UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

FARAH TOUTOUNCHIAN, et al., Plaintiffs, v. PRINCESS CRUISE LINES, LTD., et al., Defendants.	CV 20-3717 DSF (AGRx) Order GRANTING Defendants' Motion for Summary Judgment (Dkt. 67)

Defendants Carnival Corporation and Princess Cruise Lines, Ltd. move for summary judgment on Plaintiffs Farah and Mohammed Toutounchian's claim for negligence under maritime law. Dkt. 67-1 (Mot.). Plaintiffs oppose. Dkt. 71. The Court deems this matter appropriate for decision without oral argument. See Fed. R. Civ. P. 78; Local Rule 7-15. The motion for summary judgment is GRANTED.

I. UNDISPUTED FACTS

A. The Cruise

On January 20, 2020, the Diamond Princess, a cruise ship operated by Princess, embarked from Yokohama, Japan, with planned stops in Kagoshima, Japan (January 22); Hong Kong (January 25); Vietnam (January 27-28); Taipei, Taiwan (January 31); and Japan (February 1, 3). UF ¶ 20.[1] Plaintiffs were passengers on the ship when

[1] Citations to UF refer to Plaintiffs' Genuine Disputed Facts, dkt. 71-1, which incorporates Defendants' proposed uncontroverted facts and Plaintiffs' responses to those facts. Citations to AMF refer to Defendants' Reply Statement of Undisputed Facts, dkt. 72-1, which incorporates Plaintiffs'

it embarked from Yokohama. Id. ¶ 80. At the time the ship arrived in Kagoshima on January 22, only one confirmed case of COVID-19 was detected in Japan, and it was thought to have been exported from China. Id. ¶ 30.[2]

Plaintiffs disembarked at several ports, including Taipei, Taiwan on January 31 and Naha, Japan on February 1. AMF ¶ 81.

B. COVID-19

In January 2020, early studies suggested an incubation period for COVID-19 of two to seven days, but later studies showed that COVID-19 has a longer and more variable incubation period of one to fourteen days. Id. ¶ 7. In January and February 2020, there was uncertainty as to the mechanism of transmission of COVID-19; guidance from the World Health Organization (WHO) and the Centers for Disease Control and Prevention (CDC) focused on transmission from contaminated surfaces, and noted the possibility, but not certainty, of transmission from human-to-human contact. Id. ¶¶ 12-13. On January 21, 2020, the WHO reported that of the 282 confirmed COVID-19 cases worldwide, only four were outside China, and each one was exported from Wuhan. Id. ¶ 19. On February 1, 2020, WHO reported that it was aware of

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proposed additional material facts and Defendants' responses to those facts. Where the Court cites to a disputed fact, the Court has found the dispute was not valid or was irrelevant, unless otherwise indicated. The Court has independently considered the admissibility of the evidence and has not considered facts that are irrelevant or based on inadmissible evidence.

[2] Plaintiffs do not say they dispute this fact, but they cite an article that stated: "China's health ministry has confirmed human-to-human transmission of a mysterious Sars-like virus that has spread across the country and fueled anxiety about the prospect of a major outbreak . . . ." UF ¶ 30. Here and in numerous other instances, Plaintiffs violate this Court's Order re Motions for Summary Judgment. See Dkt. 9 at ¶ 5(c). Defendants also object to this statement as hearsay. Dkt. 72-5 (Objections) at 1 (No. 1). To the extent it is offered for its truth, Defendants' objection is sustained.

possible asymptomatic transmission of COVID-19, but that it was not a main driver of transmission. Id. ¶ 14. In January and February 2020, the CDC and WHO did not recommend any specific measures for travelers or restrictions outside of China. Id. ¶ 15. Additionally, in January 2020 and most of February 2020, COVID-19 testing was extremely limited. Id. ¶ 73.[3] During that time, mask use by the general public was discouraged. Id. ¶¶ 74, 75. The CDC did not recommend the use of masks by the general public until April 30, 2020. Id. ¶ 76.

C. Princess's Health-Related Policies

Dr. Grant Tarling, Princess's Chief Health Officer, was aware of and followed developments about COVID-19 beginning soon after December 31, 2019, and relied on guidance from public health authorities, including the WHO and CDC, about COVID-19. Id. ¶ 27. Princess had in place policies generally applicable to preventing and controlling the spread of diseases, though not specifically designed to stop the spread of COVID-19. Id. ¶¶ 21-23.

On January 17, 2020, the CDC issued guidance on evaluating patients under investigation (PUI) for COVID-19, and advised evaluating a patient as a PUI if the patient had a combination of clinical features, certain respiratory and other symptoms, and epidemiological risk, such as travel to Wuhan, China or a close contact with a symptomatic PUI or individual who was confirmed to be positive for COVID-19. Id. ¶¶ 33-34. In the second half of January 2020, Tarling began participating in a medical working group organized by Carnival to develop an expedited policy to address COVID-19. Id. ¶ 31. On January 23, 2020, Carnival issued a policy consistent with the CDC's guidance, and Princess issued its own policy on January 25 based on Carnival's policy that required denial of boarding to all

[3] Plaintiffs dispute this by stating "there were enough tests for the Diamond Princess" but provide no support for this statement. See id. It is not clear what Plaintiffs mean by their statement.

individuals that had visited Wuhan, China in the 14 days before embarkation. Id. ¶ 35.

D. The Index Patient

Sometime late on February 1 or on February 2, 2020, Princess received information that a passenger (the Index Patient) who had disembarked in Hong Kong on January 25 had reportedly tested positive for COVID-19 after disembarking. Id. ¶ 44; see also AMF ¶¶ 93-99. Princess researched the Index Patient and undertook contact tracing, which led it to believe it was unlikely anyone infected with COVID-19 was on the ship. UF ¶ 45. Princess determined the Index Patient had been traveling with three other individuals, none of whom had visited the ship's medical center, and there was no sign of an outbreak of respiratory disease on the ship. Id. ¶ 46. Princess also identified six crew members who were close contacts of the Index Patient and determined they did not have a respiratory illness. Id. ¶ 47. Princess isolated one passenger who had gone on an excursion off the ship with the Index Patient and who had reported respiratory symptoms. Id. Princess determined there was low risk and no reason to conclude that someone infected with COVID-19 was on the ship; Plaintiffs dispute that this belief was reasonable. Id. ¶ 48.

On February 2, 2020, Defendants were informed that the Index Patient was confirmed as positive for COVID-19, that the patient's cough began on January 23 and his fever on January 30, and recommended cleansing and disinfection. Id. ¶¶ 52-53.

On February 3, Princess distributed an advisory informing passengers that a former passenger had tested positive for COVID-19, that the ship would arrive early to Yokohama, and that the Japanese authorities would conduct a review of the ship on arrival. Id. ¶ 58. Later that day, Japanese authorities boarded the ship to begin their investigation. Id. ¶ 59.

E. The Quarantine

On February 4, the Japanese authorities decided to test 31 passengers for COVID-19. Id. On the morning of February 5, Arma learned that 10 tests had come back positive for COVID-19, that Japanese authorities would board the ship to disembark those passengers, and that the remaining passengers would be quarantined in their cabins for the next 14 days. Id. ¶ 61. All passengers were instructed to remain in their cabins. Id. ¶ 62. The Japanese government gave instructions to control the spread of COVID-19, including food handling and delivery and provision of medications. Id. ¶ 65. Along with the other passengers, Plaintiffs were quarantined in their cabin beginning on February 5. Id. ¶ 82.[4] During the quarantine, Princess did not conduct onboard testing for COVID-19, though the parties dispute whether testing was possible. Id. ¶ 79. The ship's buffet was shut down on February 5, and prior to that date, servers were not required to wear masks. AMF ¶ 117.

On February 7, Mr. Toutounchian began experiencing symptoms of COVID-19, including headache, cough, fever, and body aches. UF ¶ 83. Ms. Toutounchian began experiencing similar symptoms on February 13. Id.; AMF ¶ 121. Mr. Toutounchian tested positive for COVID-19 on February 11, and Ms. Toutounchian tested positive on February 14. AMF ¶ 121. Mr. Toutounchian's symptoms worsened, and Plaintiffs were eventually tested for COVID-19 by Japanese authorities, removed from the ship, and taken to a hospital in Japan where they remained for several weeks. UF ¶ 84. Both Plaintiffs were

[4] Ms. Toutounchian described the conditions onboard the ship during the quarantine in her declaration, including that meals were delivered by unmasked servers, beverages were served in open glasses, and only those staying in "outside cabins" had access to fresh air. AMF ¶¶ 104-06, 108. Defendants object to these statements as lacking foundation and personal knowledge. Evidentiary Objections at 1 (Nos. 2-4). The Court overrules these objections to the extent Plaintiffs speak from their personal experience, and sustains the objections to the extent they do not, such as whether the utensils used by Defendants to serve meals were sterilized. See AMF ¶ 104.

confirmed to have tested positive for COVID-19. Id. Plaintiffs state they have ongoing symptoms, including fatigue, body aches, headaches, vertigo, and loss of taste and smell. Id. ¶ 85.

II. LEGAL STANDARD

"A party may move for summary judgment, identifying each claim or defense – or the part of each claim or defense – on which summary judgment is sought. The court shall grant summary judgment if the movant shows there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). "This burden is not a light one." In re Oracle Corp. Sec. Litig., 627 F.3d 376, 387 (9th Cir. 2010). But the moving party need not disprove the opposing party's case. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986). Rather, if the moving party satisfies this burden, the party opposing the motion must set forth specific facts, through affidavits or admissible discovery materials, showing that there exists a genuine issue for trial. Id. at 323-24; Fed. R. Civ. P. 56(c)(1). A non-moving party who bears the burden of proof at trial as to an element essential to its case must make a showing sufficient to establish a genuine dispute of fact with respect to the existence of that element of the case or be subject to summary judgment. See Celotex Corp., 477 U.S. at 322.

The "mere existence of *some* alleged factual dispute between the parties will not defeat an otherwise properly supported motion for summary judgment; the requirement is that there be no *genuine* issue of *material* fact." Anderson v. Liberty Lobby, Inc., 477 U.S. 242, 247-48 (1986). An issue of fact is a genuine issue if it reasonably can be resolved in favor of either party. Id. at 250-51. "The mere existence of a scintilla of evidence in support of the [non-movant's] position will be insufficient; there must be evidence on which the jury . . . could find by a preponderance of the evidence that the [non-movant] is entitled to a verdict . . . ." Id. at 252. "Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." Id. at 248.

"[A] district court is not entitled to weigh the evidence and resolve disputed underlying factual issues." Chevron Corp. v. Pennzoil Co., 974 F.2d 1156, 1161 (9th Cir. 1992). Summary judgment is improper 'where divergent ultimate inferences may reasonably be drawn from the undisputed facts.'" Fresno Motors v. Mercedes Benz USA, LLC, 771 F.3d 1119, 1125 (9th Cir. 2014). Instead, "the inferences to be drawn from the underlying facts must be viewed in the light most favorable to the party opposing the motion." Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587-88 (1986) (simplified).

III. DISCUSSION

Plaintiffs contend Defendants' negligence caused them to contract COVID-19. To recover on a maritime negligence claim, Plaintiffs must establish (1) a duty, (2) a breach of that duty, (3) a causal connection between the offending conduct and the resulting injury, i.e., proximate cause, and (4) damages. Morris v. Princess Cruises, Inc., 236 F.3d 1061, 1070 (9th Cir. 2001). "It is a settled principle of maritime law that a shipowner owes the duty of exercising reasonable care towards those lawfully aboard the vessel who are not members of the crew." Kermarec v. Compagnie Generale Transatlantique, 358 U.S. 625, 630 (1959). "The degree of care considered reasonable in a particular circumstance depends upon the 'extent to which the circumstances surrounding maritime travel are different from those encountered in daily life and involve more danger to the passenger.'" Samuels v. Holland Am. Line-USA Inc., 656 F.3d 948, 953 (9th Cir. 2011) (citing Rainey v. Paquet Cruises, Inc., 709 F.2d 169, 172 (2d Cir. 1983)). "Where the condition constituting the basis of the plaintiff's claim is not unique to the maritime context, a carrier must have 'actual or constructive notice of the risk-creating condition' before it can be held liable." Id. (citing Keefe v. Bahama Cruise Line, Inc., 867 F.2d 1318, 1322 (11th Cir. 1989)).

Plaintiffs argue that actual or constructive notice is not required when the defendant created the hazardous condition, because the defendant is "deemed to know all foreseeable risks that arise from such

conduct." Opp'n at 13. Plaintiffs cite out-of-circuit authority in support of this argument, see id., but the Ninth Circuit has consistently applied a notice requirement to maritime negligence cases, see Samuels, 656 F.3d at 953, and district courts have applied it in cases involving COVID-19 on cruise ships, see Dorety v. Princess Cruise Lines Ltd., No. 2:20-CV-03507-RGK-SK, 2021 WL 4913508, at *3 (C.D. Cal. Oct. 1, 2021); Ford v. Carnival Corp., 553 F. Supp. 3d 765, 771 (C.D. Cal. 2021); Chung v. Carnival Corp., 553 F. Supp. 3d 775, 779 (C.D. Cal. 2021).

The parties disagree about whether the risk-creating condition is the general risk of COVID-19. Plaintiffs point to various facts supporting their contention that Defendants had constructive notice of the risk of COVID-19, including that the ship was exposed to the region in which a COVID-19 outbreak occurred, many of the passengers and crew of the ship were Chinese nationals or had visited China, and human-to-human spread of COVID-19 was suspected before the cruise began. Opp'n at 15. Defendants argue the applicable risk-creating condition is the presence of COVID-19 on the ship and cite other cases in the Central District involving COVID-19 on cruise ships that considered not the general risk of the disease, but rather the specific risk that the disease was on the vessel. Mot. at 13-14 (citing Dorety, 2021 WL 4913508, at *4; Saltzstine v. Princess Cruise Lines Ltd., 2020 WL 8475998, at *3 (C.D. Cal. Oct. 23, 2020)). The Court finds the reasoning of those cases persuasive, and also finds the risk of the presence of COVID-19 on the ship was not unique to the maritime context.

To prevail on their negligence claim, Plaintiffs therefore must establish Defendants had actual or constructive notice of the presence of COVID-19 on the ship or at least at the specific ports of call at which passengers could embark. A defendant has constructive notice if it "ought to have known about or discovered the alleged dangerous conditions . . . ." Ribitzki v. Canmar Reading & Bates, Ltd. P'ship, 111 F.3d 658, 663 (9th Cir. 1997).

Plaintiffs assert three different time frames during which Defendants knew or should have known of the risk of COVID-19 on the ship: (1) before the trip; (2) after the trip started, including the risk associated with disembarking the ship; and (3) once the ship was quarantined in Japan.

A. Pre-Trip Negligence

The ship departed from Yokohama, Japan on January 20, 2020. UF ¶ 20. The following day, the WHO reported that other than four cases outside China, each exported from Wuhan, the only confirmed cases of COVID-19 were in China. Id. ¶ 19. The ship was not scheduled to stop in the mainland of China. Id. ¶ 20. Plaintiffs do not cite any direct evidence that COVID-19 was present on the ship when it embarked. Therefore, there is no dispute that Defendants did not have actual knowledge of COVID-19 on the ship when it embarked.

Defendants argue they also did not have constructive knowledge of the risk of COVID-19 on the ship because they believed their existing policies to control the spread of disease onboard the ship were sufficient and there was no evidence that COVID-19 presented a risk beyond Wuhan, China. Mot. at 15. Defendants contend they relied on guidance from the CDC and the WHO about COVID-19, and that the WHO did not recommend travel restrictions, and even on February 1, 2020 the WHO reported that asymptomatic transmission was not a large factor in the spread of COVID-19. UF ¶¶ 14, 17, 27. Additionally, guidance from the CDC and WHO in January and February 2020 focused on transmission from contaminated sources and objects and placed an emphasis on handwashing and sanitation. Id. ¶ 12. The CDC did not recommend wearing masks until April 30, 2020. Id. ¶ 76.[5] Defendants have met their burden by establishing the lack of evidence of constructive notice.

[5] Plaintiffs argue that reliance on the guidance of public health authorities does not absolve Defendants of negligence. Opp'n at 17. Regardless, the

Plaintiffs attempt to raise a genuine dispute as to whether Defendants had constructive knowledge by arguing that many passengers and crew members on the ship were Chinese nationals or had visited China; the nature and scope of the COVID-19 disease was unknown but the number of infected people continued to grow outside of China; human-to-human spread was suspected and the disease was confirmed to be severe; and ten days before the ship embarked, news organizations were reporting that COVID-19 had spread to Thailand, Japan, and South Korea and that researchers worried the number of infections had been underestimated. Opp'n at 15-16. These facts do not demonstrate that Defendants ought to have known any individuals on the ship had or were likely to be infected with COVID-19; they simply support the proposition that the manner and degree of spread of COVID-19 was uncertain in January and February 2020. Plaintiffs therefore fail to raise a triable issue as to whether Defendants had notice of the risk of COVID-19 on the ship prior to embarking on January 20, 2020.

B. Negligence During the Cruise

Defendants also argue they did not have actual or constructive notice of the risk of COVID-19 on the ship after it embarked on January 20, 2020. Mot. at 16. Plaintiffs contend Defendants knew or should have known, but did not inform Plaintiffs that (1) Plaintiffs "were among other passengers and crew who had been potentially exposed to COVID-19 during the immediate prior voyage"; (2) "COVID-19 was capable of spreading throughout the confines of a cruise ship"; and (3) "Plaintiffs were at risk while on excursions." Opp'n at 16.

With respect to Plaintiffs' alleged potential exposure to COVID-19 "during the immediate prior voyage,"[6] id. at 16, while it is

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Court finds this evidence is relevant to determining whether Defendants had actual or constructive notice of the risk of COVID-19 on the ship.

[6] To the extent Plaintiffs are also arguing that they were potentially exposed to COVID-19 from passengers or crew who were onboard the ship from a voyage prior to January 20, 2020, Plaintiffs cite no supporting evidence.

undisputed that the Index Patient began experiencing symptoms on January 23, UF ¶ 53, Defendants were not informed of the Index Patient's positive COVID-19 test or symptoms until February 1 or 2, 2020, id. ¶ 44. Additionally, the Index Patient had disembarked on January 25, 2020, and Defendants conducted contact tracing and determined the Index Patient's travel companions and the crew members with whom he had had close contact were negative for respiratory illness, with the exception of one individual with whom the Index Patient had traveled who reported respiratory symptoms and was promptly isolated. Id. ¶¶ 45-47. Based on this information, Tarling concluded there was a high probability that the Index Patient developed the illness after disembarking from the ship. Id. ¶ 51. Plaintiff disputes this, arguing the Index Patient likely contracted COVID-19 while on the ship. Id. ¶ 56. However, without any expert testimony on the subject or any other evidence, this is mere speculation, and Plaintiffs fail to raise a triable issue.

For the reasons described above, there are no triable issues as to whether Defendants had notice that COVID-19 was capable of spreading through human-to-human contact or asymptomatically, as Plaintiffs have failed to submit evidence that Defendants should have known this even though it is undisputed that the WHO and CDC were unsure of the manner and degree of the spread of COVID-19.

Finally, there are also no triable issues as to whether Defendants knew or should have known Plaintiffs were at risk while on excursions off the ship. Plaintiffs argue that news organizations were reporting before the ship departed from Yokohama that COVID-19 had spread to Thailand, Japan, and South Korea, UF ¶ 78, but the ship was not scheduled to stop, and did not stop, in Thailand or South Korea. UF ¶ 20. Only one confirmed case of COVID-19 was detected in Japan by January 22, and it was reported to have been exported from China. Id. ¶ 30. In January and February 2020, the CDC and WHO did not recommend any specific measures for travelers or restrictions outside of China. Id. ¶ 15. While Plaintiffs argue Defendants had other sources of information, such as a news service from the Cruise Lines International Association (CLIA), they do not provide any evidence that

CLIA alerted Defendants of the risk of COVID-19 at the various ports of call or that it was present on the ship. See id. ¶ 3 (CLIA warned Tarling on January 20, 2020 that the CDC was "closely monitoring an outbreak of a 2019 novel coronavirus (2019-nCoV) in Wuhan City, Hubei Province, China that began in December 2019."). Plaintiffs also point to a January 24, 2020 bulletin from the U.S. Coast Guard, which stated that COVID-19 had expanded in scope and that there had been cases discovered across the globe, id. ¶ 18, but the vague language of this bulletin does not establish that Defendants knew or should have known COVID-19 was present at the ports of call.

C. Negligence During Mandatory Quarantine

Defendants do not dispute that they had actual notice of the risk of COVID-19 on the ship beginning on February 5, 2020, when Arma learned that ten passengers had tested positive for COVID-19, and after which the Japanese put the ship under quarantine. UF ¶ 61. However, Defendants argue that even if they were negligent, Plaintiffs cannot prevail because they have no evidence that Defendants' actions caused them to get COVID-19 on the ship. Mot. at 23.

Defendants cite to the decision in Dhillon v. Princess Cruise Lines, Ltd., a factually similar case in which the court found the plaintiffs could not establish causation because they had no admissible expert testimony as to that element of their negligence claim. No. 2:20-CV-11661-GJS, 2022 WL 504560, at *3 (C.D. Cal. Feb. 18, 2022); cf. Landivar v. Celebrity Cruises, Inc., No. 21-20815-CIV, 2022 WL 375273, at *7 (S.D. Fla. Feb. 8, 2022) (denying summary judgment as to causation because the plaintiffs' expert testified that the plaintiffs had contracted COVID-19 onboard the cruise ship). In Dhillon, the plaintiffs had not all established that they had COVID-19, id. at *4 n.3, whereas here, it is undisputed that both plaintiffs tested positive for COVID-19, UF ¶¶ 84, 121. However, like the plaintiffs in Dhillon, Plaintiffs here did not submit any admissible expert testimony regarding causation, such as an opinion on the incubation period for COVID-19 to aid the trier of fact in determining whether Plaintiffs could have contracted COVID-19 between February 1, 2020 – the last

date on which they disembarked – and February 7 and 13, when Mr. and Ms. Toutounchian began experiencing symptoms of COVID-19, or February 11 and 14, when they tested positive for COVID-19. See AMF ¶ 121. Plaintiffs submitted the rebuttal report of Lawrence S. Mayer, which did not address the issue of causation.[7] Without any evidence or expert testimony as to where or when Plaintiffs contracted COVID-19, their contentions are mere speculation – particularly in the face of testimony from Defendants' expert that COVID-19 has an incubation period of 1 to 14 days, which suggests Plaintiffs could either have contracted COVID-19 on the ship or at one of the ports where they disembarked. See UF ¶ 7.

Defendants have met their burden by establishing Plaintiffs lack any evidence of causation, and Plaintiffs have not provided sufficient evidence to create a material issue of fact regarding causation. Defendants are therefore entitled to summary judgment.

IV. CONCLUSION

Defendants' motion for summary judgment is GRANTED.

IT IS SO ORDERED.

Date: June 13, 2022

Dale S. Fischer
United States District Judge

[7] Defendants object to the Mayer report as inadmissible because he was disclosed solely as a rebuttal expert to Defendants' expert, Donald Goldman, but Defendants did not rely on Goldman's testimony in bringing the instant motion. Objections at 2 (No. 5). Neither party submitted evidence from Goldman's report, and the Court therefore sustains Defendants' objection. See Baker v. SeaWorld Ent., Inc., 423 F. Supp. 3d 878, 923 n.22 (S.D. Cal. 2019) (after granting motion to exclude opinions and testimony of expert, excluding rebuttal report based on that report).