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GLEN RICHARD FRITZLER AND DANA
JEANNE FRITZLER, INDIVIDUALLY AND AS
TRUSTEES OF THE FRITZLER FAMILY TRUST
DTD 7/27/92

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of the Counterclaim of Truth Aquatics, Inc. and Glen Richard Fritzler and Dana Jeanne Fritzler, individually and as Trustees of the Fritzler Family Trust DTD 7/27/92 as owners and/or owners pro hac vice of the dive vessel CONCEPTION, Official Number 638133, for Exoneration from or Limitation of Liability ,	CASE NO. 2:19-cv-07693-PA-MRW **TRUTH AQUATICS, INC. AND GLEN RICHARD FRITZLER AND DANA JEANNE FRITZLER, INDIVIDUALLY AND AS TRUSTEES OF THE FRITZLER FAMILY TRUST DTD 7/27/92'S NOTICE OF LODGING PROPOSED ORDER RE CHRISTINE DIGNAM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES**

Truth Aquatics, Inc. and Glen Richard Fritzler and Dana Jeanne Fritzler, individually and as Trustees of the Fritzler Family Trust DTD 7/27/92 ("Plaintiffs") hereby lodge their Proposed Order in connection with Respondent/Counterclaimant Christine Dignam's Motion to Strike Affirmative Defenses. Attached hereto as Exhibit "A" is Plaintiffs' Proposed Order re

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Respondent/Counterclaimant Christine Dignam's Motion to Strike Affirmative Defenses.

Dated: January 15, 2020 GORDON REES SCULLY MANSUKHANI, LLP

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

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EXHIBIT A

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DTD 7/27/92

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

In the Matter of the Complaint of Truth Aquatics, Inc. and Glen Richard Fritzler and Dana Jeanne Fritzler, individually and as Trustees of the Fritzler Family Trust DTD 7/27/92 as owners and/or owners pro hac vice of the dive vessel CONCEPTION, Official Number 638133, for Exoneration from or Limitation of Liability	CASE NO. 2:19-cv-07693-PA-(MRWx) **[PROPOSED] ORDER RE RESPONDENT/COUNTER-CLAIMANT CHRISTINE DIGNAM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES** Date: January 27, 2020 Time: 1:30 p.m. Place: Courtroom 9A 350 W. 1st Street Los Angeles, CA 90731

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Plaintiffs in Limitation TRUTH AQUATICS, INC., GLEN RICHARD FRITZLER AND DANA JEANNE FRITZLER, INDIVIDUALLY AND AS TRUSTEES OF THE FRITZLER FAMILY TRUST DTD 7/27/92, as owners and/or owners *pro hac vice* of the dive vessel CONCEPTION, Official Number 638133 (hereinafter "CONCEPTION"), hereby submit the following [PROPOSED] ORDER RE RESPONDENT/COUNTERCLAIMANT CHRISTINE DIGNAM's MOTION TO STRIKE AFFIRMATIVE DEFENSES FROM THE ANSWER TO HER COUNTERCLAIM filed in this Court on December 17, 2019 (Doc. No. 21).

I. BACKGROUND

This action arises from the tragic loss of the vessel *Conception*, in which thirty-three passengers and one crew member reportedly perished. Another crewmember, Claimant Ryan Sims, escaped with injuries. The other four members of the *Conception*'s crew reportedly escaped unharmed. Plaintiffs-in-Limitation (hereafter, the "Fritzlers") filed an action in this Court for exoneration from or limitation of liability under the Limitation of Liability Act and Supplemental Admiralty Rule F. Respondent/Counterclaimant Christine Dignam, the wife of one of the *Conception*'s passengers, timely appeared in the Limitation Action through an Answer to the Fritzler's Complaint and a contemporaneously-filed Counterclaim against the Fritzlers. Five of the affirmative defenses asserted in the Fritzlers' Answer to that Counterclaim – the Tenth, Fourteenth, Sixteenth, Eighteenth, and Twenty-Third – are at issue in this Motion to Strike.

II. DISCUSSION

A. Legal Standard

Motions to strike affirmative defenses are "generally regarded with disfavor because of the limited importance of pleading in federal practice, and because they are often used as a delaying tactic." *Neilson v. Union Bank of California, N.A.*,

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280 F.Supp.2d 1101, 1152 (C.D. Cal. 2003); *Armstead v. City of Los Angeles*, 66 F.Supp.3d 1254, 1271 (C.D. Cal. 2014). The question of whether to strike allegations rests within the sound discretion of the Court. *Neilson*, 290 F. Supp.2d at 1152. In the event that under some contingency an allegation may raise an issue, the motion should be denied. *Id. citing Wailua Associates v. Aetna*, 183 F.R.D. 550, 553-554 (D. Haw. 1998).

In the Ninth Circuit, "[a]n affirmative defense must be pleaded with enough specificity or factual pleading to give plaintiff 'fair notice' of the defense." *Simmons v. Navajo County, Arizona*, 609 F.3d 1011, 1023 (9th Cir. 2010.)[1] Such "fair notice" requires only that an affirmative defense be described in "general terms." *Kohler v. Flava Enterprises, Inc.*, 779 F.3d 1016, 1019 (9th Cir. 2010.) An affirmative defense that sets out a "cognizable legal theory" is sufficient. *Robertson v. Dean Witter Reynolds Co.*, 749 F.2d 530, 534 (9th Cir. 1984).

B. The Death on the High Seas Act and *Miles* Uniformity

Dignam moves to strike the Fritzlers' Twenty-Third Affirmative Defense, in which the Fritzlers allege that "the claims, relief, and/or damages claimed by [Dignam] are subject to and/or limited by the provisions of the Death on the High Seas Act, 46 U.S.C. 30301, *et seq*., and/or the uniformity principles set forth in *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and/or General Maritime Law." Doc. No. 20 at 11:26-12:3. In support of her motion, Dignam argues that her husband was not a seafarer, and that the *Conception* burned within California's territorial waters. DOHSA does not apply in state territorial waters, she argues, and neither does the "*Miles* uniformity principle" upon which the Twenty-Third

[1] *Simmons* involved the question of whether a defense not raised in the answer could be invoked in response to a claim, but its analysis of the "fair notice" standard is pertinent here nonetheless.

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Affirmative Defense is based. *Miles*, Dignam argues, was limited by the Supreme Court's decision in *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009), such that *Miles* only stands for the "narrow proposition" that the federal judiciary's ability to apply the "humane and liberal" characteristics of admiralty law is restricted solely where Congress has spoken directly to the question of recoverable damages. Doc. No. 21-1 at 20:20-22:19.

In response, the Fritzlers argue that *Miles* is still "good law," and further, that the Supreme Court's recent decision in *Dutra Group v. Batterton*, 588 U.S. ___ (2019), confirms as much. *Miles* is the "rule" to which *Atlantic Sounding* simply provides an exception that allows the judiciary to deviate from uniformity with Congress' remedial schemes, such as DOHSA, only where there is a historical basis for doing so. Like the plaintiff's claim for unseaworthiness at issue in *Batterton*, the Fritzlers argue that Dignam's wrongful death and survival claims are based on judge-made general maritime law, specifically, the Court's holding in *Moragne v. States Marine Lines*, 398 U.S. 1970. Neither the plaintiff's punitive damages claim for unseaworthiness in *Batterton* nor Dignam's general maritime claims for wrongful death and survival predate the Jones Act or DOHSA, respectively. Thus, the argument goes, there is no basis upon which to deviate from principles of *Miles* uniformity. Applying the reasoning of *Batterton* and the Supreme Court's oft-repeated theme of judicial deference to the policy announcements embodied in federal statutes therefore requires an Order denying Dignam's motion, allowing the Twenty-Third Affirmative Defense to stand, and confining Dignam's general maritime damages claim under her *Moragne* causes of action to the relief available under the analogous federal statute, specifically, the Death on the High Seas Act.

The Court's decision on this important issue is controlled by the principles handed down in *Moragne v. States Marine Lines*, 398 U.S. 375 (1970), *Miles v.*

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Apex Marine Corp., 498 U.S. 19 (1990), and the analytical framework outlined in the Supreme Court's decision in *Dutra Group v. Batterton*, 588 U.S. __ (2019). Together, those decisions instruct that "*Miles* uniformity" does apply to Dignam's wrongful death and survival causes of action, and that the Fritzlers may assert those principles as an affirmative defense to Dignam's judge-made general maritime law claims.

Mrs. Dignam's wrongful death and survival claims are based on the Supreme Court's decision in *Moragne*. In *Moragne*, the Court filled a "gap" in the maritime law landscape by creating a general maritime cause of action for wrongful death in state territorial waters. *See, Moragne*, 398 U.S. at 409. Overruling its decision in *The Harrisburg*, which held there was no general maritime law cause of action for deaths occurring at sea, the Court reasoned that the rule of *The Harrisburg* had been eroded by the passage of wrongful death statutes in virtually every state, as well as similar enactments at the federal level, such as FELA, DOHSA, the Jones Act, and the Federal Tort Claims Act. *Moragne*, 398 U.S. at 388-390, 409. In light of the clear legislative policy allowing recovery for wrongful death, there was no bar to *Moragne*'s judge-made expansion of the federal maritime wrongful death remedy into state territorial waters. *Id.*at 390-391.

But the Court was careful to enunciate the scope of the rule it was laying down, explaining that its decision simply created a cause of action, based upon general maritime law, where none previously existed. *Id.* at 405-406 ("Our decision . . . merely removes a bar to access the existing general maritime law.") The Court was also careful to explain how that cause of action fit within the broader federal and state statutory scheme: "[t]he void that existed in maritime law up until [passage of the Death on the High Seas Act and the Jones Act in] 1920 was the absence of any remedy for wrongful death on the high seas. Congress, in

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acting to fill that void [through DOHSA], legislated only to the three-mile limit because that was the extent of the problem. The express provision that state remedies in territorial waters were not disturbed by the Act ensured that Congress' solution of one problem would not create another by inviting the courts to find that the Act preempted the entire field, destroying the state remedies that had previously existed." *Id.* at 398. Thus, the Court could fill the unforeseen "gap" that the growing prominence of general maritime claims of unseaworthiness had created while still adhering to established state and federal legislative policies.[2]

Although it created a wrongful death cause of action for deaths occurring in state territorial waters, *Moragne* did not address the relief available under the judge-made *Moragne* cause of action. It did, however, provide guidance. "If still other subsidiary issues should require resolution, such as particular questions of the measure of damages, the courts will not be without persuasive analogy for guidance. Both the Death on the High Seas Act and the numerous state wrongful-death acts have been implemented with success for decades. The experience thus built up counsels that a suit for wrongful death raises no problems unlike those that have long been grist for the judicial mill." *Moragne*, 398 U.S. at 408.

Four years after *Moragne*, the Supreme Court began to fashion the contours of relief available under *Moragne*'s general maritime law cause of action. In *Sea-Land Servs. v. Gaudet*, 414 U.S. 573 (1974), the Court held that the widow of a

[2] The transformation of the shipowner's duty to provide a seaworthy ship into an absolute duty not satisfied by due diligence, the subsequent development of the unseaworthiness cause of action as "the principle vehicle for recovery," and the "resulting discrepancy between the remedies for deaths covered by the Death on the High Seas Act and for deaths that happen to fall within a state wrongful-death statute not encompassing unseaworthiness" combined to create one of the three "anomalies" that the *Moragne* wrongful death cause of action was intended to correct. *See*, *Moragne*, 398 U.S. at 395, 398-399 *citing Mahnich v. Southern S.S. Co.*, 321 U.S. 96 (1944).

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longshoreman who died in state waters could recover, through a cause of action that was distinct from the decedent's, damages for loss of support, services, society, and funeral expenses to the extent those damages were not barred by principles of *res judicata*. 414 U.S. at 574, 578, 584.

Dignam places great reliance on this aspect of the *Gaudet* decision and the damages it would provide, but that reliance is misplaced. First, subsequent Supreme Court decisions have dramatically limited *Gaudet*'s reach. *See, Mobile Oil Corp. v. Higginbotham*, 436 U.S. 618, 623 (1978); *Miles*, 498 U.S. at 31; *see also, Calhoun v. Yamaha Motor Corp., U.S.A.*, 40 F.3d 622, 634 (3d Cir. 1994) ("since *Gaudet*, the Court, disapproving of that decision but reluctant to overrule it directly, has narrowed the case to its facts so that the decision may be, for all intents and purposes, a dead letter") (internal citation omitted); *Miller v. American President Lines, Ltd.*, 989 F.2d 1450, 1458 (6th Cir. 1993) ("Although *Gaudet* has never been overruled, its holding has been limited over the years to the point that it is virtually meaningless") *cert. denied*, 126 L. Ed. 2d 252, 114 S. Ct. 304 (1993). More specifically, *Miles* instructs that "[t]he holding of *Gaudet* applies only in territorial waters, and it applies only to longshoremen." *Miles*, 498 U.S. at 31. Mr. Dignam allegedly died in territorial waters, but because he was not a longshoreman *Gaudet* does not control the Court's decision here. *See, id.*

Moreover, the "special solicitude" upon which the *Gaudet* decision was based, and upon which Dignam relies, has never been extended to nonseafarers such as Mr. Dignam. *See*, *Gaudet*, 414 U.S. at 588 *and compare with Tucker v. Fearn*, 333 F.3d 1216, 1222 (11th Cir. 2003) (affirming district court order precluding loss of society damages for the death of a nonseafarer in territorial waters, noting "[n]either Congress nor the Supreme Court have ever indicated that admiralty law evinces any particular consideration for nonseamen.")

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Indeed, *Gaudet* can rightly be described as the "high water mark" for the judicial expansion of relief beyond the damages provided by analogous congressional enactments. *See, Calhoun*, 40 F.3d at 634 ("*Gaudet* . . . represents the first, and last, time that the Court departed from the guidance of federal statutory wrongful death remedies in shaping recovery for wrongful death.") In fact, rather than expanding the damages available under *Moragne*, since *Gaudet* the tide of relief available through *Moragne* causes of action has been consistently receding. *See, e.g., id.* at 636 ("Although the trend in post-*Moragne* case law can be explained by reference to the rise in the importance of federal statutory schemes in shaping maritime remedies, it would be myopic not to recognize the other forces at work. One trend that cannot be ignored is that the Court seems to be cutting back on plaintiffs' rights in maritime actions.")

Both *Higginbotham*, decided four years after *Gaudet*, and *Miles*, decided sixteen years later, teach that conformity to established congressional statutory schemes is the "rule" to which courts must adhere when fashioning relief under the judge-made general maritime law. Thus, in *Higginbotham*, adherence to the principle of judicial deference to the federal statutory scheme lead the Supreme Court to deny loss of society damages that were not available under DOHSA's pecuniary loss standard, even though *Gaudet* would allow them based on "a policy determination . . . which differed from the choice made by Congress when it enacted the Death on the High Seas Act." 436 U.S. at 622. Similarly, *Miles* denied recovery of a decedent seaman's lost future earnings on the grounds that awarding those damages through a general maritime survival action for death in territorial waters would be impermissibly inconsistent with the relief Congress provided in the Jones Act. *Miles*, 498 U.S. 32-33 ("It would be inconsistent with [the judicial branch's] place in the constitutional scheme were we to sanction more expansive remedies in a judicially created cause of action in which liability is without fault

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[unseaworthiness] than Congress has allowed in cases of death resulting from negligence.")

Nowhere is that uniformity principle more clearly enunciated than the Supreme Court's recent decision in *Batterton*. There, plaintiff, a Jones Act seaman, sought recovery of punitive damages on an unseaworthiness cause of action for injuries sustained in California's territorial waters. *Batterton*, 588 U.S. __ at 9. Before reaching the Supreme Court, the Ninth Circuit, applying Circuit precedent[3], held that punitive damages are available for unseaworthiness claims. *Id.* at 9. Reversing the Ninth Circuit and effectively disapproving *Evich* in the process, *id.* at 18, the Court cogently outlined its analytical approach: first, "whether punitive damages have traditionally been awarded for claims of unseaworthiness," second, "whether conformity with parallel statutory schemes would require such damages," and third, whether the Court was "compelled on policy grounds" to allow them. *Id*. at 10 *citing Miles*, 498 U.S. at 27 *and Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). Applying that approach and finding no historical basis for an award of punitive damages for unseaworthiness, "[t]he rule of *Miles* – promoting uniformity in maritime law and deference to the policies expressed in the statutes governing maritime law – prevent[ed the Court] from recognizing a new entitlement to punitive damages where none previously existed." *Id*. at 18.

Batterton's analytical approach and adherence to the congressional policies expressed in the Death on the High Seas Act compel an Order confirming that Dignam's general maritime wrongful death and survival damages must conform to the remedial scheme that Congress established through DOHSA[4], and allowing the

[3] Specifically, *Evich v. Morris*, 819 F.2d 256, 258-259 (9th Cir. 1987).
[4] DOHSA, of course, applies to all persons killed on the high seas, regardless of whether the decedent was a seafarer or not. *See*, 46 U.S.C. § 30302.

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Fritzlers' Twenty-Third Affirmative Defense to stand. Like the unseaworthiness cause of action at issue in *Miles* and *Batterton*, which arose after the Jones Act was enacted in 1920, *see Mahnich*, 321 U.S. 96, Dignam's wrongful death and survival claims are based upon judge-made, general maritime law causes of action that stem from *Morange*, a case decided 50 years after Congress enacted the Death on the High Seas Act in 1920. As the Supreme Court reasoned in *Batterton*, that fact is "practically dispositive" here. *See, Batterton*, 588 U.S. __ at 12.

Turning to policy considerations, *Batterton* instructs that "[i]n contemporary maritime law, our overriding objective is to pursue the policy expressed in congressional enactments." *Id.* at 15. That is so because "it would exceed our current role to introduce novel remedies contradictory to those Congress has provided in similar areas." *Id*. at 15 *citing Miles*, 498 U.S. at 33 (declining to create a remedy "that goes well beyond the limits of Congress' ordered system of recovery"). Here, the Death on the High Seas Act is a directly analogous "congressional enactment" that provides an "ordered system of recovery" for maritime deaths, including the death of passengers like Mr. Dignam. *See*, 46 U.S.C. § 30301, *et seq.* Thus, our "overriding objective" is "to pursue the policy" its expresses. *See, Batterton*, 588 U.S. __ at 15 *citing Miles*, 498 U.S. at 33. Any relief Dignam may seek through her *Morange* wrongful death or survival causes of action must therefore conform to the Congressional scheme outlined in DOHSA. *See, id.* The Fritzlers' Twenty-Third Affirmative Defense merely restates that principle, and it must stand.

The authorities upon which Dignam relies do not dictate a different result. Dignam relies principally on *Atlantic Sounding*, but *Batterton* instructs that *Atlantic Sounding* must be read in conjunction with *Miles* to determine the limits of the relief available to her. *See, Batterton*, 588 U.S. __ at 10. And *Miles* is unquestionably still "good law" whose reasoning "remains sound." *See, Atlantic*

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Sounding, 557 U.S. at 420. Nor does *Gaudet* help Dignam because, as noted above, that case only applies only in territorial waters, and only to longshoremen. *Miles*, 498 U.S. at 31.

Dignam's reliance on *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985) (hereafter, "*Connelly*") and *Evich v. Morris*, 819 F.2d 256 (9th Cir. 1987) (hereafter, "*Morris*") is also misplaced. Dignam cites to *Connelly* for the proposition that survival damages for pre-death pain and suffering are available to her, but the Ninth Circuit has since instructed that the *Connelly* decision is no longer controlling in light of *Miles*. *See, Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir. 1994). Indeed, *Davis* supports, rather than undermines, the proposition that Dignam's relief must conform to DOHSA's remedial scheme. *See, id.* ("the principle underlying the Supreme Court's decision in both *Miles* and *Moragne* is that general maritime law is intended to supplement the statutory remedies created by Congress, *not to enhance or replace them*") (emphasis added). Further, the issue before the Ninth Circuit in *Connelly* was whether non-dependent brothers of a deceased Jones Act seaman had standing to bring their claims, not, as Dignam claims, whether damages for pre-death pain and suffering are available to her. *See*, *Connelly*, 759 F.2d at 1433. And while Dignam cites to *Voillat v. Red & White Fleet*, 2004 U.S. Dist. LEXIS 4359, *20-21 (N.D. Cal. 2004) in support of her claim that *Morris* is "still good law" on the availability of punitive damages and pre-death pain and suffering, *Batterton*'s analysis and its holding undermine that contention. *Batterton*, 588 U.S. __ at 9, 18 (reversing Ninth Circuit's ruling, based on *Morris*, that punitive damages are available under a general maritime law claim for unseaworthiness).

Neither *Voillat* nor *In re Air Crash off Point Mugu, California*, 145 F.Supp. 2d 1156 (N.D. Cal. 2001) help Dignam, either. As decisions of a sister District Court, neither of them is binding here. Yet perhaps more important, both of those

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cases were decided without the benefit of the Supreme Court's analysis in *Batterton*. Punitive damages are not a traditional maritime remedy for maritime personal injury claims, *Batterton*, 588 U.S. __ at 12, so there is no historical basis here to justify a departure from Congress' decision to limit recovery for maritime deaths to pecuniary loss. *See*, 46 U.S.C. § 30303; *see also, Batterton*, 588 U.S. ___ at 12 ("[t]he lack of punitive damages in traditional maritime law cases is practically dispositive.")

Finally, Dignam relies, in passing, on the Ninth Circuit's decision in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994) for the proposition that the vitality of *Evich* was not undermined by *Miles.* Yet the passage from *Connelly* that *Miles* referred to addressed the topic of whether the general maritime law provides a survival action. *See*, *Miles*, 498 U.S. at 34 ("[s]everal Courts of Appeals have relied on *Moragne* to hold that there is a general maritime right of survival") *citing Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985). But that is not the issue here. Rather, the Fritzlers rely on *Miles* uniformity to limit the damages that are available to Dignam, not the causes of action she may pursue. *See, e.g.*, Doc. No. 23 at 23:13-17 ("Under the reasoning of *Batterton*, any relief Counterclaimant (or any other claimant) may seek through *Morange* wrongful death or survival causes of action must therefore confirm to the Congressional scheme outlined in DOHSA") (emphasis added).) Moreover, to the extent Dignam relies on *Sutton*'s suggestion that *Miles* did not "undermine" *Morris*'s approach to recoverable damages, *see Sutton*, 26 F.3d 919, this Court believes the Ninth Circuit would have to agree that the Supreme Court's *Batterton* decision did precisely that. *See, Batterton*, 588 U.S. __ at 9, 18.

For the reasons stated above, Dignam's Motion to Strike the Twenty-Third Affirmative Defense is denied.

C. Affirmative Defenses to California Civil Code §3294

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The Fritzlers' Sixteenth and Eighteenth Affirmative Defenses address the legal limitations of state law damages available to Dignam. When non-seafarers die in the territorial waters of a state, the United States Supreme Court has confirmed that state law may supplement maritime remedies. *Yamaha Motor Corp v. Calhoun* 516 U.S. 199, 216, 116 S. Ct. 619, 133 L.Ed.2d 578 (1996). Holding that state law remedies were not entirely displaced, the Court affirmed the Third Circuit's finding that *Moragne* did not place "a ceiling on recovery for wrongful death" but rather filled a gap where no remedy had previously been available for wrongful deaths occurring in state territorial waters. *Id* at 214.

In pleading her counterclaim, Dignam has not limited or waived her ability to reach into state law to supplement her damages. Petitioners are entitled to state whatever defenses are available to them in response to the entire array of potential avenues of recovery Dignam may attempt, including pursuing punitive damages under California Civil Code §3294. If Petitioners are not allowed to assert state law defenses to those state law claims now, they may "be left hanging" when Dignam makes that choice later on. Dignam's motion to strike the Sixteenth and Eighteenth Affirmative Defenses is denied.

Further, the Fritzlers' Sixteenth Affirmative Defense provides sufficient "fair notice" that under both the general maritime law and California state law the Fritzlers are not subject to punitive damages for the actions of vessel crew under the circumstances here. Under the general maritime law, punitive damages are not recoverable against a vessel owner for acts of the master and crew "unless it can be shown that the owner authorized or ratified the acts of the master either before or after the incident." *U.S. Steel v. Furhman*, 407 F.2d 1143 (6th Cir. 1969) *cert. denied*, 398 U.S. 958, S.Ct. 2162, 26 L.Ed.2d 542 (1970). Further, the general maritime law provides that "punitive damages may not be imposed against a corporation when one or more of its employees decides on his own to engage in

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malicious or outrageous conduct." *Matter of P&E Boat Rentals, Inc.* 872 F.2d 642 (5th Cir. 1989); *see also, Prospectus Alpha Navigation Co. Ltd. v. North Pacific Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985). The Fritzlers have asserted these principles in their Sixteenth Affirmative Defense, as they are entitled to do under the authorities just cited. Dignam's motion to strike that defense is therefore denied.

D. Assumption of Risk and the Tenth and Fourteenth Affirmative Defenses

In support, Dignam argues that "the doctrine of assumption of the risk has no place in admiralty law." Doc. No. 21-1 at 14:4-15:23. She asserts that the Fritzlers will be unable to prove any set of facts to support these affirmative defenses, which, in turn, requires an Order striking them. *Id*. at 15:20-23. The Fritzlers argue, in effect, that assumption of risk is a fact-specific inquiry which, at its core, requires the "risk" in question to be identified. Thus, the argument continues, because the cause of the fire on the *Conception*, and therefore, the specific "risk" in question, remain unknown, it would be premature to strike these defenses at this early stage of the proceedings. That is particularly true, they argue, because potentially dozens more claimants are likely to appear, and the legal theories they may advance cannot be known. So, while Dignam's motion has preserved her objections to the Tenth and Fourteenth Affirmative Defenses, an Order granting this aspect of the Motion now would risk precluding the Fritzlers from asserting assumption of the risk to subsequent claims made by claimants who have not yet appeared.

The Court agrees, and will deny the Motion on this issue without prejudice. Nothing in Rule 12 of the Federal Rules of Civil Procedure precludes Dignam from raising this issue again after the record is more fully developed; indeed, Rule 12 expressly provides that the Court may strike matters from any pleading *sua sponte*.

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See, Fed. R. Civ. P. 12(f). Dignam has successfully preserved her objections to these defenses. *See, id.* But because the pleadings frame the permissible scope of discovery, *see*, Fed. R. Civ. P. 26(b)(1), an Order striking them at this early stage, before most of the likely parties have appeared and before many of the central facts to these proceedings have become known, could unfairly restrict the Fritzlers' (or any other party's) ability to obtain discovery that may be relevant to some of the central issues in this litigation. For these reasons, the Court DENIES Dignam's Motion to Strike the Tenth and Fourteenth Affirmative Defenses is denied WITHOUT PREJUDICE to her right to assert them at a later stage in the litigation upon a more fully-developed record.

III. CONCLUSION

For the reasons stated above, Dignam's Motion to Strike the Sixteenth, Eighteenth, and Twenty-Third Affirmative Defenses is DENIED. Dignam's Motion to Strike the Tenth and Fourteenth Affirmative Defenses id DENIED WITHOUT PREJUDICE to her right to assert them at a later stage in the litigation upon a more fully-developed record.

Dated:_____

_____
Hon. Percy Anderson
United States District Court Judge

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CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: GORDON REES SCULLY MANSUKHANI, LLP, 2211 Michelson Drive, Suite 400, Irvine, CA 92612. On January 15, 2020, I served the foregoing document(s) entitled:

[PROPOSED] ORDER RE RESPONDENT/COUNTER-CLAIMANT CHRISTINE DIGNAM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

☒ **VIA ECF:** by electronic service through the CM/ECF System/Proposed Order Portal, which includes a copy via email to counsel of record.

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

Executed on January 15, 2020 at Irvine, California.

Leslie M. Handy

Gordon Rees Scully Mansukhani, LLP
101 W. Broadway Suite 2000
San Diego, CA 92101

CERTIFICATE OF SERVICE

I am a resident of the State of California, over the age of eighteen years, and not a party to the within action. My business address is: GORDON REES SCULLY MANSUKHANI LLP, 2211 Michelson Drive, Suite 400, Irvine, CA 92612. On January 15, 2020, I served the foregoing document(s) entitled:

TRUTH AQUATICS, INC. AND GLEN RICHARD FRITZLER AND DANA JEANNE FRITZLER, INDIVIDUALLY AND AS TRUSTEES OF THE FRITZLER FAMILY TRUST DTD 7/27/92'S NOTICE OF LODGING PROPOSED ORDER RE CHRISTINE DIGNAM'S MOTION TO STRIKE AFFIRMATIVE DEFENSES

☐ BY MAIL. I am familiar with this firm's practice of collection and processing correspondence for mailing with the United States Postal Service, and that the correspondence shall be deposited with the United States Postal Service this same day in the ordinary course of business pursuant to Code of Civil Procedure §1013a.

☐ EMAIL OR ELECTRONIC TRANSMISSION. I caused a copy of said document(s) to be electronically sent to the email addressee(s) below, based on a court order or agreement of the parties to accept service by email or electronic transmission. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

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

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

Executed on January 15, 2020 at Irvine, California.

Leslie M. Handy

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