UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO: 0:21-cv-60793-AHS

SHARILYNE ANDERSON and VERA MELNYK

Plaintiffs,

vs.

GURMEET AHLUWALIA, NIEL HESELTON,
DYNAMIC YACHT MANAGEMENT, L.L.C and
DREAM HOLDINGS LTD., NIGEL BURGESS INC.

Defendants.

_____/

DEFENDANT DYNAMIC YACHT MANAGEMENT, LLC AND GURMEET AHLUWALIA'S MOTION TO DISMISS

Come now the Defendants, Dynamic Yacht Management, LLC and Gurmeet Ahluwalia. by and through their undersigned attorney and make and file this motion to dismiss Plaintiffs Sharilyne Anderson and Vera Melnyk's Complaint [DE 3] for lack of jurisdiction and failure to state a cause of action and in support thereof would show as follows:

This action arises from the Plaintiffs participation in a Charter voyage in the Bahamas in December of 2020 on board them M/Y Dream, a 60 Meter motor yacht. The Plaintiffs are both Canadian citizens [DE 1 ¶ ¶ 5 &6]. The Defendants are identified as a British National residing in England (Captain Heselton) [DE 1¶ 9]; foreign corporation organized under the laws of the Cayman Islands (Dream Holdings) [DE 1¶ 14] as well as Florida residents and corporations [DE 1 ¶ ¶7,13 and15]. According to the Complaint, the Plaintiffs joined the vessel in the Bahamas

[DE 1 ¶¶ 25 &55] and left the vessel in the Bahamas [DE 1¶ 80]. All acts of the captain and injuries allegedly sustained occurred during the Charter voyage in Bahamian territorial waters.

The Plaintiffs have invoked this Court's jurisdiction under 28 USC 1332 alleging Diversity of Citizenship. [DE 1 ¶ 2, D.E.1-6 II Basis of Jurisdiction - Diversity]. The Complaint alleges three causes of action all arising from common law torts. There are no causes of action under statute or the Constitution and no other basis for jurisdiction of the Court.

Based upon the allegations in the Complaint it is evident the Court lacks jurisdiction over the instant matter as there is not complete diversity of parties. Additionally, the Complaint fails to state a cause of action upon which relief can be granted. The action should be dismissed as a matter of law.

DIVERSITY JURISDICTION IS NOT PRESENT.

Article III Courts are Courts of limited jurisdiction and are required to dismiss any action which is not within their constitutional grant of authority.

> Federal courts are courts of limited jurisdiction, and they possess only the power authorized by Congress or the Constitution. *See Exxon Mobil Corp. v. Allapattah Servs., Inc.*, 545 U.S. 546, 552, 125 S. Ct. 2611, 2616-17, 162 L. Ed. 2d 502 (2005); *Kokkonen v. Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 377, 114 S. Ct. 1673, 1675, 128 L. Ed. 2d 391 (1994). The validity of a federal court's order depends upon that court having subject-matter jurisdiction. *Ins. Corp. of Ir. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 701, 102 S. Ct. 2099, 2103, 72 L. Ed. 2d 492 (1982). Absent a grant of subject-matter [*6] jurisdiction from Congress, a court "is powerless to act." *Univ. of S. Ala. v. Am. Tobacco Co.*, 168 F.3d 405, 410 (11th Cir. 1999); *Wernick v. Matthews*, 524 F.2d 543, 545 (5th Cir. 1975) (noting that absent jurisdiction a court is "powerless to consider the merits" of a case). "Without jurisdiction the court cannot proceed at all in any cause. Jurisdiction is power to declare the law, and when it ceases to exist, the only

> function remaining to the court is that of announcing the fact and dismissing the cause." *Ex parte McCardle*, 74 U.S. (7 Wall.) 506, 514, 19 L. Ed. 264 (1868).

Suntrust Bank v. Stripling, 2019 U.S. Dist. LEXIS 215563, *5-6, 2019 WL 6831439; Case No. 4:19-cv-422-MW/MJF (N.D. Fla 2019)

Indeed, even if a challenge to jurisdiction is not raised by the parties, the Court has an obligation to determine if the case is within its jurisdiction.

> as a federal court of limited jurisdiction, we must inquire into our subject matter jurisdiction *sua sponte* even if the parties have not challenged it. *See, e.g.,* [*1334] *University of S. Ala. v. American Tobacco Co.,* 168 F.3d 405, 410 (11th Cir.1999) (jurisdiction "cannot be waived or otherwise conferred upon the court by the [**4] parties"); *Perez-Priego v. Alachua County Clerk of Court,* 148 F.3d 1272, 1273 n. 1 (11th Cir.1998) (*sua sponte* raising issue of jurisdiction over appeal from magistrate judge); In re *Marriage of Nasca,* 160 F.3d 578, 578 (9th Cir.1998) (same).

Rembert v. Apfel, 213 F.3d 1331, 1333-1334, 2000 U.S. App. LEXIS 12236, *3-4, (11 Cir 2000).

The Plaintiffs bear the burden of establishing jurisdiction.

> Plaintiffs have invoked the diversity jurisdiction of the court. Because federal courts are courts of limited subject matter jurisdiction, this Court must ascertain whether it has jurisdiction over a case or controversy. *See Cadet v. Bulger*, 377 F.3d 1173, 1179 (11th Cir. 2004). There are limits on this Court's ability to hear suits involving foreign entities while sitting in diversity. *See* 28 U.S.C. § 1332. "It is a standard rule that federal courts do not have diversity jurisdiction over cases where there are foreign entities on both sides of the action, without the presence of citizens of a state on both sides." *Iraola & CIA, S.A. v. Kimberly-Clark Corp*., 232 F.3d 854, 860 (11th Cir. 2000). The party seeking federal diversity jurisdiction must show by the preponderance of the evidence that this Court has jurisdiction. *Molinos Valle Del Cibao, C. por A. v. Lama*, 633 F.3d 1330, 1340 (11th Cir. 2011).

Atlanta Equestrian Ctr. v. VDL Stud, 2012 U.S. Dist. LEXIS 195734, *; 1CASE NO. 12-80423-CIV-DIMITROULEAS/SNOW (S.D. Fla. 2012)

In the instant matter Plaintiffs, have invoked the Court's Diversity Jurisdiction pursuant to 28 USC 1332.

> When a federal court's jurisdiction is premised upon the diversity of citizenship between the parties, the plaintiff bears the obligation of demonstrating in the complaint that *complete* diversity of citizenship exists between the parties. *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch) 267, 2 L. Ed. 435 (1806); *Seyler v. Steuben Motors, Inc.*, 462 F.2d 181 (3d Cir. 1972); *Carden v. Arkoma Associates*, 494 U.S. 185, 110 S. Ct. 1015, 1017, 108 L. Ed. 2d 157 (1990).

Camper & Nicholsons Int'l, Ltd. v. Blonder Marine & Charter, Inc., 793 F. Supp. 318, 319, 1992 U.S. Dist. LEXIS 10130, *2, 6 Fla. L. Weekly Fed. D 287

In *Blonder,* the Judge Gonzalez explained the proper determination of diversity jurisdiction where the Plaintiffs were foreign citizens, as in the instant matter, as follows:

> The diversity statute generally provides for federal jurisdiction over suits involving foreign citizens or subjects in two scenarios. First, the statute contemplates federal jurisdiction over a lawsuit where the amount in controversy exceeds $ 50,000 and the suit is between citizens of an American state and citizens or subjects of a foreign state. 28 U.S.C. § 1332(a)(2). For example, were a citizen of Spain to sue a citizen of Florida, and were the amount in controversy to exceed $ 50,000, this Court would have subject matter jurisdiction pursuant to § 1332(a)(2). *Cf. Windert Watch Co., Inc. v. Remex Electronics, Ltd.*, 468 F. Supp. 1242 (S.D.N.Y. 1979); *Jaffe v. Boyles*, 616 F. Supp. 1371, 1374-75 (W.D.N.Y. 1985).
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> The diversity statute also expressly provides for jurisdiction where the amount in controversy exceeds $ 50,000 [**7] and the suit is between citizens of different states and in which citizens or subjects of a foreign state are additional parties. 28 U.S.C. § 1332(a)(3). In this latter scenario, § 1332(a)(3) provides a federal court with jurisdiction where aliens are additional parties to a controversy, so long as a citizen of a different American state is present on each side of the controversy and there is a legitimate dispute between those American citizens of diverse citizenship. *See Samincorp, Inc. v. Southwire Co.,* 531 F. Supp. 1 (N.D. Ga. 1980); *Clark v. Yellow Freight System, Inc.*, 715 F. Supp. 1377 (E.D. Mich. 1989); C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3604, at 390 (1984). For example, were a citizen of Florida and a citizen of Spain to sue a citizen of Illinois and a citizen of Ireland, and were there to be a legitimate dispute between the Florida citizen and the Illinois citizen, then,

> assuming of course that the amount in controversy exceeds $ 50,000, this Court would have jurisdiction pursuant to § 1332(a)(3). *Cf. K & H Business Consultants Ltd. v. Cheltonian, Ltd.*, 567 F. Supp. 420 (D. N.J. 1983). [**8]
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> A problem arises, however, where, as is the case here, the plaintiffs are all [*321] foreign citizens or subjects and the defendants are a mix of American citizens and foreign citizens or subjects. The presence of foreign citizens as party defendants, where all the plaintiffs are foreign citizens, runs afoul of the long established rule that diversity must be "complete." *See Strawbridge v. Curtiss*, 7 U.S. (3 Cranch.) 267, 2 L. Ed. 435 (1806). In accord with the requirement of complete diversity, a suit may not be maintained in a federal court by foreign citizens or subjects against a group of defendants which includes both citizens of American states and foreign citizens or subjects. *See Eze v. Yellow Cab Company of Alexandria, Va., Inc.*, 782 F.2d 1064 (D.C. Cir. 1986); *Ed & Fred, Inc. v. Puritan Marine Insurance Underwriters Corp.*, 506 F.2d 757 (5th Cir. 1975)

Camper & Nicholsons Int'l, Ltd. v. Blonder Marine & Charter, Inc., 793 F. Supp. 318, 320-321, 1992 U.S. Dist. LEXIS 10130, *6-8, 6 Fla. L. Weekly Fed. D 287

In the instant matter there is not complete diversity, as Plaintiffs are foreign citizens and both foreign citizens and citizens of this state are named as Defendants.

> The presence of foreign citizens as party defendants, where all the plaintiffs are foreign citizens, runs afoul of the long established rule that diversity must be complete. . . . In accord with the requirement of complete diversity, a suit may not be maintained in a federal court by foreign citizens or subjects against a group of defendants which includes both citizens of American states and foreign citizens or subjects." *Camper & Nicholsons Int'l, Ltd. v. Blonder Marine & Charter, Inc.*, 793 F. Supp. 318, 320-21 (S.D. Fla. 1992)

Mangones v. UnitedHealthcare of Fla., Inc., 2020 U.S. Dist. LEXIS 117952, *9; CASE NO. 14-24779-CIV-MARTINEZ/GOODMAN (S.D. Fla. 2020).

Specifically, the Captain whose actions are the basis for the Complaint is alleged to be a British National residing in England and Dream Holdings Ltd. is alleged to be a corporation organized under the laws of the Cayman with a Cayman Island address. The presence of these two

defendants defeats complete diversity[1]. Both Plaintiffs and two of the Defendants are foreign citizen. As there is not complete diversity the 1332 action must be dismissed for lack of jurisdiction.

THERE IS NO FEDERAL QUESTION JURISDICTION

The Complaint does not allege as a basis for relief the violation of a Federal Statute or a cause of action arising under the Constitution of the United States or treaties of the United States and therefore the Court does not have Federal Question jurisdiction under 28 U.S.C.§1331.

THIS MATTER IS NOT WITHIN THE COURT'S ADMIRALTY JURISDICTION.

Plaintiffs expressly elected to invoke the Court's Diversity Jurisdiction in the Complaint and the Civil Cover Sheet when initiating the action. However, the Complaint makes reference to Admiralty jurisdiction and the Saving to Suitors clause at paragraph 3 thereof.

Defendants assert that Admiralty jurisdiction is not present as the action involves claims by foreign Plaintiff purportedly occurring on a foreign flagged vessel in foreign territorial waters committed by a foreign national.

In *Victory Carriers, Inc. v. Law,* 404 U.S. 202, 205, 92 S.Ct. 418, 30 L. Ed. 2d 383 (1971), the Supreme Court stated that "maritime law governs only those torts occurring on the [high seas and the] navigable waters of the United States." A number of Courts following this language have held that federal maritime law does not extend to torts that occur in territorial waters of other nations. *See St. Pierre v. Maingot,* No. Civ.A.01-2281, 2002 U.S. Dist. LEXIS

[1] Inasmuch as it is the acts or inactions of the Captain which form the basis of the Plaintiffs' Complaint, he is an indispensible or required party under F.R.C.P. 19 and the action cannot proceed without his joinder.

22735, 2002 WL 31655355, *3 n.8 (E.D. La. Nov. 21, 2002); *Dunham v. Hotelera Canco S.A. de C.V.,* 933 F.Supp. 543, 547 (E.D. Va. 1996) (denying admiralty jurisdiction over tort where injury occurred in territorial waters of Mexico); *Sharma v. Skaarup Ship Management Corp.,* 699 F.Supp. 440, 448 (S.D.N.Y. 1988) (denying admiralty jurisdiction where injury occurred in territorial waters of British Columbia).

While other Courts have disagreed with this interpretation, Defendants have located no Supreme Court decision negating clear language of the decision or any guidance on the issue from the Eleventh Circuit Court of Appeals.

In the instant matter, Plaintiffs assertion of Admiralty jurisdiction would have this Court exercise jurisdiction over common law tort claims which have no nexus to the United States. The Plaintiffs did not board the vessel in the United States nor alleged to have made port in United States; the vessel is not alleged to be a U.S. flagged vessel; the passengers were not citizens of United States but are foreign nationals; the purported wrongful acts were not committed in United States territorial waters nor on the high seas but in the territorial waters of the Bahamas; the injuries were not sustained in United States nor on the high seas but in the territorial waters of the Bahamas.

Following the Supreme Court's language in *Victory Carriers,* there is no basis for exercise of the Court's admiralty jurisdiction in this matter based on the facts alleged in the Complaint. However, should the Court determine that Admiralty jurisdiction lies over the action, then the demand for jury trial must be struck as there is no basis for same for common

law torts in admiralty. See, *Neenan v. Carnival Corp*., 2001 U.S. Dist. LEXIS 1233, *5, 2001 WL 91542, CASE NO. 99-2658-CIV-LENARD IN ADMIRALTY (S.D. Fla 1999)

THE COMPLAINT FAILS TO STATE A CAUSE OF ACTION AGAINST DEFENDANTS DYNAMIC YACHT MANAGEMENT, LLC AND GURMEET AHLUWALIA

The Complaint against Defendants Dynamic Yacht Management, LLC and Gurmeet Ahluwalia is deficient as a matter of law and should be dismissed. The Complaint alleges three causes of action Negligence, False Imprisonment and Intentional Infliction of Emotional Distress. In each of the causes of action the Plaintiffs fail to specifically identify the acts of the named defendants which give rise to the causes of action. Instead the Complaint consists of conclusory allegations and legal assertions without factual predicate as to each Defendant. The Complaint also groups the Defendants actions together without delineating the actions of the particular Defendant or injury resulting therefrom.

> "To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal,* 556 U.S. 662, 678, 129 S. Ct. 1937, 173 L. Ed. 2d 868 (2009) (quotations omitted). To state a plausible claim for relief, a plaintiff must go beyond pleading merely the "sheer possibility" of unlawful activity by a defendant and must offer "factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id.* In other words, the plaintiff's "[f]actual allegations must be enough to raise a right to relief above the speculative level." *Bell Atl. Corp. v. Twombly,* 550 U.S. 544, 555, 127 S. Ct. 1955, 167 L. Ed. 2d 929 (2007).

Nassar v. Nassar, 2021 U.S. App. LEXIS 12752, *4, __ Fed. Appx. __, 2021 WL 1688769 (11th Cir . 2021)

Rule 10(b) requires that each claim founded upon a separate transaction or occurrence shall be stated in a separate count whenever a separation facilitates the clear presentation of the matter set forth. *See Veltmann v. Walpole Pharmacy, Inc.*, 928 F.Supp. 1161, 1163 (M.D.Fla. 1996). A complaint that fails to comply with Rule 10(b) may properly be called a "shotgun pleading." *Embree v. Wyndham Worldwide Corp.*, 779 F. App'x 658, 662 (11th Cir. 2019). Shotgun pleading fails to give a defendant adequate notice of the claims against it and the grounds upon which each claim rests. *Id*.

The Complaint also fails to satisfy the pleading requirements with respect to a claim for negligent hiring, training or supervision under Florida law which are asserted in the Negligence cause of action.

> As an initial matter, Plaintiff cannot state a claim for negligent hiring, retention, training or supervision based on boilerplate allegations that Defendant failed to, among other things: (1) implement adequate procedures; (2) supervise all its employees; (3) responsibly recruit all its crewmembers; (4) control and monitor all its employees; (5) adequately train all its crewmembers "not to fraternize with passengers;" and (6) otherwise [*8] "properly enforce rules, regulations, policies and procedures for NCL employees who fraternize with passengers." D.E. 1 p. 10; *Iqbal*, 556 U.S. at 678 (plaintiff must plead "more than a sheer possibility that a defendant has acted unlawfully"); *Summers v. Carnival Corp.*, No. 13-23932-CV, 2015 U.S. Dist. LEXIS 180787, 2015 WL 11983231, at *6 (S.D. Fla. Apr. 6, 2015) (granting motion to dismiss "because Plaintiff has failed to allege facts that are suggestive enough to render each element of his claim for negligent hiring, retention and training plausible"). Instead, Plaintiff must plausibly allege each element of a claim for: (1) negligent hiring and retention; (2) negligent training; and (3) negligent supervision to state a claim under Rule 12(b)(6).
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> a. *Negligent hiring or retention*
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> To state a claim for negligent hiring or retention, a plaintiff must allege that: "(1) the agent/employee/contractor was incompetent or unfit to perform the work; (2) the employer knew or reasonably should have known of the particular incompetence or unfitness; and (3) the incompetence or unfitness was a proximate cause of the plaintiff's injury." *Witover v. Celebrity Cruises, Inc.*, 161 F. Supp. 3d

> 1139, 1148 (S.D. Fla. 2016) (internal citations omitted). To satisfy the second element, a plaintiff *must* allege facts "showing that the employer [*9] was put on notice of the *harmful propensities* of the [employee]" before either hiring or retaining the employee. *Id.* (emphasis in original); *Flaherty v. Royal Caribbean Cruises, Ltd.*, 172 F. Supp. 3d 1348 (S.D. Fla. 2016); *Stires v. Carnival Corp.*, 243 F. Supp. 2d 1313, 1318 (M.D. Fla. 2002) ("The principal difference between negligent hiring and negligent retention as a basis for employer liability is the time at which the employer is charged with knowledge of the employee's unfitness. Negligent hiring occurs when, prior to the time the employee is actually hired, the employer knew or should have known of the employee's unfitness, and the issue of liability primarily focuses upon the adequacy of the employer's pre-employment investigation into the employee's background.").

Doe v. NCL (Bahamas) Ltd., 2016 U.S. Dist. LEXIS 150817, *7-9, Case No.: 1:16-cv-23733-UU (S.D. Fla 2016)

The Plaintiffs' Complaint lacks facts supporting a negligent hiring claim The Complaint also lacks the facts necessary to support a negligent training or supervision claim.

> Negligent supervision "occurs when, during the course of employment, the employer becomes aware or should have become aware of problems with an employee that indicated his unfitness, and the employer fails to take further actions such as investigating, discharge, or reassignment." *Cruz v. Advance Stores Co.*, 842 F. Supp. 2d 1356, 1359 (S.D. Fla. 2012). Accordingly, Plaintiff "must allege that (1) the employer received actual or constructive notice of an employee's unfitness, and (2) the employer did not investigate or take corrective action such as discharge or reassignment." *Id.*
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> * * *
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> Negligent training occurs when an employer "was negligent in the implementation or operation of the training program" and this negligence caused a plaintiff's injury. *Cruz v. Advance Stores Co.*, 842 F. Supp. 2d 1356, 1359 (S.D. Fla. 2012); *Gutman v. Quest Diagnostics Clinical Labs., Inc.*, 707 F. Supp. 2d 1327, 1332 (S.D. Fla. 2010); *Wynn v. City of Lakeland*, 727 F. Supp. 2d 1309, 1317 (M.D. Fla. 2010).

Doe v. NCL (Bahamas) Ltd., 2016 U.S. Dist. LEXIS 150817, *10-11, Case No.: 1:16-cv-23733-UU (S.D. Fla 2016)

The failure to allege facts supporting the theories of liability for Negligence on the part of the named Defendants necessitates dismissal of the Complaint. The Complaint is also deficient as to the intentional infliction of emotional distress cause of action.

> To state a cause of action for IIED under Florida law, Plaintiff must allege facts establishing (1) conduct that was **intentional** or reckless, (2) that the conduct was outrageous, (3) that the conduct caused **emotional** distress, and (4) that the **emotional** distress was severe. See Deauville Hotel Mgmt., LLC v. Ward, 219 So. 3d 949, 954-55 (Fla. Dist. Ct. App. 2017). Outrageous conduct means conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." Metro. Life Ins. Co. v. McCarson, 467 So. 2d 277, 278-79 (Fla. 1985) (citing Restatement (Second) of Torts § 46 (1965)). "It is not enough that the defendant has acted with an intent which is tortious or even criminal, or that he has intended to inflict **emotional** distress, or even that his conduct has been characterized by 'malice'. . .." Id. at 278. "What constitutes outrageous conduct is a question that must be decided as a matter of law." *Deauville Hotel Mgmt., LLC*, 219 So. 3d at 955.

Nassar v. Nassar, 2021 U.S. App. LEXIS 12752, *5, __ Fed. Appx. __, 2021 WL 1688769 (11th Cir . 2021)

The Complaint specifically states the Captain determined the seas were too rough to permit safe transfer of the passengers into the tender ¶¶ 67 to 70 (D.E.3). The captain has an absolute nondelegable duty to provide for the safety of its passengers and crew. At best, Count 3 challenges the captain's decision on what measures were necessary to protect the passengers, but it in no way raises to the level reckless or outrageous. Just inserting the words reckless and outrageous without supporting facts does not fulfill the Plaintiff's pleading obligation. This matter is no different than an airplane pilot diverting to a different airport due to weather. Those on board the plane may disagree with the decision, but no amount of magic words can transform the decision into an intentional tort. The acts as plead in the Complaint do not rise to the level of

conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community" as stated in Nassar. As a matter of law the conduct of a captain, even an over cautious captain, not permitting egress from a yacht due to sea conditions cannot as a matter of law constitute the standard cited in Nassar.

The Plaintiffs' allegations fail to satisfy the pleading requirements for a claim for intentional infliction of emotional distress nor does the alleged behavior rise as a matter of law to the level required to state a cause of action.

CONCLUSION

Inasmuch as Diversity jurisdiction is not present and there is no other legitimate basis for jurisdiction before the Court, the case must be dismissed. Moreover, the complaint fails to state a viable cause of action against Defendants Dynamic Yacht Management, LLC and Gurmeet Ahluwalia and should be dismissed as to those Defendants. Should the Court deny dismissal, the demand for jury trial should be struck as a jury trial is not available in Admiralty.

Respectfully submitted,

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Counsel for Defendants Dynamic Yacht Management, LLC and Gurmeet Ahluwalia

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on this 17th day of May, 2021, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF and that a true and correct copy of the foregoing document is being served this day on all counsel or parties of record on the Service List below via transmission of Notices of Electronic Filing generated by CM/ECF.

By:/s Christopher R. Fertig
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