereinafter "Celebrity") Motion to Dismiss, [D.E. 7], and in support thereof, state:

I. Plaintiffs sufficiently alleged their individual physical and emotional injuries suffered as a result of Defendant's tortious conduct.

The Amended Complaint explicitly states that both Plaintiffs "contracted COVID-19" aboard Defendant's vessel, the *Celebrity Eclipse*, as consequence of Defendant's tortious response to the virus outbreak aboard its vessel. *See* D.E. 5, at ¶¶9-13; *see also* ¶49; ¶55; ¶61; ¶67, ¶133; etc. ("As a result of Defendant's negligence, Plaintiffs and others similarly situated contracted COVID-19. . .").

Plaintiffs also clearly identified the injuries associated with their COVID-19 contraction: "The dangerous conditions associated with COVID-19 include its manifestations – severe pneumonia, acute respiratory distress syndrome (ARDS), septic shock and/or multi-organ failure – and/or its symptoms – fever, dry cough, and/or shortness of breath. . . ." [D.E. 5, ¶12]. Plaintiffs also specifically identified a primary source of their emotional distress: "the high fatality rate associated with contracting the virus." *Id.* These allegations were adopted and incorporated by reference into each of the twenty-one (21) counts. *See* D.E. 5, *generally*.

Notwithstanding the clear allegations contained in the Amended Complaint as it pertains to Plaintiff's individual damages, outlined above, Celebrity relies upon *Heinen, et. al. v. Royal Caribbean Cruises Ltd.*, 806 F. App'x 847 (11th Cir. 2020) to advance a hyper-technical argument as to how Plaintiffs should plead their alleged damages. In *Heinen*, the plaintiffs did not allege sufficient factual support concerning the "physical and emotional damage" they suffered as a result of a cruise line's delay in canceling their cruise before a hurricane. *Id.* at *849-50.

But here, Plaintiffs' allegations that they "contracted COVID-19," coupled with allegations concerning the manifestations and symptoms of that virus, provide sufficient factual support that Plaintiffs plausibly suffered physical and emotional injuries as a result of Defendant's tortious conduct. In view of these factual allegations, the Amended Complaint here is supported by ample factual allegations concerning Plaintiffs' damages, completely unlike the complaint in *Heinen*.

a. If the Court requires, Plaintiffs are able to replead the complaint to more specifically state the damages each Plaintiff suffered individually as a result of Defendant's tortious conduct.

Plaintiff, FRED KANTROW, contracted COVID-19 while aboard the *Celebrity Eclipse* and, as a result, suffered physical injuries, including: fever, pneumonia, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, nightmares, rash, and gastrointestinal

difficulties. Also, as a result of fear of contracting the virus aboard the vessel before he actually contracted it *and* Celebrity's tortious response to the virus outbreak aboard the vessel, Plaintiff, FRED KANTROW, suffered separate and severe emotional injuries, including: anxiety, depression, nightmares, and gastrointestinal difficulties.

Plaintiff, MARLENE KANTROW, contracted COVID-19 while aboard the *Celebrity Eclipse* and, as a result, suffered physical injuries, including: fever, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, nightmares, loss of taste and smell, and gastrointestinal difficulties. Also, as a result of fear of contracting the virus aboard the vessel before she actually contracted it *and* Celebrity's tortious response to the virus outbreak aboard the vessel, Plaintiff, MARLENE KANTROW, suffered separate and severe emotional injuries, including: anxiety, depression, nightmares, and gastrointestinal difficulties.

Plaintiffs can and will specifically plead the facts outlined above into each count of the Amended Complaint if the Court orders and grants Plaintiffs leave to amend. Doing so will address Defendant's arguments raised at D.E. 7, pgs. 2-8.

It must be noted that in *Heinen, et. al. v. Royal Caribbean Cruises Ltd.*, 806 F. App'x 847 (11th Cir. 2020), the district court gave the plaintiffs one opportunity to replead to allege specific facts in support of their individual damages – before the Court imposed the severe penalty of dismissing the plaintiffs' complaint with prejudice. *Id.* at *2 ("The district court highlighted this deficiency for the appellants and grant them leave to amend"). Here, this is the first time Defendant – or the Court – has raised this specific pleading issue, and Plaintiffs are willing and able to amend to address the issue. The Plaintiffs, however, did not automatically file an amended complaint addressing this point due to Defendant's additional arguments, which as addressed below, fail.

b. The Amended Complaint should not be dismissed with prejudice as Plaintiffs strictly complied with the Court's Order, [D.E. 4]; Defendant's Motion to Dismiss, [D.E. 7], raises a completely different pleading issue.

Relatedly, Plaintiffs' Amended Complaint should not be dismissed with prejudice because Plaintiffs' Amended Complaint does not suffer from the same deficiency as the original Complaint.

As the Court is aware, the Court ordered Plaintiffs to file an Amended Complaint specifically and only because it "commit[ed] the sin of not separating into a different count each cause of action or claim for relief." [D.E. 4]. The Court specifically instructed the Plaintiffs that "Each alleged breach of the duty of care is a separate claim which must be pled separately" and that Plaintiffs should "separately allege an independent count for various theories of liability." *Id.* Consequently, Plaintiffs addressed the Court's Order by separating out each way Celebrity allegedly breached their duty of care owed to Plaintiffs into separate counts, resulting in twenty-one (21) separate counts. *See* D.E. 5. That was a completely different pleading issue than the one Defendant raises at D.E. 7, pgs. 2-8.

As Defendant must acknowledge, the rule is that "if the plaintiff fails to comply with the court's order—by filing a repleader with the same deficiency—the court should strike his pleading or, depending on the circumstances, dismiss the case…" *Vibe Micro, Inc. v. Shabanets*, 878 F.3d 1291, 1295 (11th Cir. 2018) (underline emphasis added); *Jackson v. Bank of Am., N.A.*, 898 F.3d 1348, 1358 (11th Cir. 2018) (". . . the key is whether the plaintiff had fair notice of the defects and a meaningful chance to fix them.").

Here, Plaintiffs did not file an Amended Complaint with the same deficiency as that outlined by the Court's Order, [D.E. 4]; moreover, Plaintiffs are willing and able to file a Second Amended Complaint to address and satisfy Defendant's specific pleading concern here.

II. Plaintiffs' Negligent Boarding claims (Counts IX through XI) are cognizable under U.S. General Maritime Law in view of the facts alleged in Amended Complaint.

Defendant, Celebrity argues that Plaintiff's Negligent Boarding claims (Counts IX through XI) do not exist under the law. There are two separate reasons why Celebrity is wrong.

First, "the scope of [a cruise line]'s duty to protect its passengers is informed, if not defined, by its knowledge of the dangers they face onboard. And it allegedly knew a lot." *K.T. v. Royal Caribbean Cruises, Ltd.*, 931 F.3d 1041, 1044 (11th Cir. 2019). Here, Plaintiffs alleged that prior to the subject voyage, Celebrity was on notice of the dangerousness and explosive contagiousness associated with COVID-19. *See* D.E. 5, at ¶14 (Celebrity's February 5, 2020 letter informing passengers that, due to COVID-19 concerns, "any guest, or crewmember, who has traveled to, from, or through Chine, Hong Kong or Macau within 15 days of departure will be unable to board our ships."); *see also* ¶¶23-32 (factual allegations concerning's Celebrity's knowledge of the COVID-19 outbreak before and during the subject voyage).

So, given Celebrity's knowledge of the dangerousness and explosive contagiousness associated with COVID-19, Celebrity had a duty to provide a reasonably safe boarding method for passengers, including Plaintiffs herein. Despite Celebrity's characterization of this cause of action as Plaintiff's counsel's "invent[ion]", [D.E. 7, pg. 12], this claim is nothing more than a simple "general negligence" claim governed by the 'reasonable care under the circumstances' standard.[1]

Second, it is well settled under U.S. general maritime law that "[o]ne who undertakes gratuitously or for consideration, to render services to another which he should recognize as necessary for the protection of the other person or things, is subject to liability to the other for physical harm resulting from his failure to exercise reasonable care to perform his undertaking, if

[1] As noted above, the Court previously ordered that Plaintiffs' counsel "separately allege an independent count for various theories of liability." [D.E. 4].

(a) his failure to exercise such care increases the risk of such harm, or (b) the harm is suffered because of the other's reliance upon the undertaking. *Sexton v. Carnival Corp*., 2018 WL 3405246, at *2–3 (S.D. Fla. 2018) (quoting Restatement (Second) of Torts § 323 in the maritime context); *Disler v. Royal Caribbean Cruise,* Ltd., 2018 WL 1916614, *4 (S.D. Fla. 2018) (same).

Here, as outlined above, [D.E. 5, at ¶14 (Celebrity's February 5, 2020 letter)], Celebrity undertook a duty to screen prospective passengers and crewmembers who recently traveled to high-risk areas where the novel COVID-19 virus first manifested. As Plaintiffs alleged, Celebrity did not exercise reasonable care in the performance of that duty, as Celebrity did not, for example, check the temperature of all those who sought to board the vessel for fever, or reasonably screen them for potential respiratory symptoms/distress. *See e.g.* D.E. 5, at ¶98(a); ¶103(a); ¶110(a); *see also* §32(l) (and cited CDC article hyperlink).

Celebrity's remaining argument on this issue, that Plaintiffs purportedly did not allege that they became injured *while boarding* the vessel, [D.E. 7, pg. 12], misses the point. The point here is that under the undertaker's doctrine (Restatement (Second) of Torts § 323, outlined above), liability extends to the undertaker if "(a) his failure to exercise such care increases the risk of such harm". Here, and as Plaintiffs alleged, Celebrity's response to the threat of COVID-19 before the voyage, and response to the COVID-19 outbreak aboard the vessel during the voyage, was careless and/or lackadaisical. *See e.g.* D.E. 5, ¶42. Celebrity's careless and/or lackadaisical approach to passengers/Plaintiffs' boarding process [D.E. 5, Counts IX-XI], caused and/or contributed to the proliferation of cases aboard the vessel during the voyage, thus resulting in Plaintiffs' COVID19 contraction and related injuries. *See* D.E. 5, at ¶97 ("The above breach of the duty of care caused and/or contributed to the Plaintiffs and others similarly situated contracting COVID-19 and/or medical complications arising from it because the COVID-19 outbreak aboard the vessel would

not have occurred but for Defendant's failure to provide a reasonably safe boarding process"); ¶104 (same); ¶111 (same).

Plaintiff's Negligent Boarding claims (Counts IX through XI) should not be dismissed as they are supported by U.S. general maritime law and specific factual allegations asserted in the Amended Complaint.

III. Plaintiffs' Intentional Infliction of Emotional Distress ("IIED") claims (Counts XVIII through XXI) are well pled and cognizable at law.

To state an IIED claim, a plaintiff must plead the following elements:

> 1) extreme and outrageous conduct; 2) an intent to cause, or reckless disregard to the probability of causing, emotional distress; 3) severe emotional distress suffered by the plaintiff and 4) that the conduct complained of caused the plaintiff's severe emotional distress.

Broberg v. Carnival Corp., 303 F. Supp. 3d 1313, 1317 (S.D. Fla. 2017)

Under the first prong, the defendant's alleged conduct must be "so outrageous in character, and so extreme in degree, as to go beyond all bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Id.*

Celebrity does not argue that Plaintiffs' IIED counts lack factual allegations in support of the requisite elements; they can't, because the counts do. *See* D.E. 5, Counts XVIII-XXI.[2] Rather, Celebrity's lone argument here is that its underlying tortious conduct, as alleged by Plaintiffs, is

[2] *See e.g. Crusan v. Carnival Corp.*, 2015 WL 13743473, at *6 (S.D. Fla.2015) ("And while neither Party directs the Court to factually similar authority regarding the severity prong, drawing all reasonable inferences in Plaintiffs' favor, the Court cannot say as a matter of law that emotional distress manifested as sickness, nausea, exhaustion, fatigue, headaches, insomnia, and nightmares suffered during five days aboard a disabled, squalid boat cannot rise to the level of 'severe' distress").

incapable of supporting claims for IIED as a matter of law. *See* D.E. 7, pg. 3.[3] Celebrity's argument lacks legal support.

In support of Plaintiffs' IIED claims, Plaintiffs primarily rely upon facts that: 1) as late as March 26, 2020, Celebrity knew that a passenger(s) presented to the ship's infirmary with symptoms consistent with a positive COVID-19 diagnosis, [D.E. 5, ¶32(z) (including the article cited by hyperlink)];[4] yet, 2) as late as March 28, 2020, the Captain of the vessel continued to lie to passengers that "All guests onboard remain healthy and happy…" [D.E. 5, ¶32(aa) (including a screenshot of the Captain's letter cited) (underline emphasis added)].

In other words, Celebrity lied, concealed the truth, and/or misrepresented to passengers, including Plaintiffs, that all passengers aboard the vessel at that time were "healthy" – implying that no one on the ship had contracted COVID-19 – when Celebrity knew that was not the case. [D.E. 5, ¶32(z) (including the hyperlink article cited)]. Celebrity's lie, concealment, and/or misrepresentation, is so outrageous in character, and so extreme in degree, that it goes beyond all

[3] It is important to note that when considering a motion to dismiss for failure to state a claim, the Court must "accept[] the allegations in the complaint as true and construe[] them in the light most favorable to the plaintiff." *Am. Dental Ass'n v. Cigna Corp*., 605 F.3d 1283, 1288 (11th Cir. 2010).

[4] The hyperlinked article at D.E. 5, ¶32(z) explains:

> "I think she started feeling sick around the 25th. **On the 26th was when she went to the infirmary,"**
>
> Nystrom says she went to the infirmary not once, but twice. The second time, she was given a device to help her breathe. Doctors first said it was bronchitis, then changed their diagnosis to pneumonia.
>
> "**She was definitely fighting for her life at that point**," she said. "My dad's emails at that time were getting progressively worse, and saying, **she's in really bad shape**, and he's getting scared."

D.E. 5, ¶32(z) (citing https://www.10news.com/news/coronavirus/family-of-infected-passenger-on-celebrity-eclipse-says-coronavirus-symptoms-began-showing-at-sea) (emphasis added).

bounds of decency, and is to be regarded as atrocious, and utterly intolerable in a civilized community.

Thomas v. Hickman, 2007 WL 470611, (E.D. Cal. 2007) is instructive. There, the court found that a plaintiff properly stated a claim for IIED based upon allegations that medical defendants knew they had removed the plaintiff's ovaries, but lied to her concerning same. *Id.* at *14–15. The court explained:

> Because the court finds the complaint's allegations sufficiently allege CDC's Defendants knew Plaintiff's ovaries were removed, lied to Plaintiff about what happened during surgery, did not properly treat her, and refused treatment when it appeared Plaintiff might sue, the court finds the complaint sufficiently alleges intentional infliction of emotional distress.

Id. at *14–15 (underline emphasis added).

The information and power inequities between Plaintiffs and Celebrity during the subject voyage are strikingly similar to the information and power inequities alleged in *Thomas v. Hickman*. For example, Plaintiffs alleged that as early as March 7, 2020 – and during the subject voyage – Vice President of the United States, Mike Pence, met with top cruise industry executives (including the CEOs of Carnival, Royal Caribbean[5] and Norwegian cruise lines), in order to address the impact of COVID-19 on the cruise industry, specifically; and that the very next day, March 8, 2020, the U.S. Department of State, in conjunction with the CDC, set forth a recommendation that U.S. citizens should not travel by cruise ship given the CDC's findings which support the "increased risk of infection of COVID-19 in a cruise ship environment." [D.E. 5, ¶30]. In other words, in stark contrast to Plaintiffs who were on a vacation cruise aboard the *Celebrity Eclipse* with limited access to updated information concerning the novel COVID-19 pandemic at

[5] It is a known fact for which the Court can take Judicial Notice that Royal Caribbean is Defendant, Celebrity's parent company. *See e.g.* https://www.rclcorporate.com/about/brands/.

that time – other than periodic updates from the Captain of the vessel – Royal Caribbean/Celebrity's CEO was meeting with the Vice President of the United States to discuss the exact harm Defendant, Celebrity, was negligently exposing Plaintiffs to at that time – **and lying to them about same**. *See also* D.E. 5, at ¶31 (explaining the resulting March 14, 2020 CDC "No Sail" Order).

Given Plaintiffs' status as cruise ship passengers stranded on the *Celebrity Eclipse*[6] during the throes of a global health crisis, it was entirely reasonable for Defendant, Celebrity, to know that Plaintiffs were susceptible to emotional distress and experience cognitive dissonance upon learning of the *Celebrity Eclipse*'s Captain's statement that "All guests onboard remain healthy and happy…" [D.E. 5, ¶32(aa)], compared to Plaintiffs' own personal experiences aboard the vessel; that as early as March 9, 2020, they observed other passengers begin to experience respiratory difficulties consistent with a COVID-19 diagnosis, [D.E. 5, at ¶32(t)]. *See e.g. Dominguez v. Equitable Life Assur. Soc. of U.S.*, 438 So. 2d 58, 62 (Fla. 3d DCA 1983), *approved sub nom. Crawford & Co. v. Dominguez*, 467 So. 2d 281 (Fla. 1985) (". . .the defendants were, as is obvious, aware of the plaintiff's disabilities and thus his susceptibility to emotional distress when they acted. **This combination of the unjustified assertion of power by one party, and impotence of the other, would, we think, be viewed by a civilized community as outrageous and not as an indignity, annoyance or petty oppression for which the law affords no relief**. Our conclusion that the conduct alleged is outrageous is amply supported by case law") (emphasis added).

The cases Defendant rely upon in an attempt to defend its tortious conduct from the category of "outrageous," are easily distinguishable. First, *Wu v. NCL (Bahamas) Ltd.*, 2017 WL

[6] *See* D.E. 5, ¶32(x) and (y) (explaining how the *Celebrity Eclipse* was denied port entry to discharge all passengers in San Antonio, Chile (as originally planned)).

1331712 (S.D. Fla. 2017) did not involve allegations that the cruise line lied, concealed the truth, and/or misrepresented material facts to the plaintiff (as is the case here), but rather, that the cruise line "deliberately and/or recklessly inflicted emotional distress" on the plaintiffs by "failing to utilize employees in the 'Kid's Korner' … who would monitor the Kid's Korner so that it would be clear of hazards and objects which would not be readily perceived by an eleven year old child...." *Id.* at *2. Celebrity's tortious conduct here goes far beyond NCL's alleged tortious conduct in *Wu*.

Second, in *Brown v. Royal Caribbean Cruises, Ltd*., 2017 WL 3773709 (S.D. Fla. 2017), the plaintiff's complaint alleged that the cruise line knew of the presence of bacteria causing Legionnaires' disease in the vessel's water system in July and October 2015 – months before the plaintiff's November 2015 cruise – and recklessly acted in not advising plaintiff and other passengers of the presence of the bacteria/disease prior to the commencement of the Noember 2015 voyage. *Id.* at *2. There, the court acknowledged that the cruise line's failure to advise the plaintiff of the potential for contracting Legionnaires' disease was "truly objectionable behavior", but that the plaintiff's allegations did not rise to the level of outrageousness.

Obviously, however, Celebrity's conduct in lying, concealing the truth, and/or misrepresenting material facts to the Plaintiffs concerning the positive health of "[a]ll guests onboard" – in categorical terms – goes above and beyond the "truly objectionable behavior" in *Brown*, and tips the scale to "outrageous" and/or "atrocious", in line with *Thomas* and *Dominguez*, and sufficient to support an IIED claim as a matter of law.

Lastly, in *Negron v. Celebrity Cruises Inc.*, 2018 WL 3369671 (S.D. Fla. 2018), the plaintiffs alleged that the cruise line misdiagnosed a plaintiff's medical condition, failed to consult with the plaintiffs or keep them apprised of a treatment plan, and subjected them to unreasonable

risk and danger at a local shoreside hospital. *Id.* at *2. Again, however, and in stark contrast to the facts alleged in the instant case, *Negron* did not involve allegations that the cruise line willfully lied, concealed the truth, and/or misrepresented material facts to the plaintiffs – as is the case here.

In conclusion, Defendant, Celebrity's conduct lying, concealing the truth, and/or misrepresenting material facts to the Plaintiffs concerning the positive health of "[a]ll guests onboard" – in categorical terms – is sufficiently "outrageous" to support all of Plaintiffs' IIED claims [D.E. 5, Counts XVIII-XXI], as a matter of law. The conduct of cruise lines, like Celebrity here, in deliberately concealing a deadly infectious disease outbreak aboard a cruise ship – especially during a 30-day voyage – is outrageous, atrocious, and should not be tolerated in a civilized society.

IV. Plaintiffs' Negligent Infliction of Emotional Distress ("NIED") claims (Counts XV through XVII) are cognizable under U.S. General Maritime Law in view of the facts alleged in Amended Complaint.

As explained above, all of named-Plaintiffs' NIED claims are predicated on facts that, as alleged in the Amended Complaint, they both: 1) contracted COVID-19 aboard the *Celebrity Eclipse* and suffered physical harm as a result of the illness; and 2) suffered specific emotional injuries aboard the vessel and leading up to the time they contracted COVID-19 aboard same, as a result of Celebrity's careless and/or lackadaisical response to the COVID-19 outbreak aboard the vessel, including its misleading conduct. *See* D.E. 5, Counts XV through XVII; *cf. also* D.E. 5, ¶32(z) *with* ¶32(aa) (explained above).

Based on these facts, the named Plaintiffs herein represent those potential class members who suffered emotional injuries as a result of COVID-19 contraction aboard the vessel *as well as* those potential class members who did not contract the virus, but suffered emotional distress as a

result of Celebrity's misrepresentations to passengers and otherwise careless response to the COVID-19 outbreak aboard the vessel.

a. The potential class members who did not contract COVID-19 but who were placed in the zone of danger caused by Celebrity's varied tortious conduct have viable NIED claims.

To state an NIED claim under U.S. general maritime law, a plaintiff must allege they were placed in a zone of danger as a result of the defendant's negligent conduct. *See Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1338 (11th Cir. 2012) (holding that federal maritime law employs the zone of danger test to evaluate NIED claims) (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 549 (1994)).

The zone of danger test permits "recovery for emotional injury to plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, ***or who are placed in immediate risk of physical harm by that conduct***." *Gottshall*, 512 U.S. at 549 (emphasis added). Importantly here, to state a claim for NIED and satisfy the zone-of-danger test, "the plaintiff must be, at least, **threatened** with imminent physical impact." *Martins v. Royal Caribbean Cruises Ltd.*, 174 F. Supp. 3d 1345, 1355 (S.D. Fla. 2016) (emphasis in original) (citing *Chaparro*, 693 F.3d at 1337–38).

Celebrity argues that any potential class member/s who was/were only exposed to COVID-19, but did not develop classic symptoms of the virus, cannot recover for NIED. [D.E. 7, pgs. 8-11]. Celebrity's first mistake here is that it selectively reads the Amended Complaint, and on the basis of that selective reading, argues that ". . . a plaintiff who has merely been exposed to illness cannot recover damages for negligently inflicted emotional distress." [D.E. 7, pgs. 8-9].

What Celebrity misses here is that Plaintiffs, in addition to the potential class members who did not contract COVID-19 on the vessel, suffered emotional injuries *not only* as a result of

being unreasonably exposed to COVID-19, but also, ***as a result of Celebrity's careless response to the pandemic and misrepresentation to passengers concerning same*** – that is, separate and apart from the fear of contracting the virus itself.

For example, Celebrity's failure to enforce physical distancing measures aboard the vessel (Count XV); Celebrity misrepresenting to passengers that "[a]ll guests onboard" were "healthy" – when Celebrity knew that wasn't true (Count XVI); and Celebrity negligently disembarking passengers in tight, unorderly groups (Count XVII), all caused Plaintiffs emotional distress, separate and apart from Plaintiffs' fears in contracting the virus itself. These simple allegations completely distinguish this case from *Metro-North Commuter Railroad Co v. Buckley*, 521 U.S. 424 (1997), thereby eviscerating the precedential effect of that case here.

In *Metro-North*, the plaintiff's only claim for liability against the defendant, as outlined in the Court's opinion, was the defendant's negligence in exposing him to asbestos. *See Metro-North*, 521 U.S. at 426-27 ("The basic question in this case is whether a railroad worker **negligently exposed to a carcinogen (here, asbestos)** but without symptoms of any disease can recover under [FELA], for negligently inflicted emotional distress. We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease.") (emphasis added). The ways Celebrity breached its duty of care owed to Plaintiffs and potential class members here are not so limited. *See* D.E. 5, Counts XV through XVII. Moreover, the plaintiff in *Metro-North* was not confined to his workplace (in this case, the *Celebrity Eclipse*) against his will for weeks with no end in sight while at the same time subject to unreasonable exposure to a deadly virus – an alleged cause of Plaintiffs' emotional injuries here (*see* D.E. 5, Count XV).

Here, Plaintiffs allege that they were: 1) unreasonably exposed to COVID-19 as a result of Celebrity's negligent response to the COVID-19 outbreak aboard its vessel (thus, satisfying the

"immediate risk of physical harm" requirement); 2) were lied to by Celebrity concerning the positive health of "[a]ll guests onboard" – which starkly contrasted to the reality they were slowly experiencing aboard the vessel;[7] and 3) were forced to remain aboard the vessel for an unreasonable amount of time while the vessel was stranded at sea in the midst of the COVID-19 pandemic.

Thus, in this case, and unlike in *Metro-North*, there are two sources of emotional injuries – fear of COVID-19 contraction caused by Celebrity's carless response ***and*** Celebrity's Captain's overt act in lying to passengers concerning the positive health of "[a]ll guests onboard". This equates to Plaintiffs and other potential class members having emotional injuries from two separate sources, as a result of one threat of immediate physical impact (*i.e.*, the threat of physically contracting COVID-19), which puts Plaintiffs' NIED claims an those of others similarly situated in a class of cases separate and apart from the mere exposure to asbestos cases, like that of *Metro-North* and the plaintiff therein.

So, it is not *just* Celebrity's conduct in unreasonably exposing Plaintiffs to COVID-19 while aboard the vessel that caused their emotional injuries, but also, Celebrity's ***negligent conduct in responding to*** the COVID-19 outbreak aboard the vessel which also caused Plaintiffs' emotional injuries. Because Plaintiffs were at all times material "threatened" with immediate physical impact of contracting COVID-19 aboard the vessel – on which a COVID-19 outbreak clearly occurred based on Plaintiffs' allegations – Plaintiffs' allegations in support of their NIED claims satisfy the pleading threshold for stating an NIED claim under general maritime law. Celebrity's attempt to squeeze this case within the narrow confines of *Metro-North* fail, as the ways Plaintiffs alleged

[7] *See e.g.* D.E. 5, ¶32(t), (x) and (aa) (passengers aboard the vessel began to exhibit widespread respiratory issues as early as March 9, 2020; yet, on March 17 and 28, 2020, the Captain of the vessel issued a letter to all passengers stating that "[a]ll guests onboard remain healthy and happy").

that Celebrity breached the duty of care owed to them and those similarly situated are not so limited as in *Metro-North*.

The varied allegations here and analysis above also distinguish the present case from *Weissberger v. Princess Cruise Lines, Ltd.* 2020 WL 3977938 (C.D. Cal. July 14, 2020). In *Weissberger*, the plaintiffs did not argue that they sustained emotional distress as a result of the cruise line's negligent response to the COVID-19 outbreak that occurred aboard the vessel – as Plaintiffs do here. *See id.* (". . . the Plaintiffs in this case cannot recover for NIED ***based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease***.").

Celebrity's second mistake here is that a plain reading of *Metro-North* reveals that it does not stand for the proposition that in every fear of disease case, the plaintiff must allege they contracted or suffered symptoms of that disease in order to recover emotional damages. Rather, *Metro-North* holds that a plaintiff cannot recover for the fear of developing disease based on mere exposure to a substance that may cause illness *sometime in the future*, because that type of exposure is not a physical impact that meets the zone of danger test.

Plaintiffs' NIED claims here are distinguishable from the NIED claim analyzed in *Metro-North* because Plaintiffs allege here that they were placed at an actual immediate risk of physical harm by Defendant's conduct – the second criteria available under the zone of danger analysis.

The key here is that *Metro-North* was decided based on the first criteria of the zone of danger test, physical contact, while Plaintiffs' NIED claims here are premised on the second criteria, immediate risk of harm. Celebrity is mixing apples with oranges in alleging that *Metro-North* governs Plaintiffs' NIED claims here; it does not. Here, Plaintiffs allege they were placed at an actual immediate risk of harm by being exposed to a highly communicable and deadly

disease, COVID-19, which if contracted, can cause severe illness, and ultimately death, in the present or very near future.

By contrast, in *Metro-North*, the Court reasoned that exposure to a substance that may pose "*some future risk of disease . . . after a substantial period*" does not amount to a physical contact. *See Metro-North*, 521 U.S. at 428-29; 432 ("The critical question before us . . . is whether the physical contact with insulation dust . . . amounts to a 'physical impact'").

The Supreme Court's decision in *Metro-North* is not controlling here since it was decided based upon the physical impact criteria of the zone of danger test, **not** the actual risk of imminent harm criteria. More importantly, *Metro-North* dealt with the fear of developing cancer sometime in the future due to exposure to a substance, as opposed to fear of developing COVID-19, a highly communicable and deadly disease in the present, or very near future, due to contraction of that virus.

Based upon *Gottshall* and *Chaparro*, Plaintiffs properly alleged their NIED on their own behalves (by satisfying the physical impact criteria) and on behalf of prospective class members who did not contract COVID-19 aboard the vessel, but suffered emotional injuries as a result of that fear of exposure *as well as* Celebrity's careless response and lies pertaining to the COVID-19 outbreak that was ravaging the vessel at that time (by satisfying the actual risk of imminent harm criteria).

WHEREFORE, Plaintiffs respectfully request that this Court deny Defendant's Motion to Dismiss in its entirety, in addition to any further relief this Court deems just and proper. Should this Court grant Defendant's Motion, or any portion thereof, Plaintiffs respectfully request leave to amend the Amended Complaint pursuant to Fed. R. Civ. P. 15(a)(2).

Dated: September 15, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on September 15, 2020, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record or pro se parties identified on the attached Service List in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to electronically receive Notices of Electronic Filing.

By: */s/ L. Alex Perez*
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SERVICE LIST
Kantrow v. Celebrity Cruises Inc.
Case No. 20-CV-21997-JAL

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