UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 21-21215-CIV-ALTONAGA/Torres

KEVIN KULICH, *et al.*,

Plaintiffs,

v.

ROYAL CARIBBEAN GROUP,

Defendant.
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ORDER

THIS CAUSE came before the Court on Defendant, Royal Caribbean Group's Motion to Dismiss Plaintiffs' Complaint [ECF No. 7], filed on June 11, 2021. Plaintiffs, Kevin Kulich and Lori Lucas, filed a Response [ECF No. 12] to the Motion, to which Defendant filed a Reply [ECF No. 14]. The Court has carefully considered the Complaint [ECF No. 1], the parties' written submissions, the record, and applicable law. For the following reasons, the Motion is granted in part and denied in part.

I. BACKGROUND

This action arises from a cruise ship passenger's alleged contraction of COVID-19 while onboard one of Defendant's vessels. (*See generally* Compl.). Plaintiffs reside in Missouri (*see id.* ¶¶ 1–2), and Defendant is a foreign corporation with its principal place of business in Miami, Florida (*see id.* ¶ 3). Plaintiffs assert the Court has diversity jurisdiction over their claims (*see id.* ¶ 5); alternatively, Plaintiffs invoke the Court's admiralty jurisdiction (*see id.* ¶ 6).

Since December 2019, there has been a worldwide outbreak of COVID-19. (*See id.* ¶ 18). COVID-19 is associated with "dangerous conditions" and "explosive contagiousness[.]" (*Id.* ¶¶ 21, 25 (alteration added)). The World Health Organization ("WHO") declared a global health

emergency on January 30, 2020. (*See id.* ¶ 24(g)). The WHO officially declared a pandemic on March 11, 2020. (*See id.* ¶ 18). In total, there have been more than four million confirmed cases and over 290,000 deaths worldwide as a result of the COVID-19 pandemic. (*See id.* ¶ 19).

On February 13, 2020, the Centers for Disease Control and Prevention ("CDC") published the *Interim Guidance for Ships on Managing Suspected Coronavirus Disease 2019*, providing guidance for cruise ship operators to help prevent, detect, and medically manage suspected COVID-19 infections aboard ships. (*See id.* ¶¶ 20, 24(l)). In addition, two cruise ships owned by Carnival Corporation experienced outbreaks of COVID-19 in February 2020. (*See id.* ¶¶ 22–23). 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. (*See id.* ¶¶ 22, 24(n)). Second, in late February, the *Grand Princess* experienced an outbreak off the coast of California. (*See id.* ¶ 23). Despite knowing at least one passenger from the prior voyage disembarked the *Grand Princess* on February 21, 2020 experiencing COVID-19 symptoms, the cruise line made a conscious decision to go ahead with the subsequent cruise, boarding the same day with another 3,000 passengers. (*See id.*; *see also id.* ¶ 24(m)).

On February 27, 2020, Defendant commenced the at-issue voyage aboard the *Independence of the Seas* (*see id.* ¶ 25); Plaintiffs were among the passengers (*see id.* ¶¶ 33(a)–(b)). Defendant did not enact quarantine or physical distancing measures among passengers and/or crewmembers aboard the vessel nor provide personal protective equipment to crewmembers. (*See id.* ¶ 14). Defendant allowed passengers and crewmembers to eat in buffet and other communal settings, required participation in shipboard drills, and continued to host parties and events on the vessel. (*See id.* ¶ 15).

As a result of Defendant's alleged negligence, Kulich contracted COVID-19 while aboard the *Independence of the Seas*. (*See id.* ¶¶ 33(a), 39(a), 45(a), 50(a), 56(a), 62(a), 68(a), 75(a), 82(a), 88(a), 95(a), 100(a), 105(a), 110(a), 115(a), 120(a), 125(a)). He experienced fever, loss of appetite, disorientation, severe cough including coughing blood, respiratory distress, fatigue, reduced lung capacity, decreased oxygen, body aches, chills, pneumonia, and nightmares. (*See id.*). On February 29, 2020, Kulich was disembarked in Grand Cayman, Cayman Islands, and taken by ambulance to Health City Hospital. (*See id.* ¶ 26). He was placed in intensive care for 7 days, until March 6, 2020. (*See id.*). He spent 9 days in Health City Hospital before he was discharged on March 9, 2020. (*See id.* ¶ 27).

Plaintiffs filed their Complaint on March 30, 2021. (*See generally id.*). Plaintiffs assert 17 negligence-based claims against Defendant, including one negligent misrepresentation claim (Count 2) and three negligent infliction of emotional distress ("NIED") claims (Counts 15, 16, and 17); and they demand a trial by jury. (*See id.* ¶¶ 34–39, 111–125). Each count contains the following damages allegations:

> a. Plaintiff, KEVIN KULICH, contracted COVID-19 while aboard the *Independence of the Seas*, [and] as a result, suffered physical injuries, including, but not limited to: fever, loss of appetite, disorientation, severe cough including coughing blood, respiratory distress, fatigue, reduced lung capacity, decreased oxygen, body aches, chills, pneumonia, and nightmares. Also, as a result of his fear of contracting the virus aboard the vessel before he actually contracted it and [Defendant]'s tortious response to the virus outbreak aboard the vessel KEVIN KULICH suffered separate and severe emotional injuries, including, but not limited to: anxiety, depression, nightmares, and gastrointestinal difficulties.
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> b. Plaintiff, LORI LUCAS, while aboard the *Independence of the Seas* . . . suffered severe emotional distress with associated physical symptoms. Also, as a result of her fear of contracting the virus aboard the vessel and [Defendant]'s tortious response to the virus outbreak aboard the vessel LORI LUCAS suffered separate and severe emotional injuries, including, but not limited to: anxiety, depression, nightmares, and stress.

> c. In sum, and as a result of contracting COVID-19 as a result of Defendant's tortious conduct outlined above, Plaintiffs suffered physical pain, mental and emotional anguish, lost enjoyment of life, temporary and/or permanent physical disability, impairment, inconvenience in the normal pursuits and pleasures of life, and incurred medical expenses in the care and treatment of their medical conditions. Additionally, as a result of their lung injuries, the Plaintiffs' working abilities have become impaired. Plaintiff, KEVIN KULICH, is more likely than not to suffer from long-term effects of COVID-19, also known as "Long Haulers" or Long COVID Syndrome, affecting his life expectancy and jeopardizing his future health and well-being. 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.

(*Id.* ¶¶ 33, 39, 45, 50, 56, 62, 68, 75, 82, 88, 95, 100, 105, 110, 115, 120, 125 (alterations added)).

The NIED claims contain the following additional damages allegation:

> d. 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-19 contraction, 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.* ¶¶ 115(d), 120(d), 125(d)).

Defendant now moves to dismiss the Complaint, arguing: (1) Plaintiffs' NIED claims impermissibly rest on their pre-illness fear of contracting COVID-19; (2) Plaintiffs' negligent misrepresentation claims do not meet the heightened pleading standard of Federal Rule of Civil Procedure 9(b); and (3) Plaintiffs have not alleged any underlying facts to make their theory of causation plausible. (*See generally* Mot.; Reply).

II. LEGAL STANDARDS

"To survive a motion to dismiss [under Federal Rule of Civil Procedure 12(b)(6)], 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) (alteration added; quoting *Bell*

Atl. Corp. v. Twombly, 550 U.S. 544, 570 (2007)). Although this pleading standard "does not require 'detailed factual allegations,' . . . it demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Id.* (alteration added; quoting *Twombly*, 550 U.S. at 555). Pleadings must contain "more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Twombly*, 550 U.S. at 555 (citation omitted). "[O]nly a complaint that states a plausible claim for relief survives a motion to dismiss." *Iqbal*, 556 U.S. at 679 (alteration added; citing *Twombly*, 550 U.S. at 556).

To meet this "plausibility standard," a plaintiff must "plead[] factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* at 678 (alteration added; citing *Twombly*, 550 U.S. at 556). "The mere possibility the defendant acted unlawfully is insufficient to survive a motion to dismiss." *Sinaltrainal v. Coca-Cola Co.*, 578 F.3d 1252, 1261 (11th Cir. 2009) (citation omitted), abrogated on other grounds by *Mohamad v. Palestinian Auth.*, 566 U.S. 449 (2012). When considering a motion to dismiss, a court must construe the complaint in the light most favorable to the plaintiff and take the factual allegations as true. *See Brooks v. Blue Cross & Blue Shield of Fla., Inc.*, 116 F.3d 1364, 1369 (11th Cir. 1997) (citing *SEC v. ESM Grp., Inc.*, 835 F.2d 270, 272 (11th Cir. 1988)).

III. DISCUSSION

Defendant contends the Court must dismiss Plaintiffs' claims to the extent they are based on their exposure to or fear of contracting COVID-19, particularly with respect to their NIED claims. Defendant also argues Plaintiffs' negligent misrepresentation claims fail to meet the heightened pleading requirements of Rule 9(b) and all of Plaintiffs' claims must be dismissed for failure to plausibly allege facts supporting their theory of causation. (*See generally* Mot.; Reply). The Court addresses each argument in turn.

A. Claims Based on Exposure to or Fear of Contracting COVID-19

Defendant argues the Court should dismiss Plaintiffs' claims for emotional distress they allegedly suffered as a result of their "fear of" contracting COVID-19 because such claims fail as a matter of law. (*See* Mot. 5–7; Reply 3–5).[1] The Court agrees.

The parties agree the "zone-of-danger" test governs any attempt to recover damages for a stand-alone NIED claim under federal maritime law. (*See* Mot. 6; Resp. 7).[2] Defendant maintains "that, 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." (Mot. 6 (citing *Metro-North Commuter R.R. Co. v. Buckley*, 521 U.S. 424, 430–32 (1997); *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 141 (2003))). Defendant cites several recent cases in which district courts have dismissed cruise passengers' nearly identical "exposure only" or "fear of" contracting COVID-19 claims. (*Id.* 5–6; Reply 4 (collecting cases)).

In response, Plaintiffs argue they were within the zone of danger of contracting COVID-19 abord the *Independence of the Seas* because they were "placed in an immediate risk of physical harm." (Resp. 8 (citation omitted); *see also id.* 8–11 (focusing on the second prong of the zone-of-danger test and emphasizing the test is disjunctive, not conjunctive)). Plaintiffs state their fear of contracting COVID-19 was "substantial and justified" based on their exposure to the virus

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[1] The Court uses the pagination generated by the electronic CM/ECF database, which appears in the headers of all court filings.

[2] The parties agree federal maritime law governs this action. (*See* Mot. 2; Resp. 4); *see also Guevara v. NCL (Bahamas) Ltd.*, 920 F.3d 710, 720 (11th Cir. 2019) ("Maritime law governs actions arising from alleged torts committed aboard a ship sailing in navigable waters." (citation omitted)). "In the absence of well-developed maritime law, courts may supplement the maritime law with general common law and state law principles." *Marabella v. NCL (Bahamas) Ltd.*, 437 F. Supp. 3d 1221, 1225 (S.D. Fla. 2020) (citation omitted).

before Plaintiff Kulich actually contracted COVID-19, and they suffered "emotional distress" as a result. (*Id.* 9–10).

Under the zone-of-danger test, recovery for emotional injury is limited to plaintiffs who: "[(1)] sustain a physical impact as a result of a defendant's negligent conduct, or [(2)] who are placed in immediate risk of physical harm by that conduct." *Consol. Rail Corp. v. Gottshall*, 512 U.S. 532, 547–48 (1994) (alterations added). In *Metro-North*, the Supreme Court held the physical impact prong does not permit recovery for "a contact that amounts to no more than 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." *Metro-North*, 521 U.S. at 432 (alterations added). In other words, a plaintiff alleging exposure to an illness or an illness-causing substance cannot recover under the first prong "unless, and until, he manifests symptoms of a disease." *Id.* at 427; *see also id.* at 432 (agreeing with most common-law courts that "disease and symptom free" plaintiffs cannot recover). The Supreme Court did not address the second method of recovery under the zone-of-danger test — i.e., the "immediate risk of physical harm" prong. *See id.* at 430 ("The case before us . . . focuses on the [] words 'physical impact.'" (alterations added)).

Nevertheless, district courts considering COVID-19 cruise ship cases have uniformly held that passengers cannot recover for emotional distress under either prong "based solely on their proximity to individuals with COVID-19 and resulting fear of contracting the disease." *Weissberger v. Princess Cruise Lines, Ltd.*, No. 2:20-cv-02267, 2020 WL 3977938, at *3 (July 14, 2020). In *Weissberger*, the plaintiffs sought to recover only under the second prong of the zone-of-danger test and argued they therefore did not need to demonstrate they manifested symptoms of COVID-19, as required by *Metro-North*. *See id.* The court rejected that position, explaining:

> [The] [p]laintiffs' proposed reading of *Metro-North* would lead to bizarre results. Under *Metro-North*, a passenger aboard [a cruise ship] 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 [the] [p]laintiffs' 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 forbade from coming in through the front. 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. . . . Indeed, given the prevalence of COVID-19 in today's world, [the] [p]laintiffs' 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 (emphasizing the "difficulty of separating valid from invalid emotional injury claims" as a reason for limiting the recovery of exposure-only plaintiffs[])[.]

Id. at *3–4 (alterations added; other alterations adopted; emphasis in original; one citation, quotation marks, and footnote call number omitted).

"[E]very subsequent case to address the issue has adopted *Weissberger*'s analysis and dismissed the 'exposure only'/'fear of' claims." *Kantrow v. Celebrity Cruises Inc.*, No. 20-21997-Civ, 2021 WL 1976039, at *12 (S.D. Fla. Apr. 1, 2021) (alteration added; collecting cases). *Kantrow* and *Crawford v. Princess Cruise Lines Ltd.*, No. 2:20-cv-05546, 2020 WL 7382770, at *6 (C.D. Cal. Oct. 8, 2020), are "particularly instructive" because in those cases, like Plaintiff Kulich here, "the plaintiffs actually contracted COVID-19 and sued to recover emotional distress damages based on their pre-COVID-19 fear of contracting COVID-19." *Kantrow*, 2021 WL 1976039, at *12 (citation omitted). Both courts concluded 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.* (quotation marks omitted; quoting *Crawford*, 2020 WL 7382770, at *6).

Reliance on the "immediate risk of physical harm" prong of the zone-of-danger test for pre-illness fear/exposure NIED claims is problematic for another reason. As one court recently pointed out:

> Contracting COVID-19 is not plausibly imminent, immediate, or an instant physical harm. There are too many factors involved to determine the risk of exposure for each individual. Each person's personal conduct varies and contributes to whether that person is in "imminent" risk of contracting the virus. The length of time a person is exposed to the virus will also influence whether that person contracts the virus. Further, even if a person is exposed, and [the cruise line's] conduct was a factor to that exposure, contracting the virus does not occur instantly or immediately.

Ford v. Carnival Corp., No. 20-cv-6226, 2021 WL 3500959, at *4 (C.D. Cal. Aug. 9, 2021) (alteration added). Thus, mere "exposure to the virus does not result in 'immediate risk' of physical harm." *Id.*

The Court agrees with these analyses. Plaintiffs' "exposure only" and "fear of" claims, embedded in each count of the Complaint (Counts 1–14), are properly construed as NIED claims — in addition to the stand-alone NIED claims (Counts 15–17) — because they seek to recover for "severe emotional injuries" they suffered as a result of being exposed to COVID-19 and their "fear of contracting the virus aboard the vessel[,]" before Kulich "actually contracted it[.]" (Compl. ¶¶ 33, 39, 45, 50, 56, 62, 68, 75, 82, 88, 95, 100, 105, 110, 115, 120, 125 (alterations added)); *see Kantrow*, 2021 WL 1976039, at *12 (construing identical claims as NIED claims); *Weissberger*, 2020 WL 3977938, at *2 (same). Because exposure to or fear of contracting COVID-19 does not amount to a physical impact under *Metro-North*, and mere exposure does not result in an immediate risk of physical harm, such NIED claims fail to state claims upon which relief can be

granted.[3] Moreover, because amendment would be futile, these claims are dismissed without leave to amend. *See Weissberger*, 2020 WL 3977938, at *5.

Defendant further argues Kulich's alleged post-infection emotional distress damages are merely "a component of [his] pain and suffering damages rather than a stand-alone claim." (Mot. 6 (alteration added; citation omitted). Defendant is correct. The Supreme Court has identified two categories of emotional distress claims: (1) stand-alone claims "not provoked by any physical injury," like Plaintiffs' pre-illness fear and exposure claims discussed above, "for which recovery is sharply circumscribed by the zone-of-danger test"; and (2) "emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted." *Ayers*, 538 U.S. at 147.

Kulich alleges he contracted COVID-19 with attendant symptoms due to Defendant's negligence, and he suffered emotional distress "as a result of contracting COVID-19[.]" (Compl. ¶¶ 33(c), 39(c), 45(c), 50(c), 56(c), 62(c), 68(c), 75(c), 82(c), 88(c), 95(c), 100(c), 105(c), 110(c), 115(c), 120(c), 125(c) (alteration added)). Plainly, these allegations contemplate that Kulich's post-infection emotional distress was brought on, provoked by, and directly tied to a physical injury — namely, his contraction of symptomatic COVID-19. *See Ford*, 2021 WL 3500959, at *4 (holding plaintiffs who allege they contracted COVID-19, tested positive, or exhibited symptoms "necessarily allege physical injury" within the second *Ayers* category); *Crawford*, 2020 WL 7382770, at *5 (finding claims that plaintiffs suffered physical and emotional harm from developing COVID-19 "fall within *Ayers*' second category of cases"). Because this type of

[3] Since Lucas seeks recovery only for emotional distress due to her exposure to and fear of contracting COVID-19, and the Complaint does not clearly allege she ever contracted COVID-19 or experienced COVID-19 symptoms, all of her claims against Defendant are dismissed. (*See* Compl. ¶¶ 33(b), 39(b), 45(b), 50(b), 56(b), 62(b), 68(b), 75(b), 82(b), 88(b), 95(b), 100(b), 105(b), 110(b), 115(b), 120(b), 125(b); *see also* Resp. 7 (admitting "it is unknown" whether Plaintiff Lucas contracted COVID-19)).

emotional distress is "traditionally compensable" as an element of pain and suffering damages, Kulich need not maintain a separate, stand-alone NIED claim for emotional distress as a result of contracting COVID-19. *Ayers*, 538 U.S. at 148–49 (citing Restatement (Second) of Torts § 456 (Am. L. Inst. 1965)).

Accordingly, Plaintiffs' pre-illness "exposure to"/"fear of" COVID-19 and stand-alone NIED claims are dismissed.

B. Negligent Misrepresentation Claim

In Count 2, Plaintiffs allege Defendant made misleading statements as to the health of its passengers and the presence of COVID-19 onboard the cruise ship. (*See* Compl. ¶ 36(a)). Although styled as a negligent-failure-to-warn claim, Defendant argues this count is "truly a claim for negligent misrepresentation" that does not meet the heightened pleading standard of Federal Rule of Civil Procedure 9. (Mot. 7; *see also id.* 7–8). Once again, the Court agrees. *See Landivar v. Celebrity Cruises Inc.*, No. 21-20815-Civ, Order on Motion to Dismiss [ECF No. 21], filed July 12, 2021, at *5, 11 (S.D. Fla. 2021) (construing identical "negligent-failure-to-warn" claim as negligent misrepresentation claim).

To state a common law negligent misrepresentation claim under Florida law, a plaintiff must allege:

> (1) misrepresentation of a material fact; (2) that the representor made the misrepresentation without knowledge as to its truth or falsity or under circumstances in which he ought to have known its falsity; (3) that the representor intended that the misrepresentation induce another to act on it; and (4) that injury resulted to the party acting in justifiable reliance on the misrepresentation.

Doria v. Royal Caribbean Cruises, Ltd., 393 F. Supp. 3d 1141, 1145 (S.D. Fla. 2019) (citations omitted). As a fraud-based claim, Plaintiffs' negligent misrepresentation claim is subject to the

heightened pleading standard of Federal Rule of Civil Procedure 9(b), which requires Plaintiffs to allege in their Complaint:

> (1) precisely what statements were made in what documents or oral representations or what omissions were made, and (2) the time and place of each such statement and the person responsible for making (or, in the case of omissions, not making) same, and (3) the content of such statements and the manner in which they misled the plaintiff, and (4) what the defendants obtained as a consequence of the fraud.

Giuliani v. NCL (Bahamas) Ltd., No. 1:20-cv-22006, 2021 WL 2573133, at *3 (S.D. Fla. June 23, 2021) (citations omitted). In other words, "the Complaint must set forth particular allegations about the 'who, what, when, where, and how' of the fraud." *Ceithaml v. Celebrity Cruises, Inc.*, 207 F. Supp. 3d 1345, 1353 (S.D. Fla. 2016) (citation omitted).

Plaintiffs' Complaint appears to identify two alleged bases for their negligent misrepresentation claim: (1) a statement that "all guests onboard remain healthy and happy" (Compl. ¶ 36(a) (alteration adopted; quotation marks omitted)); and (2) the misrepresentation that "no person onboard had COVID-19" (*id.*). But Plaintiffs do not specify who made these statements or when, where, and how the statements were made. (*See generally id.*). Meanwhile, Plaintiffs insist that the Complaint "alleges sufficient factual material in support of each element" or they "should be entitled, at the very least, to discovery on these issues[.]" (Resp. 11–12 (alteration added)). This argument misses the point. A negligent misrepresentation claim cannot proceed unless the plaintiff has alleged with sufficient particularity *in the complaint* the "who, what, when, where, and how" of the misrepresentation. *Ceithaml*, 207 F. Supp. 3d at 1353 (citation omitted). Contrary to their conclusory assertion otherwise, Plaintiffs simply have not done so.

Indeed, Plaintiffs tacitly acknowledge the claim is not pleaded with the requisite specificity, as they offer an emailed letter as an exhibit to their Response. (*See* Resp. 16; *id.*, Ex. A, Feb. 5, 2020 Celebrity Cruises Email [ECF No. 12-1]). As an initial matter, a court "is generally

limited to reviewing what is within the four corners of the complaint on a motion to dismiss." *Bickley v. Caremark RX, Inc.*, 461 F.3d 1325, 1329 n.7 (11th Cir. 2006). The Court therefore will not consider the email attached to Plaintiff's Response, which was neither attached to nor referenced in the Complaint. *See Jallali v. Nova Se. Univ., Inc.*, 486 F. App'x 765, 767 (11th Cir. 2012) ("[A] party cannot amend a complaint by attaching documents to a response to a motion to dismiss." (alteration added; citation omitted)). Yet even if the Court were to consider it, the email pertains to a different cruise line, purportedly sent to passengers on a different cruise ship, and contains none of the statements alleged in Plaintiffs' Complaint. (*See generally* Feb. 5, 2020 Celebrity Cruises Email). Thus, the email does not save Plaintiffs' negligent misrepresentation claim.

Count 2 is dismissed without prejudice.

C. Causation

Next, Defendant argues each of the negligence-based claims asserted in the Complaint should be dismissed for failure to sufficiently plead a plausible theory of causation. (*See* Mot. 3–5; Reply 1–2). Defendant contends that aside from the conclusory allegation that Kulich "contracted COVID-19 while aboard the *Independence of the Seas*" (Compl. ¶¶ 33(a), 39(a), 45(a), 50(a), 56(a), 62(a), 68(a), 75(a), 82(a), 88(a), 95(a), 100(a), 105(a), 110(a), 115(a), 120(a), 125(a)), the Complaint offers no facts supporting this conclusion, such as when he was diagnosed with COVID-19 or when he developed symptoms (*see* Mot. 3).

Defendant cites four cases which it argues set forth "exactly what constitute 'enough facts' in the context of cruise passenger COVID-19 claims": when the passenger first began experiencing symptoms, when the passenger contracted COVID-19, when the passenger was tested for COVID-19, and the amount of time between the alleged exposure and the date the passenger tested positive

or began experiencing symptoms. (Reply 2 (collecting cases); *see also* Mot. 3–4). Defendant argues that without these facts, the Complaint's allegations raise a mere possibility that Kulich contracted COVID-19 aboard the cruise ship and fall short of plausibly alleging causation, as required to survive a Rule 12(b)(6) motion. (*See* Mot. 4). With respect to Lucas, Defendant states the Complaint is unclear whether she ever contracted COVID-19, "much less onboard her cruise." (*Id.* 5; *see also* Reply 2 (referring to vague statements in the Complaint that *Plaintiffs* "contracted COVID-19 aboard the vessel" (quotation marks and citations omitted))). Absent such an allegation, Defendant argues Lucas's causation theory is far too "tenuous" to be permitted to proceed. (Mot. 5).

In response, Plaintiffs maintain they have sufficiently alleged they contracted COVID-19 aboard the *Independence of the Seas* due to Defendant's negligent failure to protect passengers and crewmembers from COVID-19. (*See* Resp. 5–6). Plaintiffs accuse Defendant of "seek[ing] to impose an ultra-heightened pleading standard." (*Id.* 5 (alteration added)). All that is required, Plaintiffs say, is notice pleading — a standard they state they have met. (*See id.*). Curiously, Plaintiffs concede that:

> Plaintiffs did not plead the multiple differential diagnoses of Plaintiff, Kevin Kulich, including [by] Defendant's Medical Center, on board the *Independence of the Seas*, which diagnosed and treated [him] for (J.09.X) Influenza due to Identified *novel* influenza a virus. The diagnostic code J.09.X [is] [a]pplicable [t]o: Avian influenza; Bird influenza; Influenza A/H5N1; ***Influenza of other animal origin, not bird or swine***; [and] Swine influenza virus (viruses that normally cause infections in pigs) . . . . In the Defendant's own Medical Center, Plaintiff, Kevin Kulich, was also treated for fever; dehydration; disorientation; high blood pressure; sinus tachycardia, respiratory distress; tachypnea (rapid and shallow breathing); diaphoretic (heavy perspiration); and pneumonia. For these issues, on February 29, 2020, K[evin] K[ulich] was disembarked in Grand Cayman, Cayman Islands, and taken by ambulance to Health City Hospital and placed in the Intensive Care Unit for seven (7) days until March 6, 2020. Plaintiff[s] admit[] that these details were not included in Plaintiff's [sic] Complaint. Further, it is unknown whether Plaintiff, Lori Lucas, contracted COVID-19, but she was in constant contact with Plaintiff, Kevin Kulich, including accompanying him into the Medical Center onboard.

> Should the Court require further detail and specificity with regards to the diagnosis and/or symptoms, Plaintiffs respectfully request leave to amend their Complaint.

(*Id.* 6–7 (alterations added; emphasis in original; citations and footnote call numbers omitted)).

At the motion-to-dismiss stage, notice pleading is all that is required of a complaint alleging maritime negligence. *See Marabella v. NCL (Bahamas), Ltd.*, 437 F. Supp. 3d 1221, 1228–29 (S.D. Fla. 2020). The complaint need only provide "'a short a plain statement of the claim' that 'gives the defendant fair notice of what the plaintiff's claim is and the grounds upon which it rests.'" *Hunt v. Aimco Props., L.P.*, 814 F.3d 1213, 1221 (11th Cir. 2016) (alteration adopted; citations omitted); *see also* Fed. R. Civ. P. 8(a). "While notice pleading does not require the pleader to allege a 'specific fact' to cover every element or to plead 'with precision' each element of a claim, it is still necessary a complaint 'contain either direct or inferential allegations respecting all the material elements necessary to sustain a recovery under some viable legal theory.'" *Brown v. Oceania Cruises, Inc.*, No. 17-22645-Civ, 2017 WL 10379580, at *5 (S.D. Fla. Nov. 20, 2017) (citations omitted).

To plead a negligence cause of action under maritime law, a "plaintiff must allege that (1) the defendant had a duty to protect the plaintiff from a particular injury; (2) the defendant breached that duty; (3) the breach actually and proximately caused the plaintiff's injury; and (4) the plaintiff suffered actual harm." *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1336 (11th Cir. 2012) (citation omitted). Here, Defendant challenges causation. "To prove causation, a plaintiff must establish a cause and effect relationship between the alleged tortious conduct and the injury — that is, cause in fact (or 'actual' or 'but-for causation') — as well as the foreseeability of the conduct in question producing the alleged harm — i.e., 'proximate causation.'" *Marabella*, 437 F. Supp. 3d at 1229 (alterations adopted; quotation marks and citations omitted). "[A]t the motion to dismiss stage, it

is enough if one can reasonably infer actual and proximate causation for [the] [p]laintiff's injuries from [the] [d]efendant's alleged negligence." *Id.* (alterations added; citation omitted).

Here, Kulich alleges he "contracted COVID-19 while aboard the *Independence of the Seas*," which passengers boarded on February 27, 2020, "[a]s a result of Defendant's negligence[.]" (Compl. ¶¶ 33, 39, 45, 50, 56, 62, 68, 75, 82, 88, 95, 100, 105, 110 (alterations added); *see also id.* ¶ 25). Plaintiffs allege Defendant was negligent in multiple ways, including by failing to warn passengers of other passengers or crewmembers experiencing positive COVID-19 symptoms; failing to advise passengers about or implement safety measures such as providing masks and other personal protective equipment, enforcing social distancing, performing testing, adequately sanitizing the vessel, or enacting a lockdown; failing to timely quarantine passengers and crewmembers who exhibited symptoms of COVID-19; and failing to enforce their infectious disease outbreak policies. (*See generally id.*).

Kulich alleges Defendant's negligence caused him to contract COVID-19 while aboard the vessel. (*See id.* ¶¶ 31–32, 37–38, 43–44, 49, 54–55, 60–61, 66–67, 73–74, 80–81, 87, 93–94, 98–99, 103–04, 108–09). He further alleges facts concerning the foreseeability that such negligent conduct would produce the alleged harm. (*See id.* ¶¶ 22–25). These statements are sufficient to plausibly allege causation. *See Kantrow*, 2021 WL 1976039, at *13–14 (concluding similar allegations sufficiently alleged causation despite the plaintiffs' failure to allege when they tested positive for COVID-19 or when they began to experience symptoms); *cf. Rinker v. Carnival Corp.*, 753 F. Supp. 2d 1237, 1242 (S.D. Fla. 2010) (finding a plaintiff who developed infectious diseases aboard a cruise ship did not adequately plead causation because she did not "allege any facts that demonstrate that any of the crewmembers or passengers had [the infectious diseases]" nor did she indicate "how [she] was injured because of the [defendant's alleged] failures" to quarantine ill

persons onboard or implement safety measures; instead, "[t]he only causation facts the [a]mended [c]omplaint allege[d] [we]re that [the p]laintiff was injured because she was not properly diagnosed and treated, was administered a hazardous combination of pain killers, and was not timely evacuated from the ship" (alterations added)).

With respect to Lucas, the Complaint does not clearly allege she contracted COVID-19, let alone aboard the *Independence of the Seas*. (*See generally* Compl; *but see id.* ¶¶ 31–32, 37–38, 43–44, 49, 54–55, 60–61, 66–67, 73–74, 80–81, 87, 93–94, 98–99, 103–04, 108–09 (vaguely referring to "Plaintiffs" contracting COVID-19 aboard the vessel)). Indeed, Plaintiffs admit in their Response that "it is unknown whether Plaintiff, Lori Lucas, contracted COVID-19[.]" (Resp. 7 (alteration added)). Consequently, and because Lucas solely seeks to recover for her exposure to and fear of contracting COVID-19, all of her claims against Defendant are dismissed. (*See supra* Section III.A and note 3; Compl. ¶¶ 33(b), 39(b), 45(b), 50(b), 56(b), 62(b), 68(b), 75(b), 82(b), 88(b), 95(b), 100(b), 105(b), 110(b), 115(b), 120(b), 125(b)).

D. Jury Trial Demand

Finally, the Court observes Plaintiffs' jury trial demand appears to be improper. Although the issue was not raised by the parties, "[a] federal court not only has the power but also the obligation at any time to inquire into jurisdiction." *Fitzgerald v. Seaboard Sys. R.R., Inc.*, 760 F.2d 1249, 1251 (11th Cir. 1985) (alteration added; citations omitted). Stated differently, it is the Court's responsibility to "zealously insure that jurisdiction exists over a case." *Smith v. GTE Corp.*, 236 F.3d 1292, 1299 (11th Cir. 2001).

Plaintiffs allege the Court has diversity jurisdiction under 28 U.S.C. section 1332(a). (*See* Compl. ¶ 5). They allege they are "citizen[s] of the United States" and Defendant "is a foreign entity which conducts its business from its principal place of business in Miami, Florida." (*Id.* ¶¶

1–3 (alteration added)). Defendant is therefore deemed to be a citizen of Florida for purposes of evaluating diversity jurisdiction. *See* 28 U.S.C. § 1332(c)(1). Because all parties are United States citizens, Plaintiffs must allege they are citizens of a state other than Florida to establish diversity jurisdiction. *See id.* § 1332(a)(1).

Plaintiffs allege they are "resident[s] of the State of Missouri[.]" (Compl. ¶¶ 1–2 (alterations added)). Domicile, not residence, is the key factor for determining an individual's citizenship for purposes of diversity jurisdiction; mere residence in a given state is insufficient. *See Travaglio v. Am. Express Co.*, 735 F.3d 1266, 1269 (11th Cir. 2013); *Smith v. Marcus & Millichap, Inc.*, 991 F.3d 1145, 1149 (11th Cir. 2021); *Physicians Imaging–Lake City, LLC v. Nationwide Gen. Ins. Co.*, No. 3:20-cv-1197, 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 [c]ourt cannot simply presume that an allegation regarding a party's residence establishes that party's citizenship." (alterations added; citations omitted)). Because Plaintiffs have not properly pleaded their state of citizenship, the Court cannot exercise diversity jurisdiction over this action. *See Kantrow*, 2021 WL 1976039, at *9.

Alternatively, Plaintiffs allege the case falls within the Court's admiralty jurisdiction under 28 U.S.C. section 1333. (*See* Compl. ¶ 6). Given the allegations of the Complaint, the Court agrees. And because the Court only has admiralty jurisdiction under section 1333, Plaintiff's jury trial demand presents a problem. *See Caron v. NCL (Bahamas) Ltd.*, 910 F.3d 1359, 1365–66 (11th Cir. 2018).

It is well settled that there is generally no right to a jury trial in admiralty cases. *See Beiswenger Enters. Corp. v. Carletta*, 86 F.3d 1032, 1037 (11th Cir. 1996) ("[A]s in all admiralty cases, there is no right to a jury trial." (alteration added; citations omitted)); *McNair v. Royal*

Caribbean Cruises, Ltd., No. 21-21048-Civ, 2021 WL 1062588, at *2 (S.D. Fla. Mar. 19, 2021) ("The [p]laintiff's demand for a jury trial is incompatible with a case proceeding solely under the Court's admiralty jurisdiction." (alteration added; citations omitted)). Nor can Plaintiffs rely on the saving-to-suitors clause to justify their jury trial demand, for that clause only "establishes the right to choose whether to proceed within a court's admiralty jurisdiction or general civil jurisdiction when *both* admiralty and non-admiralty federal jurisdiction exist." *St. Paul Fire & Marine Ins. Co. v. Lago Canyon, Inc.*, 561 F.3d 1181, 1194 n.5 (11th Cir. 2009) (Wilson, J., concurring) (citing *Waring v. Clarke*, 46 U.S. (5 How) 441, 461 (1847) (other citations omitted; emphasis added)); *see also Salty Dawg Expedition, Inc. v. Borland*, 301 F. Supp. 3d 1189, 1191 (M.D. Fla. 2017) ("The decisions consistently interpret the saving-to-suitors clause to preserve the right to a jury trial if the plaintiff in an admiralty dispute successfully invokes a jurisdiction other than admiralty (for example, diversity or federal question)." (citation omitted)). Thus, to pursue the "savings clause" so as to be entitled to a jury trial in an admiralty case, an independent basis for federal subject matter jurisdiction such as "the requirements of diversity of citizenship and jurisdictional amount must be satisfied." *St. Paul Fire & Marine Ins. Co.*, 561 F.3d at 1194 n.5 (Wilson, J., concurring) (quoting *In re: Chimenti*, 79 F.3d 534, 537 (6th Cir. 1996) (citation omitted)).

As explained above, Plaintiffs have not sufficiently alleged their state citizenship to permit the Court to exercise diversity jurisdiction in this case. Because Plaintiffs' case is proceeding exclusively under the Court's admiralty jurisdiction and no other independent basis for subject matter jurisdiction has been sufficiently alleged to exist, Plaintiffs' jury trial demand is improper and is therefore stricken.[4] *See, e.g.*, *Neenan v. Carnival Corp.*, No. 99-2658-Civ, 2001 WL 91542,

[4] Nevertheless, Federal Rule of Civil Procedure 39(c) provides "[i]n an action not triable of right by a jury, the court, on motion or on its own . . . may, with the parties' consent, try any issue by a jury whose verdict

at *2 (S.D. Fla. Jan. 29, 2001) (no right to jury trial where plaintiffs brought passenger maritime negligence action in admiralty, no independent jurisdictional basis existed, and defendant did not consent to jury trial).

IV. CONCLUSION

For the foregoing reasons, it is

ORDERED AND ADJUDGED that Defendant, Royal Caribbean Group's Motion to Dismiss Plaintiffs' Complaint **[ECF No. 7]** is **GRANTED in part** and **DENIED in part** as follows:

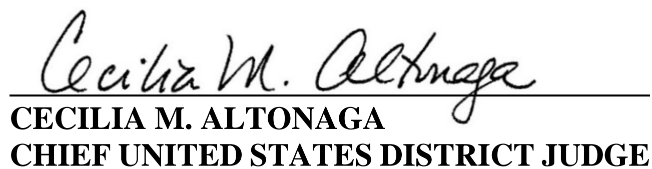
1. The Motion is **GRANTED** as to Counts 15, 16, and 17 and as to Plaintiffs' emotional distress claims premised solely on exposure to or fear of contracting COVID-19, embedded in each count of the Complaint. All of Lucas's claims are therefore dismissed.
2. The Motion is **GRANTED** without prejudice as to Plaintiffs' negligent misrepresentation claim set forth in Count 2.
3. The Motion is **DENIED** as to Kulich's remaining claims.
4. Plaintiffs' jury trial demand is stricken.
5. On or before September 10, 2021, Kulich shall file an amended complaint or a notice indicating he intends to proceed with the current Complaint.[5] Defendant shall file a

has the same effect as if a jury trial had been a matter of right . . . ." *Id.* (alterations added). Alternatively, Plaintiffs may remedy the identified pleading deficiency in an amended complaint. Any such amendment must clarify Kulich's state of citizenship, or, if he intends to proceed solely under the Court's admiralty and maritime jurisdiction pursuant to 28 U.S.C. section 1333, withdraw his jury trial demand.

[5] Generally, "[w]here a request for leave to file an amended complaint simply is imbedded within an opposition memorandum, the issue has not been raised properly." *Rosenberg v. Gould*, 554 F.3d 962, 967 (11th Cir. 2009) (citation and quotation marks omitted). In the interest of judicial economy, however, the Court grants Kulich leave to amend the Complaint to address the identified deficiencies.

response to Plaintiff Kulich's amended complaint, if he files one, or an answer to the remaining claims of the current Complaint **[ECF No. 1]** by **September 24, 2021**.

DONE AND ORDERED in Miami, Florida, this 3rd day of September, 2021.



CECILIA M. ALTONAGA
CHIEF UNITED STATES DISTRICT JUDGE

cc: counsel of record