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 9  
 10 **UNITED STATES DISTRICT COURT**  
**CENTRAL DISTRICT OF CALIFORNIA**

11 MICHAEL AUSTIN, WYONNIE  
 12 AUSTIN, KENNETH NICKENS and  
 13 LUCILLE NICKENS,

14 Plaintiff,

15 vs.

16 PRINCESS CRUISE LINES, LTD.,

17 Defendants.

CASE NO.: 2:20-CV-02531-RGK-SK

**DEFENDANT PRINCESS CRUISE  
LINE LTD.'S MOTION TO DISMISS**

Date: July 13, 2020  
 Time: 9:00 a.m.  
 Judge: Hon. R. Gary Klausner  
 Courtroom: 850

Magistrate: Hon. Steve Kim  
 Filed: 03/17/2020

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1 Defendant, PRINCESS CRUISE LINES, LTD. (hereafter “Defendant” or  
2 “PRINCESS”), hereby files this Motion to Dismiss the Complaint filed by Plaintiffs  
3 herein. In the interests of judicial economy, the court is hereby advised that this  
4 motion is identical to Motions to Dismiss filed in multiple other identical cases  
5 listed below.<sup>1</sup>

6 This motion is made following several conferences of counsel pursuant to  
7 L.R. 7-3 which took place between May 7, 2020 and June 1, 2020.

8 **I. INTRODUCTION**

9 Plaintiffs ask this Court to recognize an unprecedented theory of liability for  
10 emotional distress, unmoored from any physical harm, that is squarely foreclosed by  
11 Supreme Court precedent. If accepted, Plaintiffs’ theory would open the door to  
12 open-ended liability for every business, school, church, and municipality across  
13 America, stalling economic recovery in the wake of the COVID-19 pandemic and  
14 complicating the ability of businesses to reopen. Consistent with Supreme Court and  
15 Ninth Circuit precedent, this Court should reject Plaintiffs’ attempt to expand  
16 emotional distress liability and dismiss the Complaint.

17 Plaintiffs are among over 100 individuals who have filed nearly identical  
18 lawsuits against Defendant, each seeking one million dollars in compensatory  
19 damages for emotional distress based on their fear that they might have contracted  
20 COVID-19 during their cruise. Like dozens of virtually identical cases, these  
21 Plaintiffs embarked the *Grand Princess* cruise ship on February 21, 2020. (Compl. ¶¶

22 \_\_\_\_\_  
23 <sup>1</sup> *Weissberger v. Princess Cruise Lines Ltd*, No. 2:20-CV-02267-RGK-SK; *Abitbol v. Princess*  
24 *Cruise Lines Ltd*, No. 2:20-CV-02414-RGK-SK; *Austin v. Princess Cruise Lines Ltd*, No. 2:20-  
25 CV-02531-RGK-SK; *Gleason v. Princess Cruise Lines Ltd*, No. 2:20-CV-02328-RGK-SK;  
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*Cruise Lines Ltd*, No. 2:20-CV-03960-RGK-SK.

1 11.) Importantly, Plaintiffs do not claim they contracted COVID-19, that they  
 2 suffered any symptoms of COVID-19, or even that they ever came into direct  
 3 contact with the virus or anyone who had it. Rather, Plaintiffs seek damages for  
 4 emotional distress based solely on the fact that they were aboard the same 107,517  
 5 ton cruise ship along with approximately 3,700 other passengers and crew, some of  
 6 whom could have interacted with individuals from the preceding cruise who were  
 7 later diagnosed with COVID-19 after their cruise ended. (Compl. ¶¶ 22-23.)  
 8 Plaintiffs claim, without explanation, that merely by virtue of being on the same  
 9 cruise ship with some individuals that were on the prior cruise, they were at “actual  
 10 risk of immediate physical injury.” (Compl. ¶ 19.) While evidence will ultimately  
 11 show that Plaintiffs’ factual allegations against PRINCESS are inaccurate and  
 12 misleading, even accepting Plaintiffs’ allegations as true for the purposes of  
 13 considering this Motion to Dismiss, the Complaints make clear that Plaintiffs’  
 14 claims fail as a matter of law.

15 The Supreme Court has squarely held that a plaintiff cannot recover for  
 16 emotional distress stemming from potential exposure to a disease “unless, and until,  
 17 he manifests symptoms of a disease.” *Metro-North Commuter R. Co. v. Buckley*,  
 18 521 U.S. 424, 427 (1997). This rule applies to claims of emotional distress brought  
 19 under federal maritime law. *Negron v. Celebrity Cruises, Inc.*, 360 F. Supp. 3d 1358  
 20 (S.D. Fla. 2018). Supreme Court precedent thus requires dismissal here, because  
 21 Plaintiffs do not (and cannot) plausibly claim that they either contracted COVID-19  
 22 or had sufficient symptoms of disease to establish they had contracted the virus as a  
 23 result of Defendant’s conduct.

24 The Supreme Court has consistently reaffirmed this rule precisely to avoid the  
 25 oppressive societal costs that would occur if claims like Plaintiffs’ could go forward.  
 26 As the Court has explained, “contacts, even extensive contacts,” with potential  
 27 carriers of diseases “are common.” *Metro-North*, 521 U.S. at 434. And unlike with  
 28 physical injury, “there are no necessary finite limits on the number of persons who

1 might suffer emotional injury” as a result of fear of contracting an illness.  
2 *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546 (1994). If anyone  
3 potentially exposed to a contagion could obtain damages for emotional distress,  
4 “[t]he large number of those exposed and the uncertainties that may surround  
5 recovery” would prompt a “flood” of lawsuits, *Metro-North*, 521 U.S. at 434, and  
6 would lead to “the very real possibility of nearly infinite and unpredictable liability  
7 for defendants.” *Norfolk & W. Ry. Co. v. Ayers*, 538 U.S. 135, 146 (2003).

8 With the COVID-19 pandemic, a “flood” has already begun. In just its first  
9 few months, 24 cases have already been filed just from this one cruise ship, with  
10 similar cases filed relating to passengers on other cruises and other vessels. And  
11 there is no reason to think the flood will abate. As of the date of filing this brief,  
12 nearly 1.8 million cases of COVID-19 have been confirmed in the United States  
13 alone and 6.2 million cases worldwide.<sup>2</sup> Thousands of schools, nursing homes,  
14 shopping centers, stadiums, parks, and businesses across America have inevitably  
15 had cases on their premises. If Plaintiffs’ theory of liability succeeds, then all of the  
16 millions of individuals who passed through those venues can similarly claim to have  
17 suffered emotional distress if they learn that another person who was later diagnosed  
18 with COVID-19 was present. Straightforward application of the Supreme Court’s  
19 rules governing these fear of disease claims will prevent the cataclysmic result of  
20 allowing open-ended liability for all of these venues.

21 There is a second, independent barrier to Plaintiffs’ claims: In addition to  
22 requiring that a plaintiff contract the disease or at least show sufficient symptoms to  
23 suggest the plaintiff has contracted the disease, courts further require that the  
24 plaintiff’s fear must give rise to serious physical consequences before emotional  
25 distress damages can be recovered. Mere anxiety or fear about their health, as is  
26 alleged by Plaintiffs, is legally insufficient to support a claim for emotional distress

27 \_\_\_\_\_  
28 <sup>2</sup>See Coronavirus Disease 2019 (COVID-19), Cases in the U.S., Centers for Disease Control and  
Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/cases-updates/cases-in-us.html>.

1 in a fear of illness case. Just as Plaintiffs here do not claim a confirmed diagnosis of  
 2 COVID-19, nor symptoms suggesting they actually contracted the virus, they did  
 3 not suffer (nor do they allege to have suffered) the requisite serious physical  
 4 consequences stemming from their alleged emotional distress. Additionally,  
 5 Plaintiffs' request for punitive damages is flatly insufficient under the strict  
 6 standards governing punitive damages in maritime claims.

7 Plaintiffs' claims threaten the ability of businesses to reopen and for the  
 8 economy to resume. If individuals in Plaintiffs' situation can recover, businesses,  
 9 school, churches and other venues across America will be forced to keep their doors  
 10 closed long after state stay-at-home orders are lifted, lest they risk crushing liability  
 11 to each and every one of their invitees for emotional distress, based on the mere  
 12 possibility of infection, because some employee or other current or past customer of  
 13 the business was later discovered to have the virus. The likelihood of endless  
 14 liability for every business, church, school and other venue in America under  
 15 Plaintiffs' expansive theory is even more likely in the context of COVID-19, which  
 16 is now known to be transmitted by asymptomatic individuals which no defendant  
 17 could realistically detect with current testing limitations. The Supreme Court's  
 18 limits on emotional distress for fear of disease claims are intended to avoid exactly  
 19 that result, and a straightforward application of those limits here mandates dismissal.

## 20 **II. LEGAL STANDARD**

21 To survive a Rule 12(b)(6) motion, a complaint must allege "enough facts to  
 22 state a claim to relief that is plausible on its face." *Bell Atl. Corp. v. Twombly*, 550  
 23 U.S. 544, 570 (2007). "Factual allegations must be enough to raise a right to relief  
 24 above the speculative level, ... on the assumption that all the allegations in the  
 25 complaint are true (even if doubtful in fact)." *Id.* at 555 (citations omitted). "The  
 26 plausibility standard "asks for more than a sheer possibility that a defendant has  
 27 acted unlawfully." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). "A pleading that  
 28 offers labels and conclusions or a formulaic recitation of the elements of a cause of



1 action will not do.” *Id.*

### 2 **III. MEMORANDUM OF LAW**

3 Recognizing the potential for widespread liability in fear-of-disease cases,  
 4 courts apply two strict limits on such cases. First, the Supreme Court has held that a  
 5 plaintiff cannot recover for emotional distress stemming from alleged exposure to an  
 6 illness “unless, and until, he has symptoms of a disease.” *Metro-North*, 521 U.S. at  
 7 426-27. Second, courts independently require that a plaintiff plausibly allege serious  
 8 physical manifestations of their purported emotional distress. Plaintiffs have not  
 9 plausibly alleged either symptoms or a physical manifestation of their distress, and  
 10 thus their case must be dismissed under Rule 12(b)(6). Even if Plaintiffs’ claims  
 11 survive, their Complaint should be dismissed based on its failure to allege any facts  
 12 showing Plaintiffs ever came into actual contact with the virus and their request for  
 13 punitive damages should be dismissed or stricken.

#### 14 **A. Federal Maritime Law Applies to Plaintiffs’ Claims**

15 As Plaintiffs acknowledge by invoking this Court’s maritime jurisdiction and  
 16 stating that the case “involves a maritime tort” (Compl. ¶ 3), Federal maritime law  
 17 applies to Plaintiffs’ claims.<sup>3</sup> Maritime law applies when “(1) the alleged wrong  
 18 occurred on or over navigable waters, and (2) the wrong bears a significant  
 19 relationship to traditional maritime activity.” *Williams v. United States*, 711 F.2d  
 20 893, 896 (9th Cir.1983). “[V]irtually every activity involving a vessel on navigable  
 21 waters” is a “traditional maritime activity sufficient to invoke maritime  
 22 jurisdiction.” *See Taghadomi v. United States*, 401 F.3d 1080, 1087 (9th Cir. 2005)  
 23 ((quoting *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S.  
 24 527, 542 (1995))); *Wilkinson v. Carnival Cruise Lines, Inc.*, 920 F.2d 1560, 1654 n.  
 25 10 (11th Cir. 1991) (“In maritime tort cases such as this one, in which injury occurs  
 26 aboard a ... ship upon navigable waters, federal maritime law governs the

27 \_\_\_\_\_  
 28 <sup>3</sup> Plaintiffs’ Passage Contract applicable to their voyage similarly invokes maritime law. See, [https://www.princess.com/legal/passage\\_contract/plc.html](https://www.princess.com/legal/passage_contract/plc.html) at Section 1

1 substantive legal issues.").

2 **B. Plaintiffs Cannot Recover for Emotional Distress Because They Fail to**  
3 **Allege Facts Demonstrating They Were Within the Zone of Danger for**  
4 **Contracting COVID-19**

5 Under well-established principles that govern emotional distress claims  
6 brought under federal maritime jurisdiction, Plaintiffs’ claims should be dismissed.

7 ***1. To Recover for Emotional Distress Based on Exposure to a Disease,***  
8 ***Plaintiffs Must Plausibly Allege That They Contracted and Have***  
9 ***Suffered Symptoms of That Disease***

10 The Supreme Court has “sharply circumscribed” recovery under federal law  
11 for “stand-alone emotional distress claims”—*i.e.*, claims of emotional harm that are  
12 not “brought on by a physical injury or disease”—by requiring that the plaintiff be  
13 within the “zone of danger” of defendant’s allegedly negligent conduct. *Ayers*, 538  
14 U.S. at 147 (2003). The Supreme Court’s zone of danger test “confines recovery for  
15 stand-alone emotional distress claims to plaintiffs who: (1) ‘sustain a *physical*  
16 *impact* as a result of a defendant’s negligent conduct’; or (2) ‘are placed in  
17 *immediate risk of physical harm* by that conduct’—that is, those who escaped  
18 instant physical harm, but were ‘within the zone of danger of physical impact.’” *Id.*  
19 at 146 (emphasis added).

20 In *Metro-North*, the Supreme Court set forth a more specific, categorical  
21 version of the zone of danger test that governs claims of emotional distress based on  
22 alleged negligent exposure to a disease. Under *Metro-North*, a plaintiff alleging  
23 emotional distress from such exposure “cannot recover unless, and until, he  
24 manifests symptoms of a disease.” 521 U.S. at 426-27. In other words, there is no  
25 liability for emotional distress from fear of contracting a disease unless the Plaintiff  
26 either has been diagnosed with the disease or at least has sufficient symptoms to  
27 suggest they have the illness.

28 ///

1 The Supreme Court has since reaffirmed *Metro-North*'s categorical rule,  
2 explaining in *Ayers* that “emotional distress damages may not be recovered” by  
3 “disease-free” plaintiffs. 538 U.S. at 141. The Court specifically “decline[d] to blur,  
4 blend, or reconfigure” the “clear line” between “disease-free” plaintiffs, who cannot  
5 recover, and those “who suffer from a disease,” who can recover under certain  
6 conditions. *Id.*; *see also id.* at 146 (explaining that because the plaintiff in *Metro-*  
7 *North* “had a clean bill of health,” the Court “rejected his entire claim for relief”).  
8 The Court has also made clear that its rule applies not just to claims based on  
9 exposure to toxins like asbestos, but to any claim based on alleged exposure to a  
10 potential source of disease—specifically including “germ-laden air.” *Metro-North*,  
11 521 U.S. at 437.

12 By contrast, mere *exposure* to a contagion—even a significant and substantial  
13 exposure—is insufficient to establish someone is within the required “zone of  
14 danger,” under either the “physical impact” prong or the “immediate risk of physical  
15 harm” prong. In *Metro-North*, the plaintiff’s employer had negligently exposed him  
16 to a “massive” and “tangible” amount of asbestos, placing him in direct, close  
17 contact with asbestos for about an hour a day over a three-year period as he removed  
18 asbestos from pipes, often “covering himself with insulation dust that contained  
19 asbestos.” *Id.* at 427. The plaintiff feared that this intense prolonged exposure to  
20 asbestos increased his chances of dying from cancer and the plaintiff introduced  
21 expert testimony supporting that his risk of cancer had in fact increased. *Id.* The  
22 Supreme Court nonetheless held that the plaintiff could not recover for emotional  
23 distress since he did not ultimately contract cancer, holding that his exposure to the  
24 disease-causing substance alone was insufficient to establish emotional distress  
25 liability for fear of contracting a disease. *Id.* at 430 (quoting *Gottshall*, 512 U.S. at  
26 547-48). The Court explained that if “a simple (though extensive) contact with a  
27 carcinogenic substance” were sufficient to permit recovery, it would not “offer  
28 much help in separating valid from invalid emotional distress claims.” *Id.* at 434.

1 “Judges would be forced to make highly subjective determinations concerning the  
2 authenticity of claims for emotional injury, which are far less susceptible to  
3 objective medical proof than are their physical counterparts.” *Gottshall*, 512 U.S. at  
4 552.

5 In imposing these strict limits on emotional distress claims, the Supreme  
6 Court contrasted claims where a plaintiff alleges emotional harm “*brought on by a*  
7 *physical injury[] or disease,*” which are not subject to the same zone of danger  
8 restriction. *Ayers*, 538 U.S. at 147-48. For example, a plaintiff who has contracted  
9 asbestosis after asbestos exposure can “seek compensation for fear of cancer as an  
10 element of his asbestosis-related pain and suffering damages.” *Id.* at 158. But the  
11 same plaintiff who was exposed to asbestos and who did not contract asbestosis  
12 cannot.

13 The Supreme Court adopted the strict zone of danger test specifically to avoid  
14 the “uncabined recognition of claims for negligently inflicted emotional distress,”  
15 which would “hol[d] out the very real possibility of nearly infinite and unpredictable  
16 liability for defendants.” *Ayers*, 538 U.S. at 146 (2003) (quoting *Gottshall*, 512 U.S.  
17 at 546). And although the Supreme Court decisions developing the zone of danger  
18 test arose in the context of the Federal Employers’ Liability Act (FELA), the Ninth  
19 Circuit has expressly held that the test governs all emotional-distress claims,  
20 including those arising under federal maritime law. *See Stacy v. Rederiet Otto*  
21 *Danielsen, A.S.*, 609 F.3d 1033, 1035 (9th Cir. 2010); *see also, e.g., Chaparro v.*  
22 *Carnival Corp.*, 693 F.3d 1333, 1337-38 (11th Cir. 2012) (per curiam) (“federal  
23 maritime law has adopted ... the ‘zone of danger’ test”).

24 Indeed, courts apply *Metro-North* specifically to dismiss cruise line passenger  
25 lawsuits. For instance, in *Negron v. Celebrity Cruises, Inc.*, 360 F. Supp. 3d 1358  
26 (S.D. Fla. 2018), a passenger and her family were disembarked to a hospital in  
27 Barbados and claimed that, while at the hospital, they were exposed to Ebola virus.  
28 *Id.* at 1360. The passengers were not allowed to return to the ship, which they claim

1 added to their anxiety and they filed suit for “severe psychological damages,  
 2 emotional distress, much personal discomfort, uncertainty, fear and lack of safety,”  
 3 and “undue expenses and costs.” *Id.* Applying *Metro-North*, the Court dismissed  
 4 their claim, holding the passengers cannot recover for emotional harm when they  
 5 “do not specify any physical harm for which they seek recovery” and there were “no  
 6 plausible allegations that the Plaintiffs sustained a ‘physical impact’ merely by  
 7 being sent to a hospital” which had Ebola-infected patients in the same hospital. *Id.*  
 8 at 1362.

## 9 ***2. Plaintiffs’ Allegations Do Not Satisfy the Zone of Danger Test***

10 The hard-and-fast rule from *Metro-North*, precluding a plaintiff’s recovery for  
 11 emotional distress claims “unless, and until, he manifests symptoms of a disease,”  
 12 requires dismissal of this action. 521 U.S. at 427.

13 Plaintiffs do not allege that they contracted COVID-19 as a result of exposure  
 14 on the *Grand Princess*. Nor do they allege any symptoms. Indeed, they do not (and  
 15 cannot) allege that they ever came into close contact with the disease aboard the ship  
 16 such that they faced a probability of contracting it. Rather, Plaintiffs allege only that  
 17 other passengers on their vessel were exposed to passengers who previously had  
 18 disembarked the ship and were later confirmed to be infected with COVID-19.  
 19 Specifically, they state that “at least two passengers” who disembarked from the  
 20 previous cruise “had symptoms of the coronavirus,” and that “sixty two passenger  
 21 on board the Plaintiffs’ cruise ... were exposed to the passengers that were  
 22 confirmed to be infected, and later died.” Compl. ¶¶ 14-15. That is nowhere near  
 23 sufficient under *Metro-North*, which, again, squarely holds that a plaintiff cannot  
 24 recover “unless, and until, he manifests symptoms of a disease.” 521 U.S. at 427.<sup>4</sup>

25 \_\_\_\_\_  
 26 <sup>4</sup>Even if Plaintiffs *had* alleged symptoms, they would still face an independent bar to show that  
 27 their fear of contracting COVID-19 was “genuine and serious”—something beyond “general  
 28 concern for [one’s] future health.” *Ayers*, 538 U.S. at 157-58 (quoting *Smith v. A.C. & S., Inc.*, 843  
 F.2d 854, 859 (5th Cir.1988)); see *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009) (plaintiffs  
 seeking fear-of-disease damages “must satisfy a high standard in order to obtain them”).

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1 Even setting aside *Metro-North*'s categorical rule that requires a diagnosis or  
 2 symptoms of a disease as a threshold to recovery, Plaintiffs still would not have  
 3 stated a claim under the zone of danger test. Federal courts routinely dismiss  
 4 emotional distress claims when the plaintiff has not plausibly alleged that he  
 5 actually suffered a physical impact or faced an imminent threat of physical harm.  
 6 *See, e.g., Bonner v. Union Pac.*, 123 F. App'x 777, 778 (9th Cir. 2005); *Smith v.*  
 7 *Carnival Corp.*, 584 F. Supp. 2d 1343, 1355 (S.D. Fla. 2008); *Crawford v. Nat'l*  
 8 *R.R. Passenger Corp.*, No. 3:15-CV-131 (JBA), 2015 WL 8023680, at \*12 (D.  
 9 Conn. Dec. 4, 2015); *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 759 (M.D.N.C.  
 10 2014); *see also, e.g., Goodrich v. Long Island Rail Rd. Co.*, 654 F.3d 190, 199 (2d  
 11 Cir. 2011) (affirming dismissal of IIED claim where no allegation that plaintiff was  
 12 in zone of danger). Plaintiffs clearly have not claimed any "physical impact"; again,  
 13 it is black-letter law that an exposure to a source of disease is not a "physical  
 14 impact" under Supreme Court precedent. *Metro-North*, 521 U.S. at 430.

15 Nor have Plaintiffs plausibly alleged an "immediate risk of physical harm."  
 16 Plaintiffs' bare assertion that they "are at actual risk of immediate physical injury,"  
 17 is precisely the sort of "[t]hreadbare recital [] of the elements of a cause of action"  
 18 that cannot defeat a motion to dismiss. *Ashcroft v. Iqbal*, (2009) 556 U.S. 662, 678.  
 19 And even if mere exposure could create an "actual risk" under the zone of danger  
 20 test—and it cannot—Plaintiffs do not allege how, when or where they were actually  
 21 exposed to COVID-19. Plaintiffs conspicuously fail to assert that they came into  
 22 direct contact with any passengers or crew who had COVID-19, and instead assert  
 23 only that there were other passengers somewhere aboard the ship—one with  
 24 thousands of passengers and crew—who had come into contact with people who  
 25 were later discovered to be infected. Plaintiffs' Complaint alleges no potential route  
 26 of transmission.

27 ///

28 ///

1 To put this in perspective, there are 649 cities in California with populations  
2 smaller than the 3,700-person population of the *Grand Princess*.<sup>5</sup> If Plaintiffs’  
3 allegation that merely being in the same population of 3,700 people is sufficient to  
4 satisfy the zone of danger requirement, then anyone who lived in any of those 649  
5 cities could become subject to emotional distress liability whenever they invited  
6 anyone onto their premises if it was later discovered someone else in the town had  
7 COVID-19.

8 Plaintiffs’ failure to allege direct exposure makes their claim doubly deficient  
9 under *Metro-North*. The plaintiff in *Metro-North* had been consistently and  
10 intensely exposed to asbestos daily basis for a three-year period, and *still* the Court  
11 foreclosed recovery. *Metro-North*, 521 U.S. at 427. Plaintiffs allege nothing of the  
12 sort here.

13 Moreover, now that the window of potentially contracting COVID-19 has  
14 long passed, Plaintiffs’ claim must fail under the widely accepted, independent rule  
15 that if “at the time the court reviews a claim, a plaintiff who no longer fears  
16 contracting the disease or that risk, may not pursue a claim for emotional distress  
17 based on the earlier fear.” *Naeyaert v. Kimberly-Clark Corp.*, 2018 WL 6380749, at  
18 \*8 (C.D. Cal. Sept. 28, 2018). This rule, consistent with the zone of danger test,  
19 ensures that only those whose fears actually manifest in the form of an actual  
20 diagnosis can recover, in the interest of preventing a “flood” of cases inherently  
21 “less susceptible to objective medical proof than are their physical counterparts.”  
22 *Gottshall*, 512 U.S. at 552.

23 Cases that *do* find an immediate risk of harm provide a helpful contrast to  
24 Plaintiffs’ inadequate claims here. These cases involve “*threatened physical contact*  
25 that caused, or might have caused, *immediate traumatic harm*.” *Metro-North*, 521  
26 U.S. at 430 (emphasis added) (collecting cases); *see, e.g., Stacy*, 609 F.3d at 1035

27  
28 <sup>5</sup> [https://www.california-demographics.com/cities\\_by\\_population](https://www.california-demographics.com/cities_by_population)

1 (freighter nearly struck plaintiff's vessel and then struck another ship, killing its  
2 captain); *Sawyer Bros., Inc. v. Island Transporter, LLC*, 887 F.3d 23, 39 (1st Cir.  
3 2018) (plaintiffs were aboard ferry that nearly capsized); *In re Clearsky Shipping*  
4 *Corp.*, No. Civ. 96-4099, 2002 WL 31496659, \*1 (E.D. La. Nov. 7, 2002) (plaintiff  
5 was aboard a docked casino boat as a vessel collided with nearby wharf); *Hutton v.*  
6 *Norwegian Cruise Line Ltd.*, 144 F.Supp.2d 1325 (S.D. Fla. 2001) (plaintiffs aboard  
7 ship that collided with another vessel). Courts' consistent focus on near-miss  
8 collisions is unsurprising. The Supreme Court in adopting the zone of danger test  
9 emphasized that it would allow recovery for "emotional injury caused by the  
10 apprehension of *physical impact*." *Gottshall*, 512 U.S. at 556. (emphasis added).  
11 And in subsequently describing the test, it has equated being "placed in immediate  
12 risk of physical harm" with "escap[ing] *instant physical harm*." *Ayers*, 538 U.S. at  
13 146. Expanding the category of "immediate risk" claims to cover alleged exposure  
14 to a communicable disease which the Plaintiff did not contract would be  
15 unprecedented.

16 Because Plaintiffs were not within the zone of danger under *Metro-North*,  
17 their allegations of emotional distress, no matter how severe, are insufficient to  
18 survive a Motion to Dismiss. In *Gottshall*, one of the plaintiffs had suffered  
19 "insomnia, headaches, depression, and weight loss," followed by a "nervous  
20 breakdown." 512 U.S. at 539. The other had experienced "nausea, insomnia, cold  
21 sweats, and repetitive nightmares," plus weight loss, anxiety, and suicidal ideations.  
22 *Id.* at 536-37. The Supreme Court held that even these significant emotional injuries  
23 were not compensable because they did not stem from either a physical impact or a  
24 near-miss physical impact—*i.e.*, neither plaintiff was in the zone of danger. Indeed,  
25 even extremely grave physical results cannot be redressed unless the plaintiff was in  
26 the zone of danger. *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 757 (M.D.N.C.  
27 2014) (no recovery for "self-inflicted gunshot wound" because plaintiff was never in  
28 zone of danger).



1 Plaintiffs’ allegations of gross negligence are similarly barred by the Supreme  
 2 Court’s analysis. *Metro-North’s* zone of danger test governs all species of tort  
 3 claims seeking emotional distress, whether or not styled as claims of “negligent  
 4 infliction of emotional distress.” *See Smith v. Union Pac. R.R. Co.*, 236 F.3d 1168,  
 5 1171 (10th Cir.2000) (*Metro-North* and *Gottshall* “focused on whether emotional  
 6 injuries were generally compensable under FELA, rather than upon the specific  
 7 cause of action.”); *Fulk v. Norfolk S. Ry. Co.*, 35 F. Supp. 3d 749, 755 (M.D.N.C.  
 8 2014) (“Federal courts have consistently applied the zone of danger test to all stand-  
 9 alone emotional distress claims.”).

10 ***3. Finding Plaintiffs’ Claims Sufficient Would Invite the Exact Policy***  
 11 ***Consequences the Supreme Court Warned Against***

12 COVID-19 is now known to be a pandemic, is becoming widespread and can  
 13 be transmitted through airborne droplets. Many of its carriers can be pre-  
 14 symptomatic or asymptomatic, thereby not exhibiting any symptoms.<sup>6</sup> If a plaintiff  
 15 can recover for emotional distress based on a fear of exposure to a widespread  
 16 disease like COVID-19, there will be no limit on who can recover in the wake of the  
 17 pandemic. Any business, school, church or other venue alleged to have opened its  
 18 doors a day too soon could be open to claims of negligence by anyone who stepped  
 19 inside and afterward fears they may have come into contact with a source of  
 20 COVID-19. This concern is even more significant in relation to a widespread and  
 21 often undetectable disease like COVID-19 which has infected more than 1.7 million  
 22 people to date. Airline travel and public transportation will prove impossible.  
 23 Individuals who attend a football game, transit through an airport, eat at a restaurant,  
 24 or shop at a mall or store will all have potential emotional distress claims based

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 26 <sup>6</sup> “Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease  
 27 (COVID-19), Centers for Disease Control and Prevention (May 20, 2020),  
 28 <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-patients.html>;  
 “How to Protect Yourself and Others,” Centers for Disease Control and Prevention,  
<https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

1 entirely on having been allowed into a venue where someone later is found to have  
2 tested positive for COVID-19.

3         Allowing Plaintiffs’ claims to proceed, in other words, endorses the “nearly  
4 infinite and unpredictable liability for defendants” that *Gottshall* and *Metro-North*  
5 expressly set out to prevent. *Ayers*, 538 U.S. at 146. Courts will be confronted with a  
6 “flood” of cases in which they “would be forced to make highly subjective  
7 determinations concerning the authenticity of claims for emotional injury, which are  
8 far less susceptible to objective medical proof than are their physical counterparts.”  
9 *Gottshall*, 512 U.S. at 552. Businesses will in effect become insurers for the mental  
10 well-being of everyone who passes through their doors. Such a burden would be  
11 impossible for any business, which is why the law categorically rejects such claims.

12         Rejection of Plaintiffs’ unprecedented theory is all the more important in the  
13 maritime context. A “fundamental interest of federal maritime jurisdiction” is “the  
14 protection of maritime commerce.” *The Dutra Grp. v. Batterton*, 139 S. Ct. 2275,  
15 2287 (2019) (quotation marks omitted). The Supreme Court, recognizing that  
16 maritime law is increasingly legislative in nature, has urged courts to resist judicial  
17 expansions of liability and remedies that would “frustrate” this protective purpose.  
18 *Id.* Allowing unpredictable and potentially crushing liability for ocean carriers to  
19 potentially all of their passengers in the wake of a pandemic would so seriously  
20 inhibit maritime commerce that, even if *Metro-North* did not squarely forbid  
21 liability by its terms, principles of maritime law would independently require  
22 dismissal.

23         **C. Plaintiffs’ Claims Also Fail Because They Do Not Allege That Their**  
24         **Distress Has Caused a Non-Trivial Physical Injury**

25         To further guard against open-ended liability based on fear of illness, courts  
26 impose, as an independent and additional requirement, that the claimed emotional  
27 distress must cause non-trivial physical consequences. In other words, “[g]eneral  
28 maritime law requires an ‘objective manifestation’ of the emotional injury—a

1 physical injury or effect which arises from the emotional injury.” *Wylter v. Holland*  
2 *Am. Line-USA, Inc.*, 2002 WL 32098495, at \*1 (W.D. Wash. Nov. 8, 2002); *accord*  
3 *Martinez v. Bally’s Louisiana, Inc.*, 244 F.3d 474, 477-478 (5th Cir. 2001); *Duet v.*  
4 *Crosby Tugs, LLC*, 2008 WL 5273688, at \*3 (E.D. La. Dec. 16, 2008) (“Plaintiff’s  
5 emotional distress was not provoked by a physical injury, rather, plaintiff’s physical  
6 injury was provoked by emotional distress”); *Tassinari v. Key W. Water Tours, L.C.*,  
7 480 F. Supp. 2d 1318, 1325 (S.D. Fla. 2007) (“[S]tand-alone claims for negligent  
8 infliction of emotional distress require a physical manifestation of emotional  
9 injury.”).

10 Courts impose this physical-harm requirement because it “furnishes a  
11 ‘guarantee of genuineness’ to the fact-finder, thus limiting the prospects for a flood  
12 of fraudulent claims.” *Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403,  
13 407 (S.D. Fla. 1995); *see also Tassinari*, 480 F. Supp. 2d at 1325 (S.D. Fla. 2007)  
14 (citing “the beneficial public policy of placing an objective and easily applied  
15 restriction on frivolous claims”).

16 Under this rule, minor physical consequences are not sufficient. *See, e.g.*,  
17 *Williams v. Carnival Cruise Lines, Inc.*, 907 F. Supp. 403, 407 (S.D. Fla. 1995)  
18 (plaintiffs could not recover even though they were in the zone of danger because  
19 they “complain[ed] only of fear and/or seasickness which in most cases lasted no  
20 more than a few days”); *Ainsworth v. Penrod Drilling Co.*, 972 F.2d 546 (5th Cir.  
21 1992) (barring recovery for emotional distress where the plaintiff suffered “trivial”  
22 injuries, including upset stomach, headache, and pulled muscles); *Ellenwood v.*  
23 *Exxon Shipping*, 795 F. Supp. 31, 35 (D. Me. 1992) (loss of sleep and loss of  
24 appetite insufficient).

25 Plaintiffs’ Complaint contains no allegation of any physical manifestations of  
26 their emotional distress, yet alone the serious and significant physical manifestation  
27 which is required. As explained, such allegations are a prerequisite to stating a claim  
28 for emotional distress, even when the plaintiff meets the zone of danger test (which

1 Plaintiffs here have not). Plaintiffs’ allegations that they “are suffering from  
2 emotional distress” and are “traumatized” from fear are exactly the sorts of  
3 generalized allegations of fear and anxiety that courts have held are clearly  
4 insufficient to support a claim for emotional distress. *Supra*; *see, e.g., Williams v.*  
5 *Carnival Cruise Lines, Inc.*, 907 F. Supp. 403, 407 (S.D. Fla. 1995). Thus, even if  
6 Plaintiffs had adequately pled both that they contracted COVID-19 as a result of  
7 Defendant’s conduct and had pled facts sufficient to establish they were actually  
8 within the zone of danger to contract the virus, their claims would nonetheless fail  
9 for the separate reason that they have not adequately pled a physical manifestation  
10 of their emotional distress.

11 **D. Plaintiffs’ Claims for Punitive Damages are Foreclosed as a Matter of**  
12 **Law and Should be Dismissed or Stricken**

13 Finally, even if Plaintiffs’ claims could go forward on the merits, Plaintiffs’  
14 claims for punitive damages are foreclosed as a matter of law and should therefore  
15 be dismissed under Rule 12(b)(6) or stricken under Rule 12(f).

16 The Supreme Court has recently clarified several important limitations on the  
17 availability of punitive damages in maritime cases, all of which make clear that  
18 punitive damages are unavailable in cases alleging only emotional distress—at least  
19 where that distress is not intentionally inflicted. In *The Dutra Group v. Batterton*,  
20 139 S. Ct. 2275 (2019), the Supreme Court set forth a framework for deciding when  
21 punitive damages are available under general maritime law, and then applied that  
22 framework to hold that punitive damages are unavailable in claims for  
23 unseaworthiness. First, where there is no federal statute authorizing punitive  
24 damages, courts must determine “whether punitive damages have traditionally been  
25 awarded” in the category of case at issue. *Id.* at 2283. If they are not, then the  
26 imposition of punitive damages is precluded. *See Dunn v. Hatch*, 792 F. App’x 449,  
27 451 (9th Cir. 2019) (*Batterton* “held that punitive damages cannot be recovered on  
28 claims in admiralty where there is no historical basis for allowing such damages”).

1 If the imposition of punitive damages would create “bizarre disparities in the law,”  
2 that further counsels against their availability. *Batterton*, 139 S. Ct. at 2287. And in  
3 determining whether to permit punitive damages, courts must proceed “cautiously in  
4 light of Congress’s persistent pursuit of uniformity in the exercise of admiralty  
5 jurisdiction.” *Id.* at 2278 (*Miles v. Apex Marine Corp.*, 498 U.S. 19, 27 (1986)).

6 Under this framework, Plaintiffs cannot recover punitive damages. While the  
7 Ninth Circuit has occasionally upheld the imposition of punitive damages for certain  
8 claims under general maritime law, *see Churchill v. F/V Fjord*, 892 F.2d 763, 772  
9 (9th Cir. 1998), Defendant is aware of no binding precedent supporting the  
10 imposition of punitive damages for negligently (even grossly negligently) inflicted  
11 emotional distress. To the contrary, any “tradition” of punitive damages in maritime  
12 cases is limited to cases where the defendant’s conduct is truly “outrageous”—cases  
13 of “enormity or deplorable behavior.” *Dunn*, 792 F. App’x at 452. And some courts  
14 have held expressly that punitive damages are unavailable to “personal injury  
15 claimants ... except in exceptional circumstances such as willful failure to furnish  
16 maintenance and cure to a seaman (who are viewed as special wards of the court  
17 requiring additional protection), intentional denial of a vessel owner to furnish a  
18 seaworthy vessel to a seaman, and in those very rare situations of intentional  
19 wrongdoing.” *In re Amtrak Sunset Ltd. Train Crash in Bayou Canot, Ala. on Sept.*  
20 *22, 1993*, 121 F.3d 1421, 1429 (11th Cir. 1997). As in *Batterton*, the absence of case  
21 law supporting the availability of punitive damages in suits for negligently inflicted  
22 emotional distress “is practically dispositive.” *Id.* at 2284.

23 But even if the history of punitive damages under maritime law were more  
24 equivocal (which it is not), the imposition of punitive damages here would create the  
25 same “bizarre disparit[y] in the law” that demanded foreclosure of punitive damages  
26 in *Batterton*. The Court there noted that, if punitives were permitted for  
27 unseaworthiness claims, “a mariner could make a claim for punitive damages if he  
28 was *injured* onboard a ship, but,” because of the Court’s prior decision in *Miles*, “his

1 estate would lose the right to seek punitive damages if he *died* from his injuries.”  
 2 139 S. Ct. at 2287 (emphasis added). The same disjoint would occur here, as the  
 3 Death on the High Seas Act (DOHSA) expressly forbids the imposition of punitive  
 4 damages for deaths caused by incidents more than three miles offshore. *See* 46  
 5 U.S.C. § 30303 (allowing damages only for “pecuniary loss”); *Batterton*, 139 S. Ct.  
 6 at 2285 n.8. Under Plaintiffs’ novel theory, passengers alleging exposure to a  
 7 disease on the high seas can freely recover punitive damages if they never  
 8 contracted the disease, and yet, if those same passengers died from the disease,  
 9 DOHSA would squarely bar their claim for punitive damages. To avoid that  
 10 arbitrary differential treatment, and to properly “pursue the policy expressed in  
 11 congressional enactments” like DOHSA, punitive damages must be foreclosed. *Id.*  
 12 at 2281.

13 The policies that drive strict application of the zone of danger test in  
 14 emotional-distress cases, *see supra* section III.B, further cement that punitive  
 15 damages cannot be available in cases involving emotional distress based on alleged  
 16 disease exposure. To the extent that liability *alone* did not create the “infinite and  
 17 unpredictable liability,” *Ayers*, 538 U.S. at 146, the “stark unpredictability of  
 18 punitive awards,” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008), would  
 19 make that threat an unavoidable reality. The mere allegation that plaintiff might be  
 20 entitled to recover punitive damages will only further the flood of litigation that the  
 21 Supreme Court has so clearly warned against in fear of disease cases. The open-  
 22 ended threat of punitive damages would encourage more frivolous fear of disease  
 23 cases and hobble “maritime commerce”—the “fundamental interest served by  
 24 federal maritime jurisdiction.” *Batterton*, 139 S. Ct. at 2287.<sup>7</sup>

25 ///

26 \_\_\_\_\_  
 27 <sup>7</sup> Even if punitive damages were available, the Supreme Court has held that “under maritime law,  
 28 the maximum ratio of punitive damages to compensatory damages is 1-1.” *Exxon Valdez v. Exxon Mobil*, 568 F.3d 1077, 1079 (9th Cir. 2009). If this Court does not dismiss or strike the request for punitive damages altogether, the Court should limit Plaintiffs’ damages accordingly.

1 **V. CONCLUSION**

2 For the foregoing reasons, Defendant requests that the Court grant its motion  
3 to dismiss and to dismiss this case with prejudice.  
4

5 DATED: June 2, 2020

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