UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-20814-CIV-LENARD

ADLYN POE PAUL, individually, and as personal representative and surviving spouse of the Estate of GERALD PAUL,

Plaintiffs,

v.

CELEBRITY CRUISES INC.,

Defendant.
_____/

ORDER GRANTING IN PART AND DENYING IN PART MOTION TO DISMISS PLAINTIFFS' COMPLAINT (D.E. 6) AND PROVIDING PLAINTIFFS FOURTEEN DAYS TO FILE AN AMENDED COMPLAINT

THIS CAUSE is before the Court on Defendant Celebrity Cruises Inc.'s Motion to Dismiss Plaintiffs' Complaint, ("Motion," D.E. 6), filed May 21, 2021. Plaintiff Adlyn Poe Paul, individually and as personal representative and surviving spouse of the Estate of Gerald Paul, filed a Response on June 11, 2021, ("Response," D.E. 15), to which Defendant filed a Reply on June 18, 2021, ("Reply," D.E. 16). Upon review of the Motion, Response, Reply, and the record, the Court finds as follows.

I. Background[1]

Since December 2019, there has been a worldwide outbreak of COVID-19, which the World Health Organization officially declared a pandemic on March 11, 2020. (Compl. ¶ 20.) The virus originated in China, and quickly spread throughout Asia, Europe, and North America. (Id.) There have been millions of confirmed cases and hundreds of thousands of deaths worldwide as a result of the COVID-19 pandemic. (Id.)

On or about February 13, 2020, the Centers for Disease Control ("CDC") published the Interim Guidance for Ships on Managing Suspected Coronavirus Disease 2019, which provided guidance for ship operators, including cruise ship operators, to help prevent, detect, and medically manage suspected COVID-19 infections aboard ships. (Id. ¶ 22.) Also in February 2020, two cruise ships owned by the Carnival Corporation experienced outbreaks of COVID-19. (Id. ¶¶ 24-26.) First, in early February, the *Diamond Princess* experienced an outbreak in Yokohama Harbor, Japan; the outbreak began with ten confirmed COVID-19 cases which rapidly multiplied to 700 confirmed cases and resulted in a two-week quarantine. (Id. ¶ 24.) Second, in late February, the *Grand Princess* experienced an outbreak off the coast of California. (Id. ¶ 25.) On March 14, 2020, the CDC issued its first No Sail Order which was applicable to cruise ship operators. (Id. ¶ 26(r).)

[1] The following facts are gleaned from Plaintiff's Complaint, (D.E. 1), and are deemed to be true for purposes of ruling on the Motion to Dismiss.

Meanwhile, on March 1, 2020, Celebrity commenced the at-issue voyage aboard the *Eclipse* from Argentina for a fourteen-night Argentinian and Chilean cruise. (Id. ¶ 26(o).)

On March 2, 2020, at least one passenger aboard the *Eclipse* complained of flu-like symptoms consistent with a COVID-19 diagnosis. (Id. ¶ 26(p).)

On March 15, 2020, the *Eclipse* was denied the ability to dock in Chile due to concerns that passengers and crewmembers may have COVID-19. (Id. ¶ 26(s).) Thereafter, Defendant ordered all passengers aboard the ship to self-isolate; however, it required all crewmembers to continue cruise operations as usual and did not take any specific safety measures for crewmembers. (Id.)

On or about March 26, 2020, a crewmember tested positive for COVID-19 while aboard the *Eclipse*. (Id. ¶ 26(t).)

On March 30, 2020, the *Eclipse* docked in San Diego, California, where passengers were permitted to disembark and go home. (Id. ¶ 26(u).)

On February 26, 2021, Plaintiff Adlyn Poe Paul, individually and on behalf of the Estate of her deceased husband, Gerald Paul, filed the instant Complaint alleging that as a result of Celebrity's acts and omissions, Adlyn and Gerald contracted COVID-19 while aboard the *Eclipse*, and that Gerald ultimately died as a result. (See id. ¶¶ 34, 41, 48, 54, 61, 68, 75, 83, 91, 98, 106, 112, 118, 124, 129, 134, 139, 144.) The Complaint invokes the Court's diversity jurisdiction under 28 U.S.C. § 1332(a), (id. ¶ 7), and, alternatively, the Court's admiralty or maritime jurisdiction under 28 U.S.C. § 1333, (id. ¶ 8).

The Complaint alleges that "Plaintiff, ADLYN POE PAUL is a citizen of the United States, and resident of the State of Georgia." (Id. ¶ 1.) It further alleges that "Decedent Gerald Paul was a citizen of the United States and was a resident of Georgia at the time of his death." (Id. ¶ 2.) It further alleges that "Defendant, CELEBRITY, is a foreign entity which conducts its business from its principal place of business in Miami, Florida." (Id. ¶ 5.)

The Complaint asserts the following eighteen causes of action against Defendant Celebrity:

- Count 1: negligent failure to warn (failure to warn of other passengers/crew with positive COVID-19 symptoms);
- Count 2: negligent failure to warn (misrepresentation made to Plaintiffs);
- Count 3: negligent failure to warn (failure to warn of COVID-19 dangers);
- Count 4: negligent failure to warn (failure to warn of COVID-19 safety measures);
- Count 5: negligent management of infectious disease outbreak aboard vessel (failure to take remedial action to control spread of COVID-19);
- Count 6: negligent management of infectious disease outbreak (failure to take precautions as to passengers/crew with positive COVID-19 symptoms);
- Count 7: negligent management of infectious disease outbreak aboard vessel (failure to perform testing);
- Count 8: negligent management of infectious disease outbreak aboard vessel (failure to enforce infectious disease policies and procedures);
- Count 9: negligent boarding (failure to evaluate passengers/crew before boarding);
- Count 10: negligent boarding (failure to evaluate passengers/crew before boarding per CDC Guidelines);

- Count 11: negligent boarding (failure to restrict access to vessel);
- Count 12: general negligence (failure to enforce physical distancing measures);
- Count 13: general negligence (failure to sanitize the vessel);
- Count 14: general negligence (failure to enact vessel lockdown);
- Count 15: negligent infliction of emotional distress (failure to enforce physical distancing measures);
- Count 16: negligent infliction of emotional distress (misrepresentation as to Plaintiffs);
- Count 17: negligent infliction of emotional distress (negligent disembarkation procedure); and
- Count 18: intentional infliction of emotional distress.

(Id. ¶¶ 28-144.) Each of the first seventeen counts include the following damages allegations:

> a) Gerald Paul, represented as Plaintiff, the Estate of Gerald Paul, contracted COVID-19 while aboard the *Celebrity Eclipse* and, as a result, suffered physical injuries, including, but not limited to: fever, severe acute respiratory syndrome, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, and nightmares. As a result, of his injuries Gerald Paul died on April 2, 2020. Also, as a result of his fear of contracting the virus aboard the vessel before he actually contracted it and Celebrity's tortious response to the virus outbreak aboard the vessel Gerald Paul, prior to his death, suffered separate and severe emotional injuries, including, but not limited to: anxiety, depression, nightmares, and gastrointestinal difficulties.
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> b) Plaintiff, Adlyn Poe Paul, contracted COVID-19 while aboard the *Celebrity Eclipse* and, as a result, suffered physical injuries, including, but not limited to: fever, severe cough, respiratory distress, fatigue, reduced lung capacity, body aches, chills, and nightmares. Also, as a result of her fear of contracting the virus aboard the vessel before she actually contracted it and Celebrity's tortious response to the virus outbreak aboard the vessel Adlyn Poe Paul suffered separate and severe emotional injuries, including, but not limited to: anxiety, depression, nightmares, and gastrointestinal difficulties.

(Id. ¶¶ 34, 41, 48, 54, 61, 68, 75, 83, 91, 98, 106, 112, 118, 124, 129, 134, 139.) The negligent infliction of emotional distress claims contain the following additional damages claim:

> Additionally, and in support of this Count in particular, both Plaintiffs were exposed to an actual risk of physical injury and death in connection with COVID-9 contraction (and, did ultimately contract COVID-19 while aboard the vessel), which caused both Plaintiffs to suffer mental and emotional anguish with physical manifestations of that mental and emotional anguish including, but not limited to: sickness, nausea, gastrointestinal difficulties, exhaustion, fatigue, headaches, insomnia, lack of sleep, poor sleep, nightmares and respiratory difficulties.

(Id. ¶¶ 129(c); 134(c); 139(c).)

On May 21, 2021, Defendant filed the instant Motion to Dismiss. (D.E. 6.) It argues that various parts of the Complaint should be dismissed for failure to state a claim. (Id. at 3-11.)

II. Legal Standard

a. Subject matter jurisdiction

"[A] federal court is powerless to act without jurisdiction . . . [and] should inquire into whether it has subject matter jurisdiction at the earliest possible stage in the proceedings." Univ. of S. Ala. v. Am. Tobacco Co., 168 F.3d 405, 410 (11th Cir. 1999). "Indeed, it is well settled that a federal court is obligated to inquire into subject matter jurisdiction sua sponte whenever it may be lacking." Id. (citations omitted). "If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action." Fed. R. Civ. P. 12(h)(3).

> Attacks on subject matter jurisdiction come in two forms: (1) facial attacks, and (2) factual attacks. Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir.

> 1990) (citing Menchaca v. Chrysler Credit Corp., 613 F.2d 507, 511 (5th Cir. 1980)).
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> Facial attacks on a complaint "require the court merely to look and see if the plaintiff has sufficiently alleged a basis of subject matter jurisdiction, and the allegations in [plaintiff's] complaint are taken as true for the purposes of the motion." Lawrence v. Dunbar, 919 F.2d 1525, 1529 (11th Cir. 1990). Factual attacks challenge "the existence of subject matter jurisdiction in fact, irrespective of the pleadings, and matters outside the pleadings, such as testimony and affidavits, are considered." Lawrence, 919 F.2d at 1529. This circuit has explained that in a factual attack, the presumption of truthfulness afforded a plaintiff under Federal Rule of Civil Procedure 12(b)(6) does not attach, and the court is free to weigh the evidence, stating:
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> > [in a factual attack upon subject matter jurisdiction] the trial court may proceed as it never could under 12(b)(6) or Fed. R. Civ. P. 56. Because at issue in a factual 12(b)(1) motion is the trial court's jurisdiction—it's very power to hear the case—there is substantial authority that the trial court is free to weigh the evidence and satisfy itself as to the existence of its power to hear the case. In short, no presumptive truthfulness attaches to plaintiff's allegations, and the existence of disputed material facts will not preclude the trial court from evaluating for itself the merits of jurisdictional claims.
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> Lawrence, 919 F.2d at 1529 (quoting Williamson v. Tucker, 645 F.2d 404, 412–13 (5th Cir. 1981)).

Scarfo v. Ginsberg, 175 F.3d 957, 960-61 (11th Cir. 1999).

b. Failure to state a claim

Under Federal Rule of Civil Procedure 12(b)(6), a court may dismiss a claim for "failure to state a claim upon which relief can be granted." "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.'" Ashcroft v. Iqbal, 556 U.S. 662, 678 (2009) (quoting Bell Atlantic Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Conclusory statements, assertions or labels will not survive a 12(b)(6) motion to dismiss. Id. "A claim has facial

plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." Id.; see also Edwards v. Prime, Inc., 602 F.3d 1276, 1291 (11th Cir. 2010) (setting forth the plausibility standard). "Factual allegations must be enough to raise a right to relief above the speculative level[.]" Twombly, 550 U.S. at 555 (citation omitted). Additionally:

> Although it must accept well-pled facts as true, the court is not required to accept a plaintiff's legal conclusions. Ashcroft v. Iqbal, 556 U.S. 662, 129 S. Ct. 1937, 1949, 173 L. Ed. 2d 868 (2009) (noting "the tenet that a court must accept as true all of the allegations contained in a complaint is inapplicable to legal conclusions"). In evaluating the sufficiency of a plaintiff's pleadings, we make reasonable inferences in Plaintiff's favor, "but we are not required to draw plaintiff's inference." Aldana v. Del Monte Fresh Produce, N.A., Inc., 416 F.3d 1242, 1248 (11th Cir. 2005). Similarly, "unwarranted deductions of fact" in a complaint are not admitted as true for the purpose of testing the sufficiency of plaintiff's allegations. Id.; see also Iqbal, 129 S. Ct. at 1951 (stating conclusory allegations are "not entitled to be assumed true").

Sinaltrainal v. Coca-Cola, 578 F.3d 1252, 1260 (11th Cir. 2009), abrogated on other grounds by Mohamad v. Palestinian Auth., 566 U.S. 449, 132 S. Ct. 1702, 1706 n.2 (2012). The Eleventh Circuit has endorsed "a 'two-pronged approach' in applying these principles: 1) eliminate any allegations in the complaint that are merely legal conclusions; and 2) where there are well-pleaded factual allegations, 'assume their veracity and then determine whether they plausibly give rise to an entitlement to relief.'" Am. Dental Ass'n v. Cigna Corp., 605 F.3d 1283, 1290 (11th Cir. 2010) (quoting Iqbal, 556 U.S. at 679).

III. Applicable Law

"Federal maritime law applies to actions arising from alleged torts 'committed aboard a ship sailing in navigable waters.'" Smolnikar v. Royal Caribbean Cruises Ltd.,

787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) (citing Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1321 (11th Cir. 1989)). It also applies to tort actions arising at an offshore location during the course of a cruise. Ceithaml v. Celebrity Cruises, Inc., 739 F. App'x 546, 550 n.4 (11th Cir. 2018) (citing Doe v. Celebrity Cruises, Inc., 394 F.3d 891, 900-02 (11th Cir. 2004)).

> General maritime law is "an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." See East River Steamship Corp. v. Transamerica Delaval, Inc., 476 U.S. 858, 864–65, 106 S. Ct. 2295, 90 L. Ed. 2d 865 (1986). See also Brockington v. Certified Elec., Inc., 903 F.2d 1523, 1530 (11th Cir. 1990). In the absence of well-developed maritime law pertaining to [Plaintiff's] negligence claims, [the Court] will incorporate general common law principles and Florida state law to the extent they do not conflict with federal maritime law. See Just v. Chambers, 312 U.S. 383, 388, 61 S. Ct. 687, 85 L. Ed. 903 (1941) ("With respect to maritime torts we have held that the State may modify or supplement the maritime law by creating liability which a court of admiralty will recognize and enforce when the state action is not hostile to the characteristic features of the maritime law or inconsistent with federal legislation."). See also Becker v. Poling Transp. Corp., 356 F.3d 381, 388 (2nd Cir. 2004) ("federal maritime law incorporates common law negligence principles generally, and [state] law in particular"); Wells v. Liddy, 186 F.3d 505, 525 (4th Cir. 1999) (in the absence of a well-defined body of maritime law relating to a particular claim, the general maritime law may be supplemented by either state law or general common law principles).

Smolnikar, 787 F. Supp. 2d at 1315; see also Hesterly v. Royal Caribbean Cruises, Ltd., 515 F. Supp. 2d 1278, 1282 (S.D. Fla. 2007).

IV. Discussion

Defendant argues that the Complaint must be dismissed because: (1) the Death on the High Seas Act ("DOHSA") preempts Plaintiffs' wrongful death and survival claims; (2) Plaintiffs' Negligent Infliction of Emotion Distress (NIED) claims impermissibly rest upon

their pre-illness "fear of" contracting COVID-19; (3) Count 2 lacks sufficient specificity under Rule 9(b) of the Federal Rules of Civil Procedure; and (4) Plaintiffs' fail to allege outrageous conduct sufficient to support their Intentional Infliction of Emotional Distress (IIED) claim. (Mot. at 1-2.) However, because "a federal court is obligated to inquire into subject matter jurisdiction sua sponte whenever it may be lacking[,]" Univ. of S. Ala., 168 F.3d at 410, the Court begins with that issue.

a. Subject matter jurisdiction

"Federal courts exercise limited subject matter jurisdiction, empowered to hear only those cases within the judicial power of the United States as defined by Article III of the Constitution or otherwise authorized by Congress." Taylor v. Appleton, 30 F.3d 1365, 1367 (11th Cir. 1994) (citing Wright, Miller & Cooper, 13 Federal Practice and Procedure, § 3522 (1984)). In 28 U.S.C. § 1332, Congress granted federal courts jurisdiction over diversity actions. Relevant here, "[t]he district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between . . . citizens of different States" and "citizens of a State and citizens or subjects of a foreign state[.]" 28 U.S.C. § 1332(a)(1) & (2).

"Citizenship, not residence, is the key fact that must be alleged in the complaint to establish diversity for a natural person." Taylor, 30 F.3d at 1367; see also Congress of Racial Equality v. Clemmons, 323 F.2d 54, 58 (5th Cir. 1963)[2] ("Diversity of citizenship,

[2] In Bonner v. City of Prichard, 661 F.2d 1206, 1209 (11th Cir. 1981), the Eleventh Circuit adopted as binding precedent all decisions handed down by the former Fifth Circuit before October 1, 1981.

not of residence, is required under 28 U.S.C.A. § 1332. 'Wherever jurisdiction is predicated upon the citizenship (or alienage) of the parties, it should be noted that since residence is not the equivalent of citizenship, an allegation that a party is a resident of a certain state or foreign country is not a sufficient allegation of his citizenship.'") (quoting 2 Moore, Federal Practice §8.10, p. 1636 (2d Ed.)). For a natural person, citizenship is equivalent to "domicile." Travaglio v. Am. Express Co., 735 F.3d 1266, 1269 (11th Cir. 2013) (quoting McCormick v. Aderholt, 293 F.3d 1254, 1257 (11th Cir. 2002)). "'A person's domicile is the place of 'his true, fixed, and permanent home and principal establishment, and to which he has the intention of returning whenever he is absent therefrom . . . .'" McCormick, 293 F.3d at 1257-58 (quoting Mas v. Perry, 489 F.2d 1396, 1399 (5th Cir. 1974) (quoting Stine v. Moore, 213 F.2d 446, 448 (5th Cir. 1954))). Thus, "domicile requires both residence in a state and 'an intention to remain there indefinitely . . . .'" Travaglio, 735 F.3d at 1269 (quoting McCormick, 293 F.3d at 1257). "Residence alone is not enough." Id. (citing Denny v. Pironi, 141 U.S. 121, 123 (1891)); see also Smith v. Marcus & Millichap, Inc., 991 F.3d 1145, 1149 (11th Cir. 2021) ("Residency is necessary, but insufficient, to establish citizenship in a state.").

"[A] corporation shall be deemed to be a citizen of every State and foreign state by which it has been incorporated and of the State or foreign state where it has its principal place of business . . . ." 28 U.S.C. § 1332(c)(1).

"[C]itizenship should be 'distinctly and affirmatively alleged.'" Toms v. Country Quality Meats, Inc., 610 F.2d 313, 316 (5th Cir. 1980) (quoting 2A Moore's Federal Practice § 8.10 at 1662). Where a complaint fails to contain facts regarding the citizenship

of each party sufficient to satisfy the court that complete diversity exists, a district court is "constitutionally obligated to dismiss the action altogether if the plaintiff does not cure the deficiency." Travaglio, 735 F.3d at 1268 (citing Stanley v. C.I.A., 639 F.2d 1146, 1159 (5th Cir. Unit B Mar. 1981).[3]

Here, the Complaint alleges that Plaintiffs are citizens of the United States, (Compl. ¶¶ 1-2), and that "Defendant, CELEBRITY, is a foreign entity which conducts its business from its principal place of business in Miami, Florida[,]" (id. ¶ 5). Because Defendant's principal place of business is in Florida, it is deemed to be a citizen of Florida for purposes of diversity jurisdiction. 28 U.S.C. § 1332(c)(1). See also Jerguson v. Blue Dot Inv., Inc., 659 F.2d 31, 35 (5th Cir. Unit B 1981) (holding that "a foreign corporation is a citizen for diversity jurisdiction purposes of a state where it has its principal place of business"). Because all named Parties are United States citizens, to establish diversity jurisdiction in this case Plaintiffs must allege that the Parties are citizens of different states. 28 U.S.C. § 1332(a)(1), (d)(2)(A).

The Complaint alleges that "Plaintiff, ADLYN POE PAUL is a citizen of the United States, and resident of the State of Georgia[,]" (Compl. ¶ 1), and that "Decedent Gerald Paul was a citizen of the United States and was a resident of Georgia at the time of his death[,]" (id. ¶ 2). These statements are insufficient to allege Plaintiffs' citizenship for purposes of establishing diversity jurisdiction. Smith, 991 F.3d at 1149 ("Residency is

[3] Decisions issued by a Unit B panel of the former Fifth Circuit are binding precedent in the Eleventh Circuit. Travaglio, 735 F.3d at 1268 n.2 (citing Stein v. Reynolds Secs., Inc., 667 F.2d 33, 34 (11th Cir. 1982)).

necessary, but insufficient, to establish citizenship in a state."); Travaglio, 735 F.3d at 1269 ("Residence alone is not enough."); Clemmons, 323 F.2d at 58 ("Diversity of citizenship, not of residence, is required under 28 U.S.C.A. § 1332. 'Wherever jurisdiction is predicated upon the citizenship (or alienage) of the parties, it should be noted that since residence is not the equivalent of citizenship, an allegation that a party is a resident of a certain state or foreign country is not a sufficient allegation of his citizenship.'") (quoting 2 Moore, Federal Practice §8.10, p. 1636 (2d Ed.)); see also Physicians Imaging—Lake City, LLC v. Nationwide Gen. Ins. Co.. Case No. 3:20-cv-1197-J-34JRK, 2020 WL 6273743, at *1 (M.D. Fla. Oct. 26, 2020) ("[F]or purposes of determining whether a party has adequately pled a basis for subject matter jurisdiction, the Court cannot simply presume that an allegation regarding a party's residence establishes that party's citizenship."); Tucker v. Thomasville Toyota, 623 F. Supp. 2d 1378, 1381 (M.D. Ga. 2008) ("Because Plaintiff alleged the residency of these parties and not their citizenship, the Plaintiff has failed to properly plead their citizenship for purposes of diversity jurisdiction."). Accordingly, the Court cannot exercise diversity jurisdiction over this case. See Underwriters at Lloyd's, London v. Osting-Schwinn, 613 F.3d 1079, 1088-93 (11th Cir. 2010) (holding that the district court could not properly exercise diversity jurisdiction over the case until the plaintiff pled the citizenship of every one of its members so that the district court could determine that complete diversity existed); Kantrow v. Celebrity Cruises Inc., __ F. Supp. 3d __, 2021 WL 1976039, at *9 (S.D. Fla. Apr. 1, 2021) ("Kantrow II") (finding that the Court lacked diversity jurisdiction over cruise line

negligence action related to COVID-19 outbreak aboard the *Eclipse* because the named plaintiffs alleged only their state of residency and not their state of citizenship).

However, because Plaintiffs' Complaint alleges personal injuries suffered by cruise ship passengers at sea, this case falls within the admiralty jurisdiction of the Court. Caron v. NCL (Bahamas), Ltd., 910 F.3d 1359, 1365 (11th Cir. 2018) ("Personal-injury claims by cruise ship passengers, complaining of injuries suffered at sea, are within the admiralty jurisdiction of the district courts."); Kantrow II, 2021 WL 1976039, at *9. As such, the Court proceeds to the merits of the Parties' arguments.

b. DOHSA preemption

Defendant argues that because Gerald Paul contracted COVID-19 on the high seas, DOHSA is the exclusive remedy, preempting Plaintiffs' claims for wrongful death and survival damages under Florida's Wrongful Death Act, Section 768.21, Florida Statutes. (Mot. at 3 (citing 46 U.S.C. § 30301, et seq.; Ford v. Wooten, 681 F.2d 712, 716 (11th Cir. 1982); Ridley v. NCL (Bahamas) Ltd., 824 F. Supp. 2d 1355, 1359-60 (S.D. Fla. 2010)).) Defendant further argues that Plaintiffs' alleged non-pecuniary damages are barred by DOHSA and should be stricken. (Id. at 5-6 (citing 46 U.S.C. § 30303; Dooley v. Korean Air Lines Co., 524 U.S. 116, 118 (1998); Keiser v. Carnival Corp., No. 1:20-cv-20013-JLK, 2020 U.S. Dist. LEXIS 97559, at *5 (S.D. Fla. June 1, 2020); Kennedy v. Carnival Corp., 385 F. Supp. 3d 1302, 1318-19 (S.D. Fla. 2019); Mantione v. Royal Caribbean Cruises, No. 06-60603-CIVMARRA/JOHNSON, 2007 U.S. Dist. LEXIS 110970, at *4 (S.D. Fla. Aug. 28, 2007)).)

Plaintiffs argue that DOHSA applies when the wrongful act occurs beyond three nautical miles from the shore of the United States, but in this case Defendant's "wrongful and negligent actions began on land within 3 nautical miles of the United States." (Resp. at 5.) Specifically, it argues that the Complaint alleges that Defendant—whose principal place of business is in Miami, Florida—failed to adequately and/or timely warn Plaintiffs of the dangers and known risks of contracting COVID-19 aboard the vessel. (Id. (citing Compl. ¶ 44(a).) They also note that Count 9 of the Complaint alleges that Defendant failed to have adequate medical personnel stationed on land during the initial boarding process to evaluate passengers and crewmembers determine whether to allow boarding to those who exhibited COVID-19 symptoms. (Id. (citing Compl. ¶ 87(a)).) Plaintiffs acknowledge that the subject cruise did not originate in the United States, but argue that the decisions to, inter alia, not warn passengers about COVID-19 and to not have adequate medical personnel perform screenings were made in Miami, Florida. (Id. at 5-6 & n.1.) Finally, Plaintiffs argue that to the extent the Court finds that DOHSA preempts Plaintiffs' claims under Florida's Wrongful Death Act, the Court should "either construe the Wrongful Death damage claims under DOHSA or grant leave to amend Plaintiff's Complaint." (Id. at 6-7.)

In its Reply, Defendant argues that multiple authorities have discredited Plaintiffs' "shoreside negligence" DOHSA argument. (D.E. 16 at 1-3 (discussing Moyer v. Rederi, 645 F. Supp. 620, 627 (S.D. Fla. 1986); Wong v. Carnival Corp. & PLC, No. 2:20-cv-04727-RGK-SK, 2020 U.S. Dist. LEXIS 251485, at *14 (C.D. Cal. Sep. 4, 2020); Dorety v. Princess Cruise Lines Ltd., No. 2:20-cv-03507-RGK-SK, 2020 U.S. Dist. LEXIS

219904, at *6 (C.D. Cal. Sep. 17, 2020); Zapata v. Royal Caribbean Cruises, Ltd., No. 12-21897-Civ-COOKE/TUR, 2013 U.S. Dist. LEXIS 43487, at *13 (S.D. Fla. Mar. 27, 2013); Balachander v. NCL Ltd., 800 F. Supp. 2d 1196, 1201 (S.D. Fla. 2011); Varner v. Celebration Cruise Line, LLC, No. 0:15-CIV-60867-WPD, 2015 U.S. Dist. LEXIS 193215, at *6 (S.D. Fla. Sep. 15, 2015)).) It argues that "where Decedent contracted COVID-19 is the key inquiry for determining [DOHSA]'s application. And the allegations in the Complaint unequivocally assert Decedent contracted COVID-19 onboard, while on the high seas." (Id. at 3.) As such, it argues that DOHSA "is the only remedy available to Plaintiffs with respect to Gerald Paul's death." (Id.)

> DOHSA (as codified in the United State Code) provides, in relevant part, that
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> > When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 [now 12] nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative."

46 U.S.C. § 30302.[4] "DOHSA's applicability matters, among other reasons, because it limits a plaintiff's recovery to 'compensation for the pecuniary loss sustained by the individuals for whose benefit the action is brought' and thereby forecloses recovery for

[4] In 1988, President Ronald Reagan issued Proclamation 5928, which extended United States territorial waters from three to twelve miles from the shore of the United States. See In re Air Crash Off Long Island, New York, on July 17, 1996, 209 F.3d 200, 209 (2d Cir. 2000). In light of this proclamation, DOHSA now applies to accidents occurring more than twelve nautical miles from the shore of the United States. See id. at 213 ("[T]he effect of the Proclamation is to move the starting point of the application of DOHSA from three to 12 miles from the coast"); Kennedy v. Carnival Corp., 385 F. Supp. 1302, 1314 & n.5 (S.D. Fla. 2019); LaCourse v. Defense Support Servs., LLC, Case No. 3:16cv170-RV/CJK, 2018 WL 2041366, at *2 n.2 (N.D. Fla. Feb. 2, 2018).

emotional injury and punitive damages." LaCourse v. PAE Worldwide Inc., 980 F.3d 1350, 1355 (11th Cir. 2021) (citing 46 U.S.C. § 30303).

In LaCourse, the Eleventh Circuit rejected an argument similar to the one Plaintiffs assert here. Id. at 1355-56. In that case, retired Air Force Lieutenant Colonel Matthew LaCourse died when the F-16 fighter jet he was test-flying crashed more than twelve nautical miles offshore into the Gulf of Mexico. Id. at 1353. His widow filed suit under Florida state law in Florida state court against a company ("PAE") that had been contracted to provide service and maintenance to the F-16. Id. at 1354. PAE removed the case to federal court alleging, inter alia, admiralty jurisdiction under DOHSA. Id. "Once in federal court, PAE moved for partial summary judgment, arguing that DOHSA governed LaCourse's suit and, accordingly, that any potential recovery should (per the statute) be limited to pecuniary damages." Id. The district court granted partial summary judgment in favor of PAE on the grounds that DOHSA applied and provided the exclusive remedy for death on the high seas. Id. The plaintiffs appealed, arguing, inter alia, that "by its plain terms DOHSA applies only when a death is caused by 'wrongful act, neglect, or default occurring on the high seas,' whereas the alleged negligence here occurred on land[.]" Id. at 1355. The Eleventh Circuit, relying on Offshore Logistics, Inc. v Tallentire, 477 U.S. 207, 218 (1986) and In re Dearborn Marine Service, Inc., 499 F.2d 263, 272 n.17 (5th Cir. 1974), rejected the argument, finding that although the alleged negligent acts "occurred not 'on the high seas,' but on terra firma" at Tyndall Air Force Base in Florida, the district court correctly found that DOHSA applied. Id. at 1356.

Here, too, Plaintiffs allege that DOHSA does not apply because Defendant's "wrongful and negligent actions began on land within 3 nautical miles of the United States." (Resp. at 5.) In light of LaCourse, the Court must reject the argument. 980 F.3d at 1356. See also Knnedy v. Carnival Corp., 385 F. Supp. 3d 1302, 1315 (S.D. Fla. 2019) ("Plaintiff's land-based argument holds little weight because the injury indisputably occurred in the water."); Balachander v. NCL (Bahamas) Ltd., 800 F. Supp. 2d 1196, 1201 (S.D. Fla. 2011) ("'[A]uthority is clear that a cause of action under DOHSA accrues at the time and place where an allegedly wrongful act or omission 'was consummated' in an actual injury, not at the point where previous or subsequent negligence allegedly occurred.'") (quoting Moyer v. Rederi, 645 F. Supp. 620, 627 (S.D. Fla. 1986)), abrogated on other grounds by Franza v. Royal Caribbean Cruises, Ltd., 772 F.3d 1225, 1250 n.18 (11th Cir. 2014); Fojtasek v. NCL (Bahamas) Ltd., 613 F. Supp. 2d 1351, 1354 (S.D. Fla. 2009) (same).

Indeed, apparently all of the courts addressing the precise question before the Court have concluded that the place where the plaintiff contracted COVID-19 determines DOHSA applicability. See Maa v. Carnival Corp. & PLC, CV 20-6341 DSF (SKx), 2020 WL 5633425, at *8 (C.D. Cal. Sept. 21, 2020) ("DOHSA applies where 'the site of an accident [is] on the high seas' regardless of where 'death actually occurs or where the wrongful act causing the accident may have originated. . . . It is . . . irrelevant that decisions contributing to the [boat's] unseaworthiness may have occurred onshore or within territorial waters[.]'") (quoting Bergen v. F/V St. Patrick, 816 F.2d 1345, 1348 (9th Cir. 1987), opinion modified on reh'g, 866 F.2d 318 (9th Cir. 1989)); Wong v. Carnival Corp.

& PLC, Case No. 2:20-cv-04727-RGK-SK, 2020 WL 8767724, at *4-5 (C.D. Cal. Sept. 4, 2020) (finding that because the amended complaint did not allege where the cruise ship was located when the plaintiff contracted COVID-19, it could not determine whether DOHSA applied); Dorety v. Princess Cruise Lines Ltd., Case No. 2:20-cv-03507-RGK-SK, 2020 WL 6748719, at *2-3 (C.D. Cal. Sept. 17, 2020) (same).

Here, the Complaint alleges that on March 1, 2020, the vessel "embarked from Argentina for a fourteen (14) night Argentinian and Chilean cruise[,]" (Compl. ¶ 26(o)), that Gerald Paul contracted COVID-19 "aboard the vessel," (id. ¶ 31), and that on March 30, 2020, the *Eclipse* docked in San Diego, California and permitted passengers to disembark and go home, (id. ¶ 26(u)). However, the Complaint does not allege where the cruise ship was located when Gerald Paul contracted COVID-19 aboard the ship—e.g., whether the *Eclipse* was within or beyond twelve nautical miles of the shore of the United States.

Because the Complaint does not allege whether the *Eclipse* was located on the high seas or within the territorial waters of the United States when Gerald Paul contracted COVID-19, the Court dismisses Plaintiffs' claims for wrongful death and survival/non-pecuniary damages under Florida's Wrongful Death Act without prejudice and with leave to amend so that Plaintiffs can cure this deficiency. Wong, 2020 WL 8767724, at *5; Dorety, 2020 WL 6748719, at *3. "Any amended Complaint must specify whether the [*Eclipse*] was on the high seas more than [twelve] nautical miles from the shore of the United States when [Gerald Paul] contracted COVID-19." Wong, 2020 WL 8767724, at *5; see also Dorety, 2020 WL 6748719, at *3.

c. Claims for NIED based on pre-illness "fear of" contracting COVID-19

Next, Defendant argues that the Court should dismiss Plaintiffs' claims for negligent infliction of emotional distress to the extent that they are based upon their pre-illness "fear of" contracting COVID-19. (Mot. at 6 (citing Kantrow II, 2021 WL 1976039 at *12; Lindsay v. Carnival Corp., C20-982 TSZ, 2021 WL 488994, at *3 (W.D. Wash. Feb. 10, 2021); Archer v. Carnival Corp. & PLC, Case No. 2:20-cv-04203-RGK-SK, 2020 WL 7314847, at *6 (C.D. Cal. Nov. 25, 2020); Saltzstine v. Princess Cruise Lines Ltd., Case No. 2:20-cv-04997-RGKSK, 2020 WL 8475998, at *2 (C.D. Cal. Oct. 23, 2020); Crawford v. Princess Cruise Lines Ltd., Case No. 2:20-cv-05546-RGK-SK, 2020 WL 7382770, at *6 (C.D. Cal. Oct. 8, 2020); Parker v. Princess Cruise Lines Ltd., Case No. 2:20-cv-03788-RGK-SK, 2020 WL 6594994, at *3 (C.D. Cal. Sept. 18, 2020)). In this regard, Defendant argues that that the "zone of danger" test governs any attempt to recover damages for negligently inflicted emotional distress under maritime law, and "as a categorical rule, the zone-of-danger test is not satisfied where a plaintiff alleges mere exposure—if the plaintiff is disease-free and symptom-free, then he or she cannot recover damages for emotional distress." (Id. at 7 (citing Norfolk & W. Ry. Co. v. Ayers, 538 U.S. 135, 141 (2003); Metro-North Commuter R.R. Co. v. Buckley, 521 U.S. at 427, 430-32 (1997)).) It further argues that Plaintiffs' post-infection emotional distress claims are a component of their pain and suffering damages and not a basis for a stand-alone claim. (Id. at 7-8 (citing Crawford v. Princess Cruise Lines Ltd., Case No. 2:20-Cv-05546-RGK-SK, 2020 WL 7382770, (C.D. Cal. Oct. 8, 2020)).)

Plaintiffs argue that "[t]he zone of danger test permits 'recovery for emotional injury to plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, **or** who are placed in immediate risk of physical harm by that conduct.'" (Resp. at 7 (quoting Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 549 (1994)).) They argue that they suffered both types of emotional injury under this test. (Id. (citing Compl. ¶¶ 126-28, 129(a) & (b), 131-33, 134(a) & (b), 136-38, 139(a) & (b)).) Plaintiffs attempt to distinguish Kantrow on the grounds that the class members in that case "were only exposed to COVID-19, but did not develop symptoms of the virus[.]" (Id. at 9.)

In its Reply, Defendant argues "only subsequent emotional distress is recoverable despite Plaintiffs demand for both pre- and post- infection emotional distress."[5] (Reply at 3.) It further argues that Kantrow II is indistinguishable from this case, and that in Kantrow II this Court rejected Plaintiffs' argument. (Id. at 4.)

The Court agrees that Kantrow II is materially indistinguishable and compels the Court to reject Plaintiffs' argument. In that case, the Kantrows filed a class-action lawsuit on behalf of passengers of the at-issue voyage of the *Eclipse*. Kantrow II, 2021 WL 1976039, at *1-3. The second amended complaint alleged that the named plaintiffs—Fred and Marlene Kantrow—contracted COVID-19 while aboard the *Eclipse* and asserted

[5] Defendant also argues that Gerald Paul's emotional distress survival claim is barred by DOHSA. (Reply at 3 (citing Dooley v. Korean Air Lines Co., Ltd., 524 U.S. 116, 123 (1998) (holding that DOHSA bars recovery for a decedent's pre-death pain and suffering).) However, the Court has already found that it is unable to determine from the allegations contained in the Complaint whether DOHSA applies, dismissed the survival and non-pecuniary claims without prejudice, and provided Plaintiffs leave to file an amended complaint to clarify the relevant allegations. (See supra Section IV(b).)

claims for negligent infliction of emotional distress for, inter alia, their pre-infection "fear of" contracting COVID-19. Id. at *3-4. They also asserted NIED claims on behalf of class members who suffered emotional distress due to being exposed to COVID-19, but who did not contract the virus (the "exposure only" claims). Id. at *9. Celebrity moved to dismiss the Kantrows' claims, arguing that pursuant to Ayers, 538 U.S. at 149-50, "fear of" claims can only be asserted where the plaintiff has already been physically injured. Id. at *10. The Court agreed with Celebrity. Id. at *10-12. Because of its relevance to this case, the Court reproduces its analysis below:

> Federal maritime law has adopted the "zone of danger" test for claims of negligent infliction of emotional distress. Chaparro, 693 F.3d at 1338 (citations omitted). "The 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." Gottshall, 512 U.S. at 547-48, 114 S. Ct. 2396 (1994). "That is, 'those within the zone of danger of physical impact can recover for fright, and those outside of it cannot.'" Id. (quoting Pearson, Liability to Bystanders for Negligently Inflicted Emotional Harm—A Comment on the Nature of Arbitrary Rules, 34 U. Fla. L. Rev. 477, 489 (1982)).
>
> In Metro-North, the Supreme Court analyzed the first method of recovery—i.e., the "physical impact" method—and held that "physical impact" does not "include a contact that amounts to no more than an exposure—an exposure . . . to a substance that poses some future risk of disease and which contact causes emotional distress only because the [plaintiff] learns that he may become ill after a substantial period of time." 521 U.S. at 432, 117 S. Ct. 2113. Thus, a plaintiff alleging exposure to an illness or an illness-causing substance (like asbestos) cannot recover under the "physical impact" method "unless, and until, he manifests symptoms of a disease." Id. at 427, 117 S. Ct. 2113. Metro-North did not analyze the second method of recovery under the "zone of danger" test—i.e., the "immediate risk of physical harm" method. See Metro-North, 521 U.S. at 430, 117 S. Ct. 2113 ("The case before us . . . focuses on the . . . words 'physical impact.'").

In Weissberger, the plaintiffs were on Princess Cruise Line's *Grand Princess* cruise ship when a COVID-19 outbreak occurred on the ship. 2020 WL 3977938, at *1. The plaintiffs did not test positive for COVID-19 or experience any of its symptoms, but sued Princess Cruise Lines for "emotional distress damages based on their fear of contracting COVID-19 while quarantined on the ship, as well as punitive damages." Id. The defendant moved to dismiss, arguing that the plaintiffs were not within the zone of danger. Id. at *2. The plaintiffs argued that they were within the zone of danger under the "immediate risk of physical harm" theory. Id. at *3. The defendant argued that Metro-North "categorically bars Plaintiffs' claims, regardless of what prong of the zone of danger test they proceed under[,]" and "that Metro-North stands for the broad holding that to recover on a disease-based emotional-distress claim, the plaintiff must allege either that they contracted the disease or that they exhibit symptoms of it." Id.

The court initially found that the plaintiffs' negligence claims were properly construed as claims for negligent infliction of emotional distress (whether or not they were labeled as such) because they sought to recover damages only for their "emotional distress" and the "trauma[ ]" they suffered "from the fear of developing COVID-19" while on the ship. Id. at *2. Next, the court agreed with the defendant that "under Metro-North, the Plaintiffs in this case cannot recover for NIED based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease." Id. It reasoned:

> For one, Plaintiffs' proposed reading of Metro-North would lead to bizarre results. Under Metro-North, a passenger aboard the *Grand Princess* who was merely exposed to an individual with COVID-19 could only recover under the first prong of the zone of danger test if they either contracted COVID-19 or manifested symptoms of it. Yet under Plaintiffs' proposed interpretation, that same passenger could recover without manifesting any symptoms whatsoever so long as they cleverly pled their claim under the second prong of the test. This result is nonsensical and "means that it would be possible to sneak in through the back door what the Court [in Metro-North] expressly forb[ade] from coming in through the front." (Reply at 2-3, ECF No. 33.) In short, the exception would swallow the rule.
>
> The public policy concerns identified in Gottshall (and reiterated in Metro-North) further support the Court's conclusion. In Gottshall, the Supreme Court acknowledged that "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" were "well-founded" concerns that informed the Court's

> decision to limit liability by NIED plaintiffs. Gottshall, 512 U.S. at 557, 114 S. Ct. 2396. If this Court were to adopt the rule invited by Plaintiffs, this would inevitably lead to the scenario the Court in Gottshall was trying to avoid[.] Indeed, given the prevalence of COVID-19 in today's world, Plaintiffs' proposed rule would lead to a flood of trivial suits, and open the door to unlimited and unpredictable liability. See also Metro-North, 521 U.S. at 433–34, 117 S. Ct. 2113 (emphasizing the "difficulty of separating valid from invalid emotional injury claims" as a reason for limiting the recovery of exposure-only plaintiffs.")
>
> . . .
>
> Also, carving out an exception to Metro-North would seem at odds with the Court's holding that case-by-case determinations of negligence are not an adequate guard against unlimited and unpredictable liability. See Metro-North, 521 U.S. at 436, 117 S. Ct. 2113. That is why the Supreme Court imposed a categorical, threshold rule on Buckley's ability to recover for his exposure to insulation dust containing asbestos, even though his employer in fact "conceded negligence." Id. at 427, 117 S. Ct. 2113. As explained by the Court: "just as courts must interpret th[e] law to take proper account of the harms suffered by a sympathetic individual plaintiff, so they must consider the general impact, on workers as well as employers, of the general liability rules they would thereby create. 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. at 438, 117 S. Ct. 2113 (emphasis in original).

Id. at *3-4 (footnote omitted). Thus, the court found that the plaintiffs failed to state a claim because they failed to allege that they were within the zone of danger, and dismissed the complaint with prejudice, "as leave to amend would be futile." Id. at *5 (citing Albrecht v. Lund, 845 F.2d 193, 195 (9th Cir. 1988)).

It appears that every subsequent case to address the issue has adopted Weissberger's analysis and dismissed the "exposure only"/"fear of" claims. See Lindsay, 2021 WL 488994, at *3; Archer, 2020 WL 7314847, at *6; Saltzstine v. Princess Cruise Lines Ltd., Case No. 2:20-cv-04997-RGK-SK, 2020 WL 8475998, at *2 (C.D. Cal. Oct. 23, 2020); Crawford v. Princess Cruise Lines Ltd., Case No. 2:20-cv-05546-RGK-SK, 2020 WL 7382770, at *6 (C.D. Cal. Oct. 8, 2020); Parker v. Princess Cruise Lines Ltd., Case No. 2:20-cv-03788-RGK-SK, 2020 WL 6594994, at *3 (C.D. Cal. Sept. 18,

> 2020). Crawford is particularly instructive because in that case, as in this one, the plaintiffs actually contracted COVID-19 and sued to recover emotional distress damages based on their pre-COVID-19 fear of contracting COVID-19. 2020 WL 7382770, at *6. The Court found that the plaintiffs "cannot recover based on their mere exposure to individuals with COVID-19 and their attendant fear of contracting the disease"; rather, they "can only recover emotional-distress damages based on their post-diagnosis emotional distress." Id.
>
> The Court agrees with the analysis in Weissberger and adopts it herein. Plaintiffs' "exposure only" claims are properly construed as claims for negligent infliction of emotional distress because they seek to recover for the "severe emotional injuries" they suffered as a result of being exposed to COVID-19 on the *Eclipse*, and their "fear of contracting the virus aboard the vessel before [they] actually contracted it . . . ." (Second Am. Compl. ¶¶ 51; 57; 63; 69; 75; 81; 87; 94; 101; 108; 115; 120; 125; 130; 135; 140; 145.) For the reasons explained in Weissberger, the Court finds that "under Metro-North, the Plaintiffs in this case cannot recover for NIED based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease." 2020 WL 3977938, at *2; see also Crawford, 2020 WL 7382770, at *6 (finding that the plaintiffs "cannot recover based on their mere exposure to individuals with COVID-19 and their attendant fear of contracting the disease"; rather, they "can only recover emotional-distress damages based on their post-diagnosis emotional distress").

Id. at *10-12.

Here, as in Kantrow II and Crawford, Plaintiffs actually contracted COVID-19 and are suing to recover emotional distress damages based on their pre-COVID-19 fear of contracting COVID-19. However, for the reasons explained in Weissberger, the Court finds that "under Metro-North, the Plaintiffs in this case cannot recover for NIED based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease." 2020 WL 3977938, at *2; see also Kantrow II, 2021 WL 1976039, at *12; Crawford, 2020 WL 7382770, at *6. Consequently, Plaintiffs' "fear of" claims fail to state a claim upon which relief can be granted. Kantrow II, 2021 WL 1976039, at *12;

Crawford, 2020 WL 7382770, at *6; Weissberger, 2020 WL 3977938, at *5. Because leave to amend would be futile, Kantrow II, 2021 WL 1976039, at *12; Weissberger, 2020 WL 3977938, at *5, the Court dismisses the "fear of" claims with prejudice.

d. Count 2: NEGLIGENT FAILURE TO WARN (Misrepresentation Made to Plaintiffs)

Next, Defendant argues that although Count 2 is styled as a claim for negligent failure to warn, it is actually a claim for negligent misrepresentation and fails to meet the particularity requirement of Federal Rule of Civil Procedure 9(b). (Mot. at 8-9.) Specifically, it argues that Plaintiffs fail to specify when the alleged misrepresentations were made, whether the statements were oral or written, when Plaintiffs read/heard and relied upon them, and who was responsible for making (or not making) the statements. (Id. at 9.)

Plaintiffs argue that they have sufficiently pled a claim for negligent failure to warn in Count 2. (Resp. at 9-11.) They argue alternatively that to the extent the Court agrees with Defendant that Count 2 is actually a claim for negligent misrepresentation, they have adequately alleged with particularity a claim for negligent misrepresentation. (Id. at 11-14.) To the extent the Court finds that Count 2 fails to state a claim, Plaintiffs request leave to amend. (Id. at 14.)

In its Reply, Defendant maintains that Count 2 fails to state a claim for negligent misrepresentation under Rule 9(b) because "Plaintiffs have not specified when **each** alleged misrepresentations was made, nor who made them." (D.E. 16 at 5 (citing Gayou

v. Celebrity Cruises, Inc., No. 11-23359, 2012 U.S. Dist. LEXIS 77536, at *19 (S.D. Fla. June 5, 2012)).)

The Court observes that Plaintiffs are represented by counsel and must assume that Count 2—which is titled "NEGLIGENT FAILURE TO WARN"—is intended to state a claim for negligence based on a failure to warn. Defendant does not argue that Count 2 fails to state a claim for negligent failure to warn. Because neither the Court nor Defendant is permitted to rewrite Plaintiffs' Complaint, the Court finds that it is uncontested that Count 2 plausibly alleges a maritime claim for negligence based on a failure to warn.

e. Intentional Infliction of Emotional Distress (Count 18)

Finally, Defendant argues that Count 18 fails to state a claim for intentional infliction of emotional distress ("IIED"). (Mot. at 9-11.) Specifically, it argues that the Complaint fails to allege that Plaintiff engaged in "outrageous" conduct sufficient to support a claim for IIED. (Id. at 10 (citing Kantrow v. Celebrity Cruises, Inc., __ F. Supp. 3d __, 2020 WL 9065878, at *10-12 (S.D. Fla. Dec. 29, 2020) ("Kantrow I")).)

Plaintiffs argue that they have sufficiently alleged that Defendant engaged in outrageous behavior to support an IIED claim. (Resp. at 14-16.) Specifically, they argue that Defendant's "deliberate choice to continue with a 30 day voyage" while knowing "of the COVID-19 incubation periods, which are considerably less than 30 days, or the 14 days the sailing was originally scheduled for[,]" and while knowing "that the disease was both deadly and novel[,]" and while knowing "of the outbreaks on prior sailings" and that passengers on board the *Eclipse* had "similar COVID-19 symptoms" is outrageous behavior. (Id. at 16.) "The decision to continue to expose thousands of passengers and

crew onboard the *Celebrity Eclipse*, even after the stated events, to a known deadly virus, then, without medical cure or scientific understanding of the long term consequences is arguably and plausibly sufficient outrageous conduct at the pleading stage." (Id.) They attempt to distinguish the facts alleged in this case from those in Brown v. Royal Caribbean Cruises, Ltd., Civil Action No. 16-24209-Civ-Scola, 2017 WL 3773709, at *1, 3 (S.D. Fla. Mar. 17, 2017), which involved a similar claim of IIED against a cruise carrier for failure to advise passengers regarding the presence of Legionnaires disease aboard a ship.

In its Reply, Defendant observes that "[n]oticeably absent from Plaintiffs' Response is any mention of this Court's IIED analysis in Kantrow [I]. Yet, in Kantrow [I] this Court dismissed nearly identical IIED claims stemming from the same alleged acts on the same cruise." (D.E. at 6.) It further argues that the Plaintiffs attempt to factually distinguish Brown is inaccurate. (Id.)

"'Courts sitting in admiralty typically look to the standards set out in the Restatement (Second) of Torts § 46 (1965) as well as state law to evaluate claims for intentional infliction of emotional distress.'" Broberg v. Carnival Corp., 303 F. Supp. 3d 1313, 1317 (S.D. Fla. 2017) (quoting Wu v. NCL (Bahamas) Ltd., No. 16-22270-Civ-Scola, 2017 WL 1331712, at *2 (S.D. Fla. Apr. 11, 2017)). To state a claim for intentional infliction of emotional distress under Florida law, a plaintiff must plead the following elements: "1) extreme and outrageous conduct; 2) an intent to cause, or reckless disregard to the probability of causing, emotional distress; 3) severe emotional distress suffered by the plaintiff and 4) that the conduct complained of caused the plaintiff's severe emotional

distress." Id. (citing Blair v. NCL (Bahamas) Ltd., 212 F. Supp. 3d 1264, 1269 (S.D. Fla. 2017) (citing Metro. Life. Ins. Co. v. McCarson, 467 So. 2d 277, 278 (Fla. 1985))).

At issue in this case is whether Plaintiffs' IIED claims allege "extreme and outrageous conduct." (See Mot. at 13-15.)

> "While there is no exhaustive or concrete list of what constitutes outrageous conduct, Florida common law has evolved an extremely high standard." Garcia v. Carnival Corp., 838 F. Supp. 2d 1334, 1339 (S.D. Fla. 2012) (quoting Merrick v. Radisson Hotels Int'l, No. 06-cv-01591-T-24TGW (SCB), 2007 WL 1576361, at *4 (M.D. Fla. May 30, 2007)). Whether conduct is outrageous enough to support a claim of intentional infliction of emotional distress is a question of law for the court to decide, not a question of fact. Blair, 212 F. Supp. 3d at 1269–1270.

Id. at 1317-18. "'Outrageous' conduct is that which 'goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community.'" Wu, 2017 WL 1331712, at *2 (quoting Rubio v. Lopez, 445 F. App'x 170, 175 (11th Cir. 2011)).

> 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.

Id. (quoting Restatement (Second) of Torts § 46 cmt. d; Brown v. Zaveri, 164 F. Supp. 2d 1354, 1362 (S.D. Fla. 2001)). "Notably, the cause of action for IIED is 'sparingly recognized by the Florida courts.'" Id. (quoting Vamper v. United Parcel Serv., Inc., 14 F. Supp. 2d 1301, 1306 (S.D. Fla. 1998)). This sparse recognition is reflected in the Florida and maritime cases addressing claims of IIED. See, e.g., Rubio, 445 F. App'x at 175 (finding failure to allege sufficient outrageous conduct where deputy sheriff hobble-tied

arrestee on black asphalt pavement in sun, resulting in second-degree burns to face and chest); Wallis v. Princess Cruises, Inc., 306 F.3d 827, 842 (9th Cir. 2002) (finding no outrageous conduct where crewmember on cruise ship remarked within earshot of the plaintiff after her husband fell overboard that her husband was probably dead and that his body would be sucked under the ship, chopped up by the propellers, and would probably not be recovered); Garcia v. Carnival Corp., 838 F. Supp. 2d 1334, 1339 (S.D. Fla. 2012) (finding no outrageous conduct where crewmembers assaulted cruise passenger and prevented her from leaving her room for a period of time); Vamper, 14 F. Supp. 2d at 1306–07 (finding no outrageous conduct where defendants fabricated reckless driving charge against plaintiff, called him the "n" word, threatened him with termination, and physically struck him on ankle).

Upon review of the relevant case law, the Court finds that the Complaint does not allege that Defendant engaged in "extreme and outrageous conduct" sufficient to sustain a claim for intentional infliction of emotional distress under maritime or Florida law. See Brown, 2017 WL 3773709, at *2. In Brown, the plaintiff was a passenger aboard cruise ship from November 9 to 13, 2015. Id. at *1. Once the ship was out to sea, the cruise carrier notified its passengers (including the plaintiff) that Legionnaires disease had been discovered in the ship's water system, that two cases of passengers contracting disease had been confirmed—one in July 2015 and one in October 2015—and that all of the passengers on board the ship had potentially been exposed to the disease. Id. After the cruise was over, the plaintiff was admitted to the hospital and treated for Legionnaires disease, was hospitalized for seven days, and suffered kidney disease, congestive heart failure, and

pulmonary failure (among other things). Id. He was forced to retire from his job. Id. The plaintiff sued the cruise carrier for intentional infliction of emotional distress, arguing that it "acted with deliberate and wanton recklessness in choosing not to advise passengers of the presence of the disease prior to the ship's departure from port." Id. at *2. The plaintiff further alleged that the defendant's "motivation in failing to advise passengers of the presence of the disease prior to the departure of the ship was to protect the Defendant's economic interests, and that such conduct is outrageous, extreme, beyond the bounds of decency, and utterly intolerable in a civilized society." Id. The court found that "the Defendant's alleged conduct fails to rise to the level of outrageousness required by the Restatement (Second) of Torts and Florida state law." Id. Specifically:

> Even construing the facts in the light most favorable to the Plaintiff, Royal Caribbean's alleged conduct is not such that it "goes beyond all possible bounds of decency and is regarded as atrocious and utterly intolerable in a civilized community." See Rubio, 445 Fed. Appx. at 175. While the Plaintiff's allegations describe truly objectionable behavior, the allegations simply do not rise to the level of outrageousness required by the applicable case law.

Id. at *3. Accordingly, the court dismissed the IIED claim with prejudice. Id.

The Court finds that the allegations supporting Count 18 fail to meet the "extreme and outrageous" standard sufficient to support an IIED claim. In this regard, the Complaint alleges that Defendant engaged in "intentional and/or reckless" conduct in:

> a) proceeding with its March 1, 2020 voyage, despite the United States Centers for Disease Control and Prevention's February 13, 2020 statement and criticism of the Diamond Princess cruise ship's conduct and response to its Coronavirus outbreak resulting in over 710 confirmed cases;
>
> b) knowingly and intentionally concealing from passengers that a passenger on March 2, 2020 had symptoms consistent with the Coronavirus;

> c) knowingly and intentionally failing to order passengers to isolate in their staterooms;
>
> d) deciding to proceed with a 14-day cruise on March 1, 2020, knowing of the worldwide spread of Coronavirus;
>
> e) deciding to conceal from passengers that a passenger on the subject voyage had symptoms of coronavirus; was outrageous. This conduct is made more outrageous by the fact that this conduct was motivated by CELEBRITY's desire to make profit rather than ensure the reasonable safety and welfare of its passengers.

(Compl. ¶ 140.)

In Kantrow I, this Court found that substantially similar allegations were "comparable to, and even less objectionable than, the alleged conduct in Brown[,] and in any event "fail[ed] to rise to the level of outrageousness required by the applicable case law." Kantrow I, 2020 WL 9065878, at *12. Here, too, the Court finds that Plaintiffs' allegations fail to rise to the level of outrageousness required by the applicable case law. Therefore Count 18 is dismissed with prejudice for failure to state a claim upon which relief can be granted. See id. (dismissing IIED claim with prejudice for failure to state a claim); Brown, 2017 WL 3773709, at * 3 (same).

V. Conclusion

Accordingly, it is **ORDERED AND ADJUDGED** that:

1. Defendant's Motion to Dismiss Plaintiff's Complaint (D.E. 6) is **GRANTED IN PART AND DENIED IN PART** consistent with this Order;
2. The Complaint is **DISMISSED WITHOUT PREJUDICE** to the extent that it is predicated on the Court's diversity jurisdiction;

3. Plaintiffs' claims for wrongful death and survival damages under Section 768.21, Florida Statutes, (Compl. ¶¶ 34(a), 41(a), 48(a), 54(a), 61(a), 68(a), 75(a), 83(a), 91(a), 98(a), 106(a), 112(a), 118(a), 124(a), 129(a), 134(a), 139(a), are **DISMISSED WITHOUT PREJUDICE** with leave to amend to clarify whether Gerald Paul contracted COVID-19 within or beyond the territorial waters of the United States;

4. Counts 15, 16, and 17 are **DISMISSED WITH PREJUDICE** to the extent they allege claims for negligent infliction of emotional distress based upon Plaintiffs' pre-infection "fear of" contracting COVID-19;

5. Count 18 is **DISMISSED WITH PREJUDICE** for failure to state a claim; and

6. Plaintiffs shall have fourteen days in which to file a Second Amended Complaint.

DONE AND ORDERED in Chambers at Miami, Florida this 15th day of July, 2021.

JOAN A. LENARD
UNITED STATES DISTRICT JUDGE