UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
KEY WEST DIVISION

IN ADMIRALTY

CASE NO. 4:17-CV-10050-JLK

IN THE MATTER OF:
THE COMPLAINT OF HORIZON
DIVE ADVENTURES, INC., AS OWNER
OF THE M/V PISCES (Hull Id# FVL31002F707)
ITS ENGINES, TACKLE, APPURTENANCES,
EQUIPMENT, ETC., IN A CAUSE FOR
EXONERATION FROM OR LIMITATION OF
LIABILITY,

Petitioner,

vs.

PETER SOTIS, SANDRA STEWART, AS
PERSONAL REPRESENTATIVE OF THE
ESTATE OF ROBERT STEWART,

Respondents/Claimants.
_____/

CLAIMANT, SANDRA STEWART'S MOTION TO STRIKE OR DISMISS CLAIMANT PETER SOTIS' CLAIMS FOR INTENTIONAL INFLICTION OF EMOTIONAL DISTRESS AND NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

Claimant, SANDRA STEWART, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT STEWART, ("The Estate"), by and through undersigned counsel, hereby moves to strike or dismiss Count I of Claimant SOTIS' Second Amended Answer, Affirmative Defenses and Claim [DE 68] purporting to assert a cause for action for intentional and/or negligent infliction of emotional distress, and states:

Legal Standard on Failure to State a Claim

Federal Rule of Civil Procedure 8(a) requires "a short and plain statement of the claims" that "will give the defendant fair notice of what the plaintiff's claim is and the ground upon which it rest." Fed.R.Civ.P. 8(a). The Supreme Court has held that "while a complaint attacked by a Rule 12(b)(6) motion to dismiss does not need detailed factual allegations, a plaintiff's obligation to provide the 'grounds' of his 'entitlement to relief' requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do. Factual allegations must be enough to raise a right to relief above the speculative level." *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted).

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 (2009).

Count I of SOTIS' Second Amended Answer, Affirmative Defenses and Claim Fails to State a Cause of Action

The elements of a claim for intentional infliction of emotional distress (IIED) are (1) the wrongdoer's conduct was intentional or reckless; (2) the conduct was outrageous; that is, as to go beyond all bounds of decency and to be regarded as atrocious and utterly intolerable in a civilized community; (3) the conduct caused emotional distress; and (4) the emotional distress was severe. *Garcia v. Carnival Corp.*, 838 F.Supp.2d 1334, 1339 (S.D. Fla. 2012). *See also, Rubio v. Lopez*, 445 Fed.Appx. 170, 175 (11th Cir. 2011).

With respect to claims for Intentional Infliction of Emotional Distress (IIED) it is well established that the determination of whether the conduct alleged in a complaint rises to the extremely high level of outrageousness necessary to assert a claim for intentional infliction of emotional distress is an issue of law. *Metro. Life Ins. Co. v. McCarson*, 467 So.2d 277 (Fla.

1985). The United States District Court Judges in the Southern District have not hesitated to make that determination at the motion to dismiss stage. *See, e.g., Negron v. Celebrity Cruises, Inc.*, 2018 WL 3369671 (S.D. Fla. 2018); *Garcia v. Carnival Corp.*, 838 F.Supp.2d 1334, 1336 (S.D. Fla. 2012); *Bakar v. Bryant*, 2013 WL 5534235 (S.D. Fla. 2013). As the Florida Supreme Court has explained:

> It has not been 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" or a degree of aggravation which would entitle the plaintiff punitive damages for another tort.

McCarson, 467 So.2d at 278. (Quoting *Restatement Second of Torts* §46 cmt. d 1965).

As this Court itself has noted, a cause of action for IIED is "sparingly recognized by the Florida courts." *Vamper v. United Parcel Service, Inc.*, 14 F.Supp.2d 1301, 1306 (S.D. Fla. 1998) (King, J.). In *Rubio*, the Eleventh Circuit found that the plaintiff had failed to allege sufficient outrageous conduct where a Deputy Sheriff hobble-tied him on black asphalt pavement in the sun, resulting in second degree burns to his face and chest. *See also, Foreman v. City of Port St. Lucie*, 294 Fed.Appx. 554 (11th Cir. 2008) (affirming dismissal of an IIED claim where the complaint alleged that plaintiff watched a police officer point a BB gun at her husband's chest and pull the trigger, and that plaintiff did not know the BB gun was unloaded). Here, SOTIS does not and cannot allege anything which HORIZON did which even comes close to that behavior – behavior which the Eleventh Circuit held was insufficient to state a claim for IIED.

In *Vamper*, the plaintiff alleged that the defendant UPS "fabricated a reckless driving charge in an attempt to terminate him; . . . told a false story about plaintiff to another employee and referred to plaintiff as a "nigger" in Spanish; they did not receive pay and bonuses other drives received; that he was threatened with termination; that he was unjustifiably suspended and

demoted; and that Acquaviva struck Plaintiff from behind on the ankle." *Id.* at 1306. This Court held that while these allegations, if true, "constitute objectionable and offensive behavior, they do not rise to the level of relentless physical and verbal harassment necessary to state a claim for intentional infliction of emotional distress." *Id.* at 1306-07.

Judge Scola followed *Vamper* in *Brown v. Royal Caribbean Cruises, Ltd.*, 2017 WL 3773709 (S.D. Fla. 2017) dismissing a claim for IIED where the plaintiff alleged that Royal Caribbean knew the presence of Legionnaire's disease prior to the plaintiff's cruise and acted with deliberate and wanton recklessness in choosing not to advise passengers of the presence of the disease prior to the ship's departure from port. *Id.* at *2. The complaint further alleged that Royal Caribbean failed to advise the passengers to protect its own economic interests. In addition to actually contracting Legionnaire's disease the complaint alleged that the plaintiff suffered severe and extreme fright anxiety over potentially contracting Legionnaire's disease, as well as other mental and emotional harm. Nevertheless, Judge Scola dismissed the IIED claim, citing *Rubio v. Lopez*, and *Vamper*.

Judge Scola followed this Court's decision in *Vamper* again in *Negron v. Celebrity Cruises, Inc.*, 2018 WL3369671 (S.D. Fla. 2018), noting that "a plaintiff alleging IIED faces an extremely high burden, as Florida courts have repeatedly found a wide spectrum of behavior insufficiently 'outrageous,'" *Id.* at *2. He also noted that "a brief survey of Florida and maritime cases addressing claims of IIED underscores this point," citing, *e.g.*, *Rubio*, and *Garcia v. Carnival*. Absent the loss of a close family member, it is virtually impossible to properly state a claim for intentional infliction of emotional distress. Cf. *Broberg v. Carnival Corp.*, 303 F.Supp.3d 1313, 1318 (S.D. Fla. 2017) (noting that where a loved one, or a close family member is killed, behavior which might otherwise be merely insulting, frivolous or careless becomes

indecent, outrageous and intolerable). *See also, L.A. By and Through T.A. v. Royal Caribbean Cruises, Ltd.*, 2018 WL 3093548 (S.D. Fla. 2018) (Denying motion to dismiss where there are allegations of sexual assault, battery and abuse of the minor plaintiff.) Here, SOTIS has not lost a loved one,[1] or alleged anything as outrageous as a sexual assault on a thirteen year old.

In *Garcia v. Carnival Corp.*, Judge Moore granted the defendant's Motion to Dismiss the plaintiff's intentional infliction of emotional distress claim even though the defendant's crew members committed an assault against her. 838 F.Supp.2d at 1335. The plaintiff alleged that she was approached by seven of the defendant's crew members, several of which grabbed her. At that point she had a panic attack which made it difficult for her to breath and caused her chest pains. *Id.* She further alleged that the crew members kicked and punched her, threw her to the ground multiple times, handcuffed her in a harmful manner, dragged her across the floor while she was handcuffed, and then confined her to a cabin by placing a crew member immediately outside of her cabin door and preventing her from leaving her cabin until the following day. *Id.* at 1336. The court held that nothing alleged by the plaintiff was "so outrageous in character, and so extreme in degree," as to state an intentional infliction of emotional distress claim. *Id.*

SOTIS' allegations against Petitioner HORIZON in this limitation of liability action fall woefully short of the extremely high standard for outrageous conduct deemed to be intolerable in society, which is a necessary predicate to a claim for IIED. For instance, SOTIS asserts "Petitioner *stood silent* and in a calculated manner and *allowed blame* for Stewart's death to be shifted to SOTIS in the dive community and in particular to the IANTD, SOTIS' certifying agency, which eventually suspended SOTIS' teaching credentials and those of his company Ad

[1] Although Judge Moreno denied the motion to dismiss in *Broberg* because the case involved the death of the plaintiff's wife, upon the filing of a motion for summary judgment, the plaintiff in *Broberg* conceded that he could not meet his burden, and Judge Moreno entered summary judgment on the IIED Count. *Broberg v. Carnival Corporation*, Case Number 17-21537-CIV-MORENO (DE 78).

Helium." (DE 68, para. 41). (Emphasis added). These allegations are passive, not active, and even if they had been alleged actively, are not even in the same universe as the types of allegations that are necessary to state a claim for IIED. In fact, Claimant SOTIS does not even allege that the Petitioner HORIZON, or its employees, actually made *any specific statements*. Again, the allegations are that HORIZON "stood silent" and allowed certain misstatements to be perpetuated. Such passive behavior cannot state a claim for IIED. *See, e.g., Nguyen v. Royal Caribbean Cruises, Inc.*, 2017 WL 1374168, at *4 (S.D. Fla. 2017) (granting motion to dismiss IIED claim which alleged that cruise line inflicted emotional distress on parents whose child drowned because RCCL *failed* to have lifeguards at pool).

Although paragraph 42 contains certain buzz words such as "perpetuation of vicious innuendos and outrageous insinuations surrounding the death of Robert Stewart," merely attaching those adjectives to passive behavior does not turn Petitioner's alleged passive conduct, e.g., the "perpetuation" of innuendo, into conduct so outrageous as to state a claim for IIED. SOTIS' allegations are nothing more than an insufficient "unadorned, the-defendant-unlawfully-harmed-me accusation." *Iqbal*, 556 U.S. at 678. SOTIS alleges that Petitioner HORIZON attempted to shift blame from itself onto SOTIS for Robert Stewart's death. But that is exactly what occurs in litigation. One defendant points the finger at another defendant. There is no allegation that there is no factual basis whatsoever for Petitioner's litigation position that Robert Stewart was either wholly or partially responsible for Robert Stewart's death. SOTIS was the "safety" diver and Stewart's dive buddy.

If this Court permits a claim for intentional infliction of emotional distress to survive here, then every defendant in every action will be permitted to state a claim for intentional infliction of emotional distress, not only against a co-defendant who attempts to shift blame to it,

but also to every plaintiff.

In *Medina Wright Berry Medina Wright v. Medina*, 2013 WL 12156046 (M.D. Fla. 2013) the court dismissed a claim for IIED where, among other things, one litigant alleged that another litigant "intentionally inflicted undue emotional distress on both Andrew and Kelly Berry, including the reckless filing of Luis Medina's complaint with false allegations, especially outrageous claims of patent infringement and theft of intellectual property." *Id.* at *7. The court found that the alleged conduct did not rise to the level of outrageous sufficient to sustain a claim for intentional infliction of emotional distress. More broadly, the court held that "the assertion of intentional infliction of emotional distress cannot be used to circumvent the immunity afforded to litigation conduct." *Id. See also, Weaver v. Mateer & Harbert, P.A.*, 2011 WL 13140899 at *6, n.8 (M.D. Fla. 2011) (noting that plaintiff could not base his intentional infliction of emotional distress claim on allegations regarding discovery violations and/or statements that the defendants purportedly made to the court during the litigation). *Weaver* also noted that Florida's litigation privilege applies to state law claims adjudicated in federal court. *Id.*

Regardless, SOTIS' beef is not with Petitioner HORIZON.[2] Attached hereto as Exhibit A is a copy of PETER SOTIS' and Add Helium LLC's Complaint against International Association of Nitrox Divers, Inc. (IANTD). The Complaint seeks declaratory relief with respect to IANTD's independent investigation and decision to revoke SOTIS' license. Paragraph 32 of that Complaint recites the March 8, 2017 correspondence from IANTD to SOTIS that "the board investigated the matter and upon diligent analysis has determined your conduct is in violation of IANTD Standards and Procedures Version 20.7.2, Policies and Community Practice and unbecoming of dive professionals as set forth in the IANTD Standards and Procedures

[2] Once again, it is clear that the sole, bad faith, purpose of SOTIS' concocted claim for IIED is to defeat STEWART's right, under the Saving to Suitors Clause, to pursue her claim in state court. Once again, Petitioner HORIZON is a willing participant in the subterfuge, as it declined to move to dismiss Count I.

Version 20.7.2." (Exhibit A, p. 6). Thus, it is clear that Mr. Sotis' beef is with IANTD, not with Petitioner, HORIZON. But he has already sued the IANTD for revoking his credentials. Thus, the IANTD, not HORIZON, is responsible for those credentials being revoked.

Furthermore, SOTIS merely alleges that these actions have caused him to suffer "severe humiliation, mental anguish, and emotional and physical distress." This is insufficient as a matter of law. To overcome a motion to dismiss, an IIED claimant must make specific allegations concerning any mental suffering that the plaintiff has sustained and speak to the degree of such mental suffering. *Frias v. Demings*, 2011 WL 4903086, at *12 (M.D. Fla. 2011) ("The law intervenes only where the distress inflicted is so severe that no reasonable man could be expected to endure it.") (citing *Restatement (Second) of Torts*, §46, cmt. J (1965).

THE CLAIMANT SOTIS HAS FAILED TO STATE A CLAIM FOR NEGLIGENT INFLICTION OF EMOTIONAL DISTRESS

A claim for negligent infliction of emotional distress ("NIED") requires an adequately pled underlying claim of negligence. *Chaparro v. Carnival Corp.*, 693 F.3d 1333, 1337 (11th Cir. 2012). Here, there is no underlying claim of negligence pled by SOTIS against the Petitioner HORIZON. In addition, a NIED claim "requires mental or emotional harm (such as fright or anxiety) that is caused by the *negligence* of another." *Id.* at 1337-38. (Emphasis added). Finally, the Claimant SOTIS must allege that he was within a "zone of danger" of being placed in immediate risk of *physical* harm by defendant's conduct. *Id*. at 1338 (quoting *Stacy v. Rederiet Otto Danielsen, A.S.*, 609 F.3d 1033, 1035 (9th Cir. 2010). (Emphasis added). Here, SOTIS alleges no risk of physical harm, and no negligence. Rather, he alleges "vicious innuendo and outrageous insinuations." Count I of SOTIS' Second Amended Claim must be stricken or dismissed for failure to state a claim.

WHEREFORE, Claimant STEWART respectfully requests the Court dismiss or strike Count I of Claimant SOTIS' Second Amended Claim.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on July 12, 2018 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 or 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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