RUSSELL P. BROWN (SBN: 84505)
JAMES F. KUHNE, JR. (SBN: 251150)
GORDON REES SCULLY MANSUKHANI LLP
101 W. Broadway, Suite 2000
San Diego, CA 92101
Telephone: (619) 696-6700
Facsimile: (619) 696-7124

Attorneys for Plaintiffs
TRUTH AQUATICS, INC. AND
GLEN RICHARD FRITZLER AND DANA
JEANNE FRITZLER, INDIVIDUALLY AND AS
TRUSTEES OF THE FRITZLER FAMILY TRUST
DTD 7/27/92

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of the Complaint of Truth Aquatics, Inc. and Glen Richard Fritzler and Dana Jeanne Fritzler, individually and as Trustees of the Fritzler Family Trust DTD 7/27/92 as owners and/or owners pro hac vice of the dive vessel CONCEPTION, Official Number 638133, for Exoneration from or Limitation of Liability	CASE NO. 2:19-cv-07693 **PLAINTIFFS IN LIMITATION MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT/COUNTER-CLAIMANT CHRISTINE DIGNAM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES** Date: January 27, 2020 Time: 1:30 p.m. Place: Courtroom 9A 350 W. 1st Street Los Angeles, CA_____

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101 W. Broadway, Suite 2000

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Plaintiffs in Limitation TRUTH AQUATICS, INC., GLEN RICHARD FRITZLER AND DANA JEANNE FRITZLER, INDIVIDUALLY AND AS TRUSTEES OF THE FRITZLER FAMILY TRUST DTD 7/27/92 (hereinafter "Petitioners"), as owners and/or owners *pro hac vice* of the dive vessel CONCEPTION, Official Number 638133 (hereinafter "CONCEPTION"), hereby submit their Memorandum of Points and Authorities in Opposition to Respondent/Counterclaimant CHRISTINE DIGNAM's ("Counterclaimant") Motion to Strike Affirmative Defenses From The Answer to Her Counterclaim filed in this Court on December 17, 2019 (Doc. No. 21).[1]

I. INTRODUCTION

In the Memorandum of Points and Authorities in Support of the Motion to Strike Affirmative Defenses, Counterclaimant's attorneys echo media pundits and members of the maritime law plaintiffs' bar who have been quick to criticize Petitioners for exercising their right to invoke the Limitation of Liability Act and Supplemental Rule F. They claim those laws are "anachronisms" that have no place in modern maritime law[2]. Moreover, despite Petitioners' "strong reputation" in the dive boat industry[3], they portray Petitioners as desperate, "bare knuckled"

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[1] Counterclaimant's Memorandum of Points and Authorities I/S/O Her Motion to Strike Affirmative Defenses (Doc. 21-1) is referred to herein as the "Memorandum" or "Mem."

[2] *See*, *e.g.*, Mem. 1:22-23; *see also*, https://www.arnolditkin.com/personal-injury-blog/2019/september/criminal-probe-into-california-boat-fire-begins/ ("In the days following the accident, Truth Aquatics used the Limitation of Liability Act of 1851 to sue their employees and families of the victims. Though a common practice after disasters such as this, many experts question the law's use of these situations. The Limitation of Liability Act is a law which was created to govern a different generation of maritime travel. Today, this 150-year-old law is used by vessel owners to avoid accountability for negligent behavior.")

[3] "Truth Aquatics was the last boat you think would burn . . . The questions everyone is asking is: How did this fire start? And how and why did it spread so

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brawlers who "barricaded themselves behind . . . a truly gothic remedy" in a "shameful" and heartless attempt by Petitioners' insurers to avoid liability[4]. Mem. 1:22-2:1.

Such arguments are nothing more than gratuitous hyperbole. The Limitation of Liability Act unquestionably remains the law of the land. The United States Supreme Court has consistently upheld the law for over 150 years, including in the context of personal injury or wrongful death claims. *See, e.g., Butler v. Boston & Savannah S.S. Co.*, 130 U.S. 527, 549 (1889). In *Butler v. Boston & Savannah S.S. Co.*, cited by Counterclaimant,[5] the U.S. Supreme Court unequivocally confirmed that the Act applies with full force in the circumstances presented here. *Butler*, 130 U.S. at 549. "If we look at the ground of the law of limited responsibility of ship-owners, we shall have no difficulty in reaching the conclusion that it covers the case of injuries to the person as well as that of injuries to goods and merchandise . . . It extends to liability for every kind of loss, damage, and injury. This is the language of the maritime law." *Id.*

Courts of the Ninth Circuit have also consistently recognized and upheld the Limitation of Liability Act in cases involving personal injury and wrongful death. *See, e.g., In Re Complaint and Petition of Blue Water Boating Inc.*, 2019 U.S. App. LEXIS 35994 (9th Cir. 2019) (examining whether admiralty jurisdiction attaches to

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quickly?" https://www.latimes.com/california/story/2019-09-19/the-conception-wasnt-built-to-power-the-personal-electronics-revolution-could-this-have-caused-fire

[4] *See, e.g.*, https://www.deeperblue.com/legal-expert-weighs-in-on-conception-owners-liability/ ("The owners have now rushed into Federal Court and have filed a limitation proceeding, a case under an antiquated 1851 Federal Statute . . . This is a shameful tactic.")

[5] The language cited to by the Memorandum comes from the Syllabus, which is not part of the Court's Opinion. *See*, Mem. 1:23 n.2; *see also*, https://www.americanbar.org/groups/public_education/publications/teaching-legal-docs/how-to-read-a-u-s--supreme-court-opinion/

a paddleboard accident so as to allow the petitioner to go forward with limitation proceeding); *In Re Mission Jet Sports LLC*, 570 F.3d 1124 (9th Cir. 2009) (finding that a jet ski incident occurred on navigable waters such that the Limitation of Liability Act should apply); *In Re Morgan*, 2018 U.S. Dist. LEXIS 85980 (S.D. Cal. 2018) (determining that an incident involving a recreational boat on the Colorado River provides subject matter jurisdiction for a petition for limitation of liability.) In fact, the Ninth Circuit has applied the Act to limit a vessel owner's liability where limitation claimants could not prove what caused the loss in question, even after the shipowner had conceded that its crew was negligent. *See, Western Pioneer, Inc. v. Int'l Specialty, Inc., (In re Bowfin M/V)*, 339 F.3d 1137, 1138 (9th Cir. 2003) *citing Carr v. PMS Fishing Corp.*, 191 F.3d 1, 4 (1st Cir. 1999). And just recently, this Court applied it to enter default judgments as to claimants who failed to file and serve their claims within the applicable monitions period. *See, In re Won*, 2018 U.S. Dist. LEXIS 228774 at *8, 10 (C.D. Cal. 2018). So, "[w]hile the Limitation Act has been criticized by some commentators in recent years as being outdated, it has not been repealed by Congress, and courts therefore continue to apply it." *In re Glacier Bay*, 944 F.2d 577, 580 (9th Cir. 1991).

Indeed, not only is the Limitation of Liability Act still "on the books," Congress has chosen to keep it there despite calls that it be repealed. *See, Delta Country Ventures v. Magana*, 986 F.2d 1260, 1267 (9th Cir. 1993) (J. Kozinski, dissenting; internal citations omitted) ("[a]lthough Congress has acknowledged [the Ninth Circuit's] suggestion that the Limitation of Liability Act be repealed . . . the statute remains on the books . . .")

The present case, with 34 potential wrongful death claims, 5 potential personal injury claims, and a family-owned small passenger vessel whose owners were not on board the vessel at the time of the fire, presents *exactly* the type of

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101 W. Broadway, Suite 2000

circumstances that the Act was designed to address. As discussed below, but for the Limitation of Liability Act, its concursus and injunction provisions, its *pro rata* distribution scheme, and the Court's ability to retain jurisdiction to try damages in the event limitation is denied, the Petitioners would be overwhelmed.

Concursus and pro rata distribution lie at the very heart of the Limitation of Liability Act. Together, they provide (1) that all actions arising out of the events giving rise to the limitation action shall be stayed during the pendency of the limitation proceedings, (2) that any person making a claim against the shipowner must appear and assert their claim in the limitation action or be declared in contumacy and default, and (3) that, upon determination of the shipowner's liability, available funds "shall be divided, pro rata . . . among the several claimants in proportion to the amounts of their respective claims." Fed. R. Civ. P. Supp. Admiralty R. F(3)-(5), (8).

By way of example, crewmember Ryan Sims filed a Complaint in the Ventura County Superior Court on September 12, 2019. *See*, Declaration of James F. Kuhne, Jr. ("Kuhne Decl.") at Exhibit A. That action was stayed by the Court's Order Restraining All Suits and Directing Monition to Issue. *See*¸ Kuhne Decl. Exhibits B-C. Sims has since filed an appearance in the present Limitation Action, (Doc. 22), but as his State Court filing demonstrates that without the Act's concursus and stay provisions, and Petitioners' decision to invoke them, this litigation would quickly spiral unchecked into thirty-four separate wrongful death lawsuits and up to five personal injury lawsuits that could conceivably be filed in thirty-nine different venues, even in multiple States. Petitioners would be swamped trying to defend literally dozens of simultaneous proceedings, each of which would carry with it the risk of inconsistent judgments and conclusions of law. Moreover, the potential attorney fees and costs that would be required to defend thirty-nine separate wrongful death and personal injury lawsuits would be

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prohibitive for most defendants, including the Fritzlers' small family business. That multitude of litigation would also subject Petitioners to the risk of jury verdicts that they could not possibly satisfy.

At the same time, but for the Act's *pro rata* distribution scheme, each of the thirty-nine potential claimants would be forced to engage in a race to the courthouse, as each award or settlement could reduce the amount of funds available to compensate the other claimants who were not as quick to assert their claims and rush to seek a judgment or settlement in their favor.

Lastly, even if the Court ultimately denies limitation, it would still have discretion to retain jurisdiction over the claims. *In Re Complaint of Poling Transport Corporation*, 776 F. Supp. 779 (S.D.NY 1991) *citing Enercomp, Inc. v. McCorhill Pub, Inc.* 873 F.2d 536, 545-546 (2nd Cir. 1989) (if "substantial resources" have been committed, it is appropriate to retain pendent jurisdiction over pendent claims even if the federal claim is dismissed); *see also, In Re Paradise Holdings*, 795 F.2d 756, 763 (9th Cir. 1986) (noting that the district court had inherent discretion to stay a Master's claim in state court that was not subject to the limitation petition "or otherwise shape the limitation proceedings in a manner that promotes the purposes of the Act," such as protecting against depletion of insurance funds by the first party to race to court.) Such an exercise of discretion by the Court would be proper in this case, considering the number of claims that will likely be asserted, the potential damages at stake, and Petitioners' limited resources. *See, id.*

But Counsel and the Memorandum posture the Motion as a "white knight" that stands alone between the Petitioners and the "clutter" and "frivolity" that "will vex every other victim who files a counterclaim" if the instant Motion is not granted. *See*, Mem. 2:4-5, 7:19-22. Only by granting the instant Motion, the Memorandum argues, can Petitioners' "shameful" conduct be deterred and

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claimants' rights protected. *See, e.g., id.*; *see also*, https://www.deeperblue.com/legal-expert-weighs-in-on-conception-owners-liability/.

Those arguments ignore Petitioners' right to the benefits of the Federal Rules' "notice pleading" standard and their right to use the pleadings to frame the scope of permissible discovery. *See*, Fed. R. Civ. P. 8(b)(1), 26(b)(1). They ignore Congress' careful consideration of the Act and the procedures adopted, through Supplemental Rule F, to implement it. And they ignore the right of every litigant – including these Petitioners– to vigorously prosecute their case using all avenues available to them under the law. Those arguments have no place in this litigation.

Through the Proposed Order, Counterclaimant asks this Court to make factual and legal findings that are both unnecessary to the instant motion, and decidedly premature. *See, e.g.*, (Doc. 21-3) at 16:20-24, 6:11-15. There is an ongoing investigation by the United States Coast Guard ("USCG"), the National Transportation Safety Board ("NTSB"), the Federal Bureau of Investigation ("FBI") and the Bureau of Alcohol, Tobacco, Firearms and Explosives ("ATF") to determine the cause and origin of the fire. Kuhne Decl. Exhibit D at 2 (last line). Media reports are teeming with speculation about the fire's origin and cause, claiming it may have been "an exploding or smoldering lithium-ion battery, a fraying connection cord or a mismatched charger."[6] Counterclaimant draws similar conclusions. *See, e.g.*, (Doc 18) at 5:15-6:11, 6:24-7:2.

Unfortunately, no one has yet been able to determine what caused the fire on the CONCEPTION, where it originated on the vessel, how fast it spread, whether

[6] *See, e.g.*, https://www.latimes.com/california/story/2019-09-19/the-conception-wasnt-built-to-power-the-personal-electronics-revolution-could-this-have-caused-fire

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101 W. Broadway, Suite 2000

arson, a flash fire, or an explosion may be to blame, or even the exact cause of death of each passenger and crewmember. *See, e.g.*, Kuhne Decl. Exhibit D at 2 (last line). Until those facts are known, it would be premature to limit *any* affirmative defenses, or the discovery upon which those defenses may rely. *See*, Fed. R. Civ. P. 26(b)(1) (scope of discovery is framed by allegations in the pleadings). For example, Claimants have the right to pursue state law remedies for the death of nonseafarers occurring in state territorial waters. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 202 (1995). But the Memorandum asks the Court to find that Petitioners cannot assert state law affirmative defenses to those state law remedies, despite neither Counterclaimant, nor any subsequent claimant, making their choice of remedies known. *See,* (Doc. 21) 2:7-12. Restricting Petitioners' available defenses and limiting their right to discovery before this claimant (or the others who are likely to follow) have chosen their remedies would be a decidedly unfair and premature result.

The Limitation of Liability Act has stood the test of time because it provides a fair, equitable, and practical approach to mass-casualty maritime claims, and because it ultimately benefits everyone with a financial stake in the proceedings.

II. LEGAL ARGUMENT

A. LEGAL STANDARD

Motions to strike affirmative defenses are "generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." *Neilson v. Union Bank of California, N.A.*, 280 F. Supp.2d 1101, 1152 (C.D. Cal. 2003); *Armstead v. City of Los Angeles*, 66 F.Supp.3d 1254, 1271 (C.D. Cal. 2014). The question of whether to strike allegations rests within the sound discretion of the Court. *Neilson*, 290 F. Supp.2d at 1152. In the event that under some contingency an allegation may raise an issue, the motion should be denied. *Id. citing Wailua Associates v. Aetna*, 183 F.R.D.

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101 W. Broadway, Suite 2000

550, 553-554 (D. Haw. 1998). Because so many factual issues in this matter remain unknown, the affirmative defenses raised by Petitioners address specific contingencies that may arise in this case, and they should be permitted to stand.

In the Ninth Circuit, "[a]n affirmative defense must be pleaded with enough specificity or factual pleading to give plaintiff 'fair notice' of the defense." *Simmons v. Navajo County, Arizona*, 609 F.3d 1011, 1023 (9th Cir. 2010.)[7] Such "fair notice" requires only that an affirmative defense be described in "general terms." *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2010.) An affirmative defense that sets out a "cognizable legal theory" is sufficient. *Robertson v. Dean Witter Reynolds Co.*, 749 F.2d 530, 534 (9th Cir. 1984).

While not raised in their opening briefing, Counterclaimant may argue that the *Twombly/Iqbal*[8] heightened pleading standard for complaints applies to affirmative defenses. The 9th Circuit, however, has affirmed several times since those cases were handed down that the pleading standard for affirmative defenses in this Circuit is that of "fair notice." *See, e.g., Simmons*, 609 F.3d at 1023; *Kohler v. Flava Enterprises*, 779 F.3d at 1019. Likewise, the Central District of California has noted the split among Districts in this Circuit and declined to apply the *Twombly/Iqbal* standard to affirmative defenses. *See, Kohler v. Islands Restaurants*, 280 F.R.D. 560, 565-566 (C.D. Cal. 2012); *see also, Lauter v. Rosenblatt*, 2018 U.S. Dist. LEXIS 170422 at * 4 (C.D. Cal. 2018). The *Island Restaurants* court rejected the defendants' argument that the *Twombly/Iqbal*

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[7] *Simmons* involved the question of whether a defense not raised in the answer could be invoked in response to a claim, but the analysis regarding "fair notice" is pertinent here and has been cited as applying to affirmative defenses actually stated in a response.

[8] *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007); *Ashcroft v. Iqbal*, 556 U.S. 662 (2009).

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"plausibility standard" applied to affirmative defenses for several reasons. First, even after *Twombly* and *Iqbal*, the Ninth Circuit has continued to recognize the "fair notice" pleading standard for affirmative defenses. *Island Restaurants*, 289 F.R.D. at 566 *citing Simmons*, 609 F.3d at 1023. Second, it recognized that "the Supreme Court's analysis in *Twombly* and *Iqbal* is itself limited to pleadings under Federal Rule of Civil Procedure 8(a)(2)." *Id.* So although FRCP 8(a)(2) requires "a short plain statement of the claim *showing* that the pleader is entitled to relief, section 8(c) "only requires the responding party to '*affirmatively state*' its affirmative defenses." *Id.* (emphasis in original.) Petitioners' affirmative defenses here meet the "fair notice" pleading standard.

B. COUNTERCLAIMANT'S MOTION IS PREMATURE, AND THE COURT SHOULD NOT ACCEPT THE MOTION'S INVITATION TO DEPRIVE PETITIONERS OF SOUND AFFIRMATIVE DEFENSES AT THIS EARLY DATE

Rather than decide the issues raised by the motion now, the Court should defer its ruling until all parties have appeared and the factual and legal issues upon which this litigation will turn have been more fully developed. Courts unquestionably possess the inherent power to control their dockets and the general flow of matters that come before them. *See, Ready Transp., Inc. v. AAR Mfg.*, 627 F.3d 402, 403-404 (9th Cir. 2010) (district court's exercise of inherent power to control its docket reviewed for abuse of discretion). That inherent power includes the authority to defer ruling on motions to strike in order to promote party and judicial efficiency. *See, e.g.*, *Harrell v. City of Gilroy*, 2018 U.S. Dist. LEXIS 88500 at *24-25 (N.D. Cal. 2018) (deferring ruling on a motion to strike in order to consider motion's arguments concurrently with subsequent motions by other litigants).

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Given the many crucial facts that remain unknown – including perhaps the most significant issue in this litigation, the cause and origin of the fire – this motion is premature. Also unknown is whether Counterclaimant or the thirty-seven other potential claimants who have not yet appeared will elect to pursue federal or state remedies, and under what theories and causes of action they will pursue them. The pleadings, including those to be filed by the claimants who have not yet appeared, will frame the scope of discovery in this litigation. *See*, Fed. R. Civ. P. 26(b)(1).

An Order granting the Motion now could unfairly deprive Petitioners of potentially valid affirmative defenses long before all of the claims and relief being asserted against them become known. Such an Order at this time – before the facts upon which those claims and defenses will depend – could also dramatically prejudice Petitioners' ability to obtain the discovery they will need to defend themselves against those as-yet unknown claims. *See, id.* Conversely, Counterclaimant has preserved her objections to the affirmative defenses in question, and she will suffer no prejudice if the Court defers its ruling. *See*, Fed. R. Civ. P. 12(f)(1).

Indeed, Petitioners made a good-faith offer to stipulate to extend Counterclaimant's deadline to bring this Motion to July 31, 2020, thirty days after the monition period is set to expire. Kuhne Decl. ¶ 2. Had Counterclaimant delayed filing the Motion as Petitioners proposed, all parties would then have the opportunity to appear, and all the claims, damages, and affirmative defenses at issue would be known before the Motion was presented to the Court. The Court, in turn, would have the benefit of the "full picture" of the claims and defenses when ruling on the Motion. And both the parties and the Court would have the benefit of

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101 W. Broadway, Suite 2000

the additional factual context that the ongoing agency investigations may yield between now and then.[9]

Whatever the rationale for bringing the Motion now, everyone involved – the Court, Counterclaimant, Petitioners, and the remaining claimants – will be in a vastly better position to address these issues after the monition period has expired and all parties have made their appearances. And with so much yet unknown, a ruling on the Motion before that time would be premature. The Court should exercise its broad discretion to defer its ruling on the Motion until all parties have appeared and the facts and the record are more fully developed or, alternatively, should grant Petitioners leave to amend. *See*, *Wyshak v. City National Bank* 607 F.2d 724, 826 (9th Cir. 1979) (leave to amend should be freely given so long as there is no prejudice to the opposition party.)

C. THE MOTION TO STRIKE THE TENTH AND FOURTEENTH AFFIRMATIVE DEFENSES FOR ASSUMPTION OF THE RISK IS PREMATURE AS THE CAUSE AND ORIGIN OF THE FIRE IS UNKNOWN

1. Assumption of the Risk is a Valid Affirmative Defense in this Case

Counterclaimant suggests "the doctrine of assumption of the risk has no place in admiralty law." *See,* Mem. 14:4-15:23. That view is overly simplistic, and at this stage, premature.

Assumption of the risk comes in two forms. The first, embodied in the Fourteenth Affirmative Defense, commonly referred to as "primary assumption of risk," is a question of duty. It asks whether, "by virtue of the nature of the activity and the parties' relationship to the activity, the defendant owes [a] legal duty to

[9] Similarly, Petitioners asked the Court to extend the deadline for claimants to file answers and claims in this action for several months beyond the 30 days provided by Supplemental Rule F(4). *See,* (Doc. 4) 2:1-8.

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protect the plaintiff ***from the particular risk of harm that caused the injury***." *Knight v. Jewett*, 3 Cal. 4th 296, 314-315 (1992) (emphasis added); *see also, Mosca v. Lichtenwalter*. 58 Cal.App.4th 551, 553 (1997). The second, embodied in the Tenth Affirmative Defense, referred to as "secondary assumption of risk," arises "where the defendant does owe a duty of care to the plaintiff, but the plaintiff proceeds to encounter ***a known risk*** imposed by the defendant's breach of duty." *Id.* at 315 (emphasis added). Under "primary assumption of risk," the defendant owes a duty only to avoid increasing the risks inherent in the activity in question, and where it applies, it affords a complete defense to liability. *Id*. at 315-316. "Secondary assumption of risk," by contrast, is merged into the comparative fault scheme such that the award, if any, is apportioned according to the relative responsibilities of the parties. *Id*. at 315.

Counterclaimant advances what is essentially a "weight of authority" argument, claiming that it is "apodictic that the doctrine of assumption of risk has no place in general maritime law." Mem. 14:6-10 (citation omitted). But federal maritime law does not entirely displace state law; indeed, state law still applies where not inconsistent with the federal scheme. *See, e.g., Yamaha*, 516 U.S. at 206. One such example is application of state law defenses to claims arising from recreational maritime activities. *See, e.g., Mosca*. 58 Cal.App.4th at 553; *Stimson v. Carlson*, 11 Cal.App.4th 1201; 1993 A.M.C. 1049 (1993); *Ford v. Gouin*, 3 Cal.4th 339; 1993 A.M.C. 1216 (1992); *Ferrari v. Grand Canyon Dories*, 32 Cal.App.4th 248 (1995). Thus, application of state law here, where a recreational activity (diving) may be implicated, would not run afoul of federal maritime law. *See, id.*

2. Counterclaimant's Motion to Strike Affirmative Defenses Ten and Fourteen is Premature Because the Cause and Origin of the Fire is Unknown

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Moreover, it would be premature to mechanically apply Counterclaimant's suggested analysis at this point in the litigation, where neither the "risk" involved, nor the parties' respective relationships to the risk-producing activity (*e.g.*, the cause of the fire and the cause of injury or death) have been identified. *See*, *Knight*, 3 Cal. 4th at 314-316 (characterizing defense as addressing "particular" and "known" risks); *see also*, Fed. R. Civ. P. 26(b)(1) (framing scope of discovery in terms of, *inter alia*, matters that are relevant to the claims or defenses at issue, and the importance of the discovery in resolving the issues at stake in the action).[10]

The FBI, the ATF, the USCG, the NTSB and the U.S. Attorney's Office have been investigating the fire for over four months, but the cause and origin of the fire is still unknown. *See, e.g.*, Kuhne Decl. Exhibit D at 2 (last line). Thus, no one can yet say what "risk" caused the fire, or how it started. Was the "risk" the possibility of a fire sparked by an over-charged or defective lithium ion battery, or a faulty charging cord brought aboard by one of the CONCEPTION's passengers? Was it the "risk" a passenger falling asleep in their bunk with a lit cigarette in their mouth? Was it arson? An explosion? A flash fire? Or was it something else? Simply put, no one knows who or what started the fire, what the nature of the "risk" in question was, or whether there is any connection between the cause and origin of the fire (*i.e.*, the "risk") and the injuries and deaths in question. Until those questions are answered, it would be premature to strike these defenses and thereby potentially diminish or restrict the parties' ability to conduct discovery on

[10] Counterclaimant's request to strike Petitioners' Tenth and Fourteenth affirmative defenses now also ignores the fact that other claimants are likely to appear in the Limitation Action. No one knows what claims or counterclaims they may file, what theories they may pursue, or whether assumption of risk may ultimately afford a defense in the context of those theories. Granting the Motion now, rather than deferring a ruling or denying the Motion without prejudice, could deprive Plaintiffs' of their right to assert assumption of risk as an affirmative defense in circumstances where it may unquestionably apply.

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these critical issues. *See*, *Knight*, 3 Cal. 4th at 314-316; *see also*, Fed. R. Civ. P. 26(b)(1).

Indeed, in each of the cases cited by Counterclaimant (most of which involved the Jones Act, which specifically prohibits application of assumption of the risk), the "risk" in question was known, and not one of them involved a motion to strike assumption of risk as an affirmative defense *before the facts underpinning the cause of the incident had been identified*. *See, Socony-Vacuum Oil Co. v. Smith*, 305 U.S. 424, 426 (1939) (considering propriety of jury instructions where Jones Act seaman was injured by an unseaworthy condition of which he had prior knowledge); *Movible Offshore Co. v. Ousley*, 346 F.2d 870, 872 (5th Cir. 1965) (affirming denial of defendant's motion for judgment notwithstanding the verdict in favor of offshore drill rigger who was injured while attempting to align holes on drill rig members that he knew to be askew); *King v. Testerman*, 214 F.Supp. 335 (E.D. Tenn. 1963) (stating "rule" regarding assumption of risk in *dicta*, but not reaching affirmative defense issue because plaintiff failed to establish liability); *Barber v. Marina Sailing, Inc.*, 36 Cal. App. 4th 558 (2d Dist. 1995) (reversing summary judgment where experienced sailor lost finger in sailboat's bowline while casting off from dock); *Simeonoff v. Hiner*, 249 F.3d 883, 888-889 (9th Cir. 2001) (stating "rule," then considering comparative fault of Jones Act seaman who walked under piece of equipment known to be broken after being ordered to do so); *Edwards Leasing Corp. v. Uhlig & Assoc., Inc.*, 785 F.2d 877, 886-887 (11th Cir. 1986) (discussing plaintiff's "written acknowledgement, not assumption" of risk, and finding damages award should be reduced to account for plaintiff's post-acknowledgement conduct); *DuBose v. Matson Navigation Co.*, 403 F.2d 875, 877-878 (9th Cir. 1965) (finding District Court applied contributory negligence, not assumption of risk, to diminish recovery of Jones Act seaman who knew of injury-causing condition, but continued to confront it rather than report it to his

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supervisors); *Urian v. Milstead*, 473 F.2d 948, 950-951 (8th Cir. 1973) (Plaintiff injured from fall during attempted disembarkation from pleasure craft by climbing over bow rail and lowering herself 6-10' to adjacent beach); *Manning v. Gordon*, 853 F.Supp. 1187 (N.D. Cal. 1994) (considering assumption of risk in context of lawsuit between owners and skippers of yachts that collided during a sponsored, organized yacht race); *Tate v. C.G. Willis, Inc.*, 154 F.Supp. 402 (E.D. Va. 1957) (barge crewmember fatally injured during fall from barge he attempted to board at unsafe point in near darkness); *Gleason v. Adelman*, 2000 Mass. App. Div. 305 (2000) (collision among participants in yacht race).

None of the opinions cited by Counterclaimant support her contention that assumption of the risk can be stricken as an affirmative defense before the "risk" is known, before the parties' respective relationship to it has been determined, or before the cause of injury is known. *See id.*, *and compare with, Knight*, 3 Cal. 4th at 314-316 (discussing defense in the context of "particular," "known" risks). Until discovery can be conducted on those critical issues, an Order striking the Tenth and Fourteenth Affirmative Defenses would be both premature and contrary to the "no possible set of facts" standard upon which Counterclaimant's Motion relies. *See, e.g.*, 8:12-20, 15:20-23.

D. THE SIXTEENTH AND EIGHTEENTH AFFIRMATIVE DEFENSES PROPERLY INVOKE CALIFORNIA CIVIL CODE SECTION 3294

1. Decedent Was a Non-Seafarer Allegedly Injured In California Territorial Waters

The Sixteenth and Eighteenth affirmative defenses are state law affirmative defenses directed to the state law remedies available to the Counterclaimants. When non-seafarers die in the territorial waters of a state, the United States Supreme Court has confirmed that state law may supplement maritime remedies.

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Yamaha Motor Corp v. Calhoun 516 U.S. 199, 216, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996). The Court recognizes that preemption may occur when "Congress has prescribed a comprehensive tort recovery regime to be uniformly applied, [as] there is [ ] no cause for enlargement of damages statutorily provided." *Id.* While Congress has not spoken as to remedies for non-seafarers in territorial waters, it has ***expressly*** preserved the application of state law in territorial waters through Section 7 of the Death on the High Seas Act. *See*, 46 U.S.C. § 30307(c) (formerly 46 U.S.C. app §761-768); *see also, Yamaha*, 516 U.S. at 215-216. Counterclaimant's scholarly exposition regarding irrelevant maritime concepts ignores binding U.S. Supreme Court precedent that provides for potential state law supplementation on a case-by-case basis. *See, e.g., Yamaha*, 516 U.S. at 215-216. Nothing in Counterclaimants' pleading forecloses them from dipping into California law to so supplement regarding punitive damages. *See, id.* If Petitioners are not allowed to assert state law defenses to those state law claims now, they may "be left hanging" when Counterclaimants make that choice later on.

Yamaha is squarely on point. In *Yamaha*, a young girl was killed while operating a jet ski in territorial waters. The question before the Court was whether, after *Moragne*, state law remedies – including punitive damages – remained applicable for accidents occurring in territorial waters involving persons not engaged in a maritime trade. *Id.* at 205. Holding that state law remedies were not entirely displaced, the Court affirmed the Third Circuit's finding that *Moragne* did not place "a ceiling on recovery for wrongful death" but rather filled a gap where no remedy had previously been available for wrongful deaths occurring in state territorial waters. *Id* at 214.

Counterclaimant cites to *Exxon v. Baker*, arguing the case holds that the general maritime law judicial rulings providing for recovery of punitive damages "preempts" California Civil Code §3294, but her argument overstates the reasoning

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and holding of that case. *See*, Mem. 5:23-6:1. At the outset, the pin cite to page 493 reveals no authority for the position stated. That page addresses rationales for awarding punitive damages generally (retribution/deterrence) and a discussion of the degrees of conduct required to warrant an award of punitive damages. To the extent that *Baker* addresses pre-emption at all, it examines Exxon's claim that the Clean Water Act, a federal statute, preempts other remedies and rejects that argument, finding no indication that Congress intended for the CWA to occupy the field regarding water pollution damages. As such, Counterclaimants' reliance on the case is misplaced. *Exxon Shipping Co. v. Baker* 554 U.S. 471, 488-489 (2008).

Given that the maritime law presents no bar to Counterclaimants' potential invocation of Civil Code §3294, *Yamaha*, 516 U.S. at 202, Petitioners are entitled to assert defenses to any such state law claims. Counterclaimant's arguments regarding delay and "clutter" have no merit; Counterclaimant has no more certain understanding of what remedies other claimants will pursue than the Court or Petitioners do, and she has given no explanation of how assertion of state law defenses in response to potential state law remedies will delay these proceedings. Counterclaimant's motion to strike the Sixteenth and Eighteenth affirmative defenses should be denied.

2. Petitioners' Sixteenth Affirmative Defense Is An Accurate Statement of the General Maritime Law Rules Regarding Vicarious Liability For Punitive Damages

The Federal Rules provide that pleadings "must be construed to do justice." FRCP 8(e). A pleading is sufficient if it gives the opponent "fair notice of what the claim is and the grounds upon which it rests. *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555, 127 S.Ct. 1955 (2007). While Petitioners labeled their Sixteenth Affirmative Defense as one relating to California Civil Code §3294, the principle stated therein is also an accurate statement of vicarious liability for punitive

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101 W. Broadway, Suite 2000

damages under the general maritime law and it gives Counterclaimant fair notice of the defense being asserted.

Under the general maritime law, punitive damages are not recoverable against a vessel owner for acts of the master and crew "unless it can be shown that the owner authorized or ratified the acts of the master either before or after the incident." *U.S. Steel v. Furhman*, 407 F2d. 1143 (6th Cir. 1969) *cert. denied*, 398 U.S. 958, S.Ct. 2162, 26 L.Ed.2d 542 (1970). Further, the general maritime law provides that "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in malicious or outrageous conduct. *Matter of P&E Boat Rentals, Inc.* 872 F.2d 642 (5th Cir. 1989.)

This affirmative defense closely follows the 9th Circuit's ruling on vicarious liability for punitive damages under the general maritime law. In *Prospectus Alpha Navigation Co. Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), the Court adopted the Restatement (Second) §909, which provides:

"Punitive damages can be properly awarded against a master or other principal because of an act by an agent if, but only if,

(a) the principal or a managerial agent authorized the doing and the manner of the act, or

(b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or

(c) the agent was employed in a managerial capacity and was acting in the scope of employment, or[11]

[11] A split of authority exists as to whether subsection (c) is an accurate statement of the maritime law. That issue was before the Supreme Court in *Exxon v. Baker*, but the Court was equally divided on the issue with respect to the whether the actions of a Captain could bind the principle for punitive damages. At present, no cause for the incident that gives rise to this lawsuit has been determined. In the event Plaintiffs argue that the Captain's actions were causative, Petitioners do not concede that the actions of a managerial agent without more can serve as a basis

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(d) the principal or a managerial agent of the principal ratified or approved the act."

Id. at 1386.

Petitioners' affirmative defense asserts that Petitioners bear no liability for the owner or managing agents (1) committing any oppressive, fraudulent, or malicious act (mirroring §909(c)), (2) authorizing or ratifying the act in question (§§909 (a) and (d)), or (3) having had advance knowledge of the unfitness of the employee or employees who committed the acts (§909(b)). As such, Petitioners gave sufficient notice of the nature of their affirmative defense to satisfy the notice pleading requirements of the FRCP.

E. THE TWENTY-THIRD AFFIRMATIVE DEFENSE SIMPLY RESTATES THE WELL-ESTABLISHED RULE THAT THE COURT MUST LOOK PRIMARILY TO LEGISLATIVE ENACTMENTS, SUCH AS THE DEATH ON THE HIGH SEAS ACT ("DOHSA"), FOR POLICY GUIDANCE WHEN ADDRESSING JUDGE-MADE REMEDIES AND RELIEF

1. *Miles* and the Recent *Batterton* Decisions Confirm Uniformity is the Rule

Counterclaimant goes to great lengths to characterize the *Atlantic Sounding* decision as one that effectively "curtailed" the "misnamed" the principle of *Miles* uniformity espoused by the Petitioners' Twenty-Third Affirmative Defense. *See, e.g.*, Mem. 20:20-21:1. Counterclaimant even goes so far as to suggest that "[l]ike DOHSA, the *Miles* uniformity principle does not apply" to judge-made, gap-filling general maritime law causes of action like Counterclaimant's *Moragne* wrongful death and survival causes of action, claiming instead that a decision by this Court

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for punitive damages against an owner. Petitioners merely assert their defense that no facts have been shown to indicate that some action on the part of the owner or a managing agent was sufficient to support an award of punitive damages.

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101 W. Broadway, Suite 2000

to follow the precepts of *Miles* uniformity "is an invitation to reversible error." *Id.* at 17:28, 20:8-16. To borrow from the Memorandum, those arguments are "demonstrably wrong."

Indeed, just seven months ago, the United States Supreme Court confirmed that the principle of *Miles* uniformity is the "rule" to which the historical reasoning of *Atlantic Sounding* provides but an exception:

> *Miles* establishes that ***[courts] 'should look primarily to . . . legislative enactments for policy guidance,'*** while recognizing that we 'may supplement these statutory remedies where doing so would achieve the uniform vindication' of the policies served by the relevant statutes. In *Atlantic Sounding*, we allowed recovery of punitive damages [by a Jones Act seaman based on his employer's willful failure to pay maintenance and cure], but we justified our departure from the statutory remedial scheme based on the established theory of awarding punitive damages for certain maritime torts, including maintenance and cure. [However], ***[w]e were explicit that our decision represented a gloss on Miles rather than a departure from it.***

Dutra Group v. Batterton, 588 U.S. __, 10 (2019); *see also*, *Jesner v. Arab Bank, PLC*, 138 S. Ct. 1386, 1403 (2018) ("[e]ven in areas less fraught with foreign-policy consequences, the Court looks to analogous statutes for guidance on the appropriate boundaries of judge-made causes of action") *citing Miles v. Apex Marine Corp.*, 498 U.S. 19, 24 (1990) *and Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 736 (1975).

The U. S. Supreme Court in *Atlantic Sounding* recognized that "[t]he reasoning of *Miles* remains sound." *Atlantic Sounding v. Townsend*, 557 U.S. 404, 420 (2009). In fact, the *Atlantic Sounding* Court was careful to distinguish the circumstances before it from those that were present in *Miles*. Specifically, *Miles*

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000

addressed whether the parent of a Jones Act seaman who died from injuries sustained aboard his employer's vessel could use the general maritime law cause of action for unseaworthiness to recover damages for loss of society, and whether a claim for the seaman's lost future earnings survived his death. *Miles*, 498 U.S. at 21; *see also, Atlantic Sounding*, 557 U.S. at 419 (in *Miles*, "[t]his Court . . . was called upon to decide whether these new statutes [DOHSA and the Jones Act] supported an expansion of the relief available under pre-existing general maritime law to harmonize it with a cause of action created by statute.")[12] By contrast, *Atlantic Sounding* considered whether an injured seaman may recover punitive damages for his employer's willful failure to pay maintenance and cure. *Atlantic Sounding*, 557 U.S. at 407.

That distinction was critical. "Unlike the situation presented in *Miles*, both the general maritime cause of action (maintenance and cure) and the remedy (punitive damages) were well established before the passage of the Jones Act. Also unlike the facts presented by *Miles*, the Jones Act does not address maintenance and cure or its remedy." *Id*. at 420 (citations omitted). As such, it was "possible to adhere to the traditional understanding of maritime actions and remedies without abridging or violating the Jones Act; ***unlike wrongful-death actions, this traditional understanding is not a matter 'to which Congress has spoken directly.'"*** *Id.* at 420-421 (emphasis added) *citing Miles*, 498 U.S. at 31 *and Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625 (1978). Thus, it was only historical precedent *and the absence of an analogous Congressional remedial scheme* that justified the Court's departure from *Miles*' principles. *See, id*.

[12] Unseaworthiness as it is used today is a judge-made cause of action under which a shipowner may be strictly liable to seamen where the shipowner fails to maintain the ship and its appurtenances in a manner that is reasonably fit for their intended purpose. *See, Batterton*, 588 U.S. ___ at 7 *citing Mahnich v. So. S.S.Co.*, 321 U.S. 96 (1944).

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Last June, *Batterton* grafted the reasoning of *Atlantic Sounding*'s exception onto the uniformity rule in *Miles*, and in doing so demonstrated that Petitioners are entirely correct in asserting that Counterclaimant's *Morange*-based wrongful death and survival causes of action are subject to principles of *Miles* uniformity. *See, e.g.*, *Batterton*, 588 U.S. ___ at 11, n.6. Specifically, *Batterton* instructs that, when aligning the remedies available under judge-made general maritime causes of action, "[a]bsent a clear historical pattern, *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990) commands us to seek conformity with the policy preferences the political branches have expressed in legislation." *Id*.

Thus, *Batterton* first looked to the reasoning of *Atlantic Sounding* to determine whether punitive damages were historically available to seamen through unseaworthiness claims. *Id*. at 10. The fact that they were not was "practically dispositive." *Id.* at 12. Finding no historical precedent, the Court then considered whether punitive damages must be made available through the judge-made unseaworthiness cause of action in order to conform its relief with that afforded by the Jones Act. *Id*. at 13. Because Congress did not provide for recovery of punitive damages under the Jones Act, "[t]he rule of *Miles* – promoting uniformity in maritime law and deference to the policies expressed in the statutes governing maritime law – prevents us from recognizing a new entitlement to punitive damages where none previously existed." *Id.* at 18.

Nor did policy grounds require a different result. "In contemporary maritime law, our overriding objective is to pursue the policy expressed in congressional enactments . . . it would exceed our current role to introduce novel remedies contradictory to those Congress has provided in similar areas." *Id*. at 15 *citing Miles*, 498 U.S. at 33 (declining to create remedy "that goes well beyond the limits of Congress' ordered system of recovery"). That was so because, "with the increased role that legislation has taken over the past century of maritime law, we

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101 W. Broadway, Suite 2000

think it wise to leave to the political branches the development of novel claims and remedies." *Id*. at 15.

That reasoning establishes that *Miles* uniformity is a proper affirmative defense to Counterclaimant's judge-made wrongful death and survival causes of action. Like the unseaworthiness cause of action at issue in *Miles* and *Batterton*, which arose after the Jones Act was enacted in 1920, *see Mahnich*, 321 U.S. 96, "[t]he DIGNAMS' claims spring from judge-made, general maritime law" that was created by *Morange*, 50 years after Congress enacted the Death on the High Seas Act in 1920. Mem. 4:5; *see also, Moragne v. States Marine Lines*, 398 U.S. 375 **(1970)** (emphasis added). Therefore, Counterclaimant's claims lack the historical context that justified *Atlantic Sounding*'s departure from well-established uniformity principles. *Batterton*, 588 U.S. ___at 1 *citing Atl. Sounding Co. v. Townsend*, 557 U.S. 404, 424-425 (2009). Under the reasoning of *Batterton*, any relief Counterclaimant (or any other claimant) may seek through *Morange* wrongful death or survival causes of action must therefore confirm to the Congressional scheme outlined in DOHSA. *See, Batterton*, 588 U.S. ___ at 11, n.6.

And despite the Memorandum's unsupported claim that neither *Miles* nor DOHSA "obtain in this case," even *Moragne* instructs that just the opposite is true. In fact, the Supreme Court has expressly and repeatedly identified "[b]oth the Death on the High Seas Act and the numerous state wrongful-death acts" as "persuasive authority" for questions about the proper measure of damages available under a *Moragne* cause of action. *Moragne v. States Marine Lines*, 398 U.S. 375, 408 (1970); *see also, Miles*, 498 U.S. at 29-30 (describing *Moragne* as "the extension of the DOHSA wrongful death action to [state] territorial waters"); *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 584 (1974) (citing to *Moragne* and referring to DOHSA and state wrongful death statutes as "useful guides").

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101 W. Broadway, Suite 2000

Counterclaimant has asserted judge-made claims for wrongful death and survival damages arising from a death that reportedly occurred in state territorial waters. Mem. at 4:5. The Supreme Court has repeatedly identified DOHSA's remedial scheme as a guide to be followed in fashioning appropriate relief for those claims. *Moragne*, 398 U.S. at 408; *Miles*, 498 U.S. at 29-30; *Gaudet*, 414 U.S. at 584. *Miles*, and more recently, *Batterton*, instruct this Court that Counterclaimant's causes of action and the relief she seeks must conform to well-established uniformity principles. *Batterton*, 588 U.S. ___ at 15 *citing Miles*, 498 U.S. at 33. Petitioners asserted those principles as their Twenty-Third Affirmative Defense to Counterclaimant's claims. They have every right to do so, and Counterclaimant's request to strike Petitioners' *Miles* uniformity affirmative defense should be denied.

III. CONCLUSION

In light of the foregoing, Petitioners respectfully request that the Court deny Counterclaimant's Motion, in its entirety. Alternatively, Petitioners ask that the Court either defer ruling on the instant motion until after the July 1, 2020 deadline for Claimants to file claims and/or the legal and factual aspects of the case are more fully developed, or that the Court grant leave to amend.

Dated: January 6, 2020

GORDON REES SCULLY MANSUKHANI LLP

By: /s/ James F. Kuhne, Jr.
Russell P. Brown
James F. Kuhne, Jr.
Attorneys for Plaintiffs
TRUTH AQUATICS, INC. AND GLEN RICHARD FRITZLER AND DANA JEANNE FRITZLER, INDIVIDUALLY AND AS TRUSTEES OF THE FRITZLER FAMILY TRUST DTD 7/27/92

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway, Suite 2000

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: GORDON REES SCULLY MANSUKHANI, LLP, 2211 Michelson Drive, Suite 400, Irvine, CA 92612. On January 6, 2020, I served the foregoing document(s) entitled:

PLAINTIFFS IN LIMITATION MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO RESPONDENT/COUNTER-CLAIMANT CHRISTINE DIGNAM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

☒ **VIA ECF:** by electronic service through the CM/ECF System which automatically generates a Notice of Electronic Filing at the time said document is filed to the email address(es) listed in the Electronic Mail Notice List, which constitutes service pursuant to FRCP 5(b)(2)(E).

I declare under penalty of perjury under the laws of the United States of America that the above is true and correct.

Executed on January 6, 2020 at Irvine, California.

Leslie M. Handy