UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 14-CV-21340-GAYLES

DIANE URE, and THOMAS URE, JR.,
Plaintiffs,
v.

OCEANIA CRUISES, INC., and
FABIAN BONILLA, M.D.,
Defendants.
_____ /

PLAINTIFFS' MOTION FOR RECONSIDERATION AND REHEARING OF THIS COURT'S ORDER ON MOTION TO DISMISS PLAINTIFF'S COMPLAINT [D.E. 63], WHICH HAS BEEN IMPLICITLY OVERTURNED BY THE ELEVENTH CIRCUIT

COME NOW, Plaintiffs, by and through undersigned counsel, and file their Motion for Reconsideration and Rehearing of this Court's Order on Defendant Oceania Cruises, Inc'.s Motion to Dismiss the Plaintiffs' Complaint. [D.E. 63], dated October 31, 2014. In particular, this Court's Order has been implicitly ***overturned*** by the Eleventh Circuit in the identical matter of *Franza v. Royal Caribbean Cruises*, *Inc.*, Case No. 13-13067-DD (11th Cir. Nov. 11, 2014). *Franza*, decided on November 11, 2014, is attached as Exhibit "1."

This Court's order was entirely based and premised on the Fifth Circuit's decision in *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364, 1371 (5th Cir. 1988) (holding that a shipowner is not vicariously liable for the negligent acts of the shipboard medical personnel under a theory of respondeat superior). **This is *not* the rule in the Eleventh Circuit.**

In *Franza*, the Eleventh Circuit unequivocally declined to follow the Fifth Circuit's ruling in *Barbetta*. Instead, finding that the Fifth Circuit's 1988 decision anachronistic, in *Franza* the Eleventh Circuit held that a cruise line could be found vicariously liable for negligent medical care provided by shipboard doctors and nurses, under both principles of 1) actual agency/*respondeat*

superior and 2) apparent agency. *See Franza v. Royal Caribbean Cruises, Ltd.,* 13-13067 (11th Cir. Nov. 10, 2014), p. 2 – 4 (emphasis added):

> Franza commenced this suit against Royal Caribbean in the United States District Court for the Southern District of Florida under 28 U.S.C. § 1333 and the general maritime law, but the district court dismissed her complaint in its entirety. First, in disposing of Franza's actual agency claim, the trial court applied a longstanding rule set forth most prominently in *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364 (5th Cir. 1988). Although the general maritime law of the United States has long embraced the principles of agency law, the so-called "Barbetta rule" immunizes a shipowner from respondeat superior liability whenever a ship's employees render negligent medical care to its passengers. The rule confers this broad immunity no matter how clear the shipowner's control over its medical staff or how egregious the claimed acts of negligence. Separately, the trial court dismissed Franza's apparent agency claim as inadequately pled.
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> On appeal, Franza raises two questions of first impression. No binding precedent in this Court or in its predecessor, the former Fifth Circuit Court of Appeals, decided whether a passenger might invoke the **principles of actual agency, or those of apparent agency,** to impute to a cruise line liability for the medical negligence of its onboard nurse and doctor. **After thorough review, we hold that both theories are available in this case. We have repeatedly emphasized that vicarious liability raises fact-bound questions, and we can discern no sound reason in law to carve out a special exemption for all acts of onboard medical negligence. Much has changed in the quarter-century since Barbetta. As we see it, the evolution of legal norms, the rise of a complex cruise industry, and the progression of modern technology have erased whatever utility the Barbetta rule once may have had. We thus decline to adopt the Barbetta rule, and find that the complaint in this case plausibly establishes a claim against Royal Caribbean under the doctrine of actual agency, as well as a claim under the principles of apparent agency**. Accordingly, we reverse and remand for further proceedings consistent with this opinion.

Accordingly, as it stands, this Court's Order [D.E. 63], is in contravention of binding Eleventh Circuit precedent. This Court should, therefore, reconsider its Order and make it consistent with the Eleventh Circuit's ruling in *Franza.*

I. STANDARD OF REVIEW.

To prevail on a motion for reconsideration, a party generally must present at least one of "three major grounds which justify reconsideration: (1) an intervening change in controlling law;

(2) the availability of new evidence; or (3) the need to correct clear error or prevent manifest injustice." *Burger King Corp. v. Ashland Equities, Inc.,* 181 F. Supp. 2d 1366, 1369 (S.D. Fla. 2002).

In this case, the Eleventh Circuit's decision, dated November 10, 2014 constitutes an intervening change in controlling law. Accordingly, reconsideration of this Court's October 31, 2014 Order [D.E. 63], is warranted. *See Fernandez v. Bankers Nat'l Life Ins. Co.,* 906 F. 2d 559, 569 (11th Cir. 1990) (noting that a district court may reconsider a denial of a motion for summary judgment when there has been "an intervening change in controlling law) (citations omitted). *See also Annunziata v. School Bd. of Miami-Dade County, Florida*, 2005 WL 591205 (11th Cir. 2005):

> Rule 60(b) thus gives a district court the statutory basis to exercise its duty to, "[a]t every stage in the proceedings … 'stop, look, and listen' to determine the impact of changes in the law on the case before it." *Naturist Soc'y, Inc. v. Fillyaw,* 958 F. 2d 1515 (11th Cir. 1992) … [O]nly after a change in law on a controlling issue may a district court reconsider its previous ruling without violating the law of the case principles. *See Wheeler v. City of Pleasant Grove,* 746 F. 2d 1437, 1440 (11th Cir. 1984).
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> The propriety of the district court's grant of the Board's motion for reconsideration thus hinges on whether there was an intervening change in the law of a controlling issue in the case**.** Because Annunziata and Suarez based their §1983 claims on allegations that they were unconstitutionally deprived of property interests, a controlling issue in their cases was whether they in fact had constitutionally protected property interests.

II. BACKGROUND.

This case arises out of a catastrophic brain injury suffered by the Plaintiff, Diane Ure, while traveling on one of Defendant's cruise ships, M/V Marina, with her husband, Plaintiff Thomas Ure, Jr. As illustrated in detail below, the Plaintiff suffers from Osmotic Demyelination Syndrome (ODS), a neurological disease caused by severe damage of the myelin sheath of nerve cells in the brain stem. It is characterized by acute paralysis, dysphagia (difficulty swallowing), dysarthria (difficulty speaking), and other neurological symptoms. ODS primarily occurs in victims of

substandard medical treatment, consisting in medical personnel negligently administering excessive quantities of sodium to replenish a patient's electrolyte imbalance.

In short, if a patient experiences low sodium levels, doctors are supposed to gradually raise the patient's sodium levels. Physicians that raise sodium levels too quickly (via sodium tablets and/or saline solution), can cause patients to fall into a coma and develop ODS. In ODS victims, the layer that insulates the nerve cells in the brain stem is destroyed. Without the layer, impulses along the nerve cells are not properly and efficiently transmitted to the nerve cell. Instead, the impulses are slowed down, which decreases the nerve's ability to communicate with other cells. This ultimately leads to irreversible brain damage.

a. Oceania's shipboard physician mismanaged the treatment of the Plaintiff, causing a dramatic depletion of her electrolytes.

In this case, the Plaintiff boarded Defendant Oceania's cruise ship on May 6, 2013. Starting on May 12, 2013, she began suffering from a gastrointestinal illness. [D.E. 56, ¶ 17]. On May 12, 2013, she visited the ship's medical facility aboard the M/V Marina for evaluation, diagnosis and treatment. [D.E. 56, ¶18]. At the medical facility she was repeatedly seen, evaluated and diagnosed by the ship's medical doctor, Fabian Bonilla, between May 12, 2013 through May 19, 2013 aboard the M/V Marina. [D.E. 56, ¶19].

During this time, Oceania's shipboard physician, mismanaged the Plaintiff's medical condition, by failing to adequately monitor the Plaintiff's metabolic levels, such that her condition significantly deteriorated between May 12, 2013 and May 19, 2013. [D.E. 56, ¶20]. Indeed, Oceania's shipboard physician: 1) did not adequately monitor the Plaintiff's electrolytes, 2) did not perform a diabetic screen, 3) did not prescribe diarrhea potassium supplementation and oral fluid intake, and 4) did not instruct the patient as to foods she could eat or not eat.

As a result of Oceania's shipboard physician's mismanagement of the Plaintiff's care, she developed severe hypernatremia; a depletion of her electrolytes, sodium and plasma levels.

b. Oceania knowingly (and for its own pecuniary gain) referred the Plaintiff to a substandard medical facility in Barbados for emergency treatment. This facility continued the mismanagement of the Plaintiff's care, leading to her Osmotic Demyelination Syndrome (ODS).

Because of the hypernatremia created by Oceania's shipboard physician, the Plaintiff was in need of shoreside emergency medical treatment. [D.E. 56, ¶21]. At the time, while vessel's itinerary was en route to Barbados, Oceania represented to the Plaintiffs, that there was a "very good" hospital in Barbados. Oceania further represented that the place, Bay View Hospital, was "adept in treating medical emergencies." [D.E. 56, ¶22]. The Plaintiffs relied on Oceania's purported expertise regarding the quality and adequacy of medical care in the Caribbean; and more specifically, Plaintiffs relied on Defendants' referral to Bay View Hospital in St. Michael, Barbados, for emergency medical treatment. [D.E. 56, ¶24].

Unbeknownst to the Plaintiffs, Oceania *knowingly* recommended and sent the Plaintiff to a substandard medical facility. According to the Embassy of the United States in Barbados, "[t]here are NO emergency services at this facility."[1] In fact, as the U.S. embassy reports, "there are no resident doctors, but the facility employs approximately 35 nurses." Indeed, the hospital is designed to only deal with "less acute illnesses, minor outpatient surgery, and obstetric and gynecological care."[2]

Most troubling is Oceania's shameful motive for recommending and referring the Plaintiff to a substandard medical facility (which provides no emergency services); Oceania has a contract

[1] http://barbados.usembassy.gov/emergency-barbados.html (emphasis originals).
[2] Id.

and/or agreement with Bay View Hospital in St. Michel, whereby (for a fee) Oceania refers ill passengers for emergency medical care at Bay View Hospital. [D.E. 1, ¶25].

In short, instead of sending the Plaintiff to a properly equipped and staffed trauma center, to deal with her life threating emergency; Oceania knowingly and wilfully sent the Plaintiff to a small clinic, staffed exclusively by nurses, and designed to effectively treat minor colds. All of which was done for pecuniary gain, at the expense of the Plaintiff's health and well-being. [3]

The Plaintiff was admitted to Bay View Hospital on May 19, 2013 and was treated from May 19, 2013 through May 21, 2013. At all times material, the facility was unequipped to deal with the Plaintiff's hypernatremia; no trauma center, no emergency medical services, and no resident doctors.

In an attempt to treat her hypernatremia (low sodium levels), the inexperienced and unqualified staff at Bay View Hospital infused her with an excessive combination of saline solution and sodium tablets, in too short of a time. This raised the Plaintiff's sodium levels too quickly, causing her to fall into a coma and develop Osmotic Demyelination Syndrome. ODS ultimately destroyed the layer that insulates the Plaintiff's nerve cells, leading to permanent and irreversible brain damage.

c. The Claims Against Oceania.

As a result of the incident on the Oceania cruise, the Plaintiffs have filed claims against two Defendants: Oceania Cruises, Inc. and Oceania's shipboard physician, Dr. Fabian Bonilla, M.D.

[3] Notably, according to the U.S. Embassy in Barbados, Queen Elizabeth Hospital (a facility located closer to the vessel's port of call) is Barbados' major trauma facility. It has a 24-hour emergency room, medical intensive care, surgical intensive care, and dialysis units. More importantly, it has on its staff, physicians and surgeon consultants from almost all specialties. This is in striking contrast to Oceania's Bay View Hospital, which provides no emergency services, does not have any resident doctors, and is only equipped to treat less acute illnesses. *See* http://barbados.usembassy.gov/emergency-barbados.htm

As a preliminary matter it is critical to distinguish the different causes of action that Plaintiff has brought against Oceania: Counts directed against Oceania for its own negligence, and counts directed against Oceania, under a theory of *respondeat superior*, for the acts/negligence of its shipboard doctor.

First, the Plaintiff has filed claims against Oceania for the negligent acts of its shipboard physician. Count I, is premised under a theory of actual/agency *Respondeat Superior*. **This Court dismissed count I with prejudice.** As noted below, the dismissal with prejudice is in conflict with binding Eleventh Circuit precedent under *Franza v. Royal Caribbean Cruises, Ltd.,* 13-13067 (11th Cir. Nov. 10, 2014). Accordingly, this Court should reconsider its dismissal with prejudice of count I.

Second, under count III, Plaintiff has filed claims against *Oceania* for its own negligence. In Count III, Plaintiffs pled "General Negligence Against Oceania." In short, this count seeks relief for Oceania recommending, referring and transporting the Plaintiff to obtain medical care in a substandard medical facility in Barbados, Bay View Medical Hospital. Instead of sending the Plaintiff to a properly equipped and staffed trauma center, to deal with her life threating emergency; Oceania knowingly and wilfully sent the Plaintiff to a small clinic, staffed exclusively by nurses, and designed to effectively treat minor colds. All of which was done for pecuniary gain, at the expense of the Plaintiff's health and well-being, who now suffers from permanent and irreversible brain damage. In addition to standard compensatory damages, Oceania's conduct warrants punitive damages. **This Court dismissed Count III and the request for punitive damages with prejudice.** As noted below, the dismissal with prejudice of the negligence count is in conflict with binding Eleventh Circuit precedent under *Franza v. Royal Caribbean Cruises, Ltd.,* 13-13067 (11th Cir. Nov. 10, 2014). This Court should, therefore, reconsider its dismissal with

prejudice of count III. Moreover, because Oceania purposefully and willfully sent the Plaintiff to an inadequate (and substandard) medical facility, ultimately causing her irreversible brain damage; the prayer for punitive damages in warranted.

Third, in Count VIII, the Plaintiff filed a Count for Loss of Consortium against all defendants. **This Court dismissed Count VIII with prejudice.** As noted in *Franza v. Royal Caribbean Cruises, Ltd.,* 13-13067 (11th Cir. Nov. 10, 2014), however, the general maritime law recognizes a claim for loss of consortium. This Court should, therefore, reconsider its dismissal with prejudice of Count VIII.

Finally, in Count II (Negligence Against Oceania for Negligent Hiring and/or Negligent Retention of Bonilla), Count IV (Apparent Agency), Count V (Joint Venture), and Count VI (Third Party Beneficiary), were all dismissed ***without*** **prejudice.** Because Counts II, IV, V, and VI were dismissed *without* prejudice, these counts are not at issue in this motion for reconsideration. The Plaintiffs will amend these counts in the Complaint.

III. ARGUMENT

IN *FRANZA* THE ELEVENTH CIRCUIT IMPLICINTLY OVERTURNED THIS COURT'S RULING. *FRANZA* HELD THAT A CRUISE LINE *CAN* BE VICARIOUSLY LIABLE FOR THE NEGLIGENT ACTS (MEDICAL MALPRACTICE) OF SHIP'S DOCTORS UNDER A THEORY OF ACTUAL AGENCY/RESPONDEAT SUPERIOR. ACCORDINGLY, THIS COURT SHOULD RECONSIDER ITS DISMISSAL OF COUNTS I AND III. AS NOTED BY THE ELEVENTH CIRCUIT IN *FRANZA*, IT IS "DISINGENOUS FOR LARGE CRUISE LINES TO DISCLAIM ANY MEDICAL EXPERTISE WHEN THEY ROUTINELY PROVIDE ACCESS TO EXTENSIVE MEDICAL CARE IN INFIRMERIES THEY HAVE CONSTRUCTED FOR THIS VERY PURPOSE."

Relying exclusively on *Barbetta v. S/S Bermuda Star*, 848 F. 2d 1364, 1371 (5th Cir. 1988), at pages 3-4 of its Order [D.E. 63], this Court summarized cruise ships duties regarding medical care as follows:

> A cruise ship does not have a duty to maintain a doctor on board for the benefit of its passengers, nor does it have a duty to "exercise reasonable care to furnish such aid and assistance [to sick or injured passengers] as ordinarily prudent persons would render under similar circumstance." *Barbetta v. S/S Bermuda Star,* 848 F. 2d 1364, 1371 (5th Cir. 1988).[4] In the event a cruise ship employs an onboard doctor, its duty only is "to choose a doctor who is competent and duly qualified." A ship owner's responsibility for the negligence of a doctor, as opposed to another crew member, is different because of the doctor's unique relationship with the passengers … a cruise ship's physician is not under the exclusive control of the ship's master, at least with regard to his or her medical decisions and actions." … *see also Barbetta*, 848 F. 2d at 1371 (A "shipowner lacks both 1) the expertise to meaningfully evaluate and, therefore, control a doctor's treatment of his passengers and 2) the power, even if it had the knowledge, to intrude into the physician-patient relationship) … As a result, a ship's doctor's negligence in treating a passenger "will not be imputed to the carrier."

In short, relying on the Fifth Circuit's *Barbetta* decision, this Court held at the motion to dismiss stage, that as a a cruise line could never be vicariously liable for the negligent acts (medical malpractice) of shipboard doctors because: 1) cruise lines are not in the business of providing medical care; 2) cruise lines cannot control the medical care provided by shipboard doctors to passengers, and 3) cruise lines do not have the expertise and knowledge to evaluate shipboard doctors' medical treatment of passengers. **As noted in *Franza*, however, this is not the rule in the Eleventh Circuit.** *See Franza*, p. 26 - 28 (citations omitted):

> We decline to adopt the rule explicated in *Barbetta*, because we can no longer discern a sound basis in law for ignoring the facts alleged in individual medical malpractice complaints and wholly discarding the same rules of agency that we have applied so often in other maritime tort cases. No decision of the Supreme Court or this Court binds us to the strictures of *Barbetta*, and though we do not lightly deviate from a rule applied widely and for many years by other federal courts … As Justice

[4] Notably, this particular quotation of *Barbetta* in this Honorable Court's Order is inaccurate. Under *Barbetta*, a shipowner ***does*** have a duty exercise reasonable care to furnish such aid and assistance [to sick or injured passengers] as ordinarily prudent persons would render under similar circumstance. *See Barbetta*, 848 F. 2d 1364, 1371 ("We agree that although a carrier has no duty to furnish a doctor for its passengers' use, **it does owe its sick and injured passengers a duty to exercise "reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances.**") (emphasis added).

> Holmes famously put it, we should not follow a rule of law simply because "it was laid down in the time of Henry IV," particularly where "the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." … Here the roots of the *Barbetta* rule snake back into a wholly different world. Instead of nineteenth-century steamships, we now confront state-of-the-art cruise ships that house thousands of people and operate as floating cities, complete with well-stocked modern infirmaries and urgent care centers. In place of truly independent doctors and nurses, we must now acknowledge that medical professionals routinely work for corporate masters. And whereas ships historically went "off the grid" when they set sail, modern technology enables distant ships to communicate instantaneously with the mainland in meaningful ways.

a. In *Franza*, the Eleventh Circuit declined to follow both the *Barbetta* rule and its underlying reasoning. Under *Franza*: 1) cruise lines like Oceania are in the business of providing medical care, 2) cruise lines like Oceania can – and do – control the medical care provided by shipboard doctors to passengers, and 3) cruise lines like Oceania have the expertise and knowledge to control the medical care provided to passengers. Accordingly, the Eleventh Circuit held that a cruise like Oceania can be found vicariously liable for the negligent acts (medical malpractice) of shipboard doctors.

According to *Franza*, cruise lines are in the business of providing medical care. *See Franza*, p. 45:

> Additionally, beyond any potential for cost avoidance, cruise lines may even profit affirmatively from onboard medical care. For instance, they might charge passengers for treatment rendered. In short, cruise lines have chosen quite deliberately to enter the business of medicine, often in a large way, and they reap the tangible benefits of this business strategy. Thus, it seems hardly anomalous to require cruise lines to bear the burden of this choice.

Moreover, cruise lines have the expertise to supervise and control medical professionals. *See Franza*, at p. 37:

> The second pillar on which *Barbetta* rests is the claim that the scope and nature of a cruise line's expertise renders it unable to supervise a medical professional … In other words, since a shipowner is "not in the business of providing medical services to passengers," we are told that no cruise line could "possess the expertise requisite to supervise" – and, by extension, to control – the ship's medical personnel. Id. Even if some entities might be vicariously liable for medical negligence, the argument goes, a cruise line is no such entity as a matter of law.
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> **Again, we are unpersuaded by the breadth of this immunity-yielding rule of law. In the first place, it seems to us disingenuous for large cruise lines to disclaim any medical expertise when they routinely provide access to extensive**

> **medical care in the infirmaries they have constructed for this very purpose.** Viewing Franza's complaint in a light most favorable to the plaintiff, Royal Caribbean is sufficiently involved in the business of providing medical care to yield the possibility of liability. Thus, for example, the cruise line allegedly owns and operates onboard medical centers, Compl. ¶ 28, which are staffed by doctors and nurses whom the cruise line has hired, trained, outfitted, paid, and controlled, id. ¶¶ 6, 7. Moreover, if we credit Franza's claim that Royal Caribbean "pays to stock the 'medical centers' with all supplies, various medicines and equipment," id. ¶ 28, we also presume the cruise line knows at least something about its purchases. Taken at face value, these allegations evince at least some institutional knowledge of medicine.

Here, like in *Franza*, viewing the complaint in light most favorable to the Plaintiff, Oceania is sufficiently involved in the business of providing medical care to yield the possibility of liability. As alleged in the Amended Complaint, D.E. 56, Oceania owns and operates onboard medical centers, which are staffed by doctors and nurses whom the cruise line has hired, trained and controlled.[5] Notably, like in *Franza*, here the Complaint alleges that "Oceania financed and equipped the ship's medical facility and assisted in running it," Complaint, D.E. 56, ¶63, and that "Oceania also had control over the day to day workings of the ship's medical facility and .. had control over the day to day operations of the medical facility," id. ¶65. As noted in *Franza*, "these allegations evince at least some institutional knowledge of medicine." *See also Franza* at p. 38, n. 14:

> What's more, we suspect that Franza's allegations only scratch the surface. We have no difficulty imagining other cases in which additional evidence could demonstrate a cruise line's medical expertise -- particularly since, in the public domain, cruise lines routinely claim to possess such knowledge. See, e.g., Peltz, Has Time Passed Barbetta

[5] *See, i.e.* Complaint. D.E. 56: "At all times material, Defendant Oceania owned, operated, managed, maintained and/or controlled the medical equipment in the ship's medical facility." ¶11. "Oceania employed and/or contracted with Bonilla to serve as the full-time emergency professional, required by the Cruise Industry Passenger Bill of Rights on board the M/V Marina." ¶15. "As a result of the requirement for Oceania to have on board, a full-time, emergency medical professional, Oceania did not carry Bonilla on board the M/V Marina for the convenience of its passengers; rather Oceania employed and/or contract with and/or provided Bonilla on board the M/V Marina in connection with its operation of the M/V Marina as part of Oceania's business of operating cruise ships. ¶16.

> by?, at 19 (quoting statement by Director of Princess Cruise Lines Medical Department claiming that "major cruise lines have designed modern medical facilities comprising several ICUs, computerized radiology, and sophisticated laboratories" and "have achieved accreditation to international health care standards and ISO 9001 certification"); id. at 14-16 (noting that sixteen major cruise lines cooperated with American College of Emergency Physicians to develop and adopt "industry-wide guidelines" addressing "unique needs and limitations of shipboard medical infirmaries"); Adam Goldstein, Medical Tranquility and Peace of Mind, Royal Caribbean (Sept. 27, 2010) … We do not credit as fact any information not pled in the complaint, but we note that another plaintiff could have cited any of this information to rebut the basic assumption that cruise ships are not in the business of providing medical services.

b. This Court should reconsider its dismissal of Count I. In *Franza*, the Eleventh Circuit held that a cruise line (like Oceania) can be found vicariously liable for the negligent acts (medical malpractice) of Dr. Bonilla based on actual agency/respondeat superior.

At page 5 of its Order, this Court dismissed *with prejudice* Count I. Count I asserted that Oceania was vicariously liable for Dr. Bonilla's negligence based on actual agency/respondeat superior. Citing *Barbetta*, this Court held that "a shipowner is not liable for the negligence of a ships doctor."

In *Franza*, the Eleventh Circuit held that the *Barbetta* rule does not apply in the Eleventh Circuit. The Eleventh Circuit held that a cruise line can be held vicariously liable for the negligent acts (medical malpractice) of shipboard doctors under a theory of actual agency/*respondeat superior* and apparent agency. *See Franza v. Royal Caribbean Cruises, Ltd.,* 13-13067 (11th Cir. Nov. 10, 2014), p. 3-4 (emphasis added):

> No binding precedent in this Court or in its predecessor, the former Fifth Circuit Court of Appeals, decided whether a passenger might invoke the principles of actual agency, or those of apparent agency, to impute to a cruise line liability for the medical negligence of its onboard nurse and doctor. **After thorough review, we hold that both theories are available in this case. We have repeatedly emphasized that vicarious liability raises fact-bound questions, and we can discern no sound reason in law to carve out a special exemption for all acts of onboard medical negligence.** Much has changed in the quarter-century since Barbetta. As we see it, the evolution of legal norms, the rise of a complex cruise industry, and the progression of modern technology have erased whatever utility the Barbetta rule once may have had. **We thus decline to adopt the Barbetta rule, and**

> **find that the complaint in this case plausibly establishes a claim against Royal Caribbean under the doctrine of actual agency, as well as a claim under the principles of apparent agency**

Franza, 14 – 17 (emphasis added):

> Though we have never examined whether the principles of vicarious liability apply to a passenger's claim for onboard medical negligence, the federal courts have been especially active in the general area of maritime torts … Moreover, across well over a century of maritime tort precedent, the Supreme Court has required maritime principals to answer for the negligence of their onboard agents … That maritime law has long incorporated the concept of respondeat superior should come as no surprise. Shipowners, like other principals, exercise real control over their agents … **Thus, we have regularly permitted passengers to invoke respondeat superior in maritime negligence suits … Quite simply, our precedent has long allowed passengers to invoke the doctrine of respondeat superior in a diverse medley of maritime tort disputes.**

Franza, 19 (emphasis added):

> We can see nothing inherent in onboard medical negligence, when committed by full-time employees acting within the course and scope of their employment, that justifies suspending the accepted principles of agency. **Certainly, nothing in our case law creates – or even suggests – a bright-line zone of immunity for the onboard negligence of a cruise ship's medical employees.**

Id. (emphasis added). Notably, the Eleventh Circuit in *Franza* held that the existence of an agency relationship between the shipboard doctor and the cruise line is a question of fact under general maritime law. Accordingly, as a question of fact, it is not appropriate for determination at the motion to dismiss stage. *See Franza*, p. 20 - 22(quotations omitted):

> Instead, we think it more accurate to say that, absent any statutory mandate to the contrary, the existence of an agency relationship is a question of fact under the general maritime law. See *Naviera Neptuno S.A. v. All Int'l Freight Forwarders, Inc.*, 709 F.2d 663, 665 (11th Cir. 1983) ("[T]he existence of an agency relationship is a question of fact."). Thus, as we see it, at the pleading stage, a passenger must allege "sufficient facts to render it facially plausible that . . . an agency relationship [is] . . . present." **In cases of medical malpractice, as in other maritime respondeat superior cases, the essential element of the relationship is the principal's control over its agents.** Plainly, under the ordinary rules of agency, the allegations in Franza's complaint support a finding that Nurse Garcia and Dr. Gonzales were agents of Royal Caribbean. According to our unambiguous precedent, an agency relationship requires: "(1) the principal to acknowledge that the

> agent will act for it; (2) the agent to manifest an acceptance of the undertaking; and (3) control by the principal over the actions of the agent." *Whetstone Candy Co. v. Kraft Foods, Inc.*, 351 F.3d 1067, 1077 (11th Cir. 2003). Franza adequately alleged each of these elements. For starters, Franza's complaint plausibly established: (1) that Royal Caribbean "acknowledged" that Nurse Garcia and Dr. Gonzales would act on its behalf, and (2) that each "accepted" the undertaking. Most importantly, Franza specifically asserted that both medical professionals were "employed by" Royal Caribbean, were "its employees or agents," and were "at all times material acting within the scope and course of [their] employment." Compl. ¶¶ 6, 7, 20. Furthermore, the cruise line directly paid the ship's nurse and doctor for their work in the ship's medical center. Id. ¶ 28. Third, the medical facility was created, owned, and operated by Royal Caribbean, id., whose own marketing materials described the infirmary in proprietary language, see id. ("[T]he doctor and nurse both worked at what [Royal Caribbean] describes in its advertising as its medical centers[.]" (emphasis added and internal quotation marks omitted)). Fourth, the cruise line knowingly provided, and its medical personnel knowingly wore, uniforms bearing Royal Caribbean's name and logo. Id. ¶ 29. And, finally, Royal Caribbean allegedly represented to immigration authorities and passengers that Nurse Garcia and Dr. Gonzales were "members of the ship's crew," id. ¶¶ 31, 33, and even introduced the doctor "as one of the ship's Officers," id. ¶ 30. Taken as true, these allegations are more than enough to satisfy the first two elements of actual agency liability.

In this case, like in *Franza*, the allegations in the Plaintiff's Complaint, D.E. 56, support the finding that Dr. Bonilla was an agent of Oceania. The Amended Complaint sets forth that 1) "Bonilla was an agent and/or servant and/or employee of Oceania" Id. ¶32, 2) "Bonilla was acting within the scope of his employment and/or agency" Id. ¶ 33, 3) "Oceania employed and/or contracted with Bonilla to serve as the full-time emergency professional" Id. ¶16, 4) "Bonilla wore a ship's uniform," "the literature provided by Oceania showed Bonilla as a crew member (officer) and employee of Oceania," "Bonilla was paid a salary by Oceania," Id. ¶51, and 5) "Oceania owned, operated, managed, maintained and/or controlled the vessel, M/V Marina" Id. ¶10.

Additionally, like in *Franza*, the allegations in the Plaintiff's Complaint, D.E. 56, demonstrate that Royal Caribbean exercised "control" over the ship's medical personnel. In particular, the Complaint alleges that "Oceania employed and/or contracted with Bonilla to serve as the full-time emergency professional" Id. ¶16, to work on a medical facility which "Oceania

owned, operated, managed, maintained and/or controlled the vessel, M/V Marina" Id. ¶10. Additionally, "Bonilla wore a ship's uniform," "was under the command of the ship's officers", and "was paid a salary by Oceania" Id., ¶51. Finally, Oceania "financed and equipped the ship's medical facility and assisted in running it" Id., ¶63. Like in *Franza,* at the pleading stage, these allegations offer considerable "direct evidence" of the cruise line's "right to control its medical staff." *See Franza*, p. 23 - 24:

> Moreover, the facts alleged in Franza's complaint plausibly demonstrate that Royal Caribbean exercised "control" over the ship's medical personnel. *See Whetstone*, 351 F.3d at 1077. As we have explained, control is the fulcrum of respondeat superior. We have recognized the following considerations as "probative" of control in the maritime context: "(1) direct evidence of the principal's right to or actual exercise of control; (2) the method of payment for an agent's services, whether by time or by the job; (3) whether or not the equipment necessary to perform the work is furnished by the principal; and (4) whether the principal had the right to fire the agent." Franza's complaint plausibly supports a finding of control under at least three of these four factors.
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> To begin with, Franza alleged substantial "direct evidence" of Royal Caribbean's "right to control" Nurse Garcia and Dr. Gonzales. Id. The onboard medical personnel were: (1) "employed by" Royal Caribbean, Compl. ¶¶ 6, 7; (2) hired to work in a facility that the cruise line "owned and operated," id. ¶ 28; (3) paid directly by the cruise line, id.; (4) considered to be members of the ship's "crew," id. ¶ 31, 33; and (5) "required" to wear uniforms furnished by Royal Caribbean, id. ¶ 29. Additionally, the cruise line "put the ship's physician and nurse under the command of the ship's superior officers." Id. ¶ 32 (emphasis added). At the pleading stage, these allegations offer considerable "direct evidence" of the cruise line's "right to control" its medical staff.
>
> Franza's specific assertions about the ship's "method of payment" bolster her claim that Royal Caribbean controlled its onboard medical personnel. See Langfitt, 647 F.3d at 1121. Franza alleged that Royal Caribbean paid "salaries" to the ship's medical staff. Compl. ¶ 28. This compensation structure normally suggests an agency relationship, since payment is "by time" and not "by the job." Langfitt, 648 F.3d at 1121; see Restatement (Second) of Agency § 220 cmt. h (observing that "payment by hour or month" indicates "the relation of master and servant"). Additionally, onboard passengers are allegedly "billed directly by [Royal Caribbean] through the passengers' Sign and Sail Card." Compl. ¶ 28. Thus, the cruise line exercises complete control over any funds that might otherwise have flowed directly from the passengers to the medical professionals in consideration of treatment rendered. Finally, Royal Caribbean allegedly "pays to stock the 'medical centers' with all supplies, various medicines and equipment," id. ¶ 28, which lends further support to a finding of control by the cruise

line. *See Langfitt*, 648 F.3d at 1121 (finding agency more likely where "the equipment necessary to perform the work is furnished by the principal").

All in all, in light of *Franza*, this Honorable Court should reconsider its Order dismissing Count I of the Complaint. Like in *Franza*, Count I of the Plaintiff's complaint, unambiguously establishes an agency relationship between Oceania and its full-time employee, Dr. Bonilla. Accordingly, like in *Franza*, Count I validly sets forth a claim of actual agency/respondeat superior to hold Oceania vicariously liable for the medical negligence of Dr. Bonilla. *See Franza*, p. 26:

> On balance, then, Franza's complaint unambiguously establishes an agency relationship between the employer, Royal Caribbean Cruises, Ltd., and its full-time employees, Nurse Garcia and Dr. Gonzales. Nothing in the complaint suggests that these medical professionals somehow acted outside the scope and course of their employment or that the requisite control was missing. Thus, applying the standard principles of agency, we are compelled to hold that Franza's complaint sets out a plausible basis for imputing to Royal Caribbean the allegedly negligent conduct of its onboard medical employees.

c. For the same reasons noted above, this Court should also reconsider its Order dismissing with prejudice Count III of the Complaint. This Court's dismissal of count III was premised on the now abolished *Barbetta* rule.

As a preliminary matter, at pages 5 and 6 of its Order, this Court dismissed Count III of the Complaint with prejudice based entirely premised on the abolished *Barbetta* rule. On this ground alone, this Honorable Court should reconsider its dismissal of Count III with prejudice. *See* this Court's Order D.E. 63, p. 5:

> As detailed with respect to Count I, a cruise ship has no duty to provide medical care to its passengers – whether at sea or on land. "Because a cruise ship has no duty to provide doctors or other medical personnel to its passengers, it cannot be held liable for allegedly failing to fulfill a duty to provide medical care that it does not owe to passengers, regardless of whether the passengers are on the ship or on land.

In support of that statement this Court cited to district court cases that were entirely premised on the now abolished *Barbetta* rule, and therefore bad law in the Eleventh Circuit. *See, i.e. Aronson v. Celebrity Cruises, Inc.,* 2014 WL 3408582 (S.D. Fla. May 2012) (Holding entirely premised on

Barbetta); *Wanjstat,* 2011 WL 465340 at *1 (relying on *Barbetta*'s abolished concept that ships are not floating hospitals); *Gliniecki v. Carnival*, 632 F. Supp. 2d 1205 (S.D. Fla. 2009) (same).

In Count III, Plaintiffs pled "General Negligence Against Oceania." In short, this count seeks relief for Oceania's own negligence. More specifically, it seeks relief for recommending, referring and transporting the Plaintiff to obtain medical care in a substandard medical facility in Barbados, Bay View Medical Hospital. Instead of sending the Plaintiff to a properly equipped and staffed trauma center, to deal with her life threating emergency; Oceania knowingly and wilfully sent the Plaintiff to a small clinic, staffed exclusively by nurses, and designed to effectively treat minor colds. All of this was done for pecuniary gain, at the expense of the Plaintiff's health and well-being, who now suffers from permanent and irreversible brain damage.

Because of the hypernatremia created by Oceania's shipboard physician, the Plaintiff was in need of shoreside emergency medical treatment. [D.E. 56, ¶21]. At the time, while vessel's itinerary was en route to Barbados, Oceania represented to the Plaintiffs, that there was a "very good" hospital in Barbados. Oceania further represented that the place, Bay View Hospital, was "adept in treating medical emergencies." [D.E. 56, ¶22]. The Plaintiffs relied on Oceania's purported expertise regarding the quality and adequacy of medical care in the Caribbean; and more specifically, Plaintiff's relied on Defendants' referral to Bay View Hospital in St. Michael, Barbados, for emergency medical treatment. [D.E. 56, ¶23].

Unbeknownst to the Plaintiffs, Oceania *knowingly* recommended and sent the Plaintiff to a substandard medical facility. According to the Embassy of the United States in Barbados, "[t]here are NO emergency services at this facility."[6] In fact, as the U.S. embassy reports, "there are no resident doctors, but the facility employs approximately 35 nurses." Indeed, the hospital is

[6] http://barbados.usembassy.gov/emergency-barbados.html (emphasis originals).

designed to only deal with "less acute illnesses, minor outpatient surgery, and obstetric and gynecological care."[7]

Most troubling is Oceania's shameful motive for recommending and referring the Plaintiff to a substandard medical facility (which provides no emergency services); Oceania has a contract and/or agreement with Bay View Hospital in St. Michel, whereby (for a fee) Oceania refers ill passengers for emergency medical care at Bay View Hospital. [D.E. 56, ¶26].

In short, instead of sending the Plaintiff to a properly equipped and staffed trauma center, to deal with her life threating emergency; Oceania knowingly and wilfully sent the Plaintiff to a small clinic, staffed exclusively by nurses, and designed to effectively treat minor colds. All of which was done for pecuniary gain, at the expense of the Plaintiff's health and well-being. [8]

The Plaintiff was admitted to Bay View Hospital on May 19, 2013 and was treated from May 19, 2013 through May 21, 2013. At all times material, the facility was unequipped to deal with the Plaintiff's hypernatremia; no trauma center, no emergency medical services, and no resident doctors.

In an attempt to treat her hypernatremia (low sodium levels), the inexperienced and unqualified staff at Bay View Hospital infused her with an excessive combination of saline solution and sodium tablets, in too short of a time. This raised the Plaintiff's sodium levels too quickly, causing her to fall into a coma and develop Osmotic Demyelination Syndrome. ODS

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[7] Id.

[8] Notably, according to the U.S. Embassy in Barbados, Queen Elizabeth Hospital (a facility located closer to the vessel's port of call) is Barbados' major trauma facility. It has a 24-hour emergency room, medical intensive care, surgical intensive care, and dialysis units. More importantly, it has on its staff, physicians and surgeon consultants from almost all specialties. This is in striking contrast to Oceania's Bay View Hospital, which provides no emergency services, does not have any resident doctors, and is only equipped to treat less acute illnesses. *See* http://barbados.usembassy.gov/emergency-barbados.htm

ultimately destroyed the layer that insulates the Plaintiff's nerve cells, leading to permanent and irreversible brain damage.

As noted in *Franza*, a cruise line's liability for its own negligent actions is governed by its duty to provide reasonable care under the circumstances. **This means that if the cruise line undertakes a duty it must do so reasonably**. In this case, Oceania undertook the duty to select and find a medical facility in Barbados to treat the Plaintiff. The Plaintiff had no choice, but to rely on Oceania's expertise. As alleged in the Amended Complaint, the "Plaintiff relied on Defendants expertise regarding the quality and adequacy of medical care in the Caribbean; and, more specifically, Plaintiff's relied on Defendants' referral of Diane Ure to Bay View Hospital in St. Michael, Barbados." D.E. 56, ¶23. *See Franza* at p. 13:

> Therefore, the shipowner is only liable to its passengers for medical negligence if its conduct breaches the carrier's more general duty to exercise "reasonable care under the circumstances." *Kermarec v. Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959).

See Franza at p. 44:

> There are also important policy reasons that inform against broad immunity for cruise lines against any liability for their medical staff's malpractice. **Carriers owe their ailing passengers "a duty to exercise reasonable care to furnish such aid and assistance as ordinarily prudent persons would render under similar circumstances**." Barbetta, 848 F.2d at 1371 (internal quotation marks omitted). By investing in medical infrastructure and hiring skilled medical employees, cruise ships avoid the potentially high cost of providing reasonable care in more expensive ways.

d. The allegations in the Amended Complaint are sufficient to allow the Plaintiff to seek punitive damages. These allegations show Oceania's wilful conduct.

As noted earlier, instead of sending the Plaintiff to a properly equipped and staffed trauma center, to deal with her life threating emergency; Oceania knowingly and wilfully sent the Plaintiff to a small clinic, staffed exclusively by nurses, and designed to effectively treat minor colds. All of

this was done for pecuniary gain, at the expense of the Plaintiff's health and well-being, who now suffers from permanent and irreversible brain damage.

The allegations in the Complaint (showing Oceania's wilful conduct) are sufficient to allow the Plaintiff to seek, in addition to standard compensatory damages, punitive damages. *See Lobegeiger v. Celebrity Cruises, Inc.,* 2011 WL 3703329 (S.D. Fla. Aug. 23, 2011):

> [T]he Supreme Court, considering another Eleventh Circuit decision, Atlantic Sounding Co., Inc. v. Townsend, 496 F.3d 1282, 1284 (11th Cir.2007) [hereinafter Atlantic Sounding I], held "punitive damages have long been available at common law[, and] the common-law tradition of punitive damages extends to maritime claims." Atl. Sounding Co., Inc. v. Townsend, 129 S.Ct. 2561, 2569, 174 L.Ed.2d 382 (2009) [hereinafter Atlantic Sounding II] (footnote call number omitted) …The opinion in Atlantic Sounding II indicates punitive damages are available as damages in all actions under general maritime law unless specifically limited by Congress… Accordingly, a plaintiff may recover punitive damages under general maritime law, consistent with the common law rule, where the plaintiff's injury was due to the defendant's "wanton, willful, or outrageous conduct

e. This Honorable Court should also reconsider its dismissal of Count VIII (Loss of Consortium/society).

At page 9 of its Order [D.E. 63], this Court held that the General maritime law does not allow recovery for loss of consortium. In passing, however, the Eleventh Circuit's decision in *Franza* says otherwise. *See Franza* at p. 14 (emphasis added):

> Though we have never examined whether the principles of vicarious liability apply to a passenger's claim for onboard medical negligence, the federal courts have been especially active in the general area of maritime torts … see, e.g., Am. Export Lines, Inc. v. Alvez, 446 U.S. 274, 284-86, 100 S. Ct. 1673, 1679-80 (1980) (**recognizing claim for loss of consortium under general maritime law**)

In *Am. Export Lines, Inc. v. Alvez*, 446 U.S. 274, 284-86 (1980), the United States Supreme Court recognized a claim for loss of consortium under general maritime law. In particular, the Supreme Court held that "the general maritime law authorizes the wife of a harbor worker injured nonfatally aboard a vessel in state territorial waters to maintain an action for damages for the loss of the husband's society." *See also* Thomas J. Schoembaum, Admiralty and Maritime Law, 5-17

Loss of society and consortium, 5th Ed. (2003) (emphasis added): ("In American Export Lines, Inc. v. Alvez, the Supreme Court supplemented Gaudet by holding that under the general maritime law, the wife of a harbor worker injured non-fatally aboard a vessel in state territorial waters may maintain an action for damages for the loss of her husband's society. **Thus, the Court declared that loss of society damages are available under the general maritime law of personal injury as well as wrongful death.**")

While the law in the Eight Circuit is that recovery for loss of consortium under the general maritime law is limited to spouses of seafarers, i.e. *Doyle v. Graske,* 579 F. 3d 898, 905 (8th Cir. 2009); no such precedent exists in the Eleventh Circuit. The better rule is the one recognized by the United States Supreme Court in *Alvez*, which broadly recognized that a claim of loss of society existed under the General Maritime Law. The Supreme Court in *Alvez* did not explicitly limit this holding to spouses of seafarers.

IV. CONCLUSION

For the reasons stated above, and in particular the Eleventh Circuits recent decision in *Franza v. Royal Caribbean Cruises*, *Inc.*, Case No. 13-13067-DD (11th Cir. Nov. 11, 2014), this Court should reconsider its Order [D.E. 63], dated October 31, 2014, dismissing with prejudice Counts I, III, and VIII.

CERTIFICATE UNDER RULE 7.1

Counsel for the Plaintiff contacted counsel for Defendant Oceania regarding the aforementioned relief. In response, counsel for Defendant Oceania stated as follows: "Oceania requested additional information concerning the parameters of the reconsideration and needs additional time to evaluate before they can state a position."

CERTIFICATE OF SERVICE

I HEREBY CERTIFY, that on November 11, 2014, I electronically filed the foregoing document with the Clerk of the Court using CM/ECF. I also certify that the foregoing document is being served this day on all counsel of record pro se parties identified on the attached service list in the manner specified, either via transmission of Notices of Electronic Filing generated by CM/ECF or in some other authorized manner for those counsel or parties who are not authorized to receive electronically Notices of Electronic Filing.

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