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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

IN ADMIRALTY

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. CV 19-7693 PA (MRWx) **CLAIMANT/RESPONDENT CHRISTINE DIGNAM'S REPLY TO PLAINTIFF'S OPPOSITION TO HER MOTION TO STRIKE AFFIRMATIVE DEFENSES** Fed.R.Civ.P. 12(f) Date: Monday January, 27, 2020 Time: 1:30 p.m. Before the Hon. Percy Anderson

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SUMMARY OF ARGUMENT

Like Hamlet's mother, Queen Gertrude, the FRITZLERS doth protest too much. In one characteristic passage, they scoff that "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." *ECF No. 23* at 5:23-6:1. We are content to let Your Honor decide who is posturing and who is not.

The FRITZLERS admit that JUSTIN DIGNAM "was a 'non-seafarer'" killed on "California territorial waters," *ECF No. 23* at 15:22-23, that "Congress has not spoken as to remedies for non-seafarers in territorial waters," *id.* at 16:5-4, and that the DIGNAMS' claims therefore arise under the "gap-filling," general maritime law handed down in *Moragne v. State Marine Lines, Inc.*, 398 U.S. 375, 393 (1970), *Sea-Land Servs. v. Gaudet*, 414 U.S. 573, 578 (1974), and *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 206-208 (1996). *ECF No. 23* at 15:25-16:2. We are moving to strike the FRITZLERS' Tenth, Fourteenth, Sixteenth, Eighteenth, and Twenty-Third Affirmative Defenses because those Defenses are not available under maritime law. *ECF No. 21-1* at 12:13-24:4. Our opponents urge Your Honor either to deny our Motion outright, to defer ruling on the Motion until July 1, 2020, or to grant the FRITZLERS leave to amend those Defenses. *ECF No. 23* at 24:14-18. In support of those requests, the FRITZLERS argue that:

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1.) The DIGNAMS' Motion is "premature," *id.* at 9-11;

2.) *Yamaha* makes California's primary assumption of risk doctrine "a valid affirmative defense herein," *id.* at 11-12;

3.) The Defenses invoking Cal.Civ.Code § 3294 not only comprise an accurate statement of the general maritime law of punitive damages but have likewise been made applicable by *Yamaha*, *id.* at 15-18, and;

4.) Your Honor should use the so-called "*Miles* uniformity principle" to cabin the DIGNAMS' general maritime claims because "*Miles* establishes that courts should look primarily to legislative enactments for policy guidance" in maritime tort cases. *Id.* at 20:7-10.

Not one of those arguments has merit; they misread Fed.R.Civ.P. 12(f), misstate the holding in *Yamaha*, and misapply the holding in *Miles*.

ARGUMENT

I. SINCE IT IS IMPOSSIBLE TO PROVE ANY SET OF FACTS IN SUPPORT OF THE FRITZLERS' TENTH, FOURTEENTH, SIXTEENTH, EIGHTEENTH AND TWENTY-THIRD AFFIRMATIVE DEFENSES, THERE IS NO REASON TO DEFER THE DIGNAMS' MOTION

The FRITZLERS contend that: "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." *ECF No. 23* at 10:1-5. 10:1-5. That is the leitmotif of their entire opposition. See e.g. *Id.* at 9:16-27 ("the Court should defer its ruling until all parties have appeared and the factual and legal issues

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upon which this litigation will turn have been more fully developed"); 11:3-6 ("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 13:1-4 ("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"). The FRITZLERS base that leitmotif on the assertion that they might one day be able to discover facts which will help them defend against all or some of the DIGNAMS' claims by alleging assumption of risk, Cal.Civ.Code § 3294, or the *Miles* uniformity principle. But we brought this Motion because it will be impossible for the FRITZLERS to discover **any** set of facts to support those Defenses. Trying to discover such facts would thus be a spurious exercise. As the FRITZLERS' own authorities explain: "'The function of a 12(f) motion to strike is to avoid the expenditure of time and money that must arise from litigating spurious issues by dispensing with those issues prior to trial.'" *Harrell v. City of Gilroy*, 2018 U.S. Dist. LEXIS 88500 at *24-25 (N.D. Cal. 2018) (quoting *Sidney-Vinstein v. A.H. Robins Co.*, 697 F.2d 880, 885 (9th Cir. 1983)).[1]

[1] The FRITZLERS cite *Harrell* for the proposition that courts have discretion to defer ruling on motions to strike. *ECF No. 23* at 9:16-27. We have no quarrel with that general proposition, but the situation in *Harrell* is nothing like the one at bar. The plaintiff in *Harrell* sued the Gilroy Police Department ("GPD") and others for civil rights violations, wrongful termination, sexual harassment, (continued...)

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According to another variation of the FRITZLERS' leitmotif: "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." *ECF No. 23* at 10:3-8. But neither the DIGNAMS nor anyone else can "elect" between state and federal remedies herein. As we explained in our moving papers, *ECF No. 21-1* at 12:13-13:20,"[w]ith admiralty jurisdiction comes the application of substantive admiralty law." *East River S.S. Corp. v. Transamerica Delaval,* 476 U.S. 858, 864 (1986). The substantive principles of admiralty law "preempt state law under the Supremacy Clause of the Constitution" in **all** maritime tort cases. *Sea Hawk Seafoods v. Exxon Corp.* (*In re Exxon Valdez*), 484 F.3d 1098, 1101 (9th Cir. 2007) (citing U.S. Const. Art. VI, cl. 2). *Yamaha* is not to the contrary.

II. NEITHER *YAMAHA* NOR ANYTHING ELSE CREATES A PLACE IN ADMIRALTY LAW FOR ASSUMPTION OF RISK

As the State Court of Appeal explained in *Barber v. Marina Sailing, Inc*., 36 Cal.App.4th 558 (1995):

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[1](...continued)
negligence, assault, and infliction of emotional distress. See 2018 U.S. Dist. LEXIS 88500 at *2-*6. The GPD moved to strike the plaintiff's entire complaint under Rule 12(f), and the court deferred "ruling on the negligence, assault, and negligent and intentional infliction of emotional distress causes of action" so it could "consider" GPD's motion along with a Rule 12(b)(6) motion that had been brought by one of the other defendants. 2018 U.S. Dist. LEXIS 88500 at *22. But *Harrell* does not deal with affirmative defenses or maritime law or shed any light on the issues here.

> California law recognizes two kinds of assumption of risk: primary assumption of risk, in which the defendant owes no duty to protect the plaintiff from a particular risk of harm, regardless of whether the plaintiff's conduct in undertaking the risk was reasonable or not; and secondary assumption of risk, where the defendant does owe the plaintiff a duty of care but the plaintiff acted unreasonably in encountering a known risk of harm. The former acts as a complete bar to recovery while the latter is treated as a species of comparative fault, which acts to reduce a plaintiff's recovery.

36 Cal.App.4th at 569 n. 8. We have no objection if the FRITZLERS wish to amend their Tenth Affirmative Defense by alleging a species of comparative fault (as their Third Affirmative defense already does); but their Fourteenth Affirmative Defense is beyond saving.

Relying on *Knight v. Jewett*, 3 Cal. 4th 296 (1992), *Mosca v. Lichtenwalter,* 58 Cal.App.4th 551 (1997), *Stimson v. Carlson*, 11 Cal.App.4th 1201 (1993), *Ford v. Gouin*, 3 Cal.4th 339 (1992), and *Ferrari v. Grand Canyon Dories*, 32 Cal.App.4th 248 (1995), the FRITZLERS argue (at *ECF No. 23* at 11:21-12:21) that California's "*Knight* rule" and the doctrine of "primary assumption of risk" apply even in a maritime tort case "when a party voluntarily participates in a sporting event or activity involving inherent risks." *Ferrari*, 11 Cal.App.4th at 252-245. Putting aside the question of whether JUSTIN DIGNAM voluntarily assumed the risk of death by fire when he let the FRITZLERS take him scuba diving, the easiest way to answer our opponents' primary-assumption-of-risk argument is to repeat what the

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California Court of Appeal said about it in *Barber*.

The *Knight* rule and California's primary assumption or risk doctrine sprang from "a game of touch football" that took place far outside admiralty tort jurisdiction on "a dirt lot" in San Diego. *Knight*, 3 Cal.4th at 300. The *Barber* court therefore refused to apply them to a yacht race on Long Beach Harbor, because:

> **Numerous federal cases have held in a variety of contexts that assumption of the risk is not permitted as an affirmative defense in admiralty law**. Instead, it is deemed a species of contributory negligence which may diminish a plaintiff's recovery in proportion to his share of comparative fault but will not bar recovery in whole.

Id. at 568-569 (citing *Socony-Vacuum Co. v. Smith* (1939) 305 U.S. 424, 431 (1939)) (emphasis added). Like the FRITZLERS, the vessel owner in *Barber* claimed that *Stimson* had somehow made primary assumption of risk applicable to maritime tort cases heard in California. Retorted the *Barber* court:

> *Stimson* has no applicability here. The *Stimson* court held that a sailboat crew member, injured by a swinging line when the captain executed a course change without warning, was barred by his assumption of all risks inherent in the activity of sailing. Even though that accident occurred on the San Francisco Bay, which respondents contend is a navigable waterway, any mention of federal maritime law is absent from the decision. An opinion is not authority for a proposition not considered.[2]

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[2] Although *Mosca,* 58 Cal.App.4th at 552 (sport fishing), *Ford*, 3 Cal.4th at 342-343 (water skiing), and *Ferrari*, 32 Cal.App.4th at 251 (river rafting) arose (continued...)

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Id. at 572 (citing *Manning v. Gordon*, 853 F.Supp. 1187 (N.D.Cal. 1994) which also rejected the applicability of *Stimson*). We cited *Barber, Manning,* and a long line of similar cases on pages 14 and 15 of our moving papers. *ECF No. 20-1* at 14:15-22 and 15:8-9. To quote those cases one last time, "the tenets of admiralty law, which are expressly designed to promote uniformity, do not permit assumption of risk in cases of personal injury whether in commercial or recreational situations." *Manning,* 853 F.Supp. at 1187.

Falling back, the FRITZLERS' contend that *Yamaha* makes state law defenses like assumption of risk applicable to wrongful death claims involving non-seafarers killed on territorial waters. *ECF No. 23* at 12:16-21. But *Yamaha* does nothing of the sort. The FRITZLERS are oversimplifying a complex subject and forgetting that the judge-made death remedies spelled out in *Moragne, Gaudet,* and *Yamaha* "centered on the extension of relief, not on the contraction of remedies." *Yamaha,* 516 U.S. at 213. To be sure, *Yamaha* holds that the exercise of admiralty jurisdiction "'does not result in automatic displacement of state law.'" *Id.* at 206 (quoting *Grubart*, 513 U.S. at 545).

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[2](...continued)
on navigable waters, the courts who heard those cases made the same nearsighted error that the *Stimson* court did; not one of them paused to consider the presence of admiralty jurisdiction in, or the effect of admiralty law on, the facts before them. See *Mosca,* 58 Cal.App.4th at 553-554; *Ford*, 3 Cal.4th at 342-346, *Ferrari*, 32 Cal.App.4th at 253-254. As a result, like *Stimson*, not one of those case is authority for the proposition that assumption or risk has a place in admiralty.

> Indeed, prior to *Moragne*, federal admiralty courts routinely applied state wrongful-death and survival statutes in maritime accident cases. The question before us is whether *Moragne* should be read to stop that practice.

Id.

The answer to that question requires a far deeper understanding of maritime wrongful death law than the FRITZLERS have evinced. As one particularly thorough, judicial analysis of the *Yamaha* decision explains:

> **[S]tate law is to be applied where it 'fills gaps' or provides relief that otherwise would not be available under admiralty law; but, where state law would supersede or limit clearly defined maritime causes of action, it cannot be applied**. For instance, in *Yamaha Motor Corp.*, 516 U.S. at 204-205, the Supreme Court addressed whether state remedies for recovery that included damages for the loss of society of a deceased minor child and damages for the loss of that child's future earnings could be applied in a maritime case, when federal remedies did not typically include those damages. * * * * The Court held that *Moragne* had not launched a solitary federal scheme and, instead, that variations in state law could continue to proliferate in admiralty cases so long as those variations broadened the possibility or the extent of relief, reasoning that '*Moragne*, in sum, centered on the extension of relief, not on the contraction of remedies.' *Id.* at 213.
>
> * * * *
>
> On those bases, the Court held that, where Congress had not prescribed a comprehensive recovery scheme for the federal maritime tort at issue, state law could be applied to *supplement* the relief supplied

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> by maritime law. *Id.* at 215. However, *Moragne's* holding that state law could not be used to preclude recovery that would otherwise be available under maritime law retained its full force. *Id.* Under *Yamaha* and *Moragne*, federal maritime law sets a floor for recovery for wrongful death, and not a ceiling. *Id.*
>
> **In the wake of *Yamaha* and *Moragne*, the federal courts, in accordance with those opinions, have applied state laws to admiralty cases where those state laws "fill gaps" or add additional avenues for recovery, but have not applied state laws that seek to remove proper avenues for recovery under maritime law.**

Matheny, 503 F. Supp. 2d at 922-923 (internal brackets and some internal quotation marks and citations omitted) (emphasis added); see also *Hambrook v. Smith*, 2016 U.S. Dist. LEXIS 109484, *72 (D.Haw. 2016) ("State law on liability and limitations of damages that conflicts with and limits the relief available under federal maritime law should not be applied").

The FRITZLERS pay lip service to some of those points, see *ECF No. 23* at 16:16-24, but they do not appear to understand them. The opposition does not and cannot cite a single case which holds, suggests, or even hints that state law, assumption-of-risk doctrine applies to a case like the DIGNAMS'. Allowing the FRITZLERS to rely on that doctrine would "remove proper avenues for recovery under maritime law." *Matheny*, 503 F.Supp.2d at 923.

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III. *YAMAHA* DOES NOT MAKE ANY PLACE IN ADMIRALTY LAW FOR CAL.CIV.CODE § 3294 EITHER

The FRITZLERS try to save their invocation of Cal.Civ.Code § 3294, first, by relying on *Yamaha* yet again, *ECF No. 23* at 15:2-1:2, and second, by insisting that their Sixteenth Affirmative Defense "is an accurate statement of the general maritime law rules regarding vicarious liability for punitive damages." *Id.* at 17:19-21. Neither argument holds water.

First, as we just explained, state law may be applied under *Yamaha* only "where it 'fills gaps' or provides relief that otherwise would not be available under admiralty law; **but, where state law would supersede or limit clearly defined maritime causes of action, it cannot be applied**." *Matheny*, 503 F. Supp. 2d at 922 (emphasis added). The state remedy codified in Cal.Civ.Code § 3294 cannot be reconciled with the clearly defined, judge-made remedy for punitive damages handed down by general maritime law. See *Colombo v. BRP US Inc.*, 230 Cal.App. 4th 1442,1456 N. 7 (2014) (citing *In re Exxon Valdez*, 270 F.3d 1215, 1232 (9th Cir. 2001)). If applied to this case, that state remedy would supercede or limit the DIGNAMS' maritime recovery.

Second, since the burden of showing why the FRITZLERS' should be held vicariously liable for punitive damages lies with us, not with the FRITZLERS, *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969), we do not understand why they wish to allege the grounds for such liability as an affirmative defense; but

they are welcome to try so long as they strike any reference to Cal.Civ.Code § 3294. As their own authorities confirm, "federal law, rather than state law, controls the damages issue when the cause of action arises under maritime law." *Protectus Alpha Nav. Co. v. North Pac. Grain Growers, Inc.*, 767 F.2d 1379, 1385 (9th Cir. 1985). Cal.Civ.Code § 3294 has no place in these proceedings.

IV. NOR IS THERE ANY ROOM IN THIS CASE FOR *MILES*

Federal courts have always looked to statutory analogs like "DOHSA and the numerous state wrongful death acts" for "guidance" when it came to fashioning judge-made, maritime death remedies. *Moragne,* 398 U.S. at 408. But the *Miles* uniformity principle is more specific; it holds that courts are "not free to expand" those judge-made remedies "at will" where "Congress has spoken directly to the question of recoverable damages"– as it did when it passed DOHSA and the Jones Act. *Miles*, 498 U.S. at 31 and 36. But that principle is not applicable here.

Neither DOHSA, the Jones Act, nor any other federal statute obtains here, and as the FRITZLERS themselves admit: "Congress has not spoken as to remedies for non-seafarers in territorial waters." *ECF No. 23* at 16:5-4. The Twenty-Third Affirmative Defense is thus too vague to enforce. We cannot discern what elements of recovery it was raised to preclude. Recovery "for loss of support, services, and society," as well as "damages for funeral expenses," are indisputably available to the families of non-seafarers killed on territorial waters. *Gaudet,* 414 U.S. at 585. So are survival damages for the decedent's conscious, pre-death pain and suffering. See

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e.g. *Evich (II) v. Connelly*,759 F.2d 1432, 1434 (9th Cir. 1985). What is more:

> 'Nothing in *Miles* indicates that the Ninth Circuit's holding in *Evich* [*v. Morris,* 819 F.2d 256 (9th Cir. 1987)] regarding the recovery of pre-death pain and suffering and punitive damages or prejudgment interest in a general maritime survival action is not still good law.' *Newhouse* [v. U.S., 844 F. Supp. 1389, 1394 (D. Nev. 1994)]; see also *In re Air Crash Off Point Mugu, California*, [145 F. Supp. 2d 1156, 1166 (N.D. Cal. 2001)] (holding that punitive damages are available in a survival action based upon the death of a nonseafarer in state territorial waters).

Voillat v. Red & White Fleet, 2004 U.S. Dist. LEXIS 4359, *20-*21 (N.D.Cal. 2004); see also *Sutton v. Earles*, 26 F.3d 903, 919 (9th Cir. 1994) ("Not only does *Miles* fail to undermine *Evich*, much of the Court's discussion indicates approval of *Evich*, at least in cases not involving the death of seamen or death on the high seas."). Those are the only elements of recovery the DIGNAMS have alleged. *ECF No. 18* at Pars. 20, 21, 22, 23, 28, 27, and 29. What, then, do the FRITZLERS hope to bar by raising the so-called *Miles* uniformity principle as an Affirmative Defense?

Dated: January 9, 2020

Respectfully submitted,

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