

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

GOLDEN ALASKA SEAFOODS
LLC,

Plaintiff,

v.

DEVIN ANTHONY CARELLO,

Defendant.

CASE NO. C23-1778JLR

ORDER

I. INTRODUCTION

Before the court is Plaintiff Golden Alaska Seafoods, LLC’s (“GAS”) motion for summary judgment. (Mot. (Dkt. # 10); Reply (Dkt. # 18).) Defendant Devin Anthony Carello opposes the motion. (Resp. (Dkt. # 17).) The court has considered the parties’

//

//

//

1 submissions, the relevant portions of the record, and the governing law. Being fully
2 advised,¹ the court GRANTS in part and DENIES in part GAS's motion.

3 II. BACKGROUND

4 Mr. Carello submitted his original application for employment with GAS on May
5 9, 2022. (Carello Decl. (Dkt. # 17-1) ¶ 1.) Later that day, he was contacted by GAS
6 Human Resources Manager Joe Shaul. (*Id.* ¶ 2.) Mr. Shaul interviewed Mr. Carello on
7 May 17, 2022. (*Id.*) Sometime thereafter, Mr. Shaul informed Mr. Carello that positions
8 would be available onboard the M/V GOLDEN ALASKA in the next season. (*Id.* ¶ 3.)

9 On September 26, 2022, Mr. Carello submitted a second application for
10 employment with GAS. (*Id.* ¶ 9.) On October 4, 2022, Mr. Shaul asked Mr. Carello to
11 complete an electronic Medical Release & Health Questionnaire (“Health
12 Questionnaire”). (*Id.* ¶ 10; *see also* Shaul Decl. (Dkt. # 13) ¶ 5, Ex. 2 at 12.) Mr. Carello
13 traveled to Tokyo, Japan, between October 12 and October 31, 2022. (Carello Decl.
14 ¶¶ 11-12.) He submitted the Health Questionnaire on November 3, 2022. (*Id.* ¶ 13.)

15 The Health Questionnaire begins with a disclaimer stating:

16 The answers to the following questions will be reviewed by a Discovery
17 Health MD, LLC, or Discovery Health MD, PLLC [together, “Discovery
18 Health”] physician. Completing this questionnaire is required and will assist
19 in making recommendations to your employer for work placement that is
20 medically appropriate for you. It is important that you provide honest and
21 complete answers to each of the questions. A fitness-for-duty and worksite-
22 placement recommendation will be provided to the employer.

¹ Neither party requested oral argument, and the court concludes that oral argument would not assist it in resolving the motion. *See* Local Rules W.D. Wash. LCR 7(b)(4),

1 The following questions will assist the company in determining whether you
2 can safely perform the job for which you have been given a conditional offer,
with or without restrictions.

3 (Jarris Decl. (Dkt. # 11) ¶ 6, Ex. 2 (“Health Questionnaire”) at 1.) Mr. Carello affirmed
4 that he understood and agreed to this disclaimer. (*Id.*) He also certified that he
5 understood and agreed that (1) he would be “declared not fit for duty if a review of [his]
6 records indicate[s] that h[e has] not been truthful regarding disclosure of previous
7 medical conditions[,]” (2) “all the answers and written explanations given on the Health
8 Questionnaire will be true, complete, and correct to the best of [his] knowledge[,]” and
9 (3) the Health Questionnaire was “for the purpose of obtaining information for the sole
10 purpose of making a determination of fitness for duty based on the information
11 provided.” (*Id.* at 2.) Mr. Carello completed the Health Questionnaire, in relevant part,
12 as follows:

13 **Within the last 6 years, have you ever had to leave work or the vessel for
14 medical reasons?**

15 Yes.

16 **Please describe the injury or illness that caused you to have to leave work
17 or the vessel for medical reasons.**

18 Was leaving the FV Northern Leader several months ago for a family
19 emergency, a few days before leaving while in rough weather I hit head in
20 galley. I was sent to clinic while flying home in Anchorage where doctor
21 diagnosed with concussion related. I was placed on medical for a couple
22 weeks. He did release me after phoned follow up weeks later. No further
issues since that time.

...

20 **Have you ever filed a Worker’s Compensation, Labor and Industries, or
21 Maritime Claim for Illness or Injury?**

22 Yes

1 **Please describe the condition for which you filed a claim**

2 Concussion²

3 ...

4 **Have you been found not fit for duty in the past 5 years?**

5 No

6 ...

7 **Have you ever had an illness or injury that required you to miss school
8 or work for more than 7 days?**

9 No.

10 **Have you had medical care in an Emergency Department in the past 12
11 months?**

12 No.

13 ...

14 **Bone and Joint Questions**

15 **Please mark all of the bone and joint problems that you have or have
16 had previously:**

17 I certify that I do not have any of these bone or joint problems³

18 ...

19 **Do you have any other medical history, problems, or symptoms that
20 were not mentioned above?**

21 No

22 **You have just completed a health screening questionnaire. Were you
able to read and understand all the questions?**

Yes

**Type your full name below to indicate that all your answers above are
truthful and accurate**

Devin Anthony Carello

(*Id.* at 7-8, 11-12.)

² Mr. Carello suffered the concussion in April 2022. (*See* Jarris Decl. ¶ 8.)

³ The options included “back pain or injury,” “general joint problems,” and “any other bone or joint problems not listed.” (*See* Jarris Decl. ¶ 6, Ex. 2a at 1.)

1 GAS contracted with Discovery Health to review job applicants' Health
2 Questionnaires and make recommendations regarding the applicants' physical limitations
3 and need for accommodation. (Jarris Decl. ¶¶ 3-4; *see also* Shaul Decl. ¶ 6 (stating that
4 he relied on Discovery Health's recommendations regarding applicants' fitness for
5 work).) During this review, Discovery Health followed up with the applicant about any
6 medical conditions disclosed on the questionnaire. (Jarris Decl. ¶ 5.) If a medical
7 condition could potentially affect the applicant's ability to handle job duties onboard the
8 vessel, Discovery Health would obtain and review the applicant's medical records to
9 ensure that the applicant had received proper treatment and was released to full duty.
10 (*Id.*) Accordingly, after reviewing Mr. Carello's Health Questionnaire, Discovery Health
11 contacted him to obtain more information, including medical records, regarding the
12 disclosed concussion. (*Id.* ¶ 7.) After completing its review, Discovery Health "did not
13 see anything that would preclude [Mr. Carello] from working on the vessel as a cook or
14 require any accommodation." (*Id.* ¶ 10.) Accordingly, Discovery Health found that Mr.
15 Carello was fit for duty. (*Id.* ¶ 11; *see also id.* ¶¶ 12-13 (discussing notifications to Mr.
16 Shaul regarding Mr. Carello's fitness for duty).) According to Dr. Ann G. Jarris, a
17 founder of Discovery Health, if Mr. Carello had

18 disclosed on the [Health Questionnaire] that he had prior back problems,
19 [Discovery Health] would have investigated his back-related condition
20 further, including attempting to obtain medical records and imaging and, if
21 necessary, having him undergo a functional capacity evaluation and/or
22 specialty evaluation to determine his ability to handle the job on the
GOLDEN ALASKA.

(*Id.* ¶ 14.)

1 Mr. Shaul decided to hire Mr. Carello based on Discovery Health’s finding that he
2 was fit for duty. (Shaul Decl. ¶ 13.) On February 23, 2023, Mr. Carello signed a contract
3 to work as a prep cook on the GOLDEN ALASKA. (*Id.* ¶ 14, Ex. 6.)

4 On March 4, 2023, Mr. Carello reported an injury to his “center back” when the
5 “boat rolled and fell back, foot slipped off step to cooler trying to catch myself & slide
6 forward/to right side.” (*Id.* ¶ 15, Ex. 7 (March 2023 injury report).) Then, on March 5,
7 2023, Mr. Carello “bent over to lift bus tub of fruit off cooler floor & felt hard stabbing
8 pain in back & spasm feeling up/down spinal area, lost breath of a split second & yelled
9 w/pain.” (*Id.*) In consultation with Alaska Maritime Physicians, Mr. Shaul determined
10 that Mr. Carello should not return to work until he was medically evaluated and returned
11 to duty. (*Id.* ¶¶ 17-18.) Mr. Carello was first evaluated at the Iliuliuk Family and Health
12 Services Clinic in Dutch Harbor, Alaska on March 6, 2023. (*Id.* ¶ 19.) Based on that
13 evaluation, Mr. Shaul arranged for Mr. Carello to travel to Anchorage, Alaska for further
14 evaluation and treatment. (*Id.*) By late December 2024, GAS had paid \$26,493.52 in
15 medical expenses and \$21,875.00 in maintenance payments to Mr. Carello. (*Id.* ¶ 22.)

16 GAS has since learned that Mr. Carello had a history of back problems before he
17 applied for work on the GOLDEN ALASKA. In September 2016, for example, Mr.
18 Carello received X-Rays of his spine. (Spivak Decl. (Dkt. # 14) ¶ 10, Ex. 8.) On January
19 18, 2017, Mr. Carello was seen in the Marquette General Health System Emergency
20 Department in Michigan for back pain. (*Id.* ¶ 6, Ex. 4.) He returned to the Emergency
21 Department two days later, again complaining of back pain. (*Id.* ¶ 7, Ex. 5.)
22

1 Then, on August 8, 2022, Mr. Carello woke up with “stiffness and pain in [his]
2 mid-[back]” while he was working onboard a different vessel. (Carello Decl. ¶ 4.)
3 Although he continued to work, his captain noticed he was in pain and sent him to the
4 Iliuliuk Clinic in Dutch Harbor. (*Id.* ¶¶ 4-5; *see also* Milum Decl. (Dkt. # 12) ¶ 4, Ex 1
5 (August 13, 2022 injury report).) On August 19, 2022, a practitioner at the Iliuliuk
6 Clinic told Mr. Carello he had a compression fracture, and the company arranged for him
7 to return to Michigan. (Carello Decl. ¶ 5.) On August 22, 2022, Mr. Carello was seen at
8 the UP Health System Marquette Emergency Department for “tenderness mid T[horacic]
9 spine region and upper L[umbar] spine region” and received a CT scan. (*Id.* ¶ 6; Spivak
10 Decl. ¶ 9, Ex. 7.) On September 1, 2022, Mr. Carello was told that his injury was a “soft
11 tissue flare-up,” and on September 6, 2022, a physician at UP Health System-Bell told
12 Mr. Carello he was fit for duty with no restrictions (Carello Decl. ¶¶ 7-8.) Mr. Carello
13 received maintenance and cure benefits between August 20, 2022, and September 6,
14 2022. (Milum Decl. ¶ 5.)

15 GAS filed this action on November 20, 2023. (Compl. (Dkt. # 1).) In its
16 complaint, GAS sought declaratory judgments that (1) “it has no obligation to pay Mr.
17 Carello’s benefits of maintenance and cure” and (2) “any future award of damages or any
18 future award of maintenance and cure may be offset by the amount of [GAS]’s
19 overpayment of benefits to date.” (*Id.* ¶¶ 4.1-5.2; *see also id.* at 3-4 (prayer for relief).)
20 GAS moved for summary judgment on December 27, 2024. (Mot.) It now seeks (1) a
21 declaratory judgment it has no obligation to pay Mr. Carello’s maintenance and cure, and
22 (2) an award of restitution to recover the maintenance and cure payments it already made.

1 (See generally *id.*) Mr. Carello filed a response, and GAS filed a reply. (Resp.; Reply.)

2 The motion is now ripe for decision.

3 III. ANALYSIS

4 Below, the court sets forth the summary judgment standard and then evaluates
5 GAS's motion.

6 A. Summary Judgment Standard

7 Summary judgment is appropriate if the evidence viewed in the light most
8 favorable to the non-moving party shows “that there is no genuine dispute as to any
9 material fact and the movant is entitled to judgment as a matter of law.” Fed. R. Civ. P.
10 56(a); see *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). A fact is material when,
11 under the governing substantive law, it could affect the outcome of the case. *Anderson v.*
12 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A genuine issue of material fact exists
13 when “the evidence is such that a reasonable jury could return a verdict for the
14 nonmoving party.” *Id.*

15 To carry its burden, “the moving party must either produce evidence negating an
16 essential element of the nonmoving party’s claim or defense or show that the nonmoving
17 party does not have enough evidence of an essential element to carry its ultimate burden
18 of persuasion at trial.” *Jones v. Williams*, 791 F.3d 1023, 1030-31 (9th Cir. 2015)
19 (quoting *Nissan Fire & Marine Ins. Co. v. Fritz Cos., Inc.*, 210 F.3d 1099, 1102 (9th Cir.
20 2000)). If the moving party meets its burden of production, the burden then shifts to the
21 nonmoving party to identify specific facts from which a factfinder could reasonably find
22 in the nonmoving party’s favor. *Celotex*, 477 U.S. at 324; *Anderson*, 477 U.S. at 250.

1 The court is “required to view the facts and draw reasonable inferences in the light
2 most favorable to the [nonmoving] party[.]” *Scott v. Harris*, 550 U.S. 372, 378 (2007)
3 (internal quotations omitted). It may not weigh evidence or make credibility
4 determinations. *Anderson*, 477 U.S. at 249-50. “Where the record taken as a whole
5 could not lead a rational trier of fact to find for the nonmoving party, there is no ‘genuine
6 issue for trial.’” *Scott*, 550 U.S. at 380 (citation omitted).

7 **B. Intentional Concealment**

8 GAS asserts that it is entitled, as a matter of law, to a declaratory judgment that it
9 is under no obligation to pay maintenance and cure benefits to Mr. Carello because he
10 intentionally concealed his pre-existing back problems when he applied for employment
11 onboard the GOLDEN ALASKA. The court agrees.

12 A seaman is not entitled to maintenance and cure if “(1) he intentionally withholds
13 from his employer information about a preexisting medical condition; (2) there is a causal
14 relationship between the undisclosed condition and the impairment for which he seeks
15 compensation; and (3) the undisclosed condition was material to the employer’s decision
16 to hire him.” *Coastal Villages Pollock, LLC v. Naufahu* (“*Coastal Villages P*”), No.
17 C13-1234JCC, 2014 WL 1053126, at *6 (W.D. Wash. Mar. 19, 2014), *aff’d*, 669 F.
18 App’x 468 (9th Cir. 2016) (citing *Vitcovich v. Ocean Rover O.N.*, No. 94-3507, 106 F.3d
19 411, 1997 WL 21205 (9th Cir. Jan 14. 1997) (unpublished⁴)).

20
21 ⁴ *Vitcovich* was issued before the Ninth Circuit changed its rules to allow citation of
22 unpublished opinions. See 9th Cir. R. App. P. 36-3 (providing that unpublished dispositions
issued before January 1, 2007 “may not be cited to the courts of this circuit,” except in

1 The court has little trouble concluding that GAS has established the second and
2 third elements of the intentional concealment defense as a matter of law.⁵ The causality
3 element is met because Mr. Carello’s undisclosed 2017 and 2022 back problems involved
4 the same part of the body that he injured in 2023 and for which he sought maintenance
5 and cure. (*See* Mot. at 24-26); *Coastal Villages I*, 2014 WL 1053126, at *6 (holding that
6 causality was satisfied because the seaman’s “current symptoms and diagnoses are
7 identical to those he concealed from” the employer). And the materiality element is
8 satisfied because Mr. Carello’s answers to the questions on the Health Questionnaire
9 were material to GAS’s decision to hire him. (*See* Mot. at 27-28; Shaul Decl. ¶ 21
10 (stating that Mr. Shaul relied on Discovery Health’s evaluation of the health issues
11 disclosed on the Health Questionnaire and fitness-for-duty recommendations in making
12 hiring decisions)); *Coastal Villages Pollock, LLC v. Naufahu* (“*Coastal Villages II*”), 669
13 F. App’x 468, 469 (9th Cir. 2016) (concluding employer demonstrated materiality where
14 its pre-employment questionnaire “asked about specific health conditions relevant to the
15 work that [the seaman] would perform” and the employer “would have conducted further
16 inquiry and may not have hired [the seaman] had the seaman disclosed his
17 [medical] conditions”).

18
19
20 _____
21 circumstances not applicable here). As the court discusses below, however, courts both within
22 and outside this circuit have cited *Vitcovich* as an authority in cases involving the intentional
concealment defense.

⁵ Mr. Carello does not address the second and third elements in his response. (*See generally* Resp.)

1 Mr. Carello disputes only the first element: whether GAS has established that his
2 failure to disclose his pre-existing back problems was intentional. (Resp. at 6-10.) The
3 parties disagree about the test that applies when assessing whether a seaman intentionally
4 withheld information. Mr. Carello argues that the employer must prove that the seaman
5 subjectively believed that the employer would consider the undisclosed medical condition
6 important to prevail on the first element. (*Id.* at 7 (citing *Omar v. Sea-Land Serv., Inc.*,
7 813 F.2d 986, 990 (9th Cir. 1987).) GAS, meanwhile, argues that an objective test
8 should apply, under which proof that the seaman failed to disclose pre-existing conditions
9 on the employer’s health screening questionnaire is enough to demonstrate intentional
10 concealment. (Mot. at 20 (compiling cases).)

11 The court agrees with GAS that the objective test applies in this case. The Ninth
12 Circuit has held, albeit in an unpublished opinion:

13 The “intentional concealment” element does not require a finding of
14 subjective intent. . . . Rather, it refers to the rule that a seaman may be denied
15 maintenance and cure for failure to disclose a medical condition only if he
16 has been asked to reveal it. Failure to disclose medical information in an
17 interview or questionnaire that is obviously designed to elicit such
18 information therefore satisfies the “intentional concealment” requirement.
19 *Vitcovich*, 1997 WL 21205, at *3 (citing *Berkett v. Weyerhaeuser S.S. Co.*, 350 F.2d 826,
20 830 n. 4 (9th Cir. 1965), and compiling cases from other circuits so holding). Courts both
21 within and outside the Ninth Circuit have since adopted this test for evaluating intentional
22 concealment. *See, e.g., Brown v. Parker Drilling Offshore Corp.*, 410 F.3d 166, 174 (5th
Cir. 2005) (“We agree with the Court of Appeals for the Ninth Circuit that “[t]he
“intentional concealment” element does not require a finding of subjective intent.”

1 (quoting *Vitcovich*)); *Martinez v. Crosby Dredging, LLC*, 686 F. Supp. 3d 479, 485 (E.D.
2 La. 2023) (“Plaintiff intentionally concealed or misrepresented medical facts when he
3 stated in his medical history questionnaire that he had never experienced any back pain or
4 injuries[.]” (citing *Vitcovich*)); *Rose v. Miss Pac., LLC*, No. 3:09-CV-00306-ST, 2012
5 WL 75028, at *4 (D. Or. Jan. 10, 2012) (noting that “intentional concealment” “does not
6 require a finding of subjective intent” (quoting *Vitcovich*)); *Welsh v. Maersk Line, Ltd.*,
7 No. 06-2047 (RBK), 2008 WL 4449578, at *3 (D.N.J. Sept. 29, 2008) (adopting the
8 “majority position” and applying the test set forth in *Vitcovich*).

9 Mr. Carello meanwhile, relies on a single sentence in *Omar v. Sea-Land Services,*
10 *Inc.*: “Fraud may bar maintenance and cure where a seaman conceals a medical
11 condition that he knows or should know is related to the illness or injury for which
12 maintenance and cure are requested.” 813 F.2d at 990. He asserts that this statement
13 means that “there is no intentional concealment if the seaman had a subjective belief that
14 his medical history was irrelevant to the question of whether [he] can perform the job he
15 was applying for.” (Resp. at 7.) In *Omar*, however, the issue was whether a seaman’s
16 “use of fraudulent papers in obtaining employment bar[red] him from receiving maritime
17 remedies related to that employment.” *Omar*, 813 F.3d at 987. The Ninth Circuit
18 concluded that the seaman’s fraud in obtaining an Able-Bodied Seaman’s endorsement
19 did not bar him from receiving maintenance and cure because the fraud was unrelated to
20 his injury. *Id.* The *Omar* court did not consider whether a seaman’s failure to disclose
21 pre-existing health conditions on a health questionnaire could amount to intentional
22

1 concealment. As a result, the court finds the cases cited above that considered this
2 question more persuasive than *Omar*, and, like those courts, adopts the objective test.⁶

3 Here, it is undisputed that Mr. Carello did not disclose, in response to direct
4 questions asked in GAS's pre-employment Health Questionnaire, that he had visited the
5 emergency room for back pain in August 2022 and that he was off work and receiving
6 maintenance and cure as a result of his back problems between August 20 and September
7 6, 2022. (*See generally* Health Questionnaire.) Under the objective test, Mr. Carello's
8 failure to disclose this information constitutes intentional concealment.

9 The court concludes that GAS has met its burden to demonstrate, as a matter of
10 law, that the intentional concealment defense bars Mr. Carello from receiving
11 maintenance and cure. Therefore, the court grants GAS's motion for summary judgment
12 on its claim for a declaratory judgment that it is under no obligation to pay maintenance
13 and cure benefits to Mr. Carello.

14 **C. Restitution**

15 GAS also asks the court to award it an "affirmative recovery" against Mr. Carello
16 for reimbursement of the maintenance and cure payments it has already made. (Mot. at
17 29; *see also* Prop. Order (Dkt. # 10-1) at 2-3.) Mr. Carello counters that until now, GAS

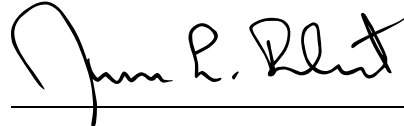
18
19 ⁶ Mr. Carello also argues that by citing *Sammon v. Cent. Gulf S. S. Corp.*, 442 F.2d 1028,
20 1029 (2d Cir. 1971), the *Omar* court "implicitly rejected" the objective standard. (Resp. at 7.)
21 *Sammon*, however, did not involve the seaman's failure to disclose pre-existing conditions in
22 response to specific questions on a health questionnaire; rather, when the seaman was asked
about "any earlier accident, injury or illness" during a physical examination, he did not disclose
that he had once received medical attention for warts on his foot. *Sammon*, 442 F.2d at 1028.
Again, the court finds cases involving pre-employment health questionnaires more persuasive
under the facts presented in this action.

1 has “represented that it is seeking only declaratory relief, . . . not a money judgment” and
2 urges the court to “decline to order affirmative relief GAS did not plead.” (Resp. at 10.)

3 The court denies GAS’s late-asserted request for reimbursement of maintenance
4 and cure payments. In its complaint, GAS seeks only a declaration that “any *future*
5 award of damages or any *future* award of maintenance and cure may be offset by the
6 amount of [GAS]’s overpayment of benefits to date.” (Compl. ¶ 5.2 (emphasis added).)
7 It has not pleaded a claim for recovery of amounts already paid (*see generally id.*), and it
8 is too late to do so now because the deadline to amend pleadings expired on October 2,
9 2024, and the March 31, 2025 trial date is swiftly approaching (*see* Sched. Order (Dkt.
10 # 9)). Furthermore, even if the cases GAS cites suggest that a vessel owner may be able
11 to bring a counterclaim for restitution, they do not support the proposition that a
12 declaratory judgment claim for offset can be transformed into an affirmative claim for
13 restitution at summary judgment. (*See* Mot. at 29 (first citing *Vitcovich*, 1997 WL 21205,
14 at *4 (awarding summary judgment to vessel owner on its counterclaim for
15 reimbursement of maintenance and cure); and then citing *Mohamed v. F/V N. Victor*, No.
16 C05-2019JLR, 2007 WL 27120, at *4-5 (W.D. Wash. Jan. 3, 2007) (holding that
17 defendants were not entitled to restitution of maintenance and cure payments already
18 made where they did not prove that the seaman intentionally concealed a prior injury);
19 *see also* Reply at 9-10 (citing other cases involving counterclaims to recover
20 overpayments of maintenance and cure).) Therefore, the court denies GAS’s motion for
21 summary judgment on its unpleaded claim for restitution.
22

1 court (1) entering judgment in GAS's favor on both of its declaratory judgment claims
2 and (2) vacating the March 31, 2025 trial date and all remaining pretrial deadlines.

3 Dated this 12th day of February, 2025.

4 

5 JAMES L. ROBART
6 United States District Judge
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22