UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 20-21569-CIV-UNGARO

ALEXANDRA NEDELTCHEVA,
ANDREW COLEMAN, and
JULIA MELIM, on behalf of themselves
and all others similarly situated,

Plaintiffs,

vs.

CELEBRITY CRUISES INC.,

Defendant.
_____/

DEFENDANT'S MOTION TO DISMISS THE AMENDED COMPLAINT

Defendant Celebrity Cruises Inc. ("Celebrity"), pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, moves for the entry of an Order dismissing the amended complaint [DE 14]. The grounds for this Motion are:

I. PRELIMINARY STATEMENT

COVID-19 has thrown our planet into the throes of a global pandemic. COVID-19 can be deadly. According to Johns Hopkins University's authoritative tracker, COVID-19 has tragically caused more than 470,000 deaths worldwide.[1] As stark and striking as that number is, however, Johns Hopkins reports that only in "rare cases" does COVID-19 cause "severe respiratory

[1] https://coronavirus.jhu.edu/map.html (last visited on June 23, 2020).

problems, kidney failure or death."[2] Johns Hopkins further reports that, as of June 3, 2020, approximately "80-90% of infections are not severe and many may be asymptomatic."[3]

One of the three plaintiffs in this action alleges that she contracted COVID-19. Fortunately, the only symptoms that she claims to have experienced are those that are also caused by the common cold and seasonal flu: coughing, fever, aches, chills, etc. The other two plaintiffs allege that they did not contract COVID-19 at all, but were exposed to the virus.

Celebrity is moving to dismiss the amended complaint, including on the basis that the plaintiffs' claims are trivial. In doing so, Celebrity in no way seeks to trivialize COVID-19. The gravity of COVID-19 is undeniable in light of the fact that there are families, friends, and loved ones around the world who are grieving the deaths of more than 470,000 people. However, the plaintiffs in this action did not suffer the tragic consequences that are sometimes caused by COVID-19. Claims seeking to recover money damages for having cold- and flu-like symptoms, and for mere exposure to illness, are not actionable.

II. INTRODUCTION

Alexandra Nedeltcheva was the sole plaintiff in the initial "class action" complaint [DE 1]. Celebrity moved to dismiss Ms. Nedeltcheva's complaint [DE 13]. Celebrity argued that dismissal was warranted because Ms. Nedeltcheva did not allege that she personally incurred any injury or damages, and her standing could not be premised upon allegations that unnamed members of the putative class incurred injury and damages.

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[2] https://www.hopkinsmedicine.org/health/conditions-and-diseases/coronavirus (section marked, "What are Symptoms of COVID-19?").

[3]https://www.hopkinsguides.com/hopkins/view/Johns_Hopkins_ABX_Guide/540747/all/Coronavirus_COVID_19__SARS_CoV_2 (section marked "disease spectrum").

An amended "class action" complaint was filed in lieu of a response to the motion to dismiss [DE 14]. The amended complaint alleges that Ms. Nedeltcheva contracted COVID-19 while working aboard a cruise chip operated by Celebrity (Am. Compl., ¶¶11, 37(nn)). Ms. Nedeltcheva alleges that she had "severe cough, shortness of breath, chest pain, respiratory distress, chills, muscle ache, fever, physical and emotional fatigue, anxiety, depression, difficulty sleeping, and nightmares" (*Id.*, ¶37(nn)).

The amended complaint adds two new plaintiffs. Andrew Coleman and Julia Melim allege that they, too, worked aboard cruise ships operated by Celebrity (*Id.*, ¶13). Mr. Coleman and Ms. Melim, however, do not allege that they contracted COVID-19 or otherwise experienced any symptoms whatsoever. They allege only that they were exposed to COVID-19 (*Id.*, ¶65, 71, 77, 84).

On the basis of those allegations, various combinations of the three plaintiffs purport to assert claims on behalf of themselves and a putative class of similarly situated people. Ms. Nedeltcheva purports to assert claims for "Jones Act negligence" (Count I) and unseaworthiness (Count II). All three plaintiffs purport to assert claims for "failure to provide maintenance and cure" (Count III) and "failure to provide prompt, proper and adequate medical care" (Count IV). Mr. Coleman and Ms. Melim purport to assert a claim for negligent infliction of emotional distress (Count V). The amended complaint should be dismissed in its entirety.

III. ARGUMENT

A. The Amended Complaint Should Be Dismissed Because It Is A Shotgun Pleading.

The amended complaint should be dismissed at the threshold because it is a shotgun pleading. As set out in greater detail in the next paragraph, each count of the amended complaint sets out myriad ways in which Celebrity allegedly breached duties that it supposedly owed to the

plaintiffs. Courts in this District have held, time and again, that this shotgun-style of pleading is inappropriate and requires dismissal. *See, e.g., Thanas v. Royal Caribbean Cruises Ltd.*, 2019 WL 1755510, at *1 (S.D. Fla. Apr. 19, 2019) ("Through a single 'negligence' count, Thanas asserts, without limitation, theories of liability for failure to investigate, failure to instruct, failure to warn, and negligent retention. These are separate causes of action that must be asserted independently and with supporting factual allegations."); *Kulakowski v. Royal Caribbean Cruises Ltd.*, 2017 WL 237642, at *2 (S.D. Fla. Jan. 18, 2017) ("[T]he Complaint runs afoul of federal pleading requirements by including nineteen separate alleged breaches of the duty of care in a single count for negligence and by failing to allege facts to support the vast majority of the alleged breaches."); *Brown v. Carnival Corp.*, 202 F.Supp.3d 1332, 1338 (S.D. Fla. 2016) ("[T]he Court also finds that Plaintiff has engaged in a shotgun-style of pleading in reciting forty-one alleged breaches. Upon a close examination, many of the alleged breaches are contradictory to each other and are unsupported by law in that they attempt to impose a heightened duty upon Carnival as the shipowner."); *Kercher v. Carnival Corp.*, 2019 WL 1723565, at *1 (S.D. Fla. Apr. 18, 2019) ("Through a single 'negligence' count, Krecher asserts multiple distinct theories of liability. Each theory is a separate cause of action and must be asserted independently and with supporting factual allegations."); *Richards v. Carnival Corp.*, 2015 WL 1810622, at **2-3 (Apr. 21, 2015) ("In her negligence count, Richards alleges a number of acts and omissions that caused Carnival to breach its duty . . . . This laundry list of allegations does not comport with the applicable standards under maritime law."); *Doe v. NCL (Bahamas) Ltd.*, 2016 WL 6330587, at *3 n.1 (S.D. Fla. Oct. 27, 2016); *Garcia v. Carnival Corp.*, 838 F.Supp.2d 1334, 1337 (S.D. Fla. 2012).

Those decisions perfectly describe the shotgun-style amended complaint that was filed here:

- Count I, for negligence, alleges without limitation that there are seventeen separate ways in which Celebrity breached various duties supposedly owed to Ms. Nedeltcheva (Am. Compl., ¶¶55(a)-(q)).

- Count II, for unseaworthiness, alleges without limitation that there are fourteen separate ways in which Celebrity breached various duties supposedly owed to Ms. Nedeltcheva (Am. Compl., ¶¶60(a)-(n)).

- Count III, for maintenance and cure, alleges in a single sentence that Celebrity "willfully **and/or** callously delayed, failed, **and/or** refused to provide Plaintiffs with their full entitlement to maintenance and cure, **and/or** Defendant willfully **and/or** callously delayed, failed, **and/or** refused to provide Plaintiffs with the level of medical treatment **and/or** maintenance they require to recover from their COVID-19 related physical injuries **and/or** emotional injuries associated with being unreasonably exposed to same, **and/or** reasonably support themselves as they convalesce" (Am. Compl., ¶69) (emphasis added). A mathematician could figure out the precise number of combinations that presents, but the exhaustive and exhausting use of "and/or" in that ***single sentence*** gives rise to more than ten combinations of alleged breaches.

- Count IV, "failure to provide prompt, proper and adequate medical care," alleges without limitation that there are six separate ways in which Celebrity breached various duties supposedly owed to Ms. Melim and Mr. Coleman (Am. Compl., ¶78(a)-(f)).

- Count V, for negligent infliction of emotional distress, alleges without limitation that there are seventeen separate ways in which Celebrity breached various duties supposedly owed to Ms. Melim and Mr. Coleman (Am. Compl., ¶¶83(a)-(q)).

The amended complaint is a shotgun pleading that should be dismissed.

B. The Amended Complaint Should Be Dismissed Because It Involves *De Minimus* Intangible Injuries That Cannot Be Measured.

Ms. Nedeltcheva alleges that she contracted COVID-19 and had symptoms that are indistinguishable from those caused by the common cold and flu, such as coughing, chills, aches, fever, and fatigue (Am. Compl., ¶37(nn)). As for Ms. Melim and Mr. Coleman – and putting aside, for now, that there is no such thing as a claim based upon mere exposure to illness – they allege that they were exposed to COVID-19, but they do not allege that they contracted the illness or had any physical symptoms whatsoever (*Id.*, ¶65, 71, 77, 84). These three plaintiffs thus propose to

assert claims in federal court seeking to recover money damages because Ms. Nedeltcheva had cold- and flu-like symptoms, and because Ms. Melim and Mr. Coleman were exposed to the virus. Their claims should be dismissed because their alleged intangible injuries are *de minimus* and incapable of being measured.

De minimus non curat lex means "[t]he law does not concern itself with trifles. — Often shortened to *de minimis*." *See* Black's Law Dictionary (11th ed. 2019). "Its particular function is to place outside the scope of legal relief the sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of." *See Swick v. City of Chicago*, 11 F.3d 85, 87 (7th Cir. 1993). "[I]f a loss is not only small but also indefinite, so that substantial resources would have to be devoted to determining whether there was any loss at all, courts will invoke the *de minimus* doctrine and dismiss the case, even if it is a constitutional case. The costs of such litigation overwhelm the benefits." *See Hessel v. O'Hearn*, 977 F.2d 299, 303 (7th Cir. 1992).

In seeking to recover money damages for (a) having cold- and flu-like symptoms such as coughing, fever, chills, body aches, etc., and (b) mere exposure to people who were sick, the amended complaint is seeking to recover for what is quintessentially the "sorts of intangible injuries normally small and invariably difficult to measure that must be accepted as the price of living in society rather than made a federal case out of." *See Swick*, 11 F.3d at 87. The cost of litigating such claims in federal court – including how to assign monetary value to, or quantify monetary compensation for, a cough, fever, chills, aches, etc. – overwhelms any benefit that could be obtained by a claimant. *See, e.g., Hessel*, 977 F.2d at 303; *Von Nessi v. XM Satellite Radio Holdings, Inc.*, 2008 WL 4447115, at *6 (D.N.J. Sept. 26, 2008) (collecting decisions, including *Alan's of Atlanta, Inc. v. Minolta Group*, 903 F.3d 1414, 1421 (11th Cir. 1990)) ("This Court

invokes the doctrine of *de minimus non curat lex*, which translates as the law does not care for, or take notice of trifling matters. The doctrine applies where no damage is implied by law from the wrong, and only trifling or immaterial damage results therefrom.") (internal quotation marks and citations omitted.").

Moreover, allowing the plaintiffs to proceed with such claims would open the metaphorical floodgates. If these plaintiffs can sue, then so too can the restaurant patron who catches a cold because diners at a nearby table were sick and sneezing, or because the patron's table was not cleaned well enough between seatings and one of the table's prior occupants was sick. The same applies to the person who worries that she might become sick – or later actually develops a fever – after sitting next to someone on the Metrorail who had glassy eyes and was coughing into a balled-up tissue during the entire ride to downtown.

In considering whether there is or should be a "right to recover," courts properly examine "the potential for a flood of trivial suits, the possibility of fraudulent claims that are difficult for judges and juries to detect, and the specter of unlimited and unpredictable liability. Although some of these grounds have been criticized by commentators, they continue to give caution to courts." *See Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 557 (1994); *see also Metro-North Commuter Railroad Co. v. Buckely*, 424 U.S. 424, 433 (1997) (citing *Gottshall*, 512 U.S. at 557); *Schlictman v. New Jersey Highway Authority*, 579 A.2d 1275, 1280 (N.J. Super Ct. Law Div. 1990), *cited with approval in Hessel*, 977 F.2d at 303 (Posner, J.) ("If the right of recovery in this class of cases should be once established, it would naturally result in a flood of litigations in cases where the injury complained of may be easily feigned without detection, and where the damages must rest upon pure conjecture and speculation . . . . a wide field would be opened for unrighteous

or speculative claims. A wise public policy requires us to hold such injuries to be non-actionable.") (internal quotation marks and citations omitted).

The amended complaint should be dismissed with prejudice because Ms. Nedeltcheva's claims that she had cold- and flu-like symptoms, and Ms. Melim's and Mr. Coleman's claims that they were exposed to the virus, are *de minimus*.

C. Ms. Melim's and Mr. Coleman's Claims Should Be Dismissed Because They Have Not Alleged Injury Or Damages, And They Cannot Recover For Negligently Inflicted Emotional Distress.

Ms. Melim and Mr. Coleman admit in the amended complaint that they never contracted COVID-19. They also admit that they have never had any symptoms associated with COVID-19. Instead, Ms. Melim and Mr. Coleman allege only that they were exposed to COVID-19. On that basis, Ms. Melim and Mr. Coleman purport to state claims for failure to provide maintenance and cure (Count III), "failure to provide prompt, proper and adequate medical care" (Count IV), and negligent infliction of emotional distress (Count V).[4] Ms. Melim's and Mr. Coleman's claims should be dismissed with prejudice.

It is axiomatic that an essential element of ***each*** of Ms. Melim's and Mr. Coleman's claims is that they must have been ***injured and suffered damages*** as a result of Celebrity's alleged conduct. *See, e.g., Fitzgerald v. United States Line Co.*, 374 U.S. 16, 18 (1963) ("Although remedies for negligence, unseaworthiness, and maintenance and cure have different origins and may on occasion call for application of slightly different principles and procedures, they nevertheless, when based on one unitary set of circumstances, serve the same purpose of ***indemnifying a seaman for damages caused by injury*** . . . .") (emphasis added); *Smith v. BP*

[4] Counts III and IV are also asserted by Ms. Nedeltcheva. Count V is asserted solely by Ms. Melim and Mr. Coleman.

America, Inc., 522 F. App'x 859, 864-65 (11th Cir. 2013) ("[A] seaman who is ***injured*** by an unseaworthy condition on a ship has a right to recovery against the owner of the vessel beyond maintenance and cure.") (emphasis added); *Crow v. Cooper Marine & Timberlands Corp.*, 2009 WL 103500, at *3 (S.D. Ala. Jan, 15, 2009) ("To recover for maintenance and cure, a plaintiff need only prove . . . ***he became ill or injured while in the vessel's service[,] and . . . he lost wages or incurred expenditures relating to the treatment of the illness or injury***.") (emphasis added); *Garay v. Carnival Cruise Line, Inc.*, 904 F.2d 1527, 1533 n.6 (11th Cir. 1990) ("[T]he shipowner . . . promptly must provide adequate emergency medical care (as is reasonable under the circumstances) for the ***injured seaman***.") (parenthetical in original) (emphasis added); *Joyce v. Atlantic Richfield Co.*, 651 F.2d 676, 685 (10th Cir. 1981) (cited in ¶78 of the amended complaint) ("Negligent failure to provide prompt medical attention to a ***seriously injured seaman*** gives rise to a separate claim for relief.") (emphasis added); *Heinen et al. v. Royal Caribbean Cruises Ltd.*, 806 F. App'x 847, 2020 WL 1510290, at *1 (11th Cir. Mar. 30, 2020) ("[T]o prove a negligence or negligent-infliction-of-emotional-distress claim, a plaintiff must prove that the defendant's actions caused the plaintiff to suffer ***actual harm***.") (emphasis added).

Here, Ms. Melim and Mr. Coleman do not – and, indeed, cannot – allege that they have incurred any actual injury or damages. The amended complaint's concession that Ms. Melim and Mr. Coleman were merely exposed to an illness – without contracting it or having any symptoms of illness – renders them unable to make any such allegations. Undaunted, and in an effort to work around that problem, Ms. Melim and Mr. Coleman allege in Counts III, IV, and V that they have suffered negligently inflicted emotional distress as a result of having been exposed to COVID-19 (Am. Compl., ¶¶65, 71, 77, 82-87). A well-settled line of authority rejects this exact theory, that

emotional distress allegedly caused by exposure to an illness is actionable by a plaintiff who has not contracted the illness and is otherwise symptom-free.

Specifically, Ms. Melim and Mr. Coleman allege that their claims "arise under the U.S. General Maritime Law and/or the Jones Act, 46 U.S.C. §30104" (Am. Compl., ¶8). Thus, the "zone-of-danger test" governs Ms. Melim's and Mr. Coleman's attempt to recover damages for negligently inflicted emotional distress. *See, e.g., Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1338 (11th Cir. 2012) (citing *Gottshall*, 512 U.S. 532) (holding that federal maritime law has adopted *Gottshall*'s zone-of-danger test for use in connection with the negligent infliction of emotional distress); *Skye v. Maersk Line Ltd. Corp.*, 751 F.3d 1262, 1265 (11th Cir .2014) ("The Jones Act incorporated the remedial scheme of the Federal Employers' Liability Act, and case law interpreting the latter statute also applies to the Jones Act.").[5]

"[T]he zone of danger test limits recovery for emotional injury to those plaintiffs who sustain a physical impact as a result of a defendant's negligent conduct, or who are placed in immediate risk of physical harm by that conduct." *See Gottshall*, 512 U.S. at 547-58. As applied in the ***specific context*** of exposure to illness and illness-causing substances, the Supreme Court has made clear that the zone-of-danger test is ***not*** satisfied where a plaintiff alleges mere exposure—if the plaintiff is disease- and symptom-free, then he or she cannot recover damages for emotional distress. *See, e.g., Metro-North*, 521 U.S. at 427 ("We conclude that the worker before us here cannot recover unless, and until, he manifests symptoms of a disease."); *id*. at 430-

[5] In the *Gottshall—Metro-North—Ayers* trilogy of decisions applying the Federal Employers' Liability Act, the U.S. Supreme Court recognized two categories of emotional distress claims: "[1] Stand-alone emotional distress claims not provoked by any physical injury, for which recovery is sharply circumscribed by the zone-of-danger test; and [2] emotional distress claims brought on by a physical injury, for which pain and suffering recovery is permitted." *See Norfolk & Western Railway Co. v. Ayers*, 538 U.S. 135, 147 (2003) (citing *Gottshall*, 512 U.S. 532; *Metro-North*, 424 U.S. 424).

32 (explaining that the zone-of-danger test is not met by exposure to, or physical contact with, illness-causing substances); *Ayers*, 538 U.S. at 141 ("In *Metro-North,* we held that emotional distress damages may not be recovered under FELA by disease-free asbestos-exposed workers . . . ."); *id.* at 146 ("The plaintiff in *Metro-North* had been intensively exposed to asbestos while working as a pipefitter for Metro-North in New York City's Grand Central Terminal. At the time of his lawsuit, however, he had a clean bill of health. The Court rejected his entire claim for relief.").

The determination that disease- and symptom-free plaintiffs cannot recover damages for negligently inflicted emotional distress – despite having been exposed to illness and illness-causing substances – furthers important policy considerations:

> [T]he physical contact here—a simple (though extensive) contact with a carcinogenic substance—does not seem to offer much help in separating valid from invalid emotional distress claims. That is because contacts, even extensive contacts, with serious carcinogens are common. . . .
>
> The large number of those exposed and the uncertainties that may surround recovery also suggest what *Gottshall* called the problem of "unlimited and unpredictable liability." . . . The same characteristic further suggests what *Gottshall* called the problem of a "flood" of cases that, if not "trivial," are comparatively less important. In a world of limited resources, would a rule permitting large-scale recoveries for widespread fear of future disease diminish the likelihood of recovery by those who later suffer from the disease?
>
> We do not raise these questions to answer them (for we do not have the answers), but rather to show that general policy concerns of a kind that have led common-law courts to deny recovery for certain classes of negligently caused harms are present in this case as well. That being so, we cannot find in *Gottshall*'s underlying rationale any basis for departing from *Gottshall* or from the current common-law consensus.

See Metro-North, 521 U.S. at 435-36 (internal citations omitted).

Ms. Melim and Mr. Coleman allege only that they were exposed to COVID-19. They do not allege that they ever contracted COVID-19 or experienced any symptoms of the illness. As

such, they cannot recover damages for negligently inflicted emotional distress and their claims should be dismissed with prejudice.

IV. CONCLUSION

For these reasons, the amended complaint should be dismissed with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on June 23, 2020 I electronically filed this document using the Court's CM/ECF system, which will automatically serve a copy on all counsel of record.

By: /s/ Scott D. Ponce