UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION

CASE NO. 20-22627-CIV-MORENO/GOODMAN

LAUREN BARHAM and
MATTHEW UREY,

Plaintiffs,

v.

ROYAL CARIBBEAN CRUISES, LTD.,

Defendant.
_____/

REPORT AND RECOMMENDATIONS ON A *PORTION* OF DEFENDANT CRUISE SHIP'S SUMMARY JUDGMENT MOTION

Lauren Barham and Matthew Urey were on a Royal Caribbean Cruises, Ltd. ("RCCL") cruise for their honeymoon. Passengers on RCCL's *Ovation of the Seas*, they booked a December 9, 2019 excursion to White Island, one of the most active volcanos in the world. The excursion brochure explains that Zodiac inflatable crafts take the excursion passengers from the boat directly into the crater complex in New Zealand. It also says that gas masks/breathing apparatuses help passengers "get up close to roaring steam vents, bubbling pits of mud, hot volcanic streams and the amazing lake of steaming acid."

Unfortunately for these two guests and many others, the volcano erupted, killing 22 people and catastrophically injuring and burning more than 20 others. Plaintiffs,

Lauren and Matthew, were horribly burned. Lauren underwent numerous surgeries at a New Zealand hospital and after she returned to the United States. She continues to undergo surgeries and laser procedures. Matthew underwent 12 surgeries in New Zealand and then underwent two additional surgeries and approximately ten laser procedures after he returned to the United States.

There is no doubt that these horrific events have created an unspeakable tragedy for Lauren and Matthew. But their sad plight is about to take yet another negative turn, as the Undersigned is compelled to recommend that Senior United States District Judge Federico A. Moreno grant a portion of RCCL's summary judgment motion and dismiss with prejudice all counts in the lawsuit.

Plaintiffs point to evidence which they say establishes myriad examples of negligence by RCCL. But their passenger and shore excursion tickets **bar** all claims resulting from incidents occurring off the vessel, as well as those arising from the negligence of independent contractors, like the one who operated the volcano excursion to White Island. This exculpatory language does not prohibit *all* types of claims by passengers on this ship against RCCL, but it does by its express terms bar the specific claims made here because the tragedy occurred during an off-the-boat excursion operated by an independent contractor.

Although a federal statute prohibits certain common carriers (like RCCL here) from disclaiming their liability vis-à-vis passengers, that statute does not apply here

because the cruise did not involve "a vessel transporting passengers between a port in the United States and a port in a foreign country." Plaintiffs' frenetic efforts to avoid this result, while energetic, passionate, and creative, do not provide any *legal* ground to do so. The sad reality for Plaintiffs is that the ship did not on this cruise transport passengers between a United States port and a foreign country port (or between two United States ports, another circumstance covered by the statutory ban).

Because this federal statute (prohibiting exculpatory contract language in certain circumstances) is inapplicable to this case and because RCCL's contract language is otherwise valid and enforceable, the Undersigned is duty-bound to follow the law and recommend that Judge Moreno grant summary judgment on all counts to RCCL. And I'm required to do this even though it negatively impacts parties whose lives have been forever altered by the cruel twist of fate of a volcano erupting while they were in its crater during a honeymoon excursion.

Plaintiffs have submitted cringe-inducing photographs depicting their gruesome injuries. Anyone viewing these images would be emotionally impacted by them. Which is why I issue this grim (for Plaintiffs) ruling with a somber attitude and a heavy sigh.

At bottom, the Undersigned recognizes that this ruling, if adopted, will stop Plaintiffs' claims against RCCL in their tracks and create a crushing and awful legal defeat for them. But, as outlined below, this result is the one mandated by the law and is the outcome Plaintiffs agreed to in the contract.

Nevertheless, in an abundance of caution (e.g., if Judge Moreno were to disagree with me and not adopt this Report and Recommendations), the Undersigned will, in a *separate* Report and Recommendations, also analyze the remaining arguments in RCCL's summary judgment motion on a claim-by-claim basis (i.e., on grounds other than the liability limitation in the ticket contracts).

[The Undersigned is using this approach because the issue of the contractual exculpatory language can be decided without a ruling on the myriad *Daubert*[1] motions challenging experts whose opinions could (if not stricken) assist in supporting or undermining the other summary judgment theories asserted by RCCL. The Undersigned will issue a follow-up Report and Recommendations to address RCCL's other grounds for summary judgment after I issue rulings on the *Daubert* motions. Plaintiffs have filed their *own* motion for partial summary judgment [ECF No. 127], but their motion relies on three experts who RCCL is seeking to strike in *Daubert* motion challenges. Therefore, my Report and Recommendations on Plaintiffs' motion for partial summary judgment must await rulings on RCCL's *Daubert* motions.].

[1] *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 597 (1993).

Procedural Background

Plaintiffs filed an Amended Complaint [ECF No. 19] against RCCL.[2] Count I is for negligent misrepresentation for myriad statements in RCCL's shore excursions brochure, website, and promotional material about the volcano excursion, including misstatements about RCCL's role in verifying, investigating or vetting the tour operator. Count II is for negligent selection and/or retention of excursion operators. Count III is for negligent failure to warn, including an alleged failure to communicate information about (1) the excursion taking place in a volcano that was active multiple times just a few years before the incident; (2) the increased alert levels, the increased volcanic activity and/or the increased risk of eruption; and/or (3) the risk of death or severe injuries.

Count IV is for general negligence, including the failure to cancel or postpone the volcano excursion when the alert levels, volcanic activity and/or risk of eruption increased. Count V is for negligence against the excursion entities (ID Tours New Zealand Limited and White Island Tours Limited), but, as noted, the Court dismissed them for lack of personal jurisdiction. Count VI is for apparent agency/agency by estoppel. Count VII for joint venture was dismissed [ECF No. 65]. The Court also dismissed Count VIII, for a third-party beneficiary theory, and Count IX, for breach of non-delegable duty. *Id.*

[2] Count V is for negligence against the "excursion entities" (ID Tours New Zealand Limited and White Island Tours Limited), but the Court dismissed them for lack of personal jurisdiction. [ECF No. 65].

Undisputed Factual Background

Introductory Note About Undisputed Facts

The facts are generated, in part, from the paragraphs in the statement of facts or response to the statement of facts which the respective opposing party expressly agreed are undisputed. For those purported facts which the opposing party classified as partly disputed, the Undersigned includes only the undisputed portions. The Undersigned will retain the paragraph numbering used by RCCL in its motion. The abbreviation "N/A," means that the paragraph is substantively and substantially disputed and cannot be reworded in a way to accurately reflect an actual undisputed fact.

The Undersigned sometimes changed the wording of an undisputed fact for stylistic and/or grammatical purposes. In addition, to enhance readability, I removed the specific record citations. They can be found in the source document, if needed.

If Plaintiffs argued that a fact was disputed but did not provide record evidence to support the contention, then I deemed the fact to be undisputed if otherwise supported by record evidence.

At times, Plaintiffs challenged a fact as disputed but analysis demonstrates that the undisputed fact is not actually disputed. Instead, Plaintiffs were at times merely offering an *additional*, but not **contradictory**, point.

To provide a factually-simple analogy, assume that a plaintiff in a garden-variety car collision personal injury case submits an affidavit (in support of a summary judgment

motion) that the traffic light at issue was red for the defendant driver. Assume that the defendant submits a response, arguing that the fact is "disputed," and files a supporting affidavit saying (only) that it was storming and the visibility was poor. The weather and visibility might be additional facts leading to another point or argument, but they do not prevent the fact about the traffic light being red from being treated as *undisputed.*

This analogy applies even if Plaintiffs (the party opposing RCCL's summary judgment motion) offered *several* additional facts to support the notion that the undisputed fact is actually disputed. Thus, if the hypothetical affidavit mentioned above also explained that it was storming, the visibility was poor, the radio was on loud, it was dusk, the driver was changing stations on the car radio, the windshield wipers were inoperable and the plaintiff was speeding, none of these additional facts would cause the undisputed fact that the light was red for the defendant driver to somehow be deemed a **disputed** fact.

To provide a more-comprehensive and more-balanced factual background, the Undersigned sometimes combined an undisputed fact from a response and added it into the initial numbered paragraph.

If Plaintiffs took the position that a purported undisputed fact is disputed but cited only to inappropriate source material, then the Undersigned would treat the undisputed fact as undisputed. For example, if Plaintiffs relied solely on the unverified allegations of a pleading as supposed grounds to support the argument that a factual dispute exists,

then that reliance is not well founded and was ignored, as it is mere rhetoric, inadequate to generate a viable evidentiary reason to conclude that a factual dispute exists.

If Plaintiffs, in responding to a purportedly undisputed fact, injected a new fact (as opposed to actually opposing the undisputed fact or filing their own additional undisputed facts, as the Local Rule requires),[3] then I would *sometimes* include the additional fact to provide context and a more-comprehensive factual narrative.

Undisputed Facts

1. On the day of the subject incident, December 9, 2019, Plaintiffs were passengers onboard the *Ovation of the Seas*.

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[3] Local Rule 56.1(b)(2)(D) requires a party opposing a summary judgment motion and who wants to add new facts to include a separate Additional Facts section after responding to the Movant's undisputed facts. The additional facts are supposed to start with a numbered paragraph immediately following the last numbered paragraph in Movant's Statement of Undisputed Facts. The Movant (RCCL, here) then has the opportunity to indicate, in a Reply Statement of Facts, whether it thinks any of the additional undisputed facts are actually disputed, and, if so, to include a record cite for that evidence.

When a party opposing a summary judgment motion does not follow this procedure but, instead, simply drops in the new, purportedly-undisputed fact into his paragraph-by-paragraph response to the undisputed facts supporting a Movant's summary judgment motion, then the process is short-circuited and the Court has difficulty discerning whether a specific additional fact is disputed, and, if so, what record evidence supports the argument that the fact is disputed.

As I will outline later in this Report, Plaintiffs routinely used this impermissible approach (e.g., contend that a fact submitted by RCCL was "disputed" and then refer immediately -- in the same numbered paragraph -- to myriad *additional* and purportedly undisputed facts, thereby preventing RCCL from filing a formal response to explain whether and why the additional fact is disputed).

2. The ship's itinerary commenced and ended in Australia. The itinerary did not include a port in the United States. No passengers were transported between ports in the United States or between a port in the United States and a port in a foreign country.

[Note: Plaintiffs *contend* this is disputed, but it is not. Plaintiffs simply added facts which do not make RCCL's fact disputed. For example, RCCL may be headquartered in Miami (a fact which Plaintiffs point to as grounds to show that this paragraph is disputed), but this does not in any way impact the fact that this specific cruise did not involve Miami or any other United States port.].

3. Plaintiffs boarded the *Ovation of the Seas* after accepting the terms and conditions in RCCL's passenger Cruise Ticket Contract via RCCL's website.

4. Plaintiffs, like all other passengers, were not allowed to board an RCCL cruise without accepting the cruise ticket terms and conditions.

5. RCCL provided Plaintiffs the Terms and Conditions of the Ticket Contract through Plaintiffs' travel agent before Plaintiffs boarded the subject cruise.

6. The Terms and Conditions in the Cruise/Cruisetour Ticket Contract, addressed shore excursions at paragraph five (5):

> **SHORE EXCURSIONS, TOURS, FACILITIES OR OTHER TRANSPORTATION:**
>
> All arrangements made for or by Passenger for transportation (other than on the Vessel) before, during or after the Cruise or CruiseTour of any kind whatsoever, as well as . . . shore excursions . . . are made **solely for Passenger's convenience and are at Passenger's risk**. The providers, owners and operators of such services, conveyances, products and facilities

> are **independent contractors** and are not acting as agents or representatives of Carrier. Even though carrier may collect a fee for, or otherwise profit from, making such arrangements and offers for sale shore excursions, tours, hotels, restaurants, attractions, the Land Tour and other similar activities or services taking place off the Vessel for a profit, it does not undertake to supervise or control such independent contractors or their employees, nor maintain their conveyances or facilities, and makes no representation, whether express or implied, regarding their suitability or safety. **In no event shall Carrier be liable for any loss, delay, disappointment, damage, injury, death or other harm whatsoever to Passenger which occurs on or off the Vessel or the Transport as a result of any acts, omissions or negligence of any independent contractors.**

(emphasis added). [Note: The contract does in fact say this. Plaintiffs' contentions that they had certain beliefs about the language does not change the reality that the language is as RCCL listed it in the Undisputed Facts. But Plaintiffs still say the paragraph is disputed. It is not.].

7. Before the subject incident, Plaintiff, Lauren Barham, sailed on three other cruises, including one with RCCL. [Note: Plaintiffs' so-called dispute is illogical. They say Plaintiffs had difficulty understanding the contract terms because they are not lawyers. This has nothing to do with the undisputed fact in this paragraph, and the Undersigned predicts that Plaintiffs intended this argument to go somewhere else.].

8. Plaintiffs understood that by accepting RCCL's Ticket Contract, they were accepting the terms and conditions in it. Although they chose not to read the terms and conditions, or only read them briefly, Plaintiffs testified that nothing stopped them from reading the entire document, which they had in their possession prior to boarding the cruise. Plaintiffs concede that the terms and conditions specify that all shore excursions

are operated by independent contractors. [Note: These undisputed facts are accurate references to Plaintiffs' deposition testimony. Their status as non-lawyers does not somehow invalidate their deposition testimony or inject a legitimate dispute into an accurate transcript. Plaintiffs have not argued that the deposition transcripts are inaccurate.].

9. After booking their cruise and reviewing RCCL's website and/or RCCL's shore excursion brochure, Plaintiffs purchased tickets for the "White Island Volcano Experience Cruise and Guided Exploration" shore excursion.

10. A description of all shore excursions offered during the subject cruise, including the subject excursion, was available to Plaintiffs in a tour booklet and a brochure accessible via RCCL's website. Plaintiffs testified that they read the subject tour's description in this brochure. This description included the following statement: "THIS TOUR IS OPERATED BY A TOUR OPERATOR THAT HAS BEEN THIRD-PARTY VERIFIED TO AN INTERNATIONALLY RECOGNIZED SUSTAINABILITY STANDARD." [Note: Plaintiffs raise similar so-called "disputes" which are not bona fide disputes about this paragraph. Plaintiffs do not challenge that the language in the brochure is not what is quoted.].

11. The second page of the brochure contains a hyperlink that directs readers to "Terms and Conditions" addressing shore excursions. [Note: Plaintiffs say they did

not see or click on the hyperlink. That may well be, but it does not generate a dispute about where the hyperlink linked to and its subject.].

12. The Terms and Conditions section establishes, *inter alia*, that "Shore Excursions are operated by independent third-parties. Royal Caribbean Cruises Ltd. has no responsibility for the performance of the Shore Excursions herein specified . . . See the Guest Ticket contract for additional terms and conditions applicable to your purchase of and participation in a Royal Caribbean International Shore Excursion." Plaintiffs recognized that these terms and conditions establish that RCCL did not operate shore excursions or take responsibility for their performance. [Note: Plaintiffs' reasons for branding this as disputed are similarly unpersuasive. They have not argued that the language was different and there is likewise no argument that Plaintiffs did not say what they testified to in their deposition transcripts.].

13. While aboard the *Ovation of the Seas*, Plaintiffs received their tickets for the "White Island Volcano Experience Cruise and Guided Exploration."

14. On the front, the tickets displayed the name of the Plaintiffs and the name of the tour provider/destination management company, ID Tours New Zealand, Ltd ("ID Tours"). [Note: Plaintiffs say this fact is disputed, but their reasons are unconvincing.].

15. On the back, the tickets displayed a disclaimer that was consistent with the other disclaimers that Plaintiffs previously received, which again explained that the providers of shore excursions were independent contractors and that in no event RCCL

shall be liable for any accident or harm to passengers that occurs as a result of any acts, omissions, or negligence of any independent contractors. [Note: Plaintiffs assert similar unpersuasive arguments but do not claim that the tickets had language other than what is accurately quoted here.].

16. The first page of the Guest Ticket Booklet states in bold letters:

IMPORTANT NOTICE TO GUESTS

Your Cruise/Cruisetour Ticket Contract is contained in this booklet. The Contract contains important limitations on the rights of passengers. It is important that you carefully read all the terms of this Contract, paying particular attention to section 3 and sections 9 through 11, which limit our liability and your right to sue, and retain it for future reference. This Agreement requires the use of arbitration for certain disputes and waives any right to trial by jury to resolve those disputes.

17. Paragraph 11 of the Ticket Contract expressly disclaims liability on behalf of RCCL for events like the instant matter:

LIMITATIONS OF LIABILITY:

a. EXCEPT AS OTHERWISE EXPRESSLY PROVIDED IN ARTICLE 6 (e), CARRIER SHALL NOT BE LIABLE FOR INJURY, DEATH, ILLNESS, DAMAGE, DELAY OR OTHER LOSS TO PERSON OR PROPERTY, OR ANY OTHER CLAIM BY ANY PASSENGER CAUSED BY ACT OF GOD, WAR, TERRORISM, CIVIL COMMOTION, LABOR TROUBLE, GOVERNMENT INTERFERENCE, PERILS OF THE SEA, FIRE, THEFTS OR ANY OTHER CAUSE BEYOND CARRIER'S REASONABLE CONTROL, OR ANY ACT NOT SHOWN TO BE CAUSED BY CARRIER'S NEGLIGENCE.

b. PASSENGER AGREES TO SOLELY ASSUME THE RISK OF INJURY, DEATH, ILLNESS OR OTHER LOSS, AND CARRIER IS NOT RESPONSIBLE FOR PASSENGER'S USE OF ANY ATHLETIC OR RECREATIONAL EQUIPMENT; OR **FOR THE NEGLIGENCE OR**

> **WRONGDOING OF ANY INDEPENDENT CONTRACTORS**, INCLUDING BUT NOT LIMITED TO PHOTOGRAPHERS, SPA PERSONNEL OR ENTERTAINERS; **OR FOR EVENTS TAKING PLACE OFF THE CARRIER'S VESSELS, LAUNCHES OR TRANSPORTS, OR AS PART OF ANY SHORE EXCURSION, TOUR OR ACTIVITY.**
>
> d. ON CRUISES WHICH DO NOT EMBARK, DISEMBARK OR CALL AT ANY UNITED STATES PORT AND DO NOT EMBARK OR DISEMBARK AT ANY EUROPEAN UNION MEMBER STATE PORT, CARRIER SHALL BE ENTITLED TO ANY AND ALL LIABILITY LIMITATIONS, IMMUNITIES AND RIGHTS APPLICABLE TO IT UNDER THE "Or tort CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA" OF 1974, AS WELL AS THE "PROTOCOL TO THE ATHENS CONVENTION RELATING TO THE CARRIAGE OF PASSENGERS AND THEIR LUGGAGE BY SEA" OF 1976 ("ATHENS CONVENTION"). THE ATHENS CONVENTION LIMITS THE CARRIER'S LIABILITY FOR DEATH OR PERSONAL INJURY TO A PASSENGER TO NO MORE THAN 46,666 SPECIAL DRAWING RIGHTS AS DEFINED THEREIN (APPROXIMATELY U.S. $64,500 AS OF FEBRUARY 26, 2015, WHICH AMOUNT FLUCTUATES, DEPENDING ON DAILY EXCHANGE RATE AS PRINTED IN THE WALL STREET JOURNAL). IN ADDITION, AND ON ALL OTHER CRUISES, ALL THE EXEMPTIONS FROM AND LIMITATIONS OF LIABILITY PROVIDED IN OR AUTHORIZED BY THE LAWS OF THE UNITED STATES (INCLUDING TITLE 46, UNITED STATES CODE SECTIONS 30501 THROUGH 30509 AND 30511) WILL APPLY.

(emphasis added). [Note: Plaintiffs do not challenge the accuracy of the quoted language. Their grounds for saying this is disputed are not dispute-creating factors; they are simply additional points.].

18. In the cruise industry, it is standard for cruise operators to retain local Destination Management Companies ("DMCs") to assist in the coordination and handling of, among other things, shore excursion offerings to cruise passengers in specific

regions across the globe. One of the reasons for utilizing DMCs is their superior knowledge about local operators:

> Q: And what is RCL's understanding about their knowledge about the different operators and types of tours that are available in New Zealand for people like cruise passengers?
>
> A: That they have relationships with them, that they know the reputations of them, that they are -- they have been doing this for over 20 years, without cruise line passengers and with cruise line passengers. And they're reputable; have -- I mean, excellent history, safety history, in terms of the tours being offered there, and they're the most knowledgeable.
>
> Q: Do you consider Destination Management Companies in New Zealand like Renaissance and ID Tours to be more knowledgeable about local operators than Royal Caribbean?
>
> A: Yes; they would be.

[Note: Plaintiffs' reasons for saying this fact is disputed are merely efforts to argue around the undisputed facts and make it seem like they are disputed. For example, the fact that RCCL's website says that "Royal Caribbean thoroughly reviews its tour operators" may establish that RCCL was incorrect but it does not change the undisputed fact. Likewise, the fact that RCCL earns significant revenue from its excursion tours does not change the undisputed facts here into disputed facts.].

19. N/A

20. RCCL first began its business relationship with Renaissance Tours, Ltd., a local New Zealand DMC, on or about 2003 when it began sailing to New Zealand. Renaissance Tours was founded in 1977 and was well known in the cruise industry. They were

reputable and knowledgeable about tour operators in New Zealand, the tours offered in that country, and the local regulations and practices. Renaissance Tours also had strong relationships with government officials, local authorities, and businesses throughout New Zealand. [Note: Plaintiffs add that RCCL's relationship ended in 2017 because one of its subcontractors, a bus company, went off the side of a road and crashed, causing injuries. But this bus incident does not change into a disputed fact about RCCL's understanding of the operator's reputation in 2003, 14 years earlier.].

21. Paul Loughrin, RCCL's Director of Global Tour Operations, worked directly with Renaissance Tours in his capacity as account manager and senior account manager. He testified that Renaissance Tours operated in New Zealand significantly before RCCL first sailed there and had relationships with different tour operators. They operated tours and all reports in New Zealand and had a good track record. [Note: Again, Plaintiffs' comment about the 2017 termination does not impact RCCL's understanding of Renaissance's reputation in 2003.].

22. It is cruise industry standard for DMCs to subcontract the operation of the shore excursions to independent contractors. [Note: Plaintiffs' additional facts do not change the undisputed nature of these facts.].

23. In 2016, during the owners of Renaissance Tours' annual visit to Miami to meet with Mike Koster, Celebrity Cruises Excursion Account Manager for Australia and New Zealand, they proposed the subject excursion to RCCL. [Note: Plaintiffs say this fact is

not material, but this comment, even if true, does not mean that the fact is somehow "disputed."].

24. As part of the proposal process, RCCL required Renaissance Tours to submit a tour content worksheet ("TCW"), which included, among other things, a description of the tour. During this process, Renaissance Tours advised that the tour would be operated by White Island Tours ("WIT") "a subcontractor that had been operating for many years . . .," which was "certified to take guests to the island":

> Q: What was your -- at the time of the approval of the tour, what was your understanding of what the risk would be, if any, to Royal Caribbean passengers in visiting an active volcano?
>
> A: When I reviewed that tour, I read the description and the language was there. My understanding was that this is a tour that is operated by, you know, a company that's been operating that company -- that tour for many years, that our company that we've been working with for many years, as approved, so and also, you know, New Zealand is, you know, very accustomed to active tours. It's a very developed country. So I did not think that there was any risk to our passengers by taking them to that location.

25. RCCL relies on the experience and expertise of its independent contractor DMCs, such as Renaissance Tours, to advise it of any potential safety issues related to the DMC's tours, including those related to any subcontractors should they exist.

26. Upon approval of Renaissance Tours' proposal, RCCL began offering the subject excursion to its passengers pursuant to a Tour Operator Agreement ("TOA") with Renaissance Tours. The first tour to White Island occurred on or about November 14, 2016. [Note: In arguing that this fact is disputed, Plaintiffs add (but not in a separate

section required by Local Rule) that this was only seven months after an April 27, 2016 explosive eruption and only two months after a September 13, 2016 eruption.].[4]

27. RCCL terminated its contractual relationship with Renaissance Tours after a 2017 accident involving an independent bus operator that Renaissance Tours subcontracted. RCCL ceased doing business with Renaissance Tours on or about June 2018.

28. RCCL monitors passenger feedback, including feedback related to shore excursions. [Note: Plaintiffs submitted long paragraphs of additional facts which do not change this straightforward fact.].

29. During the time that Renaissance Tours offered and arranged for the subject excursion, there were no safety complaints or incidents related to volcanic activity. [Note: Plaintiffs point to additional facts and arguments which are not sufficient to convert this undisputed fact into a disputed fact. For example, the fact that Plaintiffs say that the excursion itself was dangerous does not impact the accuracy of this fact.].

30. In September 2017, Tourism New Zealand, a Crown entity responsible for the promotion of New Zealand as a tourism destination internationally, invited Koster to

[4] Plaintiffs did not submit their own Additional Facts section; it merely embedded them in the section where they are trying to explain why an undisputed fact is actually a disputed fact. As noted, these efforts typically failed. At the end of the undisputed facts section, the Undersigned will highlight some of Plaintiffs' factual positions (which Defendant has been unable to respond to, given that they were not in a section which permitted a response).

White Island as part of a two-week official familiarization trip. Koster arrived at White Island as part of a helicopter tour and was accompanied by, among other people, a representative of ID Tours. The tour guide gave Koster and others a safety briefing and guided them through White Island. Koster, who was on the island between 45 minutes to an hour, testified that nothing about the visit gave him the inclination that White Island was unsafe. [Note: Plaintiffs grounds for claiming this is a disputed fact are simply additional facts which do not create a dispute about this fact.].

31. In 2018, ID Tours became RCCL's exclusive DMC in New Zealand. ID Tours does not operate any of the excursions themselves. At the time, RCCL was very familiar with ID Tours, with which it had existing contracts for grounds services and shore excursions in several New Zealand ports. ID Tours had also served as Azamara Cruises' (a then subsidiary of RCCL) DMC.

32. ID Tours was incorporated in New Zealand in 1978 and had a cruise line division that performed ground handling services for major cruise lines in 1982, employed highly-experienced staff, many of whom had past experience as shore excursion managers with cruise lines, had a management committee with members who were part of "Cruise New Zealand," and was very active and knowledgeable in the cruise line industry, especially as it pertains to New Zealand. ID Tours has worked with the majority of cruise lines that travel to New Zealand, including Carnival, Cunard, Holland American, Norwegian Cruise Lines, Oceania, P&O UK, Princess Cruises, Viking Cruises

and others. ID Tours had been providing shore excursions in New Zealand for more than twenty-five (25) years. [Note: Plaintiffs contend that this paragraph is not material, but this point, even if correct, does not create a factual dispute. At best, it creates a *legal* disagreement over relevance.].

33. Before entering into a contract with ID Tours, RCCL vetted ID Tours during a "Request for Proposal" process:

> A: Royal Caribbean vetted ID Tours during an RFP -- Request For Proposal process -- whom they provided proposals that they had reviewed, and that they knew of, and they proposed to Royal Caribbean. We reviewed them -- all the documents, the questionnaire, the TCW, the bid template which has the information of the tours. Their information -- we vetted and reviewed their operation in terms of providing tours, had they -- with their track record, based on their experience -- reputable, knowledgeable with working with other cruise lines -- we vetted their operation and appointed them as a tour operator to handle and operate tours for Caribbean, and entered into an agreement to -- for them to operate those tours. And they -- yes, they did subcontract, and that is relatively -- in my understanding -- an industry norm, standard within the industry that there's these larger tour operators, locally knowledge [sic] communicating with cruise lines, and also communicating with subcontractors, smaller tour operators who are more specialized in different tours throughout those regions. And ID Tours had been doing that for a number of years and working with other cruise lines, and -- with a reputable and good track record, we appointed and -- ID Tours to present and operate those tours on behalf of Royal -- for Royal, and take Royal guests on those tours.

[Note: Plaintiffs say this is not relevant.].

34. ID Tours continued to monitor the White Island excursion, which included visits to White Island. They never reported any safety concerns about White Island and did not provide information concerning past eruptive activity, the monitoring of volcanic

activity at White Island, or volcanic alert levels. [Note: Plaintiffs say this does not meet RCCL's duty to monitor excursions and tour operators, but RCCL did not assert that as a fact here.].

35. RCCL does not share profits or losses with ID Tours, have any of the same employees, have any control over ID Tours' operations, or share ownership of any property. [Note: Plaintiffs say this is not material because the Court dismissed the joint venture claim. While true, this observation does not create a factual dispute concerning this sentence.].

36. Throughout RCCL's business relationship with ID Tours, ID Tours acted professionally and competently:

> Q: Prior to the incident with the volcano, how would you describe your relationship with -- you and your department's relationship -- with ID Tours. Were they good, were they professional?
>
> A: Very good; very professional. Found them to be very responsive, and -- with - - and -- very much networked [sic] within New Zealand, knew a lot about the programs, the destinations, the ports. Very cordial, professional team. After -- you know, talking with them and reading about their profile over the years, just understanding they've been in business for quite some time, and -- a number of decades, doing what they're doing as a tour operator destination management company, and providing experiences for guests and working with [the] majority of the cruise lines that I recall. I think they were already working with a number of other cruise lines -- Princess, at the time, T and L before Royal Caribbean got involved -- and that was important to us, that they were, again, established and working already within the cruise industry space, and providing experiences, ground provider and ground transportation, and as well as a Tour Operator, as a DMC in the multiple areas in the ports. So it was a good relationship with them. I found them very professional and very responsive to -- and -- great tour proposals along the way; yes.

37. WIT owned, operated, managed, and controlled the subject excursion, which they had been operating for twenty-two (22) years before the subject incident. WIT held an exclusive license to ferry tours to the privately-owned island housing the volcano. [Note: Plaintiffs say these points are irrelevant.].

38. At the time of the subject incident, WIT was a certified registered adventure activity provider pursuant to New Zealand's Health and Safety at Work Act 2015 and the related Health and Safety at Work (Adventure Activities) Regulations 2016.

39. In 2018, WIT was recognized as "New Zealand's Safest Place to Work" in the Small Business category by the Health and Safety Association of New Zealand and the New Zealand Institute of Safety Management. [Note: Plaintiffs assert several unconvincing arguments to support their view that this fact is disputed. But, once again, the arguments raised, such as noting the obvious point that Plaintiffs did not work for WIT or an excursion company, do not render the fact disputed.].

40. During the course of RCCL's offering of the subject excursion, approximately 1,190 passengers purchased tickets for and/or participated in the excursion. Approximately 10,000 tourists visited White Island each year. [Note: Plaintiffs challenge this as being irrelevant.].

41. Up to the subject incident, WIT provided the subject excursion to RCCL and Celebrity cruise passengers without incident:

> Q:·As an account manager, are you alerted whenever passengers have safety-related concerns pertaining to an excursion?

A:·Yes, we are.

Q: In this particular case, did you or anybody working with you at Royal Caribbean investigate whether there were any incident[s] involving injury related to volcanic activity during the White Island excursion since inception in 2016 through just before the incident in [sic] December 9th, 2019?

A: Yes, we have reviewed all comments that have been submitted by guests and there was [sic] no safety comments or questions or comments from any guest.

Q: Did you also review whether there had been incidents involving injury related to volcanic activity?

A: Yes, and there's never been any injury from any volcanic activity.

[Note: Plaintiffs argue that this fact is irrelevant.].

42. N/A

43. The shore excursion brochure that Plaintiffs admittedly reviewed includes the following description of the subject shore excursion:

> Journey to sunny Whakatane for a scenic boat ride along the picturesque Bay of Plenty to White Island for an unforgettable guided tour of New Zealand's **most active volcano.** In fact, White Island is one of the most active volcanoes **in the world**. Zodiac inflatable crafts take you from your boat directly into the crater complex. Since the majority of the volcano sits beneath the sea, you head straight to the action without much, if any, climbing at all. **Gas masks/breathing apparatus helps you get up close to roaring steam vents, bubbling pits of mud, hot volcanic streams and the amazing lake of steaming acid**. And the vivid hues of yellow and orange resulting from all sulfur on the island make for remarkable photos, so have your camera ready.

[Note: Plaintiffs raise many challenges, none of which change the factual reality that the brochure said all of this. In addition, Plaintiffs' argument that RCCL's description

did not convey the danger does not mean that the brochure does not say what it says.].

44. Plaintiff, Lauren Barham, had initial hesitations about participating in the subject shore excursion due to the description referencing an "active" volcano. Such hesitations were related to her knowledge that active volcanos can erupt:

> Q. And the White Island, whose idea was that one?
>
> A. That was Matt's.
>
> Q. And is that one where you immediately said okay or did you have any hesitations?
>
> A. No, I had hesitation.
>
> ***
>
> Q: What was your initial fear about White Island?
>
> A: Initially, I was scared, okay, like what if it does erupt, you know.

[Note: According to the transcript, Plaintiff did say this. She does not claim that the transcript is incorrect. Instead, she refers to another portion of her testimony, which does not mean that she did not give the testimony excerpted above. Although Plaintiffs did not follow the proper procedure by submitting an "Additional Facts" section, the Undersigned will mention her later testimony below, under "Highlights of Plaintiffs' (Procedurally Improper) Additional Facts."].

45. New Zealand follows a Volcanic Alert Level ("VAL") System, which is maintained by the "GeoNet Project," a collaboration of the New Zealand Earthquake

Commission (EQC), GNS Science (a leading provider of Earth, geoscience and isotope research and consultancy services), and Land Information New Zealand (LINZ). This system publishes a scale, ranging from 0 (no volcanic unrest) to 5 (major volcanic eruption), to define the current status of each volcano. [Note: Plaintiffs add that the bulletins were publicly available on the internet and that RCCL had free access to those bulletins. But, then again, so did Plaintiffs. And, as mentioned myriad times in this Report, these additional facts do not convert these facts into disputed facts.].

46. GeoNet uses this system of volcanic alert levels "to define the current status of each volcano" and the VALs, on their own, do not have a predictive or forecast content. [Note: Plaintiffs points are additional facts, not contrary facts generating an actual dispute.].

47. On November 18, 2019, GeoNet increased the VAL System to a level 2. [Note: Plaintiffs say that RCCL could have cancelled the excursion for safety reasons and has done so thousands of times over the years. But this does not make RCCL's statement false and does not create an actual dispute over this specific fact.].

48. RCCL was not informed or otherwise aware of the increase in volcanic activity levels prior to the subject incident. [Note: Plaintiffs say that RCCL had constructive notice of the increase (as opposed to actual knowledge). Although this does not technically generate a factual dispute, the Undersigned deems this fact to relate solely to

actual knowledge, a step which avoids any ambiguity about whether this paragraph is actually disputed (and it is not) with competent record evidence.].

49. N/A

50. RCCL was not advised by ID Tours or aware of the increased volcanic activity levels before the subject incident. [Note: Plaintiffs say that RCCL had constructive knowledge, but that is a different point. Similar to my approach above, I will deem this paragraph to address only actual knowledge.].

51. Upon reaching White Island, Plaintiffs were provided safety equipment for use during the tour, including a hard hat and a gas mask. [Note: Plaintiffs say this is disputed because the equipment did not prevent them from harm, as they were both badly burned. While true, this does not mean that the factual statement as phrased is false or actually in dispute.].

52. Plaintiffs testified that WIT tour guides provided the shore excursion participants with a safety briefing after they arrived at the volcano:

> Q: What information do you contend [RCCL] had and they knew about this volcano before the eruption?
>
> A: I believe that you guys knew that it was at a level two and that you didn't -- and that you didn't give us the information, and we didn't know what a level two was. And -- and that there was [sic] other eruptions prior to that in the years earlier and we had no idea how -- exactly how active White Island was.
>
> ***

> Q: What else -- so Jake -- Kelsey gave you instructions. You said she would be in the front and Jake in the back. What else did she say?
>
> A. She said that we needed to stay in between the two of them at all times and that -- and that there was just a heightened level of activity. She didn't explain really what that was, but just that there was a heightened level of activity and that we just couldn't go to certain areas that they normally could go to.
>
> ***
>
> Q: Okay. So tell me about the conversation with Jake?
>
> A: . . . And, and I can't remember if I asked him when the last eruption was or if he just offered that, but I think I must have asked him when the last eruption was and he said in 2016. And, and then I got kind of scared because that's a little worrisome that it's 2019 and the last one was 2016. And I was pretty -- I was pretty scared.
>
> ***
>
> Q: Okay. Jake conveyed to you before you had actually started the hike that his had happened in 2016, correct?
>
> A: Correct.

53. Barham testified that the guide mentioned that the volcano had a sensor or something similar that "would alarm ten minutes before any sort of eruption." [Note: Plaintiffs add that the sensor or alarm did not work, which, in their view, means that the comment was false. But the operability of the alarm does not change into a disputed fact the fact that the guide made the comment.].

54. N/A

55. Barham conceded that she has no information to suggest that WIT would have given RCCL information that was different from what WIT gave her as it relates to volcanic activity levels or previous eruptions. [Note: Plaintiffs add that they (now) say they would not have gone on the excursion had they been told before the excursion started about the volcano's history of eruptions, the increased alert level and the increased risk of eruption.].

56. GeoNet declared that the eruption on December 9, 2019, was a level 4.

Highlights of Plaintiffs' (Procedurally Improper) Facts

Had Plaintiffs correctly referenced their additional facts in an Additional Facts section as required by Local Rule, then RCCL would have provided its response (i.e., the fact is "disputed" or "undisputed" and, if disputed, what competent record evidence supports that position).

Technically, therefore, the Undersigned need not even mention Plaintiffs' factual contentions. *See*, *e.g.*, *Peak v. ReliaStar Life Ins. Co.*, No. 1:16-CV-3491-AT, 2018 WL 6380772, at *3 (N.D. Ga. Sept. 28, 2018) ("[W]here a respondent, similar to a movant, fails to conform its Rule 56.1 statement of additional facts to the rule's requirements, the district court is vested with broad discretion to disregard it, in whole or in part.");[5] *Webb v. Atlanta*

[5] "Local Rule 56.1 for the Northern District of Georgia is similar in all material respects to Local Rule 56.1 for the Southern District of Florida." *Fed. Trade Comm'n v. Pointbreak Media, LLC*, 376 F. Supp. 3d 1257, 1275 n.5 (S.D. Fla. 2019).

Indep. Sch. Sys., No. 115CV001613RWSWEJ, 2017 WL 4334246, at *11 n.25 (N.D. Ga. Jan. 18, 2017), report and recommendation adopted, No. 115CV01613RWSWEJ, 2017 WL 4456890 (N.D. Ga. July 26, 2017) ("[The] [p]laintiff admits a fact not proposed above and then makes a long and argumentative denial containing additional facts . . . , which the Court disregards because it violates the Local Rules."); *see also Hum. Rts. Def. Ctr. v. Dixon*, No. 21-81391-CV, 2022 WL 4243921, at *3 (S.D. Fla. Aug. 24, 2022) (observing that "[d]istrict courts have considerable discretion in applying the Local Rules" and "find[ing] it necessary to deem facts undisputed that substantially fail[ed] to comply with the Local Rules and [were] otherwise evasive, non-responsive and [did] not clearly controvert the opponent's fact").

However, I will summarize the gist of them here for two reasons: (1) to add overall context and (2) because these factual assertions, even if true, do not impact the legal ruling here about the narrow point at issue: the enforceability of the liability disclaimer which Plaintiffs agreed to in their ticket contracts for a foreign ship transporting passengers from one foreign port outside the United States to another foreign port outside the United States. To be sure, these Plaintiffs-submitted facts, which may well be disputed,[6] might impact the other arguments in RCCL's summary judgment motion or could affect

[6] We don't know with certainty if they're *actually* disputed because RCCL was deprived of the procedural opportunity to lodge formal positions and reference record evidence supporting any assertions that the factual submissions are disputed.

Plaintiffs' opposition to those other arguments. But they don't change the analysis on the one limited issue underlying this ruling.

Framed by this background, the Undersigned lists Plaintiffs' primary factual allegations:

a. The DMCs did not have any expertise in sending passengers to active volcanos.

b. RCCL assumed the duty to vet or reasonably select WIT directly.

c. RCCL's website stated: "Royal Caribbean thoroughly reviews its tour operators, whether it's the guide on a sightseeing tour or the one that provides proper equipment and ensures the safety of gear used on active excursions like scuba diving, quad riding, and zip lining."

d. RCCL did not do anything to verify WIT's ability or competency to take passengers to an active volcano.

e. RCCL began offering the volcano tour without knowing about, or conducting any research into, White Island's history of eruptions.

f. RCCL approved the excursion without knowing whether WIT had an evacuation plan in place for emergencies -- a step which Plaintiffs say violated (unspecified) "industry standards."

g. The excursion was classified as an "adventure activity," which New Zealand defined as an activity "designed to deliberately expose the participant to a serious risk to his or her health and safety that must be managed by the provider of the activity."

h. RCCL prohibits some inherently dangerous activities (such as skydiving, bungee jumping and paragliding) from being offered as an excursion.

i. Other inherently dangerous activities, like ziplining, scuba diving, helicopter tours, and/or flight tours, undergo a more vigorous

approval process, wherein RCCL asks more questions, requires third-party certification, and risk management reviews the proposed excursion.

j. A single RCCL employee who lacked safety inspection qualifications reviewed and approved the volcano tour excursion.

k. The excursion to the White Island volcano was an inherently dangerous and ultrahazardous tour.

l. RCCL generates significant revenue from its shore excursion program.

m. RCCL generates revenue from shore excursions by negotiating the net cost paid to the tour operators and then adding an amount up to 40%.

n. It is industry standard for cruise lines to regularly check local conditions before an excursion, especially when dealing with high-risk tours observing natural phenomena, like White Island. In those circumstances, it is industry standard for the Shore Excursion Manager to collect all relevant information by, *inter alia*, directly checking the monitoring body (in this case, GeoNet) before the commencement of the voyage and before the tour departure date. That did not happen here.

o. The lack of prior incidents does not establish the nonexistence of a dangerous condition, and the subject excursion was dangerous.

p. Most recently before the subject incident, the White Island volcano erupted on September 13, 2016.

q. The White Island volcano also experienced a significant, explosive eruption on April 27, 2016, which was an almost exact replica of the subject eruption.

r. The April 27, 2016 eruption occurred without warning at night when there was no one on the island, but many people would also have been killed and/or catastrophically injured if it had occurred during the day when tourists were on the island.

s. The White Island volcano is on a remote island without any communication, safety, or emergency infrastructure on the island. As a result, any rescue effort would involve significant time delay because the only way to access the island was by boat or helicopter.

t. RCCL failed to warn Plaintiffs of the volcano's significant modern history of eruptions, the increased alert level, the increased volcanic activity, or the increased risk of eruption because RCCL claims it was not aware.

u. Barham testified her "hesitation" was because she's generally "just a very scared person," but she was "relieved" by the fact that the excursion was offered by a "reputable" company like RCCL and kids were allowed on the excursion. She also testified that she "was not worried about the volcano erupting," and likened a fear of eruption (what RCCL quoted) to a fear of an "alien apocalypse." ("Initially, I was scared, okay, like what if it does erupt, you know. Just like what if there's an alien apocalypse, you know. I mean, my fears, like I said, are completely irrational.").

v. According to WIT's tour guide on the date of the incident, "the higher the level, the more risk there is of an eruption. . . . We're on level 2, nearing level 3 now." In addition, the scale for New Zealand's Volcanic Alert System lists "potential for eruption hazards" under the "Most Likely Hazards" at a level 2 and lists those eruption hazards specifically as: "ballistics (flying rocks), pyroclastic density currents (fast moving hot ash clouds), lava flows, lava domes, landslides, ash, volcanic gases, lightning, lahars (mudflows), tsunami, and/or earthquakes." GeoNet's bulletins also repeated warnings weeks before the incident that "the volcano may be entering a period where eruptive activity is more likely than normal[,]" and that the observations "bear some similarities with those seen during the 2011-2016 period when Whakaari/White Island was more active and stronger volcanic activity occurred" (which concluded with the April 2016 explosive eruption of the volcano).

w. RCCL only communicated with ID Tours concerning the excursion (and not the actual tour operator, WIT). There is not a single communication in the record between RCCL and WIT, and RCCL did not even have the contact information for WIT (or any subcontractor).

x. When the alert increased to a level 2, WIT notified passengers as follows: "At present the volcano is sitting at Alert Level 2 which means it is in an elevated state of unrest and that there is an increased hazard to visitors."

y. Plaintiffs were never given the option of not proceeding on the volcano tour, despite the increased alert level and/or increased volcanic activity, and they were not aware there was any option to return to the cruise ship and not proceed with the tour.

Applicable Legal Standards

Summary Judgment

Summary judgment must be entered against a party who fails to show a genuine issue as to a material fact, thus enabling a court to decide the case as a matter of law. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986). "A genuine issue of material fact does not exist unless there is sufficient evidence favoring the nonmoving party for a reasonable jury to return a verdict in its favor." *Haves v. City of Miami*, 52 F.3d 918, 921 (11th Cir. 1995) (citations omitted) (affirming summary judgment for the defendant); *see also generally Quintero v. Geico Marine Ins. Co.*, 983 F.3d 1264 (11th Cir. 2020) (affirming summary judgment for the defendant).

To obtain summary judgment, a defendant may either (1) produce evidence that refutes an essential element of the plaintiff's claim or (2) "point[] out . . . that there is an absence of evidence to support the [plaintiff's] case." *Celotex Corp.*, 477 U.S. at 325, 331. The burden is on the non-moving party to come "forward with sufficient evidence on

each element that must be proved." *Earley v. Champion Int'l Corp.*, 907 F.2d 1077, 1080 (11th Cir. 1990) (citation omitted) (affirming summary judgment for the defendant).

Moreover, "the mere existence of a scintilla of evidence in support of the plaintiff's position will be insufficient [to preclude summary judgment for the movant]; there must be evidence on which the jury could reasonably find for the plaintiff." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 250 (1986).

Consideration of a summary judgment motion does not lessen the burdens on the non-moving party: the non-moving party still bears the burden of coming forward with sufficient evidence on each element that must be proved. *Rollins v. TechSouth, Inc.*, 833 F.2d 1525, 1528 (11th Cir. 1987). "[I]n ruling on a motion for summary judgment, the judge must view the evidence presented through the prism of the [movant's] substantive evidentiary burden." *Anderson*, 477 U.S. at 254. The trial judge must bear in mind the "actual quantum and quality of proof necessary to support liability" in a given case. *Id*. "[I]f on any part of the prima facie case there would be insufficient evidence to require submission of the case to a jury, we must affirm the grant of summary judgment [for the defendant]." *Barnes v. Southwest Forest Indus., Inc.*, 814 F.2d 607, 609 (11th Cir. 1989).

Where, as here, discovery has been conducted, "there is no issue for trial unless there is sufficient evidence favoring the non-moving party for a jury to return a verdict for that party. If the evidence is merely colorable, or is not significantly probative, summary judgment may be granted." *Anderson*, 477 U.S. at 249–50 (citations omitted)

(emphasis added); *accord Hudson v. Southern Ductile Casting Corp.*, 849 F.2d 1372, 1376 (11th Cir. 1988).

General Maritime Law

As Plaintiffs and this Court recognize, "[t]he causes of action asserted in this Complaint arise under the General Maritime law of the United States." [ECF Nos. 19, ¶ 6; 65 (applying maritime law in ruling on RCCL's Motion to Dismiss)]. Incidents occurring on the navigable waters and bearing a significant relationship to traditional maritime activities are governed by maritime law. *See Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625 (1959); *Kornberg v. Carnival Cruise Lines, Inc.*, 741 F.2d 1332, 1334 (11th Cir. 1984).

This principle extends to torts occurring at offshore locations or ports-of-call during the course of a cruise. *See Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 901 (11th Cir. 2004); *Isbell v. Carnival Corp.*, 462 F. Supp. 2d 1232, 1236 (S.D. Fla. 2006) (applying federal maritime law in negligence action against cruise line company stemming from accident occurring during an offshore excursion).

As the court explained in *Smolnikar v. Royal Caribbean Cruises, Ltd.*, "maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." 787 F. Supp. 2d 1308, 1315 (S.D. Fla. 2011) (citing *East River Steamship Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986)). In the absence of well-developed maritime law pertaining to the subject negligence claims, the courts incorporate "general

common law principles" and state law "to the extent they do not conflict with federal maritime law." *Id*. (citing *Just v. Chambers*, 312 U.S. 383, 388 (1941)).

The Enforceability of the Contractual Liability Waivers

Plaintiffs' passenger ticket contracts and shore excursion tickets contain language in which Plaintiffs agree that RCCL would not be liable for any injuries "taking place off the carrier's vessels . . . or as part of any shore excursion, tour or activity." In addition, Plaintiffs agreed that RCCL would not have liability for "any acts, omissions or negligence of any independent contractors."[7]

If these contractual waivers are valid and not barred by 46 U.S.C. § 30509,[8] then they are enforceable and serve to bar all of the Counts as the injuries clearly occurred in circumstances covered by the waivers. Section 30509 (entitled "Provisions limiting liability for personal injury or death") provides, in relevant part:

(a) Prohibition.--

---

[7] RCCL concedes that the liability disclaimer for the acts, omissions, or negligence of independent contractors would provide protection to RCCL only for Plaintiffs' claims of RCCL's vicarious liability for the negligence of ID Tours and/or WIT -- but would not bar claims for RCCL's direct negligence. But the language disclaiming liability for any injuries occurring "off the vessel" or "as part of any shore excursion, tour or activity" would prohibit all the claims asserted here.

[8] 46 U.S.C. § 183c(a) is the predecessor to 46 U.S.C. § 30509. *See, e.g., Kornberg v. Carnival Cruise Lines, Inc*., 741 F.2d 1332, 1335-36 (11th Cir. 1984) (involving section 183c, which expressly invalidated contract provisions purporting to limit a ship's liability for negligence to its passengers for any vessel "transporting passengers between ports of the United States or between such port and a foreign port"). Some of the case law authority discussed in this section involved the earlier version of the statute.

> (1) In general.--The owner, master, manager, or agent of a **vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country**, may **not** include in a regulation or **contract** a provision limiting --
>
> (A) the liability of the owner, master, or agent for personal injury or death caused by the negligence or fault of the owner or the owner's employees or agents; or
>
> (B) the right of a claimant for personal injury or death to a trial by court of competent jurisdiction.

46 U.S.C. § 30509(a)(1).

Plaintiffs' initial theory is to argue that the cruise contract is not an effective liability waiver because it includes an assumption-of-risk clause. Plaintiffs say that an assumption-of-risk clause does not entirely bar recovery, as they instead are applied under the comparative negligence doctrine. RCCL agrees that an assumption-of-risk clause is incorporated into a comparative negligence approach. *See Najmyar v. Carnival Corp.*, No. 1:17-cv-22448, 2017 WL 7796327, *2 (S.D. Fla. Aug. 25, 2017).

But, as RCCL correctly points out, Paragraph 11(b) contains *both* an assumption-of-risk clause and a disclaimer of responsibility, separated by the word "and," demonstrating that both apply:

> PASSENGER AGREES TO SOLELY ASSUME THE RISK OF INJURY, DEATH, ILLNESS OR OTHER LOSS, **AND** CARRIER IS NOT RESPONSIBLE [A] FOR PASSENGER'S USE OF ANY ATHLETIC OR RECREATIONAL EQUIPMENT; OR [B] FOR THE NEGLIGENCE OR WRONGDOING OF ANY INDEPENDENT CONTRACTORS, INCLUDING BUT NOT LIMITED TO PHOTOGRAPHERS, SPA PERSONNEL OR ENTERTAINERS; OR [C] FOR EVENTS TAKING

> PLACE **OFF THE CARRIER'S VESSELS**, LAUNCHES OR TRANSPORTS, OR AS PART OF ANY **SHORE EXCURSION, TOUR OR ACTIVITY.**

[ECF No. 131, ¶ 17 (emphasis added)].

In addition, Paragraph 5 contains a separate disclaimer of liability specifically related to "shore excursions" operated by independent contractors: "[i]n no event shall Carrier be liable for any loss, delay, disappointment, damage, injury, death or other harm whatsoever to Passenger which occurs on or off the Vessel or the Transport as a result of any acts, omissions or negligence of any independent contractors." *Id.* at ¶ 6.

Likewise, the excursion brochure's Terms and Conditions section provides:

> Shore Excursions are operated by independent third-parties. Royal Caribbean Cruises Ltd. has no responsibility for the performance of the Shore Excursions herein specified . . . See the Guest Ticket contract for additional terms and conditions applicable to your purchase of and participation in a Royal Caribbean International Shore Excursion.

Id. at ¶ 12.

RCCL's motion is not based on the assumption-of-risk clause. Instead, it is based on language quoted above, which Plaintiffs try to ignore, overlook or gloss over.

Paragraph 11(b)'s assumption-of-risk clause provides, in exceptionally *broad* terms, that passengers assume the risk of any and all injury, death, illness, or other loss suffered in relation to the voyage. *Id.* at ¶ 17. This assumption of risk is not limited to any specific activities, equipment, persons, or locations. Instead, under this clause (as applied in admiralty), any harm suffered by a passenger will be offset by the passenger's

comparative negligence. *See Edward Leasing Corp. v. Uhlig & Assoc., Inc.*, 785 F.2d 877, 886 (11th Cir. 1986).

But the disclaimers of responsibility in Paragraphs 5 and 11(b) and in the Terms and Conditions are different.

While they are narrower in *scope*, they more *broadly* exculpate RCCL. Unlike the assumption-of-risk clause, the disclaimers are limited to three specific categories in which passengers might expect liability to be limited: (a) passengers' use of any athletic or recreational equipment; (b) the acts, omissions, or negligence of any independent contractors; and (c) events taking place off ship, including "as part of any shore excursion, tour or activity." [ECF No. 131, ¶ 17 (capitalization altered)]; *see also id.* at ¶¶ 6, 12.

Unlike an assumption of risk, the disclaimers provide that, when applicable, RCCL categorically "is not responsible," *id.* at ¶ 17, "shall [not] be liable," *id.* at ¶ 6, and "has no responsibility," *id.* at ¶ 12.

Therefore, the mere fact that the ticket contract contains an assumption-of-risk clause does not somehow mean that the additional clause establishing a complete liability waiver in three specific scenarios is somehow invalid or required to be part of a comparative negligence assessment.

So the analysis will focus on the liability disclaimer, not the assumption-of-risk language, and whether the statute invalidates it.

By its terms, the statute does not apply (and, therefore, would not prevent RCCL from entering into contracts with Plaintiffs (or other passengers on the cruise) containing liability waiver provisions. The *Ovation of the Seas* did not transport the passengers on this cruise between ports in the United States or between a United States port and a foreign port. *Najmyar*, 2017 WL 7796327 (allowing defendant to amend its affirmative defense of express waiver if it is able to allege that the "origin or destination of the cruise" did not trigger section 30509 (citing *Johnson v. Royal Caribbean Cruises, Ltd.*, 449 F. App'x 846, 848 (11th Cir. 2011) ("[T]he waiver at issue in this case is only enforceable if it does not run afoul of 46 U.S.C. § 30509.")).

The waiver at issue does not "run afoul" of section 30509 because the cruise was a completely foreign one, with only foreign ports on the itinerary. Phrased differently, the cruise did not involve a U.S. port in any way.

To avoid this result, Plaintiffs argue that the statutory language does not require that the *specific* voyage touch a U.S. port. Instead, they contend, the statute requires only that the vessel -- without any specific time reference -- must transport passengers to or from a U.S. port. Plaintiffs emphasize that the specific vessel at issue, the *Ovation of the Seas*, transported passengers in the United States in *other* voyages. In fact, they emphasize that the vessel transported passengers in the United States in more than half of its 2019 voyages.

That argument, while creative, suffers from a significant fatal flaw: a lack of legal support.

First, Plaintiffs cite *Wallis ex rel. Wallis v. Princess Cruises, Inc.*, 306 F.3d 827 (9th Cir. 2002), but that reliance seems misplaced, as RCCL itself relies on the case. *Wallis* involves a widow who brought an action against a cruise ship operator for damages based on the death of her husband, who drowned off the coast of Greece after falling in an undetermined way from the ship. An earlier version of the statute did not bar the Defendant from incorporating into its passenger ticket contract a provision which limited its own liability. The Court held that the statute barring liability disclaimers in contract "plainly did not apply" to the cruise because "the **voyage** upon which Plaintiff and her husband sailed did not touch a United States port." *Id.* at 835 (emphasis added).

In addition, although the appellate court reversed the trial court's order granting the cruise lines' motion for partial summary judgment for other reasons, the *Wallis* Court explained that:

> The legislative history cited by plaintiff suggests a **congressional intent**, consistent with the text, to regulate all foreign carriers within the waters of the United States, but **not to regulate foreign vessels in foreign waters**. *See Hodes v. S.N.C. Achille Lauro ed Altri-Gestione*, 858 F.2d 905, 915 (3d Cir. 1988) (" Congress, in Sections 183b and 183c, delimited the reach of American public policy to contracts of passage for voyages that touch the United States; we refuse to supplement that Congressional choice with judicial embellishment."), overruled on other grounds by *Lauro Lines S.R.L. v. Chasser*, 490 U.S. 495, 104 L. Ed. 2d 548, 109 S. Ct. 1976 (1989); *Mills v. Renaissance Cruises, Inc*., 1992 WL 471301 (N.D. Cal. Aug. 17, 1992) (same).

Id. (emphasis added)

Other courts have rejected Plaintiffs' theory that the statutory prohibitions apply even if the specific trip did not involve a U.S. port. *See, e.g., Jerome v. Water Sports Adventure Rentals & Equip., Inc.*, No. 2009-092, 2013 WL 1499046, *7 (D.V.I. Apr. 12, 2013) ("While § 30509 prevents an owner from limiting its liability under certain circumstances, it does not apply here because the jet ski involved in this case was not a 'vessel transporting passengers between ports in the United States, or between a port in the United States and a port in a foreign country' as required by § 30509(a)(1)."). In addition, the *Najmyar* Court granted leave for the cruise operator to amend an affirmative defense invoking the liability disclaimer in the cruise ticket contract after noting that the pleadings did not state the origin or destination of the cruise and explaining that the prohibition on liability disclaimers applies only "on a cruise" transporting passengers between U.S. ports or U.S. and foreign ports. 2017 WL 7796327, at *2.

The Undersigned finds *Shultz v. Florida Keys Dive Ctr., Inc.*, 224 F.3d 1269 (11th Cir. 2000) instructive. In that case, a widower sued a dive center for the wrongful death of his wife, who died of an apparent drowning while scuba diving on a trip operated by the dive center. The Eleventh Circuit affirmed summary judgment for the defendant based on a release, concluding that the federal statute did not invalidate a scuba diving release otherwise valid under state law. The Court held that the release was "unquestionably valid" unless the liability release was invalidated by the statute or admiralty common law.

The *Shultz* Court held that the statute did not apply to the facts because the vessel served only as a dive boat, it departed the port of Tavernier in the Florida Keys, it brought the divers to the location of the dive and then returned them to Tavernier after the dive. In other words, the Court explained, "[i]t was not a 'vessel transporting passengers between ports of the United States or between any such port and a foreign port.'" *Id.* at 1271 (quoting 46 U.S.C. § 183c(a)); *see also Rodriguez v. Seabreeze Jetlev LLC,* No. 4:20-cv-07073, 2022 WL 3639305 (N.D. Cal. June 23, 2022) (agreeing with defendant's position, in a wrongful death lawsuit involving a death during a tubing ride, that section 30509 did not apply because the passengers were not being "transported," a statutory requirement).

Although the instant lawsuit involves devastating injuries, courts do not hesitate to enforce waivers in *death* cases, finding, when appropriate under the facts, that the statute is inapplicable. *See, e.g., Olivelli v. Sappo Corp., Inc.,* 225 F. Supp. 2d 109 (D.P.R. 2002) (granting summary judgment to defendant in wrongful death lawsuit against a dive instructor and its employee arising from wife's death during a scuba diving accident off the coast of Puerto Rico and holding that the (earlier version of the) statute did not invalidate the release because the dive boat was not a vessel transporting passengers between U.S. ports).

Plaintiffs' final argument against the liability disclaimers they approved in their contracts is to say that the language is against public policy and should not be enforced, regardless of whether section 30509 applies.

As noted, the language at issue is not an attempt by RCCL to abandon altogether its obligations to the public. Instead, as outlined above, it focuses on only limited scenarios. Thus, if a passenger on this specific cruise was injured because RCCL served him tainted food which was not properly refrigerated, the liability disclaimer would not prevent that claim from being successful. Likewise, a garden-variety slip-and-fall case (where, for example, a passenger on this cruise slipped on sticky sauce which had been on the floor of an onboard restaurant for three hours) would not be barred by the liability disclaimer.

This Court and others have routinely upheld narrower, specific disclaimers of liability, such as disclaimers of liability for specific situations. *See, e.g., Henderson v. Carnival Corp.*, 125 F. Supp. 2d 1375 (S.D. Fla. 2000) (granting cruise ship owner's summary judgment motion in case seeking damages for injuries sustained during a catamaran excursion and finding that the ticket contract disclaimer for injuries caused by independent contractors on excursion was valid and enforceable); *Verna v. Seven Seas Cruises De R.L., LLC*, No. 13-cv-23051, 2018 U.S. Dist. LEXIS 162610 (S.D. Fla. Aug. 28, 2018) (granting summary judgment for defendant cruise ship operator after holding as enforceable a ticket contract liability disclaimer for the acts or omissions of independent shore excursion operators absent its own negligence); *Dubret v. Holland Am. Lin Westours, Inc.*, 25 F. Supp. 2d 1151, 1153-54 (W.D. Wash. 1998) (granting summary judgment for cruise ship operator based on express liability waiver in ticket contract for injuries

sustained during off-shore services and listing cases finding similar liability waivers enforceable); *Corby v. Kloster Cruise Ltd*, No. C-89-4548, 1990 WL 488464 (N.D. Cal. Oct. 5, 1990) (granting summary judgment to defendant cruise ship operator in lawsuit arising from passenger's on-shore excursion at Dunn's River Falls, while the vessel was in port in Jamaica, because ticket contract's exculpatory clause was enforceable); *Nicole Morgan v. Water Toy Shop, Inc.*, No. 16-2540, 2018 WL 1725550 (Mar. 30, 2018, D.P.R.) (granting summary judgment to defendant in a "tragic accident" involving a collision between two jet skis because the plaintiff signed an enforceable liability waiver in the contract).

In enforcing contractual liability disclaimers, courts sometimes discuss the practical issues surrounding a plaintiff's decision to enter into the contract in ways which undermine the claimant's efforts to avoid the contractual language they agreed to in the contract. *See Olivelli,* 225 F. Supp. 2d at 119 (noting that the scuba diving excursion was "a strictly voluntary recreational pursuit" and noting that the plaintiff's wife, who died during a scuba diving accident, was "free to decline [the] [d]efendant's services if she did not wish to assent to the terms of the waiver"); *Corby,* 1990 WL 488464, at *3 ("Passengers can protect themselves and their property by staying within the passenger areas of the vessel, where [the cruise ship operator] is liable."); *Nicole Morgan*, 2018 WL 1725550, at *10 ("[The] [p]laintiffs cannot escape the consequences of their voluntary decisions" to "bypass[] the contracts they signed to avoid the legal consequences of their free choice" when there is "no evidence of deceit, violence or intimidation exerted" on them to "coerce

or wrongfully induce them to sign the waivers, or that they did so solely by mistake, thinking they were signing something else."). *Cf. Matter of Carpe Diem 1969 LLC,* No. 2017-56, 2019 WL 3413841 (D.V.I. July 29, 2019) (release was unambiguous, not inconsistent with public policy nor the product of a monopoly or excessive bargaining power).

Conclusion

For the reasons discussed above, the Undersigned **respectfully recommends** that Judge Moreno grant a portion of RCCL's summary judgment motion based on the liability disclaimer in the ticket contract and **dismiss all claims with prejudice**.[9]

Objections

The parties will have fourteen (14) days from the date of being served with a copy of this Report and Recommendations within which to file written objections, if any, with United States District Judge Federico A. Moreno. Each party may file a response to the other party's objection within fourteen (14) days of the objection. Failure to file objections timely shall bar the parties from a de novo determination by the District Judge of an issue covered in the Report and shall bar the parties from attacking on appeal unobjected-to factual and legal conclusions contained in this Report except upon grounds of plain error

[9] RCCL further contends, in a separate section of its summary judgment motion, that the ticket contract also referenced a liability limitation under the Athens Convention, and that this contractual language limits the recovery. The Undersigned is not addressing that argument in this ruling, as it would, if successful, only *limit* the amount of the recovery (as opposed to *precluding* it entirely).

if necessary in the interest of justice. *See* 28 U.S.C. § 36(b)(1); *Thomas v. Arn*, 474 U.S. 140, 149 (1985); *Henley v. Johnson*, 885 F.2d 790, 794 (11th Cir. 1989); 11th Cir. R. 3-1 (2016).

RESPECTFULLY RECOMMENDED in Chambers, in Miami, Florida, on October 4, 2022.

Jonathan Goodman
UNITED STATES MAGISTRATE JUDGE

Copies furnished to:
The Honorable Federico A. Moreno
All Counsel of Record