

1
2
3
4 UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
5 AT TACOMA

6 Dana McArthur, et al.,

7 Plaintiffs,

8 v.

9 Holland America Line et al.,

10 Defendants.

Case No. 2:22-cv-01071-RAJ-TLF

REPORT AND
RECOMMENDATION ON MOTION
FOR SUMMARY JUDGMENT

NOTED FOR FEBRUARY 19, 2025

11 This matter comes before the Court on the Holland America defendants' motion
12 for summary judgment. Dkt. 106. The motion has been fully briefed, Dkt. 120
13 (response), Dkt. 131 (reply) and the Court heard oral argument on January 13, 2025.
14 After considering the parties' briefs, oral argument, and all supporting evidence
15 submitted to the Court, the motion should be DENIED.

16 DISCUSSION

17 **A. Factual Background**

18 In the summer of 2021, the decedents, Andrea McArthur, Jacquelyn Komplin, and
19 Janet Kroll, were passengers on a Holland America cruise ship vessel. They
20 disembarked in Ketchikan, Alaska, to participate in an excursion – the Misty Fjords tour
21 by floatplane on August 5, 2021. Dkt. 110, Dec. of James Kosmos, at ¶14. At about
22 10:50 am Alaska daylight time, the floatplane crashed. Dkt. 107, Dec. of Caryn
23 Jorgensen, Exh. R, NTSB Aviation Investigation Final Report (9-21-2022), at 275-281.
24
25

1 The National Transportation Safety Board (NTSB) reported that during their return flight
2 from the Misty Fjords National Monument to Ketchikan, Alaska, the plane crashed into a
3 mountain and killed all aboard. *Id.*

4 The floatplane was not operated by the defendants. Dkt. 39, Decl. of James
5 Kosmos, at 2-3; Dkt. 126-1, Deposition of Jennifer Miller (Sealed) at 4-5. The tour and
6 floatplane were operated by Southeast Aviation. Dkt. 110, Dec. of James Kosmos, at
7 ¶14; Dkt. 107-1, Dec. of Caryn Jorgensen, Exh. R at 278. Although defendants did not
8 operate the floatplane, the parties dispute whether defendants actively encouraged and
9 promoted this excursion to its cruise passengers. Dkt. 48-3; Dec. of James Rogers, at
10 Exhs. A, B, C; Dkt. 126, Dec. of James Rogers, at Exhibit 1 (Sealed) at 39:3-24, 40:2–
11 42:6; Dkt. 111, Dec. of Jessica A. Ashe, at ¶¶3-11.

12 The parties dispute whether there is an unreasonably high risk of an accident
13 when on a seaplane tour of the area of Misty Fjords National Monument or Ketchikan,
14 Alaska. Dkt. 121, Dec. of James Rogers, Exh. 96 at 28:6-16; Dkt. 109, Dec. of William
15 Edwards, Exh. C at 11, Dkt. 107, Dec. of Caryn Jorgensen, Exh. O at 82-83, 103. The
16 Holland America defendants' expert, William Edwards, claims that flying in Alaska is not
17 "uniquely unsafe," and Controlled Flights into Terrain accidents have occurred around
18 the world and in every state. Dkt. 109, Dec. of William Edwards, Exh. C at 11. Plaintiffs
19 claim that the risk-creating conditions for seaplane flights around Misty Fjords are not
20 obvious considering the high accident rate, the crowded airspace, and the terrain itself.
21 Dkt. 121, Dec. of James Rogers, Exh. 19 at ¶39.

22 Both parties acknowledge that other floatplane accidents occurred in Southeast
23 Alaska. One such incident occurred on June 25, 2015 – the "Promech Accident" – when
24
25

1 a floatplane operated by Promech crashed during its return from the Misty Fjords. Dkt.
2 107, Dec. of Caryn Jorgensen, Exh. C. The NTSB invited Holland America to participate
3 as a party to its investigation. Dkt. 115, Dec. of Karen Reich, at ¶14; Dkt. 107, Dec. of
4 Caryn Jorgensen, Exh. B at 72:2-73:4. In its April 2017 report, NTSB explained the
5 aircraft crashed when it “encountered deteriorating weather conditions” which “likely
6 obscured” the terrain “by overcast clouds with visibility restricted in rain and mist.” Dkt.
7 107, Dec. of Caryn Jorgensen, Exh. C, ¶2.2.1, at 46.

8 NTSB identified probable causes for the accident. *Id.* ¶3.2, at 68. First, “the pilot’s
9 decision to continue visual flight into an area of instrument meteorological conditions,
10 which resulted in his geographic disorientation and controlled flight into terrain.” *Id.*
11 Second, Promech’s “company culture, which tacitly endorsed flying in hazardous
12 weather and failed to manage the risks associated with the competitive pressures
13 affecting Ketchikan-area air tour operators, its lack of a formal safety program; and its
14 inadequate operational control of flight releases.” *Id.*

15 After issuing its report, NTSB sent a letter to the Cruise Lines International
16 Association (CLIA), to “encourage its members that sell air tours as shore excursions to
17 review the circumstances of this accident and to consider ways to mitigate associated
18 risks.” Dkt. 115, Dec. of Karen Reich, ¶15, Exh. B at 2; Dkt. 107, Dec. of Caryn
19 Jorgensen, Exh. C, ¶2.5, at 64.

20 In 2019, two more airplane crashes occurred in the Ketchikan area. Both planes
21 in those accidents were operated by Taquan. In its investigation of the first crash, the
22 NTSB noted that Ketchikan was a “high-traffic tour area” where “the risk of collision is
23
24
25

1 greater than in the general National Airspace System. Dkt. 107, Dec. of Caryn
2 Jorgensen, Exh. G at 141.

3 An employee of the defendants participated in meetings sponsored by the
4 Federal Aviation Administration in 2019 (FAA) where air safety issues and accidents in
5 the Ketchikan area were discussed. Dkt. 121, Dec. of James Rogers, at 16; Dkt. 121-89
6 Exh. 91; Dkt. 121-91, Exh. 93; Dkt. 126-1, Deposition of Jennifer Miller (Sealed) at 32-
7 33.

8 The parties dispute whether the NTSB or FAA undertook work to improve safety
9 of flights in Alaska in response to safety issues in the Misty Fjords National Monument.
10 The Holland America defendants claim that operators and the FAA have worked to
11 improve safety by enhancing weather surveillance, training, and collaboration. Dkt. 114,
12 Dec. of Jennifer Miller, at ¶¶14- 19; Dkt. 115, Dec. of Karen Reich, at ¶¶16-20. Plaintiffs
13 point to a report where the NTSB noted that a contributory cause for this subject crash
14 was “the FAA’s reliance on voluntary compliance with the Ketchikan [LOA]¹.” Dkt. 107-1,
15 Dec. of Caryn Jorgensen, at 276.

16 Plaintiffs point to internal communications among Holland America employees where
17 they exchanged articles relating to airplane crashes in the area. For example, after the
18 2019 crashes, an article titled “NTSB has long cautioned Southeast flight operators,
19 cruise lines about flightseeing infrastructure (Alaska)” was shared among Holland
20 America employees. Dkt. 121, Dec. of James Rogers, at Exh. 23. In another email
21 following an accident on June 17, 2019, other Holland employees shared information
22 about the incident. Dkt. 121, Dec. of James Rogers, at Exh. 18 (sealed).

23
24 ¹ Letter of Agreement

B. Legal Standard on Summary Judgment

Summary judgment is supported if the materials in the record “show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law.” Federal Rule of Civil Procedure (FRCP) 56 (a),(c). The moving party bears the initial burden to demonstrate the absence of a genuine dispute of material fact for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986). A genuine dispute about a material fact is presented when there is sufficient evidence for a reasonable jury to return a verdict for the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 252 (1986).

In this context, materiality means the fact is “relevant to an element of a claim or defense and whose existence might affect the outcome of the suit”, and so materiality is “determined by the substantive law governing the claim.” *T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass’n*, 809 F.2d 626, 630 (9th Cir. 1987).

The non-moving party must show that genuine issues of material fact “can be resolved only by a finder of fact because they may reasonably be resolved in favor of either party.” *Anderson*, 477 U.S. at 250. When the Court considers a motion for summary judgment, “[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in [their] favor.” *Id.* at 255. Yet the Court is not allowed to perform the jury’s function – the Court may not weigh evidence, draw legitimate inferences from facts, or decide credibility. *Id.*

If the moving party meets their initial burden, an adverse party may not rest on the mere allegations or denials of their pleading; the response, by affidavits or as otherwise provided in FRCP 56, must set forth specific facts showing there is a genuine

1 issue for trial. FRCP 56(c). The Court may not disregard evidence solely based on its
2 self-serving nature. *Nigro v. Sears, Roebuck & Co.*, 784 F.3d 495, 497 (9th Cir. 2015).
3 “The district court can disregard a self-serving declaration that states only conclusions
4 and not facts that would be admissible evidence.” *Id.*

5 **C. Analysis**

6 Plaintiffs are required to prove four elements of negligence: “(1) duty; (2) breach;
7 (3) causation”; and (4) damages.” *Morris v. Princess Cruises, Inc.*, 236 F.3d 1061, 1070
8 (9th Cir. 2001). In a maritime tort action for negligence when plaintiff is not a seaman,
9 the ship’s owner “owes to all who are on board. . . the duty of exercising reasonable
10 care under the circumstances of each case.” *Kermarec v. Compagnie Generale*
11 *Transatlantique*, 358 U.S. 625, 632 (1959); *Peters v. Titan Navigation Co.*, 857 F.2d
12 1342, 1344 (9th Cir. 1988).

13 An owner of a ship in navigable waters owes a duty to exercise reasonable care
14 to its passengers. *Rainey v. Paquet Cruises, Inc.*, 709 F.2d 169, 172 (2d Cir.1983). The
15 law does not impose a duty to warn of an obvious danger. *Poston v. United States*, 396
16 F.2d 103, 107 (9th Cir.1968). See also *Weiss v. Holland America Line, Inc.*, No. C12-
17 2105 RSM, 2014 WL 1569204, at *4 (W.D. Wash. Apr. 18, 2014); but see *Samuels v.*
18 *Holland America Line-USA Inc.*, 656 F.3d 948, 954 (9th Cir. 2011) (“we have no need to
19 address ... whether [the] question [of open and obvious] is an appropriate one for
20 decision on summary judgment”).

21 “Where the condition constituting the basis of the plaintiff’s claim is not unique to
22 the maritime context, a carrier must have ‘actual or constructive notice of the risk-
23 creating condition’ before it can be held liable.” *Samuels*, 656 F.3d at 953 (quoting
24
25

1 *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1322 (11th Cir. 1989) and *Isbell v.*
2 *Carnival Corp.*, 462 F. Supp. 2d 1232, 1237-1238 (S.D. Fla. 2006)). A duty to warn
3 passengers of a hazard requires that the carrier have “actual or constructive notice of
4 the risk-creating condition[.]” *Keefe*, 867 F.2d at 1322; *Galentine v. Holland Am. Line—*
5 *Westours, Inc.*, 333 F. Supp. 2d 991, 997 (“based on this disputed evidence [of actual or
6 constructive notice] alone, summary judgment is not appropriate”).

7 1. *Open and Obvious*

8 Courts have consistently held that there is no duty to warn of an obvious and
9 apparent danger. *Reed v. Royal Caribbean Cruises, Ltd.*, 618 F. Supp.3d 1346, 1352
10 (11th Cir. 2022); *Morrell & Co. v. Royal Caribbean Cruises, LTD.*, 534 F. Supp. 2d 1345,
11 1352 (S.D.Fla. 2008) (cruise ship had no duty to warn of obvious dangers of operating a
12 dune buggy on a shore excursion); *Isbell*, 462 F. Supp. 2d at 1238 (no duty to warn of
13 obvious danger that snakes may be in the river on a cruise ship excursion involving
14 floating down a river in a rainforest). If a reasonable person, by the ordinary use of their
15 senses — an objective standard – would perceive the extent of risk, then the danger
16 would be open and obvious. *See Reed*, 618 F. Supp.3d at 1353. The question is not
17 whether under this objective test any risk would be present for a given activity, but
18 whether “an increased risk” was present, as opposed to “the underlying risk itself”. *Id.*

19 The Court in *Reed v. Royal Caribbean Cruises Ltd.* explained that the defendant
20 cruise ship line did not show the risk of visiting an island with an active volcano was an
21 open and obvious risk; the defendant argued it was open and obvious because there
22 was a general risk associated with active volcanoes. 618 F. Supp. 3d 1346 (S.D. Fla.
23 2022). Rejecting the defendant’s argument, the Court pointed to the allegations of an
24
25

1 increased risk because the specific volcano “had just been upgraded to a higher risk
2 designation, had erupted merely three years prior, and had been subject to a recent
3 warning from New Zealand’s earthquake and geological hazard information
4 organization”. *Id.* at 1353. On these facts, the Court found the extent of the risk was not
5 open and obvious.

6 Plaintiffs argue that genuine issues of material fact exist as to whether the
7 conditions around Ketchikan are open and obvious to a reasonable person. Plaintiffs
8 claim that the unreasonably high accident rate of seaplanes in the Ketchikan area is not
9 open and obvious to the reasonable person.

10 Although transportation-related activities involve some risks, the enhanced risk
11 of seaplane flights associated with clouds and rainy weather was not necessarily open
12 and obvious to a reasonable person. This would be a jury question. There is a genuine
13 dispute of material fact whether individuals who have been on an airplane would
14 reasonably be expected to know that a pilot of a seaplane in the Misty Fjords National
15 Monument and Ketchikan area would need to fly in high-traffic areas, or would find it
16 more difficult to navigate in cloudy, rainy weather. A reasonable person would know
17 there is some amount of risk in airplane travel, yet there is a genuine dispute of material
18 fact whether increased risk would or would not be perceived by a reasonable person. A
19 jury potentially could find that a reasonable person likely may believe that pilots in that
20 area would be able to successfully navigate in all types of weather. Although some risk
21 would always be present, it is the enhanced risk that, based on a purely objective
22 standard, a reasonable person potentially would not perceive.

1 2. *Actual or Constructive Notice*

2 A defendant has constructive notice “if, in the exercise of reasonable care, [the
3 defendant] ought to have known about or discovered the alleged dangerous conditions.”
4 *Ribitzki v. Canmar Reading & Bates*, 111 F.3d 658, 663 (9th Cir. 1997). “This implies a
5 duty of reasonable inspection...” *Ibid*.

6 As for whether the defendants were put on notice, this is a closer question but
7 construing the facts here in the light most favorable to Plaintiffs, there is a genuine
8 dispute of material fact that would require that this case be submitted to a jury.

9 The Ninth Circuit in *Samuels v. Holland America Line-USA Inc.* found that there
10 was no genuine dispute of material fact concerning duty to warn, because the record on
11 summary judgment showed defendant cruise ship line did not have actual or
12 constructive notice of a dangerous condition. 656 F.3d 948 (9th Cir. 2011). Plaintiff
13 waded on the Pacific Ocean side of Lover's Beach and that activity was not uniquely
14 associated with maritime travel.

15 The record did not include any evidence (particularly because the material
16 portions of the declarations made by Plaintiff's experts were properly stricken) that
17 Holland America knew or should have known that the Pacific Ocean side of Lover's
18 Beach was so dangerous that it needed to warn passengers not to swim there. *Id.* at
19 952-953. Other than Plaintiff, 96,000 Holland American passengers visited Cabo San
20 Lucas in 2008 without a single report that any of those passengers who chose to visit
21 Lover's Beach were injured while doing so. *Id.* at 954. Nor was Holland America aware
22 of any similar accident, or any accident at all, that had previously occurred while a
23
24
25

1 Holland American passenger was swimming on the Pacific Ocean side of Lover's
2 Beach. *Id.*

3 In this case, Plaintiffs assert there is evidence showing Holland America had
4 constructive knowledge and *should have known* about the dangerous conditions: (1)
5 Holland America knew of the previous crashes in the Ketchikan area; (2) Holland
6 America participated in FAA-sponsored meetings where air tour safety issues in the
7 Ketchikan area were discussed; and (3) Holland America employees exchanged articles
8 highlighting the safety concerns involving those crashes.

9 Defendants contend that Plaintiffs must show Holland America had knowledge of
10 a risk presented specifically by Southeast. Defendants rely on *Reming v. Holland*
11 *America Line, Inc.* where the Ninth Circuit found that Holland America did not have
12 constructive notice of uneven pavement in Mazatlán that led to a cruise passenger's
13 injury because Holland America "completed a daily review of a comprehensive file of
14 security and safety updates concerning each of its ports of call, including Mazatlán," and
15 those materials did not report that Mazatlán streets posed a safety risk. 662 Fed.Appx.
16 507, 510 (9th Cir. 2016). The Ninth Circuit also pointed out that thousands of visitors
17 had toured the location where the Plaintiff's injury occurred without incident, leaving
18 Holland America unaware of any potential dangers². *Id.*

19 _____
20 Plaintiffs rely on *Chaparro v. Carnival Corp.* to support their argument that Holland America had a duty to
21 warn Plaintiffs of "known dangers at ports of call." 693 F.3d 1333 (11th Cir. 2012). The Eleventh Circuit
22 held "a cruise line owes its passengers a duty to warn of known dangers beyond the point of debarkation
23 in places where passengers are invited or reasonably expected to visit." *Id.* The Eleventh Circuit held that
24 this rule is "consonant with the federal maritime standard of ordinary reasonable care." *Id.* at 1336.
25 Defendants maintain that the court's ruling in *Chaparro* goes beyond maritime duties recognized in this
Court. The Ninth Circuit has not directly adopted the Eleventh Circuit's proposition, and the Court, in this
instance, does not find it necessary to rely on the Eleventh Circuit's holding *Chaparro* to analyze Plaintiffs'
duty to warn claim.

1 The unpublished decision in *Reming* should not be interpreted to mean Plaintiffs
2 must establish that Defendants knew about a risk presented specifically by Southeast.
3 The Ninth Circuit in *Reming* did not state that the Plaintiff was required to show Holland
4 America had knowledge of a risk presented specifically by Tropical Tours, the company
5 that operated the shore excursion in Mazatlán.

6 As discussed, the parties acknowledge that previous crashes have occurred in
7 the area (even though those crashes involved companies other than Southeast).
8 Further, reports from the NTSB following those other crashes indicate that there is an
9 increased risk of collision in popular tour areas because of the high concentration of
10 traffic. Plaintiffs have shown that Defendants had knowledge of the risk presented by
11 seaplane tours in the Misty Fjords area.

12 Plaintiffs have thus presented sufficient evidence for the Court to conclude that
13 there is a genuine dispute of material fact as to whether Holland America had a duty to
14 warn the Plaintiffs of the dangers associated with taking a seaplane tour in the Misty
15 Fjords.

16 3. *Causation*

17 Defendants argue that there is no “non-speculative evidence to establish
18 proximate cause – namely, evidence Decedents would not have gone on Southeast’s
19 flight if HAL had issued some sort of warning.” Dkt. 106 at 27.

20 Questions of foreseeability and causation in negligence cases particularly lend
21 themselves to resolution by a jury. See *Cook v. Baker Equipment Engineering Co.*, 582
22 F.2d 862, 865 (4th Cir.1978); *Wylor v. Holland America Line-USA, Inc.*, 348 F. Supp. 2d
23 1206, 1210 (W.D.Wash. 2003). When determining whether the failure to warn caused
24
25

1 an injury, the jury must reach that conclusion based on the experience of the
2 community, “the court may seldom rule on [cause] as a matter of law.” See Restatement
3 (Second) of Torts, § 433B cmt.b; *see also, Hipwell v. Air & Liquid Systems Corp.*, No.
4 1:20-cv-00063-JNP-JCB, 2022 WL 3999949 (D. Utah 2022) (discussing the causation
5 element in a failure-to-warn case). In the analogous context of failure to warn regarding
6 harmful substances, the Washington Court of Appeals in *Budd v. Kaiser Gypsum*
7 *Company, Inc.* found that evidence of a plaintiff’s heeding warnings on other products
8 would allow the jury to draw a permissible inference that plaintiff would have heeded
9 warnings about the defendant’s product. 21 Wn. App. 2d 56, 75-76 (2022).

10 The witnesses who could have testified regarding their decision-making are
11 deceased, and the Defendants cannot speculate how the decedents subjectively would
12 have responded to a warning. Interpreting the facts in the light most favorable to the
13 non-moving Plaintiffs, the Court should refrain from speculating whether each of the
14 Decedents subjectively would respond to a warning by deciding to avoid the fatal flight.
15 The Plaintiffs have put forth evidence that when passengers received notice in 2015
16 informing them of a float plane crash, some of the cruise passengers canceled airplane
17 tours and were offered a full refund. Dkt. 120, Plaintiff’s Response at 29, citing Dkt. 121-
18 73, 121-74 (sealed), 121-76, 121-77 (sealed), 121-78 (sealed), and Dkt. 126-1,
19 Deposition of Jennifer Miller (Sealed) at 7-8. Dana McArthur, for instance, testified in
20 their deposition that Rachel McArthur had, in the past, declined to participate in an
21 activity because of concerns about safety. Dkt. 121-70 at 7. There is a genuine dispute
22 of material fact that a jury must decide regarding whether the decedents would have
23 responded to warnings by refraining from an activity that posed this degree of risk.

1 4. *Objections to Expert Evidence*

2 Plaintiffs object to Defendants' reliance on the testimony and report of Plaintiffs'
3 withdrawn expert Joellen Gill. Dkt. 120 at 30-31.

4 Under Fed. R. Evid. 402, "[a]ll relevant evidence is admissible," except as
5 otherwise provided. "We let jurors see and hear even marginally relevant evidence,
6 because we trust them to weigh the evidence appropriately." *United States v. Hitt*, 981
7 F.2d 422, 423 (9th Cir. 1992). A district court exercises broad discretion in deciding
8 whether the probative value of evidence outweighs its prejudicial effect under Fed. R.
9 Evid. 403, and abuses that discretion only by admitting evidence of very slight or no
10 probative value when there is a likelihood of unfair prejudice or risk of misleading the
11 jury. *Id.* at 424.

12 Some district courts have held that under Fed. R. Civ. P. 26(b)(4)(D), a non-
13 testifying expert's testimony may be used only by another party upon a showing of
14 "exceptional circumstances." *Lehan v. Ambassador Programs, Inc.*, 190 F.R.D. 670,
15 672 (E.D. Wash. 2000); *FMC Corp. v. Vendo Co.*, 196 F. Supp. 2d 1023, 1046 (E.D.
16 Cal. 2002). Other courts have held that such a decision is "committed to the sound
17 discretion of the district court". *Peterson v. Willie*, 81 F.3d 1033, 1037-1038, n.4 (11th
18 Cir. 1996), and applied a balancing test under Fed. R. Evid. 403. *Araujo v. Coachella*
19 *Valley Water District*, No. 20-CV-01800-AJB-MMP, 2023 WL 5983849, at *2-3 (S.D.
20 Cal. Sept. 14, 2023) (discussing court opinions that use various approaches and
21 selecting the balancing test). Some courts have used a permissive standard, particularly
22 when the issue involves an expert who has conducted an examination under Fed. R.
23 Civ. P. 35. See, 6 Moore's Federal Practice § 26.80[1][a](3d ed.) (Once a party has
24
25

1 designated an expert witness as someone who will testify at trial, the later withdrawal of
2 that designation may neither prevent the deposition of that witness by the opposing
3 party nor the expert's testimony at trial. Furthermore, if a party is deemed to have
4 waived the privilege for documents provided to its named expert, that party may not
5 avoid production of those documents under Rule 26(b)(4)(A) by later changing the
6 designation of that expert from "testifying" to "non-testifying" expert); *House v.*
7 *Combined Ins. Co. of America*, 168 F.R.D. 236, 243-248 (N.D. Iowa 1996) (discussing
8 three standards, deciding the balancing test should apply, and prohibiting the jury from
9 learning which of the parties had hired the expert, because that party may be prejudiced
10 if the jury hears that the expert was hired to be the opposing party's expert). There is no
11 Ninth Circuit controlling authority on the test to be used.

12 Defendants, in their reply brief, move to strike the expert testimony and report of
13 David Downey. Dkt. 131 at 11, 18. Defendants make this argument for the first time in
14 their reply. "[W]here new evidence is presented in a reply to a motion for summary
15 judgment, the district court should not consider the new evidence without giving the
16 [non-]movant an opportunity to respond." *Dutta v. State Farm Mut. Auto. Ins. Co.*, 895
17 F.3d 1166, 1172 (9th Cir. 2018) (quoting *Provenz v. Miller*, 102 F.3d 1478, 1483 (9th
18 Cir. 1996)).

19 The parties have not fully briefed these issues. Thus, Plaintiff's motion to strike,
20 and Defendants' motion to strike should be denied without prejudice to the parties' later
21 making fully briefed motions in limine at an appropriate time.

1 CONCLUSION

2 For all these reasons, the Holland America defendants' motion for summary
3 judgment should be DENIED. The Plaintiffs' motion to strike evidence from their
4 withdrawn expert Joellen Gill should be DENIED without prejudice. The Holland
5 America Defendants' motion to strike expert testimony and report of David Downey
6 should be DENIED without prejudice.

7 Pursuant to 28 U.S.C. § 636(b)(1) and Fed. R. Civ. P. 72(b), the parties shall have
8 fourteen (14) days from service of this report to file written objections. *See also* Fed. R.
9 Civ. P. 6. Failure to file objections will result in a waiver of those objections for purposes
10 of *de novo* review by the district judge, *see* 28 U.S.C. § 636(b)(1)(C), and can result in a
11 waiver of those objections for purposes of appeal. *See Thomas v. Arn*, 474 U.S. 140,
12 142 (1985); *Miranda v. Anchondo*, 684 F.3d 844, 848 (9th Cir. 2012) (citations omitted).
13 Accommodating the time limit imposed by Fed. R. Civ. P. 72(b), the Clerk is directed to
14 set the matter for consideration on February 19, 2025, as noted in the caption.

15
16 Dated this 4th day of February, 2025.

17
18 

19

20 Theresa L. Fricke
21 United States Magistrate Judge
22
23
24
25