UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21997-CIV-LENARD

FRED KANTROW
and MARLENE KANTROW,
on behalf of themselves all others
similarly situated,

Plaintiffs,

vs.

CELEBRITY CRUISES INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS THE SECOND AMENDED COMPLAINT

Defendant Celebrity Cruises Inc. ("Celebrity"), pursuant to Rules 12(b)(1) and (6) of the Federal Rules of Civil Procedure, moves for the entry of an Order dismissing Plaintiffs' second amended complaint (the "SAC") [DE 30]. The grounds for this Motion are:

I. INTRODUCTION

This is a putative class action in which the only named plaintiffs are Fred and Marlene Kantrow. The Court dismissed the Kantrows' two prior class action complaints, making this their third attempt to assert claims against Celebrity. (DE 4, 29). In the most recent order of dismissal, the Court wrote that it would "grant Plaintiffs leave to make a final amendment to cure all deficiencies" (DE 29, p. 17) (emphasis in original).

The Kantrows were passengers on a scheduled fourteen-night South American cruise aboard *Eclipse*, which is a cruise ship operated by Celebrity (SAC, ¶¶7, 10, 34p). The Kantrows traveled from their residence in New York to South America to meet the ship (*Id.*, ¶1). The Kantrows allege that they contracted COVID-19 on the ship and experienced physical symptoms

associated with the virus (*Id.*, ¶¶11-12). However, the Kantrows do *not* allege *when* they tested positive for COVID-19 (or its antibodies) or *when* they first began to experience symptoms. The SAC also says nothing about whether the Kantrows were exposed to COVID-19 while traveling from New York to South America to meet the ship. In other words, the Kantrows do not allege a factual basis for the premise that they were not exposed to COVID-19 while traveling to South America to meet the ship, but were instead exposed only after they boarded the ship.

Against that backdrop, the Kantrows purport to assert claims on behalf of themselves and every passenger on their cruise who allegedly contracted COVID-19 on the ship (*Id.*, ¶¶36-37). The Kantrows also purport to assert claims on behalf of passengers who did ***not*** contract COVID-19, but were merely exposed to it (*Id.*, ¶39).

The SAC purports to state seventeen negligence-based claims against Celebrity:

- negligent failure to warn (Counts I through IV);
- "negligent management of infectious disease outbreak aboard vessel" (Counts V through VIII);
- "negligent boarding" (Counts IX through XI);
- "general negligence" (Counts XII through XIV); and
- negligent infliction of emotional distress (Counts XV through XVII).

Each of the seventeen claims is structured the same way. As to the unnamed class members who were merely exposed to COVID-19 – and did *not* contract the illness – the SAC alleges only that those passengers "were placed at an increased risk of exposure to contracting it" (*Id.*, ¶39). That allegation is expressly incorporated into each of the seventeen counts.

As to the Kantrows – who allegedly contracted COVID-19 – each of the seventeen claims seeks to recover for three discrete things allegedly occurring in three distinct periods of time:

First, the claims are for the mental anguish the Kantrows allegedly felt *before* they contracted COVID-19 because they feared they might contract the virus (*Id.*, ¶¶11-12, 51a-b, 57a-b, 63a-b, 69a-b, 75a-b, 81a-b, 87a-b, 94a-b, 101a-b, 108a-b, 115a-b, 120a-b, 125a-b, 130a-b, 135a-b, 140a-b, 145a-b) ("[A]s a result of his fear of contracting the virus aboard the vessel before he actually contracted it . . . Plaintiff suffered separate and severe emotional injuries . . . .").

Second, the claims are for experiencing the physical symptoms allegedly caused by contracting COVID-19 (*Id.*) ("Plaintiff contracted COVID-19 while aboard the *Celebrity Eclipse* and, as a result, suffered physical injuries, including, but not limited to: fever, pneumonia, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, nightmares, rash, and gastrointestinal difficulties.").

Third, the claims are for *future* physical injuries caused by contracting COVID-19 in 2020, ***but for which the SAC concedes there is no factual, medical, or scientific basis*** (*Id.*, ¶¶51c, 57c, 63c, 69c, 75c, 81c, 87c, 94c, 101c, 108c, 115c, 120c, 125c, 130c, 135d, 140d, 145d) ("Because the science pertaining to COVID-19 contraction is still developing, Plaintiffs allege that their injuries and damages are permanent or continuing in nature, and Plaintiffs will suffer the losses and impairments in the future.").

The SAC should be dismissed in its entirety, without leave to amend.

II. ARGUMENT

A. The SAC Fails To Allege Diversity Jurisdiction, Leaving Only Admiralty Jurisdiction As A Possible Basis For Subject Matter Jurisdiction.

The SAC alleges that the Court can exercise subject matter jurisdiction over this action pursuant to 28 U.S.C. §§1332(a) and (d), which relate to diversity of citizenship (SAC, ¶3). The SAC alternatively alleges that if diversity jurisdiction does not exist, then this action is "brought under" "the admiralty and maritime jurisdiction of this Honorable Court" (*Id.*). This action should

be dismissed to the extent that subject matter jurisdiction is based on diversity of citizenship under §1332 because the Kantrows have not pleaded the requisite diversity of citizenship.

Specifically, the SAC alleges that the Kantrows are "residents" of New York (SAC, ¶1). However, "[c]itizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person." *See Taylor v. Appleton*, 30 F.3d 1365, 1367 (11th Cir. 1994); *see also Travaglio v. American Express Co.*, 735 F.3d 1266, 1269 (11th Cir, 2013) (citing *Taylor*, 30 F.3d at 1367) ("Residence alone is not enough."). The Kantrows' failure to allege their citizenship means that the Court cannot exercise diversity jurisdiction over this action. The SAC should be dismissed for lack of subject matter jurisdiction to the extent that jurisdiction is premised upon §1332.

B. Claims By Putative Class Members Who Were Merely Exposed To COVID-19 Should Be Dismissed.

The Kantrows allege that they contracted COVID-19. However, the seventeen claims in the SAC also purport to assert claims on behalf of passengers who did ***not*** contract COVID-19, but allegedly were exposed to it on the ship (SAC, ¶39).. There are two reasons that these claims – the "exposure-only" or "fear of" claims – should be dismissed. First, the Kantrows do not have standing to assert them. Second, even if they did, the claims are not recognized as a matter of law. Each reason is discussed, in turn, below.

1. The Kantrows Lack Standing To Assert The Exposure-Only Claims.

In order to possess the standing required by Article III of the U.S. Constitution, the representative of a putative class must, among other things, "suffer the same injury as the class members." *See Fox v. Ritz-Carlton Hotel Co., LLC*, 977 F.3d 1039, 1046 (11th Cir. 2020) (internal quotation marks omitted). Indeed, as the Court has already ruled, "the Kantrows do not have

standing to assert claims on behalf of putative class members who suffered injuries that the Kantrows themselves did not suffer" [DE 29, pp. 16-17].

Here, the Kantrows' alleged injuries – contracting COVID-19 and supposedly experiencing its physical symptoms – are different from people who were merely exposed to COVID-19 and never contracted the virus. This means that the Kantrows do not have standing to assert the exposure-only claims because

> it is not enough that a named plaintiff can establish a case or controversy between himself and the defendant by virtue of having standing as to just one of many claims he wishes to assert. Rather, each claim must be analyzed separately, and a claim cannot be asserted on behalf of a class unless at least one named plaintiff has suffered the injury that gives rise to that claim.

Griffin v. Dugger, 823 F.2d 1476, 1483 (11th Cir. 1987); *see also Fox*, 977 F.3d at 1047 (citing *Mills v. Foremost Ins. Co.*, 511 F.3d 1300, 1307 (11th Cir. 2008)) (standing requires the class representative to have the "identical" injury as the unnamed class members). The claims that the Kantrows purport to assert on behalf of the exposure-only passengers should be dismissed because the Kantrows do not have standing to assert them.

2. The Exposure-Only Claims Fail As A Matter Of Law Because Disease- And Symptom-Free Plaintiffs Cannot Recover For Negligently Inflicted Emotional Distress.

Each of the SAC's seventeen negligence-based claims seeks to assert claims based on the emotional distress allegedly suffered by passengers who did not contract COVID-19 and never had any of its physical symptoms. Even if the Kantrows had standing to assert such claims, which they do not, the exposure-only claims would nonetheless have to be dismissed with prejudice because they are barred as a matter of law.

The Kantrows allege that the claims in the SAC "arise under U.S. General Maritime Law" (SAC, ¶6). Thus, the "zone-of-danger test" governs any attempt to recover damages for negligently inflicted emotional distress. *See, e.g., Chaparro v. Carnival Corp.*, 693 F.3d 1333,

1338 (11th Cir. 2012) (citing *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994)) (holding that federal maritime law has adopted *Gottshall*'s zone-of-danger test for use in connection with the negligent infliction of emotional distress).

"[T]he zone of danger test limits recovery for emotional injury to those 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." *See Gottshall*, 512 U.S. at 547-48. As applied in the ***specific context*** of exposure to illness and illness-causing substances, the Supreme Court has made clear that, ***as a categorical rule***, the zone-of-danger test is ***not*** satisfied where a plaintiff alleges mere exposure—if the plaintiff is disease- and symptom-free, then he or she cannot recover damages for emotional distress. *See, e.g., Metro-North Commuter Railroad Co. v. Buckely*, 424 U.S. 424, 427 (1997) ("We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease."); *id*. at 430-32 (explaining that the zone-of-danger test is not met by exposure to, or physical contact with, illness-causing substances); *Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 141 (2003) ("In *Metro-North,* we held that emotional distress damages may not be recovered [ ] by disease-free asbestos-exposed workers . . . ."); *id.* at 146 ("The plaintiff in *Metro-North* had been intensively exposed to asbestos while working as a pipefitter for Metro-North in New York City's Grand Central Terminal. At the time of his lawsuit, however, he had a clean bill of health. The Court rejected his entire claim for relief.").

The determination that disease- and symptom-free plaintiffs cannot recover damages for negligently inflicted emotional distress – despite having been exposed to illness and illness-causing substances – furthers important policy considerations:

> [T]he physical contact here—a simple (though extensive) contact with a carcinogenic substance—does not seem to offer much help in separating valid from invalid emotional distress claims. That is because contacts, even extensive contacts, with serious carcinogens are common. . . .

> The large number of those exposed and the uncertainties that may surround recovery also suggest what *Gottshall* called the problem of "unlimited and unpredictable liability." . . . The same characteristic further suggests what *Gottshall* called the problem of a "flood" of cases that, if not "trivial," are comparatively less important. In a world of limited resources, would a rule permitting large-scale recoveries for widespread fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?
>
> We do not raise these questions to answer them (for we do not have the answers), but rather to show that general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well. That being so, we cannot find in *Gottshall*'s underlying rationale any basis for departing from *Gottshall* or from the current common-law consensus.
>
> * * *
>
> [T]he common law in this area does not examine the genuineness of emotional harm case by case. Rather, it has developed recovery-permitting categories . . . . ***The point of such categorization is to deny courts the authority to undertake a case-by-case examination. The common law permits emotional distress recovery for the category of plaintiffs who suffer from a disease (or exhibit a physical symptom)*** for example, thereby finding a special effort to evaluate emotional symptoms warranted in that category of cases—perhaps from a desire to make a physically injured victim whole or because the parties are likely to be in court in any event. ***In other cases, however, falling outside the special recovery-permitting categories, it has reached a different conclusion.*** (parenthetical in original) (emphasis added).

See Metro-North, 521 U.S. at 435-37 (internal citations omitted) (emphasis added).

The SAC's exposure-only claims must be dismissed with prejudice because they are barred as a matter of law. *See, e.g., Weissberger v. Princess Cruise Lines, Ltd.*, 2020 WL 3977938, at **3-5 (C.D. Cal. July 14, 2020) (dismissing with prejudice cruise passengers' exposure-only claims because, as a categorical rule, disease- and symptom-free plaintiffs cannot recover damages for negligently inflicted emotional distress as a result of having been exposed to illness); *Archer*

v. Carnival Corp, & plc, 2020 WL 7314847, at **6-7 (C.D. Cal. Nov. 25, 2020) (dismissing with prejudice cruise passengers' exposure-only claims).

C. The Kantrows' Claims Should Be Dismissed.

The Kantrows allege that they contracted COVID-19 and experienced various of its physical symptoms. The Kantrows take that alleged fact and stretch matters such that their seventeen negligence-based class action claims seek to recover for three discrete things allegedly occurring in three distinct periods of time:

First, for the mental anguish the Kantrows allegedly felt *before* they contracted COVID-19 because they feared they might later contract it (*Id.*, ¶¶11-12, 51a-b, 57a-b, 63a-b, 69a-b, 75a-b, 81a-b, 87a-b, 94a-b, 101a-b, 108a-b, 115a-b, 120a-b, 125a-b, 130a-b, 135a-b, 140a-b, 145a-b) ("[A]s a result of his fear of contracting the virus aboard the vessel before he actually contracted it . . . Plaintiff suffered separate and severe emotional injuries . . . .").

Second, for the physical symptoms allegedly caused by contracting COVID-19 (*Id.*) ("Plaintiff contracted COVID-19 while aboard the *Celebrity Eclipse* and, as a result, suffered physical injuries, including, but not limited to: fever, pneumonia, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, nightmares, rash, and gastrointestinal difficulties.").

Third, for *future* physical injuries caused by contracting COVID-19 in 2020, ***but for which the SAC concedes there is no factual, medical, or scientific basis*** (*Id.*, ¶¶51c, 57c, 63c, 69c, 75c, 81c, 87c, 94c, 101c, 108c, 115c, 120c, 125c, 130c, 135d, 140d, 145d) ("Because the science pertaining to COVID-19 contraction is still developing, Plaintiffs allege that their injuries and damages are permanent or continuing in nature, and Plaintiffs will suffer the losses and impairments in the future.").

As discussed below, the Court should dismiss each of these three aspects of the Kantrows' claims.

1. The Kantrows' "Fear Of" Claims Should Be Dismissed With Prejudice Because The Alleged Emotional Distress Was Not Accompanied By Physical Injury.

The Kantrows' seventeen negligence-based claims seek to recover for negligently inflicted emotional distress that the Kantrows allegedly suffered *before* they contracted COVID-19 and experienced physical symptoms. The Kantrows' theory is that they "fear[ed]" they would contract COVID-19 because they were exposed to the virus on the ship, and they should be permitted to recover for that pre-contraction fear of becoming sick ("[A]s a result of his fear of contracting the virus aboard the vessel before he actually contracted it . . . Plaintiff suffered separate and severe emotional injuries . . . ."). This theory is decidedly insufficient to state a claim.

As discussed at length in the immediately preceding section, a plaintiff asserting maritime claims is subject to the zone of danger test. Under that test, a plaintiff cannot recover for negligently inflicted emotional distress for the period of time *before* he or she was ill because exposure to illness is not considered a physical injury. *See, e.g., Metro-North*, 424 U.S. at 427 ("We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease."); *id.* at 430 (recognizing that recovery for negligently inflicted emotional distress exists "where that distress accompanies physical injury").

Indeed, the Supreme Court has expressly held that "fear-of" claims can be asserted only where the plaintiff has already been physically injured. *See Ayers*, 538 U.S. at 149-50 (addressing that "fear-of" claims are limited to plaintiffs who are already physically injured); *id*. at 157 ("We affirm only the qualification of an asbestosis sufferer to seek compensation for fear of cancer as an element of his asbestosis pain and suffering damages.").

That the Kantrows were allegedly exposed to a virus on the ship – and feared that they would later become sick as a result of the exposure– does not give rise to a right of recovery for negligently-inflicted emotional distress. This aspect of the Kantrows' seventeen claims should be dismissed with prejudice for failure to state a claim. *See, e.g., Weissberger*, 2020 WL 3977938, at *3 (dismissing with prejudice the "fear" claims) ("The Court agrees that, under *Metro-North*, the Plaintiffs in this case cannot recover for [negligently inflicted emotional distress] based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease."); *Crawford v. Princess Cruise Lines Ltd.*, 2020 WL 7382770, at *6 (C.D. Cal. Oct. 8, 2020) (citing *Weissberger*, 2020 WL 3977938) (dismissing with prejudice the "fear" claims) ("Defendant attempts to distinguish between the emotional distress that Plaintiffs suffered before and after their COVID-19 diagnosis. Defendant argues that Plaintiffs cannot recover damages based on the former period for the same reason the Fear Plaintiffs could not recover in *Weissberger*. The Court agrees.").

2. The Kantrows' Claims For Experiencing Cold- And Flu-Like Symptoms As A Result Of COVID-19 Should Be Dismissed With Prejudice Because They Do Not Allege Causation And, In Any Event, The Claims Are *De Minimis*.

The second aspect of the Kantrows' seventeen negligence-based claims seeks to recover for the cold- and flu-like symptoms the Kantrows allegedly experienced as a result of contracting COVID-19: "fever, pneumonia, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, nightmares, rash, and gastrointestinal difficulties." The Kantrows' attempt to recover for cold- and flu-like symptoms should be dismissed for two reasons. First, the Kantrows have not sufficiently alleged causation. Second, the claims are *de minimis*.

a. Failure To Allege Causation.

The Kantrows reside in New York, and they traveled to South America to meet *Eclipse* for the scheduled fourteen-night cruise through Argentina and Chile. The Kantrows allege that they contracted COVID-19 and experienced its physical symptoms, but they make only a *conclusory* statement that they contracted COVID-19 as a result of exposure aboard *Eclipse* (SAC.¶¶11-12) ("Plaintiff contracted COVID-19 while aboard the *Celebrity Eclipse* during the subject voyage…."). Noticeably absent from the SAC are factual allegations supporting that conclusion relating to causation, which is an essential element of the SAC's negligence-based claims. *See Tesoriero v. Carnival Corp.*, 965 F.3d 1170, 1178 (11th Cir. 2020) (listing causation as an element of maritime negligence claims).

For example, the Kantrows do not allege *when* they tested positive for COVID-19 (or its antibodies), much less that they tested positive while aboard the ship. Nor do the Kantrows allege *when* they began to feel the physical symptoms identified in the SAC. Did they feel ill during or after the cruise? Did they first feel ill at the outset of the cruise, which was immediately after they traveled to South America from New York? Did they first feel ill immediately after they departed the ship, or was it not until weeks later? The Kantrows do not plead any factual basis for the premise that they were not exposed to COVID-19 while traveling from New York to Argentina to meet the ship, but instead were exposed only after they boarded the ship. The Kantrows also do not plead any factual basis for the premise that they were not exposed to COVID-19 when they were traveling back home after departing the ship.

By failing to make such factual allegations, the Kantrows have done nothing more than raise the possibility that they contracted COVID-19 due to exposure aboard *Eclipse*. However, that is decidedly insufficient to state a claim because "[w]here a complaint pleads facts that are

'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *See Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 557) (2007)).

Indeed, courts considering this precise issue in this same context have held that factual allegations of the type described above are necessary to *plausibly* plead causation. *See, e.g., Crawford*, 2020 WL 7382770, at *6 (dismissing for failure to allege causation)

> Defendant separately contends that Plaintiffs' claims should be dismissed because they have not plausibly alleged causation. The Court agrees. Plaintiffs' Complaint does not include any factual allegations demonstrating that Plaintiffs contracted COVID-19 as a result of Defendant's alleged negligence, such as when Plaintiffs were tested for COVID-19 or when they contracted the disease. The Complaint merely states that Plaintiffs ultimately became ill with COVID-19. As currently pled, the Complaint makes it impossible to determine if Plaintiffs caught the virus at some port of call or during their post-cruise transportation or quarantine. (internal quotation marks, brackets, ellipses, and citations omitted).

See also Wortman v. Princess Cruise Lines Ltd., CV 20-4169 DSF, at 7 (C.D. Cal. Aug. 21, 2020 (DE 30)) (dismissing for failure to allege causation) ("Wortman has failed to allege the amount of time between the alleged exposure and the date she and Mireles began experiencing COVID-19 symptoms or received a positive test result – a key fact necessary to render the causation allegations plausible, not merely plausible."); *Parker*, 2020 WL 6594994, at *4 (holding that causation requires allegations of when a cruise passenger-plaintiff "first began experiencing symptoms," in addition to allegations that the passenger contracted COVID-19 and when the passenger believes he/she was exposed to it); *Archer*, 2020 WL 7314847, at *7 (holding that cruise passengers-plaintiffs sufficiently pleaded causation because – unlike here – the complaint alleged that prior to boarding the ship the plaintiffs were not exposed to anyone exhibiting symptoms, and also alleged when the plaintiffs first experienced symptoms).

This aspect of the Kantrows' claims, which seeks to recover for the cold- and flu-like symptoms the Kantrows allegedly experienced as a result of contracting COVID-19 aboard the ship, should be dismissed with prejudice for failure to state a claim.

b. Even If Causation Were Pleaded, This Aspect Of The Claims Is De Minimis

De minimis non curat lex means "[t]he law does not concern itself with trifles. — Often shortened to *de minimis*." *See* Black's Law Dictionary (11th ed. 2019). "Its particular function is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of." *See Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). "[I]f a loss is not only small but also indefinite, so that substantial resources would have to be devoted to determining whether there was any loss at all, courts will invoke the *de minimis* doctrine and dismiss the case, even if it is a constitutional case. The costs of such litigation overwhelm the benefits." *See Hessel v. O'Hearn*, 977 F.2d 299, 303 (7th Cir. 1992).

In seeking to recover money damages for having cold- and flu-like symptoms such as coughing, fever, chills, body aches, etc., the Kantrows are seeking to recover for what is quintessentially the "sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of." *See Swick*, 11 F.3d at 87. The cost of litigating such claims in federal court – including how to assign monetary value to, or quantify monetary compensation for, a cough, fever, chills, aches, etc. – overwhelms any benefit that could be obtained by a claimant. *See, e.g., Hessel*, 977 F.2d at 303; *Von Nessi v. XM Satellite Radio Holdings, Inc.*, 2008 WL 4447115, at *6 (D.N.J. Sept. 26, 2008) (collecting decisions, including *Alan's of Atlanta, Inc. v. Minolta Group*, 903 F.3d 1414, 1421 (11th Cir. 1990)) ("This Court invokes the doctrine of *de minimis non curat lex*, which translates

as the law does not care for, or take notice of trifling matters. The doctrine applies where no damage is implied by law from the wrong, and only trifling or immaterial damage results therefrom.") (internal quotation marks and citations omitted.").

Moreover, allowing the Kantrows to proceed with such claims would open the metaphorical floodgates. If these plaintiffs can sue, then so too can the restaurant patron who catches a cold because diners at a nearby table were sick and sneezing, or because the patron's table was not cleaned well enough between seatings and one of the table's prior occupants was sick. The same applies to the person who worries that she might become sick – or later actually develops a fever – after sitting next to someone on the Metrorail who had glassy eyes and was coughing into a balled-up tissue during the entire ride to downtown.

In considering whether there is or should be a "right to recover," courts properly examine "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they continue to give caution to courts." *See Gottshall*, 512 U.S. at 557 (1994); *see also Metro-North*, 424 U.S. at 433 (citing *Gottshall*, 512 U.S. at 557); *Schlictman v. New Jersey Highway Authority*, 579 A.2d 1275, 1280 (N.J. Super Ct. Law Div. 1990), *cited with approval in Hessel*, 977 F.2d at 303 (Posner, J.) ("If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigations in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon pure conjecture and speculation . . . . a wide field would be opened for unrighteous or speculative claims. A wise public policy requires us to hold such injuries to be non-actionable.") (internal quotation marks and citations omitted); *but see Crawford*,

2020 WL 7382770, at *4 (declining to consider at the motion to dismiss stage whether specific symptoms of COVID-19 are "sufficiently harmful to warrant compensation").

The Kantrows' attempt to recover for experiencing cold- and flu-like symptoms should be dismissed with prejudice because they are *de minimis*.

3. Article III's Case Or Controversies Requirement Bars The Kantrows' Attempt To Recover For Future Injuries For Which The SAC Concedes There Is No Basis.

The Kantrows' seventeen negligence-based claims also seek to recover for future injuries caused by allegedly having contracted COVID-19 aboard the ship. Importantly, however, the Kantrows concede that there is no basis for the premise that a case of COVID-19 contracted in 2020 will cause future injuries: "*Because the science pertaining to COVID-19 contraction is still developing*, Plaintiffs allege that their injuries and damages are permanent or continuing in nature, and Plaintiffs will suffer the losses and impairments in the future" (SAC, ¶¶51c, 57c, 63c, 69c, 75c, 81c, 87c, 94c, 101c, 108c, 115c, 120c, 125c, 130c, 135d, 140d, 145d) (emphasis added). This aspect of the Kantrows' claims is barred by the Cases or Controversies requirement of Article III of the U.S. Constitution.

As courts of limited jurisdiction, federal district courts may hear only those cases that are permitted by Article III. *See, e.g., Corbett v. Transportation Security Administration*, 930 F.3d 1225, 1231 (11th Cir. 2019). To that end, "Article III of the Constitution limits federal courts to deciding 'Cases' or 'Controversies.'" *See Muransky v. Godiva Chocolatier, Inc.*, 979 F.3d 917, 924 (11th Cir. 2020) (en banc) (quoting U.S. Const. art. III, §2). "The existence of a case or controversy is a bedrock requirement of our jurisdiction; we cannot exercise judicial power without it." *See id.* (internal quotation marks omitted).

Standing is one of the three doctrines that informs whether a case or controversy exists. Standing is "perhaps the most important of the jurisdictional doctrines," *see id.*, and "is a threshold

issue that must be explored at the outset of any case." *See Corbett*, 930 F.3d at 1232. Standing has three elements, and the one implicated here requires an injury in fact – "an invasion of a judicially cognizable interest, which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical . . . ." *see id.* This is where the Kantrows' attempt to recover for future COVID-19-related injuries fails.

As it relates to seeking money damages for future injuries, the injury in fact requirement "'insist[s] that a plaintiff show a *substantial likelihood* of future injury . . . .'" *See id.* (quoting *Bowen v. First Family Financial Services, Inc.*, 233 F.3d 1331, 1340 (11th Cir. 2000)) (emphasis added). The plaintiff must be "immediately in danger of sustaining some direct injury as a result of the challenged [ ] conduct and the injury or threat of injury is both real and immediate, not conjectural or hypothetical." *See id.* at 1232-33 (internal quotation marks omitted).

> Immediacy requires that the anticipated injury occur within some fixed period of time in the future. When a plaintiff cannot show that an injury is likely to occur immediately, the plaintiff does not have standing to seek prospective relief even if he has suffered a past injury. And even if the plaintiff shows immediacy, ***the injury must still be substantially likely to occur***, meaning that the threatened future injury must pose a ***realistic danger*** and cannot be merely hypothetical or conjectural.

See id. at 1233 (internal citations and quotation marks omitted) (emphasis added); *see also 31 Foster Children v. Bush*, 329 F.3d 1255, 1265 (11th Cir. 2003) (same).

The Kantrows do not – and cannot – plead that the COVID-19 they allegedly contracted on *Eclipse* in March 2020 is "substantially likely" to cause future injuries. The Kantrows cannot make such allegation because, *as they concede in the SAC*, the science relating to COVID-19 is "still developing." The Kantrows' attempt to recover for future injuries should be dismissed for lack of standing because the Kantrows have no basis to assert that future injuries are substantially likely to occur as a result of allegedly contracting COVID-19 on the ship.

III. CONCLUSION

For these reasons, the SAC should be dismissed in its entirety, without leave to amend.

Respectfully submitted,

HOLLAND & KNIGHT LLP
701 Brickell Avenue, Suite 3300
Miami, Florida 33131
(305) 374-8500 (telephone)
(305) 789-7799 (facsimile)

By: /s/ Scott D. Ponce
Sanford L. Bohrer (FBN 160643)
sbohrer@hklaw.com
Alex M. Gonzalez (FBN 0991200)
alex.gonzalez@hklaw.com
Scott D. Ponce (FBN 0169528)
sponce@hklaw.com

-- and --

HAMILTON, MILLER, & BIRTHISEL LLP
Jerry D. Hamilton (FBN 970700)
jhamilton@hamiltonmillerlaw.com
Evan S. Gutwein (FBN 58741)
egutwein@hamiltonmillerlaw.com
Annalisa Gutierrez (FBN 97940)
agutierrez@hamiltonmillerlaw.com
150 S.E. Second Avenue, Suite 1200
Miami, Florida 33131
(305) 379-3686 (telephone)
(305) 279-3690 (facsimile)

Attorneys for Defendant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 8, 2021 I electronically filed this document using the Court's CM/ECF system, which will automatically serve a copy on all counsel of record.

By: /s/ Scott D. Ponce