UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21569-CIV-UNGARO

ALEXANDRA NEDELTCHEVA,
on behalf of herself and all others
similarly situated,

Plaintiff,

vs.

CELEBRITY CRUISES INC.,

Defendant.
_____________________________________/

DEFENDANT'S MOTION TO DISMISS THE COMPLAINT

Defendant Celebrity Cruises Inc. ("Celebrity"), pursuant to Rule 12(b)(6) of the Federal Rules of Federal Procedure, moves for the entry of an Order dismissing Plaintiff's Complaint (DE 1) because it fails to state a claim. The grounds for this Motion are:

I. PRELIMINARY STATEMENT

Plaintiff's attorneys know that the Complaint fails to state a claim. They know it because the Eleventh Circuit made it clear to them two months ago.

These same attorneys represented the plaintiffs-appellants in *Heinen et al. v. Royal Caribbean Cruises Ltd.*, __ F. App'x__, 2020 WL 1510290 (11th Cir. Mar. 30, 2020). In *Heinen*, the plaintiffs purchased tickets for a cruise that was scheduled to depart from Galveston, Texas. *See id.* at *1. Hurricane Harvey ultimately caused the cruise to be cancelled, but not before the plaintiffs allegedly had already traveled to Galveston to meet the ship and, while in Galveston, were exposed to the hurricane and its effects. *See id.*

The plaintiffs alleged that Royal Caribbean's negligence in not canceling the cruise "quickly enough" caused the plaintiffs to be in Galveston and endure the hurricane. *See id.* None of the plaintiffs, however, identified any personal injuries or damages that he or she suffered. *See id.* Instead – in what the Eleventh Circuit described as "shotgun fashion" – the plaintiffs "ticked off a laundry list of injuries at the end of their complaint, without specifying who suffered what." *See id.*

The Eleventh Circuit did not reprint that "laundry list" in its decision, but this is the allegation of the amended complaint to which the Court was referring:

> As a result of [Royal Caribbean's negligence], Plaintiffs were injured about their body and extremities, suffered both physical pain and suffering, mental and emotional anguish, loss of enjoyment of life, temporary and/or permanent physical disability, impairment, inconvenience in the normal pursuits and pleasures of life, feelings of economic insecurity, disfigurement, aggravation of any previously existing conditions therefrom, incurred medical expenses in the care and treatment of their injuries including life care, suffered physical handicap, lost wages, income lost in the past, and their working ability and earning capacity has been impaired. The injuries and damages and permanent or continuing in nature, and Plaintiffs will suffer the losses and impairments in the future.

See Heinen et al. v. Royal Caribbean Cruises Ltd., Case No. 18-23395-CIV-MORENO (S.D. Fla) (DE 1, ¶¶120, 126; DE 20, ¶¶57, 60).

The Eleventh Circuit affirmed the ***dismissal with prejudice*** of the amended complaint for failure to state a claim, holding that:

> Although each appellant alleged that Royal Caribbean's delay caused them "physical and emotional damage," that threadbare allegation does not suffice without factual allegations in support. The only specific factual support for the appellants' threadbare allegations of harm comes in a combined paragraph listing what seems to be every possible injury imaginable. Among many others, the injury list includes claims of "injury about their body and extremities," "physical pain and suffering," "disfigurement," "aggravation of any previously existing conditions," and "physical handicap." Yet the appellants still fail to identify which appellant suffered which injury. For example, is Mr. Heinen disfigured? Did Ms. Ruiz

> aggravate a pre-existing condition? Does Mr. Russell now have a physical handicap? Surely each appellant did not suffer *every* injury listed in the kitchen-sink paragraph the appellants add at the end. In any event, the complaint does not plausibly allege that they have done so. *See* [*Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)]. Because the appellants fail to connect their general allegations of "physical and emotional damage" with the specific facts they pleaded in bulk, we must ignore that threadbare assertion of harm. *See id*. And without sufficiently plausible allegations of harm, the appellants cannot state a claim.

See Heinen, 2020 WL 1510290, at *2 (additional internal citations omitted) (emphasis in original).

The same shotgun-style pleading of a laundry list of every injury that could conceivably befall a human being – which the Eleventh Circuit held is incapable of pleading injury and damages – has now resurfaced in this action. As discussed below, Plaintiff's Complaint should be similarly dismissed.

II. FACTUAL BACKGROUND

This is an action, brought as a putative class action, by a Plaintiff who alleges that she worked aboard one or more cruise ships operated by Celebrity (Compl., ¶¶1, 7, 10-11, 31(p)). Plaintiff alleges that on March 30, 2020, while she was on a ship, she tested positive for COVID-19 (*Id*., ¶31(hh)).

Plaintiff does ***not*** allege that she has experienced any physical or emotional injuries as a result of testing positive for COVID-19. Plaintiff does ***not*** allege that she has needed, sought, or received any medical or psychological treatment, much less that she has been denied treatment. Plaintiff does ***not*** allege that she has incurred any economic losses as a result of having tested positive for COVID-19.

Instead, Plaintiff alleges – on behalf of herself and apparently also the putative class she hopes to represent – that as a result of Celebrity's alleged conduct:

> Plaintiff*s* contracted COVID-19, became more susceptible and/or vulnerable to other illness and/or medical conditions, including pre-existing illness and/or medical conditions, and were injured about their bodies and/or extremities. Plaintiff*s* also suffered physical pain and suffering, mental anguish, reduced lung function and/or capacity, future physical and medical problems (including but not limited to reduced lung function and/or capacity) and/or the reasonable fear of developing future physical and medical problems. Plaintiff*s* also lost enjoyment of life, and suffered physical and/or functional disability, (sic) physical and/or functional impairment. Plaintiff*s* were also inconvenienced in the normal pursuits and pleasures of life and suffered from feelings of economic insecurity caused by disability, (sic) disfigurement. Plaintiff*s* also suffered aggravation of any previously existing conditions as a result of contracting COVID-19, incurred medical expenses in the care and treatment of ***their*** injuries, suffered physical handicap, lost wages, income lost in the past, and ***their*** working abilities and/or earning capacities have been impaired. Additionally, ***some Plaintiffs*** have (sic) or will die. The ***Plaintiffs*** that do not die immediately will experience a reduced life expectancy. Plaintiff*s*['] injuries and damages are permanent and continuing in nature, and ***they*** will suffer these losses and impairments in the future.

(Compl., ¶¶50, 55, 66) (emphasis added to show pluralization).

On the basis of those allegations, Plaintiff's four-count complaint purports to state claims against Celebrity for Jones Act negligence (Count I); unseaworthiness (Count II); failure to provide maintenance and cure (Count III); and "failure to provide prompt, proper and adequate medical care" (Count IV).[1] Each count should be dismissed.

III. ARGUMENT

A. The Applicable Pleading Standard.

Plaintiff hopes to get past the pleading stage – and into expensive and time-consuming discovery – without alleging the most basic factual information: the injuries and damages that ***she*** has supposedly incurred as a result of testing positive for COVID-19. Rule 8 of the Federal Rules of Civil Procedure does not permit such tactics. *See Ashcroft v. Iqbal*, 556 U.S. 662, 678-79 (2009)

[1] Plaintiff alleges that her claims arise under U.S. maritime law (Compl., ¶6). Celebrity will assume for the purposes of this motion that U.S. maritime law applies.

("Rule 8 . . . does not unlock the doors of discovery for a plaintiff armed with nothing more than conclusions.").

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.'" *See Iqbal*, 556 U.S. at 678 (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)).

> Stating a plausible claim for relief requires pleading "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged": this obligation requires "more than a sheer possibility that the defendant has acted unlawfully." While plaintiffs need not include "detailed factual allegations," they must plead "more than the unadorned, the-defendant-unlawfully-harmed-me accusation."

See Mamani v. Berzain, 654 F.3d 1148, 1153 (11th Cir. 2011) (quoting *Iqbal*, 556 U.S. at 678) (internal citations omitted).

"A pleading that offers 'labels and conclusions' or a 'formulaic recitation of the elements of a cause of action will not do.' Nor does a complaint suffice if it tenders 'naked assertion[s]' devoid of 'further factual enhancement.'" *See Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 555, 557) (internal citations omitted) (brackets in original). "[T]he tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions. Threadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Id.*

As was the case in *Heinen*, Plaintiff's Complaint is full of threadbare, conclusory statements, but wholly fails to plead the supporting factual allegations that are necessary to state a claim.

B. Injury And Damages Is An Essential Element Of Plaintiff's Claims.

As mentioned above, the Complaint purports to state claims for Jones Act negligence (Count I); unseaworthiness (Count II); failure to provide maintenance and cure (Count III); and

"failure to provide prompt, proper and adequate medical care" (Count IV). It is axiomatic that an essential element of ***each*** of the those claims is that Plaintiff must have been ***injured and suffered damages*** as a result of Celebrity's alleged conduct. *See, e.g., Fitzgerald v. United States Line Co.*, 374 U.S. 16, 18 (1963) ("Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of ***indemnifying a seaman for damages caused by injury*** . . . .") (emphasis added); *Ivy v. Security Barge Lines, Inc.*, 606 F.2d 524, 525 n.3 (5th Cir. 1979) ("The Jones Act imposes liability on the owner of the vessel for ***injuries or death*** resulting from negligence . . . .") (emphasis added); 46 U.S.C. §30104 (the Jones Act) (providing a claim to "[a] seaman ***injured*** in the course of employment or, ***if the seaman dies from the injury***, the personal representative of the seaman") (emphasis added); *Smith v. BP America, Inc.*, 522 F. App'x 859, 864-65 (11th Cir. 2013) ("[A] seaman who is ***injured*** by an unseaworthy condition on a ship has a right to recovery against the owner of the vessel beyond maintenance and cure.") (emphasis added); *Crow v. Cooper Marine & Timberlands Corp.*, 2009 WL 103500, at *3 (S.D. Ala. Jan, 15, 2009) ("To recover for maintenance and cure, a plaintiff need only prove . . . ***he became ill or injured while in the vessel's service[,] and . . . he lost wages or incurred expenditures relating to the treatment of the illness or injury***.") (emphasis added); *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527, 1533 n.6 (11th Cir. 1990) ("[T]he shipowner . . . promptly must provide adequate emergency medical care (as is reasonable under the circumstances) for the ***injured seaman***.") (parenthetical in original) (emphasis added); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 685 (10th Cir. 1981) (cited in ¶67 of the Complaint) ("Negligent failure to provide prompt medical attention to a ***seriously injured seaman*** gives rise to a separate claim for relief.") (emphasis added).

C. The Complaint Fails To State A Claim Because Plaintiff Has Not Pleaded Injury And Damages.

Despite the fact that Plaintiff is required to plead facts supporting each element of her claims (and not merely recite threadbare statements or legal conclusions) – and despite the fact that injury and damages is an essential element of each her claims – Plaintiff has not pleaded any facts whatsoever identifying any injuries or damages that ***she*** has suffered as a result of testing positive for COVID-19.

Instead, Plaintiff alleges that

> Plaintiff***s*** contracted COVID-19, became more susceptible and/or vulnerable to other illness and/or medical conditions, including pre-existing illness and/or medical conditions, and were injured about their bodies and/or extremities. Plaintiff***s*** also suffered physical pain and suffering, mental anguish, reduced lung function and/or capacity, future physical and medical problems (including but not limited to reduced lung function and/or capacity) and/or the reasonable fear of developing future physical and medical problems. Plaintiff***s*** also lost enjoyment of life, and suffered physical and/or functional disability, (sic) physical and/or functional impairment. Plaintiff***s*** were also inconvenienced in the normal pursuits and pleasures of life and suffered from feelings of economic insecurity caused by disability, (sic) disfigurement. Plaintiff***s*** also suffered aggravation of any previously existing conditions as a result of contracting COVID-19, incurred medical expenses in the care and treatment of ***their*** injuries, suffered physical handicap, lost wages, income lost in the past, and ***their*** working abilities and/or earning capacities have been impaired. Additionally, ***some Plaintiffs*** have (sic) or will die. The ***Plaintiffs*** that do not die immediately will experience a reduced life expectancy. Plaintiff***s***[’] injuries and damages are permanent and continuing in nature, and ***they*** will suffer these losses and impairments in the future.

(Compl., ¶¶50, 55, 66) (emphasis added to show pluralization). There are three reasons that this laundry list is incapable of alleging the required element of injury and damages.

First, Plaintiff is required to identify the injuries and damages that ***she*** has supposedly suffered as a result of testing positive for COVID-19. *See Heinen*, 2020 WL 1510290, at *2. The shotgun-style pleading in bulk of every injury that could conceivably befall a person is decidedly insufficient to state a claim. *See id.*

Second, any contention that Plaintiff, herself, suffered all of those injuries and damages is belied in the first instance by the laundry list's use of the plural, "Plaintiffs." But, in any event, the notion that one person suffered all of those injuries and damages is simply not plausible. *See Heinen*, 2020 WL 1510290, at *2 ("Surely, each appellant did not suffer *every* injury listed in the kitchen-sink paragraph the appellants add at the end. In any event, the complaint does not plausibly allege that they have done so.") (emphasis in original).

Third, Plaintiff appears to believe that if unnamed members of the putative class suffered some of those injuries and damages, then Plaintiff can style the Complaint as a "Class Action" and assert claims despite the fact that she does not allege that ***she*** has incurred injury and damages. That, however, manifests a misunderstanding of the law. The Eleventh Circuit has made clear that a named plaintiff in a putative class action must ***personally*** incur injury and damages, and cannot borrow or otherwise rely upon injuries and damages that unnamed class members might have incurred:

> If [a plaintiff] cannot show personal injury, then no article III case or controversy exists, and a federal court is powerless to hear his grievance. This individual injury requirement is not met by alleging "that injury has been suffered by other, unidentified members of the class to which [the plaintiff] belong[s] and which [he] purport[s] to represent." *Warth v. Seldin,* 422 U.S. 490, 502, 95 S. Ct. 2197, 2207, 45 L. Ed. 2d 343 (1975); *see also Minority Police Officers Ass'n v. City of South Bend,* 721 F.2d 197, 202 (7th Cir. 1983) ("Feelings of solidarity do not confer standing to sue."). Thus, a plaintiff cannot include class action allegations in a complaint and expect to be relieved of personally meeting the requirements of constitutional standing, "even if the persons described in the class definition would have standing themselves to sue." *Brown v. Sibley,* 650 F.2d 760, 771 (5th Cir. Unit A July 1981); *see also Vuyanich v. Republic Nat'l Bank,* 723 F.2d 1195, 1200 (5th Cir.), *cert. denied,* 469 U.S. 1073, 105 S. Ct. 567, 83 L. Ed. 2d 507 (1984). A named plaintiff in a class action who cannot establish the requisite case or controversy between himself and the defendants simply cannot seek relief for anyone—not for himself, and not for any other member of the class. *O'Shea v. Littleton,* 414 U.S. 488, 494, 94 S. Ct. 669, 675, 38 L. Ed. 2d 674 (1974). Moreover, 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, 1482–83 (11th Cir. 1987); *see also Chandler v. Sec'y of Fla. Dep't of Transp.*, 695 F.3d 1194, 1201 n.5 (11th Cir. 2012) ("The Chandlers cannot rely on an allegation that others' rights were violated to establish their own constitutional injury."); *Snyder v. Green Roads of Florida, LLC*, 2020 WL 42239, at **2-3 (S.D. Fla. Jan. 3, 2020) (collecting decisions) (holding that a class representative must be personally injured and cannot assert class claims unless he or she has the same injury as the putative class members).

Each count of the Complaint should be dismissed because Plaintiff has failed to plead the essential element of injury and damages.

IV. CONCLUSION

For these reasons, Celebrity respectfully requests the entry of an Order dismissing Plaintiff's Complaint.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on May 27, 2020 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