UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES - GENERAL

Case No.: 2:21-cv-08134-SB-KS	Date: December 13, 2021

Title: ***In re The Complaint of Epic Cruises, Inc.***

Present: The Honorable	**STANLEY BLUMENFELD, JR., U.S. District Judge**
Victor Cruz Deputy Clerk	N/A Court Reporter
Attorney(s) Present for Plaintiff(s): N/A	Attorney(s) Present for Defendant(s): N/A

Proceedings: **ORDER ON PLAINTIFF IN LIMITATION'S MOTION TO STRIKE [Dkt. No. 14] AND CLAIMANT'S MOTION TO STAY ACTION AND DISSOLVE INJUNCTION [Dkt. No. 15], MOTION TO DISMISS [Dkt. No. 17], AND MOTION TO INCREASE LIMITATION FUND [Dkt. No. 18]**

Claimant Ana Maria Hernandez alleges that during a whale watching voyage aboard the AZURE SEAS (the Vessel) in March 2021, she was thrown from her chair and broke her hip and arm when the captain negligently sped up to chase down whales. Hernandez filed a personal injury suit against the Vessel's owner, Epic Cruises, Inc. d/b/a Celebration Cruises of Santa Barbara (Epic). Epic then filed this action seeking exoneration from or limitation of liability under the Limitation of Liability Act (LOLA), 46 U.S.C. § 30501 *et seq*. Dkt. No. 1 (Compl.). The Court accepted Epic's submission of a letter of undertaking as security for Epic's $365,000 interest in the Vessel, stayed the pending litigation, and ordered that notice of this action be provided to known claimants and published as required by Supplemental Rule F. Dkt. No. 9. Hernandez then filed a claim and answer, Dkt. No. 11, as well as motions to dismiss for lack of subject matter jurisdiction, Dkt. No. 17, to stay this action and dissolve injunction, Dkt.

No. 15, and to increase the limitation fund and security, Dkt. No. 18. Also pending is Epic's motion to strike all or part of three affirmative defenses from Hernandez's answer. Dkt. No. 14. All four motions have been fully briefed, and the Court finds these matters suitable for decision without oral argument and vacates the December 17, 2021 hearing. Fed. R. Civ. P. 78; L.R. 7-15. For the following reasons, the Court **denies** Hernandez's motions and **grants in part and denies in part** Epic's motion.

I. HERNANDEZ'S MOTION TO DISMISS

Hernandez moves to dismiss this limitation action for lack of subject matter jurisdiction, arguing that Epic has not met its burden to establish that this Court has admiralty jurisdiction.

Epic invokes jurisdiction under 28 U.S.C. § 1333(1), which provides that "[t]he district courts shall have original jurisdiction, exclusive of the courts of the States, of: (1) Any civil case of admiralty or maritime jurisdiction, saving to suitors in all cases all other remedies to which they are otherwise entitled."[1] This jurisdiction "allows the filing of claims related to maritime contracts and maritime torts. A party seeking to invoke federal admiralty jurisdiction 'over a tort claim must satisfy both a location test and a connection test.'" *In re Mission Bay Jet Sports, LLC*, 570 F.3d 1124, 1126 (9th Cir. 2009) (quoting *Gruver v. Lesman Fisheries Inc.*, 489 F.3d 978, 982 (9th Cir. 2007)). Those tests require that "[t]he tort must occur on navigable waters and bear a 'significant relationship to traditional maritime activity.'" *Id.* (quoting *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 674 (1982)).

It is undisputed that the location test is satisfied here, since Plaintiff's injury occurred onboard the Vessel while it was sailing in the navigable waters of the Pacific Ocean. Hernandez contends, however, that Epic cannot satisfy the connection test. That test raises two issues: "A court, first, must assess the general features of the type of incident involved to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must

[1] The Ninth Circuit has held that the jurisdiction conferred by the LOLA is coextensive with admiralty jurisdiction, such that the LOLA does not provide an independent basis for federal jurisdiction where admiralty jurisdiction is otherwise lacking. *Seven Resorts, Inc. v. Cantlen*, 57 F.3d 771, 773 (9th Cir. 1995).

determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity." *Id.* (cleaned up).

In assessing the first issue, courts "determine the potential impact of a given type of incident by examining its general character. The jurisdictional inquiry does not turn on the *actual* effects on maritime commerce of the [incident]; nor does it turn on the particular facts of the incident . . . . Rather, a court must assess the general features of the type of incident involved to determine whether such an incident is likely to disrupt commercial activity." *Sisson v. Ruby*, 497 U.S. 358, 363 (1990) (holding that fire on vessel docked at marina was likely to disrupt commercial activity). The Ninth Circuit has "taken an inclusive view of what general features of an incident have a potentially disruptive effect on maritime commerce." *Mission Bay*, 570 F.3d at 1128 (collecting cases).

In *Mission Bay*, the Ninth Circuit held that an incident in which jet ski passengers were thrown off and injured "is best described as harm by a vessel in navigable waters to a passenger," and that such harm "could have a potentially disruptive impact" on maritime commerce and therefore satisfied the first prong of the connection test even through there was no actual disruption of commerce in that case. *Id.* at 1129. Hernandez attempts to distinguish *Mission Bay* and various other cases, arguing that because she did not fall overboard and was not a crew member whose injuries impacted the Vessel's navigation, her injury did not have the potential to disrupt maritime commerce. This argument is perplexing given that Hernandez does not appear to dispute that her injury, which was reported to the Coast Guard, *did* disrupt maritime commerce by causing the Vessel to cut short its whale watching trip and return to port. *See* Dkt. No. 25 at 6. But even setting aside that actual effect on the Vessel's commercial activity, this case—like *Mission Bay*—involved "harm by a vessel in navigable waters to a passenger," and therefore satisfies the first prong of the connection test. Contrary to Hernandez's suggestion, the case law does not require that an injured passenger be thrown overboard to satisfy this prong. *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 840–41 (9th Cir. 2002) (finding first prong satisfied as to claim for intentional infliction of emotional distress based on crew member's verbal statement to passenger because "[a] cruise line's treatment of paying passengers clearly has potential to disrupt commercial activity, and certainly has substantial relationship to traditional maritime activity").[2]

[2] Hernandez relies on *H2O Houseboat Vacations Inc. v. Hernandez*, 103 F.3d 914 (9th Cir. 1996), in which the Ninth Circuit held that the emission of carbon monoxide fumes in a stationary houseboat tied to the shore had no potential to

Turning to the second issue, the Supreme Court and the Ninth Circuit have repeatedly cited the navigation of vessels as a paradigm example of traditional maritime activity. *See* *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 540 (1995) ("Navigation of boats in navigable waters clearly falls within the substantial relationship."); *Foremost Ins. Co. v. Richardson*, 457 U.S. 668, 675 (1982) ("The potential disruptive impact of a collision between boats on navigable waters, when coupled with the traditional concern that admiralty law holds for navigation, compels the conclusion that this collision between two pleasure boats on navigable waters has a significant relationship with maritime commerce."); *Mission Bay*, 570 F.3d at 1129 ("So far as the second prong is concerned, we believe the activity giving rise to the incident is best characterized as operating a vessel in navigable waters. As *Foremost* and *Grubart* say, this 'clearly falls within the substantial relationship.'"). Just as in *Mission Bay*, "there is a clear connection between a vessel traveling on navigable waters, causing injury to a passenger, and traditional maritime activity." 570 F.3d at 1129–30 (finding that district court had admiralty jurisdiction and reversing dismissal of LOLA action).

Accordingly, this Court has admiralty jurisdiction and Hernandez's motion to dismiss is **denied**.

II. HERNANDEZ'S MOTION TO STAY ACTION AND DISSOLVE INJUNCTION

In the alternative, Hernandez asks the Court to dissolve the injunction preventing her from litigating her personal injury suit in state court and to stay this action pending the outcome of the state court litigation.

Hernandez correctly argues that she has a right—apart from this litigation—to prosecute her personal injury claims in state court under the "saving to suitors clause" of § 1333(1). "Some tension exists between the saving to suitors clause and the [LOLA]. One statute gives suitors the right to a choice of remedies, and the other statute gives vessel owners the right to seek limitation of liability in federal court." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 448 (2001). "By its own terms, the [LOLA] protects the right of vessel owners to limit their

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disrupt maritime commerce. That case is plainly distinguishable, as it did not involve injury to passengers on board a vessel navigating on the ocean.

liability to the value of the vessel, provided that the events or circumstances giving rise to the damage occurred without the vessel owner's privity or knowledge." *Id.* at 453. "The Act and the rules of practice, however, do not create a freestanding right to exoneration from liability in circumstances where limitation of liability is not at issue." *Id.* Thus, "[i]f the district court concludes that the vessel owner's right to limitation will not be adequately protected" in separate state court proceedings, "the court may proceed to adjudicate the merits, deciding the issues of liability and limitation," but where the court is satisfied that the owner's right to seek limitation will be protected, it may dissolve the injunction and allow the claimant to litigate in state court. *Id.* at 454.

The Ninth Circuit has held that where "a single claim is involved or where multiple claims do not exceed the limitation fund, the court's discretion is narrowly circumscribed and the injunction must be dissolved unless the owner can demonstrate that his right to limit liability will be prejudiced." *Newton v. Shipman*, 718 F.2d 959, 961 (9th Cir. 1983) (cleaned up). Under the single claimant exception, the Ninth Circuit in *Newton* identified three specific matters to which the claimant must stipulate in order to obtain a lifting of the stay so that she can pursue her claims in state court:

> Before [a single claimant] is entitled to pursue a separate claim, she must stipulate *inter alia* to the district court's continuing, exclusive jurisdiction to decide the owner's right to limit his liability. Specifically, claimant must: (1) stipulate that the value of the limitation fund equals the combined value of the vessel and its cargo; (2) waive the right to claim res judicata based on any judgment rendered against the vessel owner outside of the limitation proceedings; and (3) concede the district court's exclusive jurisdiction to determine limitation of liability issues.

Id. at 962 (citations omitted); *accord* *In re Complaint of Ross Island Sand & Gravel*, 226 F.3d 1015, 1017 (9th Cir. 2000).

Far from "stipulat[ing] that the value of the limitation fund equals the combined value of the vessel and its cargo" and "conced[ing] the district court's exclusive jurisdiction to determine limitation of liability issues," as required by *Newton*, Hernandez has filed separate motions contending that the limitation fund must be increased and that this Court lacks subject matter jurisdiction. In conjunction with her motion to stay this action and dissolve the injunction, Hernandez filed a stipulation that she contends satisfies *Newton*'s requirements.

But the stipulation contains multiple conditions that render it largely meaningless, particularly in light of her related motions taking opposite positions. For example, the stipulation is made "[t]o the extent necessary to allow claimant to prosecute her claim for personal injury against Epic in state Court" and only "provided (1) that the Court has admiralty jurisdiction in this matter, (2) that the Court dissolves the Injunction in place in this action . . . and (3) in the event that the present Limitation Action is not dismissed . . . , that the Court stays the present Limitation Action pending the completion of the litigation of Claimant's claims . . . concerning the Incident." Dkt. No. 15-1 at 2. A stipulation that the Court has jurisdiction only if the Court has admiralty jurisdiction (which Hernandez separately contests) is no stipulation at all. Moreover, when a federal court lifts an injunction and allows state court proceedings on liability to resume, it is not obligated to stay its own limitation proceedings. *See Newton*, 718 F.2d at 963 ("[W]hether the limitation question must await trial of the liability issue is largely a matter for the district court's discretion under the circumstances of each case."). Hernandez's equivocal conditioning of her stipulation on the Court exercising its discretion in a particular manner to which she is not entitled further undermines its value.

Finally, even setting aside the other conditions, it is not clear that Hernandez has "stipulate[d] that the value of the limitation fund equals the combined value of the vessel and its cargo" as required by *Newton*. Instead, her proffered stipulation states:

> That whatever amount this Court should determine to be the value of the Vessel and its pending freight immediately following the Incident shall constitute the amount of the Limitation Fund, and, should the Court require that Claimant further so stipulate in order to proceed with their state court action concerning the Incident, that said Limitation Fund amount is $365,000.00.

Dkt. No.15-1 at 3. In light of her separately pending challenge to the adequacy of the limitation fund, it is not clear that Hernandez has adequately stipulated to the value of the limitation fund. *See Ross Island*, 226 F.3d at 1018 ("*Newton* is on point in directing that the claimant must stipulate to the value of the limitation fund before the stay can be lifted.").[3]

[3] Hernandez relies on an older decision, *Anderson v. Nadon*, 360 F.2d 53 (9th Cir. 1966), in which the Ninth Circuit did not require a stipulation to the adequacy of the limitation fund as a condition for requiring the district court in a limitation action to dissolve its injunction. *Newton* cited to *Anderson* without noting any

Because the conditional stipulation offered by Hernandez does not satisfy the requirements of *Newton*, she is not entitled to dissolution of the injunction or a stay of this case. Her motion is therefore **denied** without prejudice to her filing a new motion supported by an unconditional stipulation that satisfies *Newton*'s requirements.

III. HERNANDEZ'S MOTION TO INCREASE LIMITATION FUND AND SECURITY

Hernandez's third motion seeks an order increasing the $365,000 limitation fund and security either to $1 million—the limit of Epic's liability insurance policy—or to the value of the "flotilla" of three whale watching vessels owned by Epic and insured under the same policy.

Hernandez's motion is heavy on rhetoric and policy attacks on what she describes as the "ancient and anachronistic" LOLA but light on textual or legal support. Under the LOLA, Epic's liability "shall not exceed the value of the vessel and pending freight." 46 U.S.C. § 30505(a). Hernandez seeks to increase the limitation under Supplemental Rule F(7), which provides that "[a]ny claimant may by motion demand that the funds deposited in court or the security given by the plaintiff be increased on the ground that they are less than the value of the plaintiff's interest in the vessel and pending freight" and allows the Court to institute an appraisal. Fed. R. Civ. P., Suppl. Rule F(7). But Hernandez does not dispute that Epic provided an accurate appraisal of the Vessel's value. Instead, Hernandez argues that Congress intended the LOLA to apply to freight vessels, not to recreational whale watching tours, and that the Court in equity should "dramatically" increase the fund.

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conflict. Although a concurring opinion in *Ross Island* criticized the *Newton* decision and contended that it conflicted with *Anderson*, the per curiam panel decision in *Ross Island* accepted Newton as binding on this point, despite its apparent disagreement. *See* *Ross Island*, 226 F.3d at 1018 (describing challenge to *Newton*'s rule as "persuasive" but concluding that "*Newton* remains the law of this circuit" and "absent a rehearing en banc, we are without authority to overrule its directives"). Following the Ninth Circuit's lead, the Court concludes that to the extent *Anderson* is in tension with *Newton*, *Newton* provides the governing rule.

Hernandez first argues that the fund should be increased to $1 million, the limit of Epic's liability insurance policy. An insurance policy, however, is not part of the "value of the vessel and pending freight," and therefore is not properly included in the limitation fund under the LOLA, as numerous courts have held. *E.g.*, *Place v. Norwich & N.Y. Transp. Co.*, 118 U.S. 468, 493–96 (1886) (insurance proceeds not part of owner's "interest in the vessel and her freight"); *In re Boat Camden, Inc.*, 569 F.2d 1072, 1074 (1st Cir. 1978) (liability insurance policy "is not an interest of the owner in the ship to be included in the bond required by the Limitation Act"); *In re Hanjin Container Lines Ltd.*, 1988 WL 1731482 (W.D. Wash. Dec. 10, 1987) ("Insurance proceeds do not constitute part of the owner's interest and therefore, cannot be included in the limitation fund. Although *The City of Norwich* concerned hull insurance, its holding has almost universally been applied to other types of marine insurance, including liability insurance and indemnity insurance, like the P&I policy of concern here." (citations omitted)). Hernandez's suggestion that the "freight" on the whale watching boat should be construed to mean its passengers—and by extension the insurance policy that covers their personal injuries—is wholly unsupported by authority.

Hernandez's reliance on the flotilla doctrine is similarly unavailing. "Under the 'flotilla doctrine,' the limitation fund liability of a defendant shipowner may be increased to include his interest in the value of all vessels engaged in a common enterprise or venture with the vessel aboard which the loss or injury was sustained." *Complaint of Patton-Tully Transp. Co.*, 715 F.2d 219, 222 (5th Cir. 1983). Hernandez argues that two other whale watching vessels owned by Epic, together with the Vessel, are "devoted to a single venture, i.e., recreational sight-seeing tours all covered by the same insurance policy." Dkt. No. 18 at 6. Hernandez does not represent that either of Epic's other vessels had any role in her whale watching trip or even that those vessels were at sea on the date of her injury, and it is not at all clear that the flotilla doctrine has any application here. *See In re Hornblower Fleet, LLC*, No. 16CV2468 JM(JMA), 2017 WL 4769654, at *2 (S.D. Cal. Oct. 23, 2017) ("Claimants fail to establish that the seven vessels comprising Plaintiffs' fleet in San Diego Harbor were engaged in a single enterprise at the time of Claimants' injuries. Plaintiffs were on a whale-watching cruise aboard the M/V Adventure Hornblower. The cruise was independent from the cruises offered by the other vessels operated by Plaintiffs. While Plaintiffs' other vessels also provided whale-watching cruises, the cruises did not operate as a unit in a common enterprise. Accordingly, the flotilla doctrine does not apply under the circumstances and the limitation amount calculated based only upon the value of the M/V/ Adventure Hornblower."). Regardless, "it is clear that the flotilla doctrine does not apply in the 'pure tort' context, in which the disputed injury is

sustained by a third party to which the vessel owner owes no contractual duties." *Matter of C & C Boats, Inc.*, No. SACV1301420JVSJPRX, 2014 WL 12567148, at *5 (C.D. Cal. July 3, 2014) (collecting cases). Hernandez's only response is that the Ninth Circuit has not expressly adopted the pure tort rule and the Court must "do equity" by increasing the remedy available to her. Dkt. No. 30 at 4. Hernandez cites no authority suggesting that the pure tort rule—which has been repeatedly recognized by district courts within the Ninth Circuit—does not apply, nor does she argue that the facts of her case would fall outside that rule if it does apply. Accordingly, Hernandez has not shown that the flotilla doctrine requires an increase in the limitation fund.

Because Hernandez has not shown that the $365,000,000 limitation fund underrepresents Epic's interest in "the vessel and pending freight," 46 U.S.C. § 30505(a), she is not entitled to an increase of the limitation fund, and her motion is **denied**.

IV. EPIC'S MOTION TO STRIKE

Epic moves to strike part or all of three affirmative defenses involving insurance in Hernandez's answer. Under Rule 12(f), "[t]he court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter." Fed. R. Civ. P. 12(f).

Epic moves to strike the portion of Hernandez's seventh affirmative defense that defines "the correct value of the Vessel plus its pending freight" as "including without limitation available insurance and the passengers," as well as the entirety of Hernandez's eleventh affirmative defense, which asserts that the insurance proceeds should be included in this limitation proceeding. *See* Dkt. No. 11 at 13 (Answer). As explained above, the Court has concluded that the insurance proceeds are not properly included in the limitation fund. Hernandez's arguments that the motion to strike is premature fail in light of the Court's rulings on her motion to dismiss and motion to increase the limitation fund. Because Epic's insurance policies are not part of its interest in the Vessel and its freight so as to be included in the limitation fund, Hernandez's contrary assertions in her seventh and eleventh affirmative defenses are immaterial and are **stricken**. *See Matter of Olympia Dev. Grp., Inc.*, No. 8:09-CV-2230-T-33AEP, 2010 WL 11629141, at *4 (M.D. Fla. Feb. 3, 2010) (finding that "any reference to Olympia's liability insurance in Claimant's Answer is also immaterial and impertinent" and recommending that affirmative defense be stricken), *report and recommendation adopted*, 2010 WL 11629137 (M.D. Fla. Feb. 22, 2010).

Epic also moves to strike Hernandez's tenth affirmative defense, which alleges:

> To the extent Epic's insurers attempt to avail themselves of the limitation/exoneration defense, Claimant asserts that the Limitation of Liability Act is unavailable to insurers of vessel owners under the circumstances and/or no prima facie case has been made establishing they are entitled to avail themselves of the Limitation of Liability Act.

Dkt. No. 11 at 13. Epic's motion focuses on the impropriety of increasing the liability fund based on the value of the insurance proceeds, which is central to Hernandez's seventh and eleventh affirmative defenses but only tangentially related to Hernandez's tenth affirmative defense, which challenges the ability of Epic's insurers to avail themselves of the LOLA. Epic makes no argument that its insurers are entitled to invoke the LOLA, and it is unclear whether Epic even disputes the correctness of Hernandez's tenth affirmative defense. Accordingly, Epic has not shown that striking is warranted, and Epic's motion to strike Hernandez's tenth affirmative defense is **denied**.

V. ORDER

Hernandez's motions to dismiss for lack of subject matter jurisdiction, Dkt. No. 17, to stay this action and dissolve the injunction, Dkt. No. 15, and to increase the limitation fund and security, Dkt. No. 18, are **DENIED**. The denial of the motion to stay and dissolve the injunction is without prejudice to Hernandez filing a new motion to dissolve the injunction supported by an adequate stipulation that complies with the requirements of *Newton*. Epic's motion to strike, Dkt. No. 14, is **GRANTED IN PART** as to (1) the language "including without limitation available insurance and the passengers" in Hernandez's seventh affirmative defense and (2) the entirety of her eleventh affirmative defense, and those portions of her Answer are **STRICKEN**. Epic's motion to strike is **DENIED** as to Hernandez's tenth affirmative defense.