The Honorable Thomas S. Zilly

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

LEONARD C. LINDSAY, et al.,

Plaintiffs,

v.

CARNIVAL CORPORATION, et al.,

Defendants.

CASE NO. 2-20-cv-00982-TSZ

MOTION TO DISMISS BY DEFENDANTS CARNIVAL CORPORATION; CARNIVAL PLC; HOLLAND AMERICA LINE INC.; and HOLLAND AMERICA LINE-USA INC.

NOTED ON MOTION CALENDAR: November 6, 2020

ORAL ARGUMENT REQUESTED

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Cases Page(s)

FLYNN, DELICH & WISE LLP
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Long Beach, CA 90831-1800
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Rules

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Other Authorities

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Defendants CARNIVAL CORPORATION and CARNIVAL PLC (together, "Carnival"), and HOLLAND AMERICA LINE, INC., and HOLLAND AMERICA LINE – U.S.A., INC. (together, "Holland America") (collectively, "Defendants"), file this Motion to Dismiss the First Amended Complaint (FAC) under Federal Rules of Civil Procedure 12(b)(1), 12(b)(6), and 23(d)(1)(D).

INTRODUCTION AND SUMMARY OF ARGUMENT

Plaintiffs Leonard C. Lindsay and Carl E.W. Zehner—two of the more than 1,000 passengers who sailed on the *Zaandam* when it departed Buenos Aires, Argentina, on March 8, 2020—seek to bring a class action against Holland America and its parent and affiliate corporations for failing to anticipate and prevent a COVID-19 outbreak onboard the ship. The FAC, however, suffers from numerous defects requiring dismissal of most of Plaintiffs' claims.

First, the Court should dismiss or strike the class-action allegations in the FAC. Plaintiffs have brought this suit as a putative class action, but they both agreed to the Cruise Contract referenced repeatedly in the FAC, which includes a clear and unambiguous class-action waiver. The waiver is enforceable because it was reasonably communicated to Plaintiffs, and enforcement would not be fundamentally unfair. Indeed, class-action waivers are common in cruise-ship passenger ticket contracts, and courts have repeatedly enforced them. This Court should do likewise and dismiss or strike the class allegations with prejudice.

Second, Lindsay's claims must be dismissed because he has not alleged that he contracted COVID-19, that he suffered any harmful symptoms of the disease, or any facts establishing causation. The fact that Lindsay "believes" (FAC ¶ 106) that he contracted COVID-19—despite the lack of *any* factual allegations to support that belief—is not sufficient to survive a motion to dismiss under even the most lenient pleading standards. Moreover, permitting claims based on allegations as thin as Lindsay's to proceed would raise grave policy concerns. As one district court recently recognized, "given the prevalence of COVID-19 in today's world," a rule under which a "passenger could recover without manifesting any symptoms … would lead to a flood of trivial suits, and open the door to unlimited and unpredictable liability." *Weissberger v. Princess Cruise Lines, Ltd.*, 2020 WL 3977938, at *4 (C.D. Cal. July 14, 2020).

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Third, Plaintiffs have not alleged any facts sufficient to hold Carnival liable for Holland America's conduct. For courts to disregard the corporate form, a plaintiff must demonstrate that the parent exercises "total domination" over its subsidiary. Plaintiffs' allegations here—that Carnival owns Holland America, that the companies share board members, and that Carnival exercises supervision over Holland America—describe a normal parent-subsidiary relationship not anywhere close to the total domination necessary to disregard corporate separateness.

Fourth, Plaintiffs' claim for intentional infliction of emotional distress (IIED) must be dismissed because the complaint does not allege Defendants intentionally committed "outrageous" conduct. Liability for IIED "has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002) (quoting Restatement (Second) of Torts § 46 (1965)). Defendants' alleged conduct here comes nowhere near meeting that "extremely difficult standard." *Id.* Plaintiffs make no allegation that Defendants did anything inconsistent with what the U.S. Centers for Disease Control and Prevention (CDC) recommended at the time. In fact, Plaintiffs admit that Holland America *did* take precautions to contain the spread of COVID-19 onboard by directing all guests "to isolate themselves in their staterooms" where they were delivered meals and laundry service by crewmembers. (FAC ¶ 91). And Defendants transferred asymptomatic guests to the *Rotterdam*, another ship, in order to further control the spread of the disease. (FAC ¶ 97). In these extremely uncertain and unprecedented circumstances—at the very outset of a pandemic that *still* remains out of control—Defendants' conduct was not "outrageous" as a matter of law.

Finally, Plaintiffs lack standing to seek prospective injunctive relief. For this Court to grant such relief Plaintiffs must establish a *certainty* not only that Plaintiffs will cruise with Holland America again (which Plaintiffs do not allege) but also that Holland America would certainly harm them in the same way that they allege they were harmed in the past (which Plaintiffs cannot allege). Their claim for injunctive relief therefore must be denied.

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BACKGROUND

A. Allegations in the First Amended Complaint

The FAC alleges the following: Plaintiffs are two of the more than 1,000 passengers who sailed on the *Zaandam* when it departed Buenos Aires, Argentina, on March 8, 2020, with a final destination of Ft. Lauderdale, Florida, scheduled for April 7, 2020. (FAC at 1, ¶ 82). Three days after embarking, on March 11, 2020, the World Health Organization (WHO) declared the novel coronavirus known as COVID-19 a global pandemic. (FAC ¶ 85). On March 13, 2020, Holland America announced that it would suspend its cruise operations and on March 15, 2020, announced that it was canceling the remainder of the *Zaandam*'s voyage. (FAC ¶ 86). South American ports, however, refused the *Zaandam*'s entry, which prevented guests from disembarking. (FAC ¶¶ 87, 89). In the following week, some guests and crew began exhibiting symptoms consistent with COVID-19. (FAC ¶ 90). On March 22, 2020, Holland America instructed all guests to confine themselves in their state rooms, where their meals and laundry services were delivered by crew-members. (FAC ¶ 91). Defendants sent the *Rotterdam*, another ship, to meet the *Zaandam* off the coast of Panama in order to deliver COVID-19 tests, ventilators, and other supplies to the vessel. (FAC ¶ 93). Defendants then transferred asymptomatic guests to the *Rotterdam* in order to control the spread of the disease. (FAC ¶ 97). The ships were allowed passage through the Panama Canal and arrived at port in Port Everglades, Florida, on April 1, 2020. Over the following several days, passengers were allowed to disembark while some others were required to quarantine further onboard. (FAC ¶¶ 99-105). Out of the more than 1,000 passengers aboard the *Zaandam* and *Rotterdam*, only 107 experienced any symptoms related to COVID-19. (FAC ¶ 99).

Plaintiffs Leonard C. Lindsay and Carl E.W. Zehner, who are married, boarded the *Zaandam* on March 7, 2020. (FAC ¶¶ 1-2, 103). On March 27, 2020, Zehner began experiencing symptoms resembling COVID-19 and later tested positive for the virus, at which point he was relocated to another area of the ship. (FAC ¶ 95). On April 5, 2020, Zehner disembarked the *Zaandam* and was admitted to Advent Health Orlando Hospital, where he was placed on a ventilator. (FAC ¶ 104). He has since been released to his home but has not yet made a full recovery. (FAC ¶ 104).

After Zehner was transferred to the hospital, Lindsay remained quarantined on board the

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Long Beach, CA 90831-1800
(562) 435-2626

Zaandam until April 9, 2020, at which point he was allowed to disembark. (FAC ¶ 105). Lindsay does not allege that he ever suffered any symptoms of COVID-19 whatsoever, nor has he ever tested positive for the disease. (FAC ¶ 106).

B. Plaintiffs Agreed to a Class-Action Waiver

Plaintiffs brought this suit as a putative class action on behalf of all 1,000-plus passengers on the *Zaandam*, even though the FAC itself acknowledges that their voyage was subject to a Cruise Contract that includes a class-action waiver. (FAC ¶¶ 113-19). That waiver provides in all-capital letters: "Waiver of Class Action: This cruise 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." (Bergman Decl. ¶ 11 (capitalization altered)).

Plaintiffs booked their cruise through a travel agent on January 9, 2019—*over a year* before their voyage. As a part of this process, their travel agent would have forwarded them a Booking Confirmation PDF containing important information about their voyage. (Bergman Decl. ¶¶ 2-3). The Booking Confirmation PDF states—under the heading "**IMPORTANT NOTICES**"—"All Holland America Line guests travel under the terms and conditions of the Cruise Contract that will be issued to you and which may be provided upon request or viewed on our website: www.hollandamerica.com. Please read the contract carefully as it affects your legal rights." (*Id.* ¶¶ 3, 9). Between the date of booking and the cruise departure date, Plaintiffs received *seven* automated emails at regular intervals, each of which instructed them to complete Online Check In and provided a clickable link to the Online Check In section of Holland America's website. (*Id.* ¶ 4). To complete the Online Check In process, all guests are presented with a copy of the Cruise Contract for the voyage with the instructions "Please Read Carefully the Following Terms and Conditions." (*Id.* ¶ 6). To proceed, passengers must scroll through the entire Cruise Contract on their screen before checking a box indicating acceptance of the Cruise Contract and its terms. (*Id.*). Passengers may also print out the Cruise Contract. (*Id.*). Important here, both Plaintiffs completed the Online Check

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In process and accepted the Cruise Contract's terms and conditions on January 31, 2020—*37 days* before embarking. (*Id.* ¶ 14).

Plaintiffs' reservation was governed by Holland America's standard refund policy, under which Plaintiffs would have received a full refund of their deposit and fare if they cancelled their cruise at any time in the 11 months after their initial booking. (*Id.* ¶ 15). Both Plaintiffs had sailed with Holland America a total of nine times prior to their voyage on the *Zaandam* and had accepted materially identical class-action waivers every time. (*Id.* ¶ 16).

LEGAL STANDARD

To survive a Rule 12(b)(6) motion, a complaint must allege "enough facts to state a claim for relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief above the speculative level, … on the assumption that all the allegations in the complaint are true (even if doubtful in fact)." *Id.* at 555. The plausibility standard "asks for more than a sheer probability that a defendant has acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that offers labels and conclusions or a formulaic recitations of the elements of a cause of action will not do." *Id.*

ARGUMENT

I. The Court Should Strike or Dismiss the Class Allegations Because Plaintiffs Waived the Right to Bring a Class Action.

Plaintiffs' class-action claims must be stricken or dismissed under Rules 12(b)(1), 12(b)(6), and 23(d)(1)(D) because they accepted a Cruise Contract with a class-action waiver, which was both "reasonably communicated" and "fundamentally fair." *Oltman v. Holland America Line, Inc.*, 538 F.3d 1271, 1276 (9th Cir. 2008).

A. The Cruise 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 Cruise Contract satisfies both prongs.

1. "The first prong of the test focuses on the physical characteristics of the ticket and

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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' Cruise 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 cruise 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 … ." (Bergman Decl. ¶ 10 (capitalization altered)). Section 15 then provides, again in all-capital letters: "Waiver of Class Action: This cruise 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.* ¶ 11 (capitalization altered)).[1] Most of the Cruise Contract is not in all-capital letters, therefore highlighting the importance of the provisions at issue here even more.

Plaintiffs do not allege that the Cruise Contract or the class waiver contained therein is in any way unclear or inconspicuous. Nor could they. The Ninth Circuit—along with numerous other courts—has held that virtually identical language in other cruise-ship passenger contracts was sufficiently conspicuous and clear to satisfy 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); *Loving v. Princess Cruise Lines, Ltd.*, 2009 WL

[1] The class action waiver also applies to Plaintiffs' claims against all Defendants. The Cruise Contract specifically provides that any affiliated or related companies of Holland America N.V. (the operator of the vessel) are entitled to all of Holland America's rights, exemptions from liability, defenses, and immunities. (Bergman Decl. ¶ 11). 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).

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7236419, at *3-4 (C.D. Cal. Mar. 5, 2009); *Powell v. Carnival Cruise Lines*, 2005 WL 3080928, at *4 (E.D. Cal. Nov. 17, 2005).

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 Cruise Contract, including the class-action waiver. Plaintiffs admit that they and putative class members were "provided" with the Cruise Contract "prior to the embarkation of the cruise." (FAC ¶ 113.) That occurred in multiple ways. Because Plaintiffs booked through a travel agent, they would have been sent a Booking Confirmation PDF by the travel agent, on or around the date they booked their voyage, January 9, 2019—*424 days* before embarking. (Bergman Decl. ¶¶ 2-3).[2] The Booking Confirmation PDF states—under the heading "**IMPORTANT NOTICES**"—"All Holland America Line guests travel under the terms and conditions of the Cruise Contract that will be issued to you and which may be provided upon request or viewed on our website: www.hollandamerica.com. Please read the contract carefully as it affects your legal rights." (*Id.* ¶¶ 3, 9). Between the date of booking and the cruise departure date, Plaintiffs received *seven* automated emails at regular intervals, each of which instructed them to complete Online Check In and provided a clickable link to the Online Check In section of Holland America's website. (*Id.* ¶ 4). To complete the Online Check In process, all guests are presented with a copy of the Cruise Contract for the voyage with the instructions "Please Read Carefully the Following Terms and Conditions." (*Id.* ¶ 6). To proceed, passengers must scroll through the entire Cruise Contract on their screen before checking a box indicating acceptance of the Cruise Contract and its terms. (*Id.*). Passengers may also print out the Cruise

[2] The fact that Plaintiffs' tickets were booked through a travel agent does not render the Cruise Contract any less binding on them. *See Shute*, 499 U.S. at 587; *Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 912 (3d Cir. 1988), *abrogated on other grounds by Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495 (1989); *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083, 1089 (N.D. Cal. 1999); *Powell*, 2005 WL 3080928, at *1; *Gomez v. Royal Caribbean Cruise Lines*, 964 F. Supp. 47, 50 (D.P.R. 1997).

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(562) 435-2626

Contract. (*Id.*). Important here, both Plaintiffs completed the Online Check In process and accepted the Cruise Contract's terms and conditions on January 31, 2020—*37 days* before embarking. (*Id.* ¶ 14). And this was not Plaintiffs' first time reviewing and accepting those terms. *Both* Plaintiffs had sailed with Holland America *nine times* prior to this voyage and had accepted materially identical class-action waivers before. (*Id.* ¶ 16).

Plaintiffs assert that "Plaintiffs and Class members did not receive the Cruise Contract, if at all, until well after the time period during which they could refuse its terms (i.e. by cancelling their cruise) without being subject to significant fees, sometimes costing up to thousands of dollars." (FAC ¶ 116). That is false. Plaintiffs had *11 months* to review the Cruise Contract and cancel their voyage, if desired, with absolutely zero cancellation fee. (Bergman Decl. ¶ 15).

In any event, the possibility of receiving a full refund is simply not required for the Cruise Contract to be binding. The Ninth Circuit held in *Oltman* 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." 538 F.3d at 1276-77. It is implausible that the plaintiffs in that case could have received a full refund if they had attempted to cancel their cruise while walking the gangway to board the ship. Likewise, in *Toyling Maa v. Carnival Corp. & plc*, another district court in this Circuit recently rejected the argument that a cruise contract was unenforceable due to the cruise line's "aggressive regime of cancellation penalties." 2020 WL 5633425, at *6 n.4 (C.D. Cal. Sept. 21, 2020). Instead, the court held that the contract was enforceable so long as the "the passenger 'had an opportunity to review the contract *before boarding*.'" *Id.* (quoting *Schlessinger v. Holland America, N.V.*, 120 Cal. App. 4th 552, 559 (2004)). And other courts applying maritime law, including the Supreme Court, have routinely enforced virtually identical Cruise Contracts that were accepted by passengers under comparable circumstances. *See Carnival Cruise Lines v. Shute*, 499 U.S. 585, 593 (1991); *McIntosh*, 2018 WL 1732177, at *3; *DeLuca*, 244 F. Supp. 3d at 1349; *Lankford*, 2014 WL 11878384, at *4; *Loving*, 2009 WL 7236419, at *4; *Walker v. Carnival Cruise Lines*, 63 F. Supp. 2d 1083, 1090 (N.D. Cal. 1999). In none of these

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cases was enforcement of the contract contingent upon plaintiffs' ability to receive a full refund.[3] This case is no different. Plaintiffs received the Cruise Contract over a year before embarking and expressly accepted its terms 37 days before embarking. (Bergman Decl. ¶ 14). Plaintiffs had ample opportunity to review and understand the class-action waiver.

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 *Shute*, 499 U.S. at 595). This inquiry turns on "whether the clause was included because of a 'bad-faith 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). Plaintiffs have demonstrated no such circumstances. The FAC does not allege any bad-faith motive or that Princess obtained Plaintiffs' accession to the agreement through fraud or overreaching. (*See* FAC ¶¶ 113-19). Nor can it be said that this class-action waiver discourages passengers from pursuing legitimate claims: there is at least one other lawsuit filed against Holland America and Carnival by individual plaintiffs who were passengers on the same vessel and there are dozens of lawsuits that have been filed to date by more than one hundred individuals who were passengers on cruise ships operated by corporate affiliates of Holland America alleging injuries relating to COVID-19. *E.g.*, *Parker v. Princess Cruise Lines Ltd.*, No. 2:20-cv-03788-RGK-SK (C.D. Cal. Sep. 18, 2020); *Dachinger v. Princess Cruise Lines Ltd.*, No. 2:20-cv-03847-RGK-SK (C.D. Cal. Sep. 8, 2020); *Toutounchian v. Princess Cruise Lines Ltd.*, 2:20-cv-03717-DSF-AGR (C.D. Cal. Aug. 17, 2020);

[3] The *only* case Defendants have identified in which a court has considered a cruise line's refund policy in declining to enforce the terms of a cruise contract, *Corna v. Am. Hawaii Cruises, Inc.*, 794 F. Supp. 1005 (D. Haw. 1992), in fact supports enforcement of the Cruise Contract here. The plaintiffs in *Corna* booked a cruise on a standby basis and did not receive their tickets until one day before they needed to leave their homes for their cruise in Hawaii, which was only two to three days before the cruise's scheduled departure. *Id*. at 1009 & n.4. The court reasoned that it would be unfair to apply the cruise contract's forum selection clause to plaintiffs because at the time the received their tickets and first had an opportunity to become familiar with its terms, they would have forfeited the *entire fare*. *Id*. at 1011-12. Here, unlike in *Corna* where the plaintiffs "could not have obtained their tickets earlier," *Hicks v. Carnival Cruise Lines, Inc.*, 1994 WL 388678, at *4 (E.D. Pa. July 26, 1994), Plaintiffs booked their cruises on the *Zaandam* over a year in advance. And, unlike in *Corna*, Plaintiffs here all had the opportunity to review and become familiar with the Cruise Contract *immediately upon booking*. *Id*. Courts, moreover, have also consistently rejected efforts to expand *Corna* beyond its facts, noting that a passenger's failure to review their tickets in a timely fashion "does not relieve them of the limitations therein." *Lurie v. Norwegian Cruise Lines*, 305 F. Supp. 2d 352, 360 (S.D.N.Y. 2004); *see also Schlessinger v. Holland America, N.V.*, 120 Cal.App.4th 552, 559 (2004); *Hicks*, 1994 WL 388678, at *4. *Corna* is plainly inapplicable here.

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(562) 435-2626

Toyling Maa v. Carnival Corp., 2020 WL 5633425 (C.D. Cal. Sep. 21, 2020).

Plaintiffs assert that "[t]he Cruise Contract is unfairly one-sided, against public policy, unconscionable and, as such, i[s] unenforceable." (FAC ¶ 115). That argument finds no support in the case law. For one thing, "[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." *McIntosh*, 2018 WL 1732177, at *3; *DeLuca*, 244 F. Supp. 3d at 1345 (same). And courts applying maritime law have routinely enforced virtually identical cruise-ship passenger ticket contracts that were accepted by passengers under comparable circumstances. *E.g.*, *Toyling Maa*, 2020 WL 5633425, at *6-7; *Loving*, 2009 WL 7236419, at *4; *McIntosh*, 2018 WL 1732177, at *3; *DeLuca*, 244 F. Supp. 3d at 1349; *Lankford*, 2014 WL 11878384, at *4; *Schlessinger*, 120 Cal. App. 4th at 559; *Walker*, 63 F. Supp. 2d at 1090. Beyond that, both the Supreme Court and the Ninth Circuit have repeatedly affirmed that class-action waivers contained in contracts of adhesion are broadly enforceable and not contrary to public policy. *See DIRECTV, Inc. v. Imburgia*, 136 S. Ct. 463 (2015); *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333 (2011); *Am. Exp. Co. v. Italian Colors Rest.*, 570 U.S. 228, 235-36 (2013); *Carter v. Rent-A-Center, Inc.*, 718 Fed. App'x 502, 504 (9th Cir. 2017) ("foreclosing any argument that a class action waiver, by itself, is unconscionable under state law").

Plaintiffs also assert that providing them with the Cruise Contract after they had booked their voyage "constitutes surprise and is procedurally unconscionable." (FAC ¶ 116). But, again, that argument is foreclosed by *Oltman*, which upheld enforcement of a cruise contract that passengers first received as they were boarding the ship. 538 F.3d at 1276-77. Likewise, in *Shute*, the Supreme Court held that a cruise contract was valid notwithstanding the fact that the passengers purchased through a travel agent and were not provided with the terms of the contract until after purchase. 499 U.S. at 587. Indeed, it is common practice in the cruise industry to provide cruise contracts to passengers after purchase, and those contracts are uniformly enforced. *E.g.*, *Toyling Maa*, 2020 WL 5633425, at *6-7; *Loving*, 2009 WL 7236419, at *4; *McIntosh*, 2018 WL 1732177, at *3; *DeLuca*, 244 F. Supp. 3d at 1349; *Lankford*, 2014 WL 11878384, at *4; *Schlessinger*, 120 Cal. App. 4th at 559; *Walker*, 63 F. Supp. 2d at 1090.

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C. The Court should decide the waiver's enforceability at the pleading stage.

This Court can and should decide the enforceability of class-action waiver provisions at the pleading stage and strike or dismiss the class allegations with prejudice. Federal Rule of Civil Procedure 23 expressly authorizes the Court to strike class action allegations by issuing an order "requiring that the pleadings be amended to eliminate allegations about representation of absent persons." Fed. R. Civ. P. 23(d)(1)(D). As a leading treatise notes, under Rules 23 and 12 "the court has the authority to strike class allegations prior to discovery if the complaint demonstrates that a class action cannot be maintained." 1 McLaughlin on Class Actions § 3:14 (16th ed. Oct. 2019 update); *see id.* ("Class allegations also may be stricken when they are asserted in contravention of a clear legal bar against class treatment of the action."); *Pilgrim v. Universal Health Card, LLC*, 660 F.3d 943, 949 (6th Cir. 2011) ("Rule 23(c)(1)(A) says that the district court should decide whether to certify a class '[a]t an early practicable time' in the litigation, and nothing in the rules says that the court must await a motion by the plaintiffs.").

Courts thus routinely dispose of class actions pursuant to class-action waivers at the pleading stage, including in litigation involving cruise lines. *See, e.g.*, *Carter v. Rent-A-Center, Inc.*, 718 Fed. App'x 502 (9th Cir. 2017); *Laver v. Credit Suisse Sec. USA, LLC*, 2018 WL 3068109 (N.D. Cal. June 21, 2018); *Provencher v. Dell, Inc.*, 409 F. Supp. 2d 1196 (C.D. Cal. 2006); *Cruz v. Cingular Wireless, LLC*, 648 F.3d 1205 (11th Cir. 2011); *Carretta*, 343 F. Supp. 3d 1300 (granting motion to dismiss class allegations based on waiver in cruise line's passage ticket contract); *McIntosh*, 2018 WL 1732177 (same); *Crusan*, 13-CV-20592-KMW [ECF No. 41] (same). This is consistent with how courts treat other contractual limitations of litigants' rights, such as forum-selection clauses, *Shute*, 499 U.S. 585, and arbitration clauses, *e.g.*, *Concepcion*, 563 U.S. 333. As in those cases, deciding the class-waiver issue at the outset of litigation preserves the benefit of the waiver by conserving party and judicial resources associated with class certification and by eliminating uncertainty surrounding whether the case will be treated as a class or individual action.[4] The Court should therefore enforce the class-action waiver now. And because amendment

[4] One court recently decided to withhold decision on the enforceability of a similar class-action waiver until the

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cannot cure the legal defects in the class allegations, the Court should strike or dismiss Plaintiffs' class-action allegations with prejudice. *See* Fed. R. Civ. Pro. 12(b)(1), 12(b)(6), 23(d)(1)(D).

II. Lindsay's Claims Must Be Dismissed for Failure To Allege Injury or Causation.

A. Plaintiffs must allege concrete, harmful symptoms of disease to recover.

Under the Supreme Court's decision in *Metro-North Commuter Railroad Co. v. Buckley*, a plaintiff alleging emotional distress from disease exposure "cannot recover unless, and until, he manifests symptoms of a disease." 521 U.S. 424, 427 (1997). The Court has made clear that its rule applies not just to claims based on exposure to toxins like asbestos, but to any claim based on alleged exposure to a potential source of disease—specifically including "germ-laden air." *Metro-North*, 521 U.S. at 437. The Supreme Court "sharply circumscribed" recovery under federal law specifically to avoid the "uncabined recognition of claims for negligently inflicted emotional distress," which would "hol[d] out the very real possibility of nearly infinite and unpredictable liability for defendants." *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 146 (2003) (quoting *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994)).

The Supreme Court clarified *Metro-North* further in *Ayers*. In *Ayers*, plaintiffs diagnosed with asbestosis—"scarring of the lungs by asbestos fibers"—sued to recover for pain and suffering stemming from the disease. 538 U.S. at 142 n.2. The question presented was whether a plaintiff "who suffers from the disease asbestosis" may, as part of his "recovery for his asbestosis-related 'pain and suffering,'" recover "damages for fear of developing cancer." *Id.* at 140. The Court said yes, but with caveats that are dispositive here. The Court allowed recovery for emotional distress

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certification stage, but in that case the court had ordered expedited class-certification briefing, which both overlapped with defendants' motion-to-dismiss briefing and also raised the class-waiver issue. *See* In Chambers Order at 4-5, *Archer v. Carnival Corp. & plc*, No. CV 20-4203 (C.D. Cal. Sept. 22, 2020), Dkt. 82. Plaintiffs here have not yet filed a motion to certify a class, and there is no reason for this Court to wait for them to do so before deciding the legal question of whether the class waiver they agreed to is enforceable. To the contrary, deciding the applicability of the class-action waiver now will save substantial party and judicial resources related to briefing a motion for class certification. Additionally, the case *Archer* relied on for the proposition that motions to strike class allegations are "disfavored" involved arguments that the proposed class could not satisfy the requirements of Rule 23. *Id.* (citing *In re Apple, AT&T iPad Unlimited Data Plan Litig.*, No. C-10-02553 RMW, 2020 WL 2428248, at *2 (N.D. Cal. June 26, 2012)). But this case, and *Archer* for that matter, is different because Defendants rely on a contractual class waiver, rather than Rule 23's substantive provisions (although, to be sure, if the Court does not dismiss the case and/or the class allegations, Plaintiff will not be able to satisfy her burden to prove that the proposed class satisfies Rule 23).

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only because it was "brought on by a physical injury, for which pain and suffering recovery is permitted." *Id.* at 147. Importantly, the parties in *Ayers* "agreed[]" that asbestosis—which the Court characterized as "a chronic, painful and concrete reminder that [a plaintiff] has been injuriously exposed to a substantial amount of asbestos"—was itself such "a cognizable injury." *Id.* at 156; *see id.* at 148 (asbestosis is "clinically serious, often disabling, and progressive"). Because asbestosis was a compensable physical injury, a plaintiff suffering from asbestosis could also recover for emotional distress under the common law principle that "pain and suffering associated with, or 'parasitic' on, a physical injury are traditionally compensable." *Id.* at 148. A "classic example" of that principle was that "plaintiffs bitten by dogs" can recover "not only for the pain of the wound, but also for their fear that the bite would someday result in rabies or tetanus." *Id.* at 149; *see id.* at 149 n.8 (citing cases allowing recovery for rabies, lockjaw, blood poisoning, hydrophobia, and apprehension of poison from dog bite).

Key here, the plaintiffs in *Ayers* were not asymptomatic. In assuring that its decision would not "risk 'unlimited and unpredictable liability'"—"a point central to the Court's decision in *Metro-North*"—*Ayers* approvingly cited "[c]ommentary distinguish[ing] asymptomatic asbestos plaintiffs from plaintiffs who developed asbestosis and thus suffered real physical harm." *Id.* at 156 (quotation marks omitted). Those "asymptomatic asbestos plaintiffs" could not recover either for a physical injury or emotional distress; recovery was limited to those with "real physical harm." *Id.* On that score, the Court observed that the law "classif[ied]" individuals as "asymptomatic" even when asbestos exposure caused "pleural thickening," an asbestos-related disease where fibers scar the lungs, thickening the lung lining and causing chest pain and difficulty breathing. *Id.*

Presaging cases like this one, *Ayers* explained that limiting recovery to individuals who actually suffered from the "chronic, painful and concrete" condition of asbestosis—a "fraction" of "those exposed to asbestos"—was critical to "reduce[] the universe of potential claimants to numbers neither 'unlimited' nor 'unpredictable.'" *Id.* at 157. Courts have adhered to this line between "plaintiffs who develop asbestosis," which "is a physical injury," and "those who are merely exposed to asbestos but remain asymptomatic," *Howard Cohn v. Diamond Offshore Mgmt. Co.*, 2003 WL 21750661, at *2 (E.D. La. July 28, 2003), with the latter category including individuals who

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are diagnosed with conditions "such as pleural plaques or pleural thickening in the lung unaccompanied by an objectively verifiable functional impairment," *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990) (cited in *Ayers*, 538 U.S. at 157).

In *Weissberger v. Princess Cruise Lines, Ltd.*, a district court in this Circuit recently applied *Metro-North* and *Ayers* to dismiss fifteen lawsuits filed by *Grand Princess* passengers who had not alleged any symptoms of, or diagnoses with, COVID-19. 2020 WL 3977938 (C.D. Cal. July 14, 2020). The court explained that under *Metro-North* and *Ayers*, "to recover, a plaintiff must manifest some symptom of the feared disease." *Id.* at *3; *see id.* ("[*Ayers*] found that plaintiffs who actually contracted asbestosis and manifested symptoms had sustained a physical impact"). The Court rejected that a passenger could "recover without manifesting any symptoms whatsoever" for emotional distress. *Id.* The hard-and-fast rule from *Metro-North*, *Ayers*, and *Weissberger*, precluding a plaintiff's recovery for emotional distress claims "unless, and until, he manifests symptoms of a disease," thus squarely forecloses any recovery both for passengers who have not contracted COVID-19 and for passengers who contracted COVID-19 but have not manifested any harmful symptoms. 521 U.S. at 427.

The requirement of concrete, harmful symptoms to trigger liability accords with the widely recognized tort principle that a plaintiff claiming compensable harm from a disease must adduce objective testimony of a "functional impairment." *In re Hawaii Fed. Asbestos Cases*, 734 F. Supp. 1563, 1567 (D. Haw. 1990); *see also, e.g.*, *Sheridan v. Cabot Corp.*, 113 F. App'x 444, 448 (3d Cir. 2004); *Sondag v. Pneumo Abex Corp.*, 55 N.E.3d 1259, 1265 (Ill. App. Ct. 2016) ("To qualify as 'physical harm,' the alteration of the body must have a detrimental effect in a more practical sense, such as by causing noticeable respiratory symptoms"). It also respects the rule that de minimis injuries do not support tort claims. *See Skaff v. Meridien N. Am. Beverly Hills, LLC*, 506 F.3d 832, 839-40 (9th Cir. 2007) ("The ancient maxims of de minimis non curat lex and lex non curat de minimis teach that the law cares not about trifles."); *see also, e.g., Granfield v. CSX Transp., Inc.*, 597 F.3d 474 (1st Cir. 2010) ("de minimis aches and pains are not considered to be an injury for the purposes of the FELA statute of limitations"); *Oliver v. Keller*, 289 F.3d 623 (9th Cir. 2002) (plaintiffs cannot recover for emotional suffering under the Prison Litigation Reform Act absent a

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physical injury that is more than de minimis); *Stewart v. Cent. of Ga. R.R. Co.*, 87 F. Supp. 2d 1333, 1339 (S.D. Ga. 2000) (same for the FELA). Defendants are not suggesting that COVID-19 is trifling and does not seek to minimize its impact. But plaintiffs, who do not allege that they contracted COVID-19 and have experienced no harmful symptoms, have no legally cognizable injury under *Metro-North*, *Ayers*, and *Weissberger*.

B. *Metro-North* requires dismissal of Lindsay's claims.

Metro-North requires dismissal of Lindsay's claims. Lindsay does not allege that he contracted COVID-19—only that he "believes" that he contracted the disease. (FAC ¶ 106). But belief alone is not enough to sustain his claims. Lindsay does not supply a single plausible factual allegation to support his belief, thus failing Rule 8's most basic requirements. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). And, in fact, his alleged belief is contradicted by the pleadings. Lindsay admits that he has *never* tested positive for COVID-19. (FAC ¶ 106). And nowhere does he allege that he suffered *any* symptoms of the disease. In other words, there is no factual basis for Lindsay's alleged belief that he contracted COVID-19. That alone warrants dismissal under *Metro-North* because merely "being exposed to, and *potentially* contracting, COVID-19" (FAC ¶ 111 (emphasis added)), does not give rise to any cognizable claim. *Ayers*, 538 U.S. at 157 ("*Metro-North* sharply distinguished exposure-only plaintiffs from 'plaintiffs who suffer from a disease[.]'"). As explained in *Weissberger*, "Plaintiffs … cannot recover … based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease." 2020 WL 3977938, at *3; *see also* In Chambers Order at 5, *Parker v. Princess Cruise Lines Ltd*, No. CV 20-3788 (C.D. Cal. Sept. 18, 2020), Dkt. 54 (same). Beyond that, even if Lindsay could plausibly allege that he contracted the disease, under *Metro-North* and *Ayers* he must allege more than *de minimis* symptoms of the disease to state a claim for emotional distress. *See Ayers*, 538 U.S. at 156 (explaining that plaintiffs must "suffer[] real physical harm" and held that even plaintiffs who suffered from "pleural thickening," an asbestos-related disease where fibers scar the lungs, cannot recover for emotional distress for fear of cancer). Lindsay has alleged no symptoms whatsoever, let alone the sort of "chronic, painful and concrete" harm required by the Supreme Court in *Ayers*. 538 U.S. at 156.

Permitting Lindsay's claims to proceed based entirely on his unfounded belief that he

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contracted COVID-19 raises the same policy concerns central to the decisions in *Metro-North*, *Ayers*, and *Weissberger*. COVID-19 has infected over 31.4 million people, including nearly 7 million people in the United States alone. If a plaintiff can recover without suffering any symptoms, liability will be expanded dramatically, and courts will be forced into the impossible task of attempting to sort out responsibility for a global pandemic. In precisely this context, the *Weissberger* court recognized the dangers of straying from the *Metro-North* and *Ayers* framework, noting that "given the prevalence of COVID-19 in today's world," a rule under which a "passenger could recover without manifesting any symptoms … would lead to a flood of trivial suits, and open the door to unlimited and unpredictable liability." 2020 WL 3977938, at *4. Allowing recovery without any plausible allegation of harmful symptoms will create a "flood" of cases in which courts "would be forced to make highly subjective determinations concerning the authenticity of claims for emotional injury, which are far less susceptible to objective medical proof than are their physical counterparts." *Gottshall*, 512 U.S. at 552. That would open the door to virtually limitless liability for all manner of businesses, schools, airlines, and even private persons who are found somewhere on the causal chain that ends with an individual's positive diagnosis for the disease.

The ability of individual defendants like Holland America and Carnival to prove they were not negligent does not abate these grave policy concerns. The Supreme Court's cases stand for the principle that "case-by-case determinations of negligence are not an adequate guard against unlimited and unpredictable liability." *Weissberger*, 2020 WL 3977938, at *4. "That is why the Supreme Court imposed a categorical, threshold rule on [the plaintiff's] ability to recover for his exposure to insulation dust containing asbestos, even though his employer in fact 'conceded negligence.'" *Id.* (quoting *Metro-North*, 521 U.S. at 436). "Here the relevant question concerns not simply recovery in an individual case, but the consequences and effects of a rule of law that would permit that recovery." *Id.* (quoting 521 U.S. at 438). Plaintiffs' theory of liability would allow all of the millions of individuals who test positive for COVID-19 to seek millions of dollars in damages from the deepest-pocketed businesses that they recently visited.

C. Lindsay has failed to allege causation.

Finally, even if Lindsay had actually contracted COVID-19 and suffered harmful

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symptoms of the disease, his claims would still fail because he does not allege any facts establishing causation, such as where, when, or how he contracted the disease. (FAC ¶ 106). As another district court recently held, to allege causation, a plaintiff seeking to recover for exposure to COVID-19 must state "*when* [he] tested positive for COVID-19, when [he] tested positive for COVID-19 antibodies, or when [he] first began experiencing symptoms." In Chambers Order at 8, *Archer v. Carnival Corp. & plc*, No. CV 20-4203 (C.D. Cal. Sept. 22, 2020), Dkt. 82. Lindsay's bare allegations—based entirely on his unfounded beliefs—satisfy none of these requirements.

III. Plaintiffs Have Made No Plausible Allegation of Alter Ego Status

Plaintiffs' allegations that Carnival and Holland America acted as alter egos (FAC ¶ 8-19) are conclusory and do not amount to the total domination necessary to pierce the corporate veil. It is undisputed that Holland America Line – USA, Inc. and Holland American Line, Inc. are separate corporate entities from Carnival Corporation and Carnival plc. (FAC ¶¶ 9, 12-13). Under maritime law, disregarding corporate separateness "requires that the controlling corporate entity exercise total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own." *Chan v. Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1294 (9th Cir. 1997) (quoting *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 859 (9th Cir. 1986)).

The rare remedy of veil-piercing is available "only under extraordinary circumstances," like when "the corporate form [is] being used for wrongful purposes." *Vitol, S.A. v. Primerose Shipping Co.*, 708 F.3d 527, 543-44 (4th Cir. 2013) (quotation marks omitted). "Common ownership alone" is far from sufficient. *Chan*, 123 F.3d at 1294; *see also, e.g., Kirno Hill Corp. v. Holt*, 618 F.2d 982, 985 (2d Cir. 1980) ("[Being] the sole owner … does not alone justify piercing the corporate veil."). Rather, "[c]orporate separateness is respected unless doing so would work injustice upon an innocent third party." *Chan*, 123 F.3d at 1293 (quoting *Kilkenny v. Arco Marine Inc.*, 800 F.2d 853, 859 (9th Cir. 1986)). Alter-ego findings have been reversed without evidence of "a shared corporate existence or common scheme to perpetrate fraud on third parties." *Chan*, 123 F.3d at 1294. And the Ninth Circuit has affirmed dismissal of complaints that fail to "allege facts supporting a plausible alter ego claim." *G.O. Am. Shipping Co. v. China COSCO Shipping Corp.*, 764 F. App'x 629, 629 (9th Cir. 2019) (mem.).

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Plaintiffs do not allege anything approaching the requisite corporate domination that could warrant piercing the veil. Plaintiffs' *factual* allegations describe only a normal parent-subsidiary relationship. Plaintiffs' allegations of "ownership and control over HOLLAND" are simply that Carnival "owns HOLLAND as a subsidiary" (FAC ¶ 13), which is never sufficient to pierce the corporate veil. *See Chan*, 123 F.3d at 1294; *Kirno Hill Corp.*, 618 F.2d at 985. And Plaintiffs' allegations of "control over HOLLAND's operations" are simply that Carnival "'currently monitors and supervises environmental, safety, security, and regulatory requirements' for its brands, including HOLLAND" (FAC ¶ 16). Monitoring and supervising certain narrow aspects of a subsidiary's operations do not amount the "total domination" necessary to pierce the corporate veil. *Chan*, 123 F.3d at 1294.

Plaintiffs' remaining, conclusory allegations of shared directors and assets (FAC ¶ 18) and "control and domination over HOLLAND's business and day-to-day operations" (FAC ¶ 19), are nowhere near sufficient under the governing standard. A plaintiff cannot rely on "[c]onclusory allegations of 'alter ego' status … to state a viable claim." *Xyience Beverage Co., LLC v. Statewide Beverage Co., Inc.*, 2015 WL 13333486, at *5 (C.D. Cal. Sept. 24, 2015) (collecting cases). "Rather, a plaintiff must allege specifically … the elements of alter ego liability, as well as *facts* supporting each." *CSX Transp., Inc. v. California Railcar Corp.*, 2010 WL 11597958, at *3 (C.D. Cal. Aug. 9, 2010) (emphasis added); *see also, e.g., Wehlage v. EmpRes Healthcare, Inc.*, 791 F. Supp. 2d 774, 782-83 (N.D. Cal. 2011) ("broad," "general" alter-ego allegations insufficient). Where, as here, the only non-conclusory factual allegations in the FAC point to a typical parent-subsidiary relationship, allowing Plaintiffs' claims against Carnival to proceed would turn the piercing doctrine on its head, converting it into the rule rather than the exception.

In at least four recent cases, other courts within this Circuit have rejected attempts by plaintiffs to hold Carnival liable for the alleged conduct of its subsidiaries based on nearly identical allegations. In *Archer*, the court rejected plaintiffs' attempt to pierce the corporate veil based (*inter alia*) on allegations that Carnival and Princess Cruise Lines (another subsidiary) "share the same board of directors and almost all of the same executive officers"; that Carnival "currently monitors and supervises environmental, safety, security, and regulatory requirements for Princess and other

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Carnival brands"; and that "Carnival directed the manner in which Princess Cruises responded to COVID-19 outbreaks on Princess Cruise ships." In Chambers Order at 6-7, No. CV 20-4203 (C.D. Cal. Sept. 22, 2020), Dkt. 82. In *Toyling Maa*, the court likewise agreed with Carnival "that ownership coupled with common officers or directors is insufficient to establish alter ego liability," concluding that, in a nearly identical complaint, "there are no facts to indicate that the alleged 'control' Carnival exercises over Princess extends beyond the control reasonably expected of a sole shareholder to 'total domination.'" 2020 WL 5633425, at *10. In *Eva Yuk Wah Ma Wong v. Carnival Corp. & plc*, the court rejected plaintiffs' attempt to pierce the corporate veil based on allegations that "(1) Carnival owns Princess Cruises as a subsidiary, (2) Carnival and Princess Cruises share the same Board of Directors and almost all of the same executive officers, (3) Princess Cruises calls itself a Carnival-brand cruise line, and (4) Carnival exerts control over Princess Cruises' business and day-to-day operations." In Chambers Order at 5, No. CV 20-4727 (C.D. Cal. Sept. 4, 2020), Dkt. 35. And in *Toutounchian v. Princess Cruise Lines Ltd.*, the court rejected plaintiffs' attempt to pierce the corporate veil absent factual allegations that Carnival exercises "*total domination*" over its subsidiary. Order at 5, No. CV 20-3717 (C.D. Cal. Aug. 17, 2020), Dkt. 34 (quoting *Chan*, 123 F.3d at 1294).

As in those cases, the FAC contains no allegation of total corporate domination, and certainly no indication that Holland America—a separate company incorporated and headquartered elsewhere—has "no separate corporate interests" from Carnival. *Chan*, 123 F.3d at 1294. The absence of any specific allegations against the Carnival entities indicates they have been included in this suit for no reason except their corporate relationship to Holland America. Accordingly, all claims against Carnival Corporation and Carnival plc must be dismissed.

IV. Plaintiffs Fail to State a Claim for Intentional Infliction of Emotional Distress

The Court should dismiss Plaintiffs' claim for intentional infliction of emotional distress (IIED) because Plaintiffs have failed to allege that Defendants committed "extreme and outrageous conduct" that "intentionally or recklessly cause[d] [Plaintiffs] severe emotional distress." *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 841 (9th Cir. 2002) (quoting Restatement (Second) of Torts § 46) (applying Restatement standard to IIED claims under federal maritime law). This

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standard is "extremely difficult to meet." *Id.* at 842. "It has not been enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict emotional distress, or even that his conduct has been characterized by 'malice,' or a degree of aggravation which would entitle the plaintiff to punitive damages for another tort." Restatement (Second) of Torts § 46, cmt. d. Rather, "[l]iability has been found only where the conduct has been so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Wallis*, 306 F.3d at 841 (quoting Restatement (Second) of Torts § 46).

Courts thus routinely dismiss IIED claims based on facts that are either comparable or more outrageous than those alleged here. In *Brown v. Royal Caribbean Cruises, Ltd.*, for example, the court dismissed an IIED claim based on allegations that a cruise line "knew of the presence of Legionnaires' disease" and "acted with deliberate and wanton recklessness in choosing not to advise passengers of the presence of the disease prior to the ship's departure," because, although the complaint "describe[d] truly objectionable behavior, the allegations simply d[id] not rise to the level of outrageousness required by the applicable case law." 2017 WL 3773709, at *2-3 (S.D. Fla. Mar. 17, 2017). Likewise, in *Negron v. Celebrity Cruises, Inc.*, the court dismissed cruise-ship passengers' IIED claims based on allegations that they were "expos[ed] to areas contaminated with Ebola" after being forced to disembark and travel to a local hospital due to another passenger's medical condition. 2018 WL 3369671, at *1 (S.D. Fla. July 9, 2018). And in *Garcia v. Carnival Corp.*, the court dismissed a cruise-ship passenger's IIED claim based on allegations that crew members assaulted her and prevented her from leaving her room. 838 F. Supp. 2d 1334, 1339 (S.D. Fla. 2012). *See also, e.g.*, *Wallis*, 306 F.3d at 842 (dismissing cruise-ship passenger's IIED claim alleging that an employee said, after the passenger's husband disappeared from the vessel, that he "was probably dead and that his body would be sucked under the ship, chopped up by the propellers, and probably not be recovered"); *York v. Commodore Cruise Line, Ltd.*, 863 F. Supp. 159, (S.D.N.Y. 1994) (dismissing cruise-ship passenger's IIED claim alleging ship failed to notify authorities of passenger's rape claim, made misrepresentations to examining doctor, and misrepresented applicable law).

Plaintiffs' allegations here fall well short of the "extremely difficult" standard of "extreme

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and outrageous" conduct. Plaintiffs' allegations rest on the failure to anticipate and stop a COVID-19 outbreak in early March 2020. Notwithstanding the fact that outbreaks at large institutions continue even today, Plaintiffs insist that Defendants "exhibited repeated and continued extreme and outrageous conduct" when they failed to take various precautions to prevent the spread of COVID-19, such as discontinuing "turn down service to passengers" and instituting "policies for quarantine, isolation, or social distancing for passengers." (FAC ¶ 195). Even if that were true, Plaintiffs' alleged conduct was simply not "beyond all possible bounds of decency," "atrocious," or "utterly intolerable" as required to plead an IIED claim. *Wallis*, 306 F.3d at 841 (internal quotations omitted). The *Zaandam* embarked *seven days* before the CDC issued a No Sail Order restricting cruise-ship operations in the United States,[5] and *three days* before the WHO declared COVID-19 a pandemic (FAC ¶ 83). Plaintiffs admit that much remained unknown about the virus at that time, including how the virus was transmitted. (FAC ¶ 38).[6] Plaintiffs admit that COVID-19 diagnostic tests were unavailable and inaccurate, "particularly during the early days of the pandemic." (FAC ¶ 34). And there is no allegation that Defendants did anything inconsistent with what the CDC (or South American authorities) had recommended at the time. In fact, Plaintiffs admit that Defendants suspended cruise-ship operations shortly after the WHO declared COVID-19 a pandemic and one day *before* the CDC issued its No Sail Order. (FAC ¶ 86). And after some guests began exhibiting symptoms consistent with COVID-19, Holland America did take precautions to contain the spread of COVID-19 onboard by directing all guests "to isolate themselves in their staterooms" where they were delivered meals and laundry service by crewmembers. (FAC ¶ 91). Defendants sent the *Rotterdam*, another ship, to meet the *Zaandam* off the coast of Panama in order to deliver COVID-19 tests, ventilators, and other supplies to the vessel. (FAC ¶ 93). And Defendants then transferred asymptomatic guests to the *Rotterdam* in order to control the spread of the disease. (FAC ¶ 97). In

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[5] *See* U.S. Dep't of Health & Human Servs., Order Under Sections 361 & 365 of the Public Health Service Act (42 U.S.C. §§ 264, 268) and 42 Code of Federal Regulations Part 70 (Interstate) and Part 71 (Foreign): No Sail Order and Other Measures Related to Operations (Mar. 14, 2020), https://www.cdc.gov/quarantine/pdf/signed-manifest-order_031520.pdf.

[6] Indeed, there remains uncertainty to this day about whether aerosol transmission of COVID-19 is common. *CDC Publishes—Then Withdraws—Guidance on Aerosol Spread of Coronavirus*, NPR (Sept. 21, 2020), https://www.npr.org/sections/coronavirus-live-updates/2020/09/21/915351325/cdc-publishes-then-withdraws-guidance-on-aerosol-spread-of-coronavirus.

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these extremely uncertain and unprecedented circumstances—at the very outset of a pandemic that *still* remains out of control—Defendants' conduct was not "outrageous" as a matter of law.

Nor have Plaintiffs adequately alleged that Defendants "intentionally" or "recklessly" caused their emotional distress. *Wallis*, 306 F.3d at 841 (quoting Restatement (Second) of Torts § 46). Nowhere do Plaintiffs allege that Defendants intended to cause them harm or emotional distress, nor would such allegations be plausible, considering that Defendants have no incentive whatsoever to intentionally inflict emotional harm on their guests. And Plaintiffs' only allegation of "recklessness" is that Defendants' "decid[ed] to continue to operate the MS ZAANDAM" despite knowing "of the unreasonably high risk of viral contagion of COVID-19 on cruise ships." (FAC ¶¶ 174-75). Bare allegations that Defendants caused an "unreasonably high risk" do not amount to recklessness under *Wallis* and the Restatement. Rather, Plaintiffs must allege facts demonstrating "that such risk is *substantially greater* than that which is necessary to make [a defendant's] conduct negligent." Restatement (Second) of Torts § 500 (emphasis added). That they cannot do. Plaintiffs' allegations about the uncertainty surrounding transmission of COVID-19 in March 2020—which they admit continues to this day (FAC ¶ 38)—as well as the measures Defendants did undertake to limit the spread of the disease (FAC ¶ 91), foreclose a finding of recklessness as a matter of law.[7]

If Plaintiffs have stated a claim here, then any one of the more than 7 million Americans who have contracted COVID-19 to date could bring an IIED claim against any business, institution, or person who might have exposed them to the disease for failing to implement sufficient measures to prevent infection—notwithstanding that governments, schools, universities, and other institutions are still struggling to control the pandemic. Defendants' failure to anticipate and prevent the outbreak of a disease that *nobody* was able to anticipate or prevent does not "go beyond all possible bounds of decency" so as "to be regarded as atrocious, and utterly intolerable in a civilized

[7] One court has permitted IIED claims to proceed based on similar allegations as here. *See* In Chambers Order at 8-9, *Archer v. Carnival Corp. & plc*, No. CV 20-4203 (C.D. Cal. Sept. 22, 2020), Dkt. 82. That decision is wrong. It failed to recognize that the standard for extreme and outrageous conduct is "extremely difficult to meet." *Wallis*, 306 F.3d at 842. It failed to acknowledge that courts regularly dismiss IIED claims at the motion-to-dismiss stage. It failed to address—and is entirely irreconcilable with—the numerous cases cited above in which IIED claims were dismissed based on similar or more-outrageous conduct. And it failed to consider whether the plaintiffs had adequately alleged intent or recklessness.

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community." *Wallis*, 306 F.3d at 841. Moreover, if Plaintiffs' theory is correct, recovery would not be limited to persons who actually contracted COVID-19; rather, anyone who happened to be present in a place where someone later was found to have been diagnosed with COVID-19 could bring an IIED claim. That is simply not the law. "Given the prevalence of COVID-19 in today's world," a rule under which a passenger could recover for emotional damages "without manifesting any symptoms … would lead to a flood of trivial suits, and open the door to unlimited and unpredictable liability." *Weissberger*, 2020 WL 3977938, at *4. Such liability is precisely what the Supreme Court foreclosed in *Metro-North* and *Ayers*. *See id.* Plaintiffs' IIED claims must be dismissed.

V. Plaintiffs Lack Standing to Seek Injunctive Relief

Finally, even if Plaintiffs' claims are allowed to proceed, their request for injunctive relief must be dismissed under Rule 12(b)(1) because Plaintiffs lack Article III standing to seek prospective relief. Plaintiffs bear the burden of establishing standing to invoke federal subject matter jurisdiction. *See D'Lil v. Best Western Encina Lodge & Suites*, 538 F.3d 1031, 1036 (9th Cir. 2008). Critically, a plaintiff must show "that he has standing for each type of relief sought." *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009). For injunctive relief the plaintiff must face a threat of future injury. *Id.* That threat must be "actual and imminent, not conjectural or hypothetical." *Id.* In other words, the "threatened injury must be certainly impending to constitute injury in fact" and "allegations of possible future injury are not sufficient." *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 409 (2013). And it must be true that "injunctive relief will vindicate the rights of the particular plaintiff," not merely "the rights of third parties" who may find themselves in a position similar to the plaintiff. *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 949 (9th Cir. 2011).

Under these principles, Plaintiffs have no standing to obtain injunctive relief. All five components of the injunction that Plaintiffs seek relate to Holland America's future business conduct. But being a past customer does not provide standing to enjoin a business's conduct going forward. Rather, Plaintiffs would need to plausibly allege not only that one of them will (not simply might) travel on a vessel operated by Holland America in the future, but also that Holland America's conduct would be "certain[]" injure them. *Clapper*, 568 U.S. at 409. Courts will deny standing even when a plaintiff alleges an "intent to purchase" from the defendant in the future; "profession of an

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intent … is simply not enough." *Levay Brown v. AARP, Inc.*, 2018 WL 5794456, at *3 (C.D. Cal. Nov. 2, 2018) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 565 (1992)). Likewise, "'some day' intentions—without any description of concrete plans or indeed any specification of when the some day will be—do not support a finding of … 'actual or imminent' injury.'" *Id.*

The FAC does not even allege a "some day intention[]," let alone future injury that is *certain* to occur. Rather, Plaintiffs' statement that they "would like to go on cruises again" is conditional on certain "corrective action" to be undertaken by Defendants in the future. (FAC ¶ 130). And even if Plaintiffs plausibly alleged that they are certain to take another Holland America cruise, there is no plausible allegation Holland America would certainly act negligently so as to harm Plaintiffs in the way they were allegedly harmed in the past. For precisely these reasons, the court in *Archer* rejected a materially identical request for injunctive relief against Carnival and another of its subsidiaries, holding that "Plaintiffs' vague allegation that they would like to go on cruises again in the future 'is simply not enough.'" In Chambers Order at 10, No. CV 20-4203 (C.D. Cal. Sept. 22, 2020), Dkt. 82 (quoting *Lujan*, 504 U.S. at 565); *see also* In Chambers Order at 7, *Eva Yuk Wah Ma Wong*, No. CV 20-4727 (C.D. Cal. Sept. 4, 2020), Dkt. 35 (dismissing materially identical claim for injunctive relief after plaintiffs failed to dispute defendants' arguments that they faced no threat of future harm). Plaintiffs' claim for injunctive relief should be dismissed.

CONCLUSION

For the foregoing reasons, Plaintiffs' class-action claims should be dismissed or stricken with prejudice; Lindsay's claims should be dismissed with prejudice; Plaintiffs' alter-ego claims against Carnival Corporation and Carnival plc should be dismissed with prejudice; Plaintiffs' claims of intentional infliction of emotional distress should be dismissed with prejudice; and Plaintiffs' claims for injunctive relief should be dismissed with prejudice.

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**Application to appear pro hac vice pending*

CERTIFICATE OF SERVICE

I hereby certify that on the 2nd day of October 2020, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the Honorable Thomas S. Zilly and serve it on all associated counsel.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

s/Sherry L. Gillilan

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