

THE HONORABLE ROBERT S. LASNIK

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IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

JOSEPH BOHM and JOHN LEE,
Individually and on behalf of all others
similarly situated,

Plaintiffs,

vs.

PARK WEST GALLERIES, INC., d/b/a
PARK WEST GALLERY, *et al*,

Defendants.

Case No. 2:09-MD-2076-RSL

DEFENDANT ROYAL CARIBBEAN
CRUISES LTD.'S AND CELEBRITY
CRUISES INC.'S MOTION TO
DISMISS

**Noted: Friday, October 23, 2009
ORAL ARGUMENT REQUESTED**

Defendants Royal Caribbean Cruises Ltd. and Celebrity Cruises Inc. (collectively, "Celebrity"),¹ pursuant to Rules 12(b)(3) and 12(b)(6) of the Federal Rules of Civil Procedure, move for the entry of an Order dismissing with prejudice the claims asserted against Celebrity in the Amended Complaint.

I. RELEVANT FACTUAL ALLEGATIONS

This is a putative class action brought by two people who allege that while they were on a cruise ship operated by Celebrity, they purchased artwork from Defendants Park West Galleries, Inc., PWG Florida, Inc., Fine Art Sales, Inc., Vista Fine Art, LLC, and Albert

¹ Celebrity Cruises Inc. is a wholly-owned subsidiary of Royal Caribbean Cruises Ltd.
2:09-MD-2076-RSL

1 Scaglione (collectively, "Park West") that is not worth as much money as Park West said it
2 was worth.

3 In 2002, Plaintiffs took a cruise aboard a cruise ship operated by Celebrity (Am.
4 Compl., ¶99(c)). During the cruise, and while the cruise ship was in international waters, they
5 purchased a piece of art from Park West (*Id.*, ¶¶99(d) and (d)(i)). Plaintiffs allege that Park
6 West told them that the artwork was a "good investment" and "would appraise for many times
7 its sale price" (*Id.*, ¶¶99(d)(2) and (d)(3)). Plaintiffs allege that they relied upon those
8 representations by Park West in deciding to purchase the artwork (*Id.*, ¶99(d)(2)). Plaintiffs
9 allege that Park West provided them with an invoice at the time they purchased the artwork
10 (*Id.*, ¶¶99(d)(iv)).

11 Plaintiffs allege that two to three weeks after they purchased the artwork (and after they
12 had returned home from the cruise) they received in the mail an appraisal from Park West for
13 the artwork they purchased from Park West (*Id.*, ¶99(d)(vii)). Plaintiffs allege that the
14 appraisal, which was signed by Park West, valued the artwork at more than twice the amount
15 they paid for it (*Id.*, ¶99(d)(viii)).

16 Plaintiffs allege that in 2008 they tried to sell some of their art collection, although they
17 do *not* allege that the single piece of art they purchased on the Celebrity ship was among the
18 items they tried to sell (*Id.*, ¶¶100-01). Plaintiffs allege that they received no responses to their
19 inquiries about selling their art, except one person told them that the frames were worth more
20 than the pictures (*Id.*, ¶101). Plaintiffs allege that in 2008 they also read a newspaper article
21 reporting about lawsuits that had been brought against Park West arising from shipboard art
22 auctions (*Id.*, ¶102). Plaintiffs allege that after reading the article, they engaged in
23 communications with Park West regarding the value of the artwork they purchased, but they
24 were unable to reach any sort of agreement with Park West (*Id.*, ¶¶104-06).

25

1 Based on those operative facts – and although those facts have absolutely no
2 connection with Celebrity – Plaintiffs' Amended Complaint (which was the first pleading filed
3 by Plaintiffs naming Royal Caribbean Cruises Ltd. or Celebrity Cruises Inc. as a defendant)
4 purports to state claims against Celebrity for alleged violations of 18 U.S.C §1962(d), the
5 Racketeer Influenced and Corrupt Organizations Act (“RICO”) (Count II); unjust enrichment
6 (Count IX); and civil conspiracy (Count X). Each claim should be dismissed.

7 **II. ARGUMENT**

8 **A. The Amended Complaint Should Be Dismissed Because Plaintiffs Have Failed To**
9 **State Claims Against Celebrity.**

10 Plaintiffs' Amended Complaint purports to state claims against Celebrity for alleged
11 violations of RICO (Count II); unjust enrichment (Count IX); and civil conspiracy (Count X).
12 The Amended Complaint should be dismissed with prejudice because it fails to state claims
13 against Celebrity.

14 1. Plaintiffs' Claims Against Celebrity Are Barred By The Applicable Statutes Of
15 Limitation.

16 Plaintiffs allege that they took a cruise aboard a Celebrity ship in September 2002 (Am.
17 Compl., ¶99(c)). Plaintiffs do *not* allege that they have had any interaction or dealings with
18 Celebrity since their cruise ended in September 2002.

19 Plaintiffs filed their Amended Complaint on July 24, 2009 – *seven* years after their last
20 interaction with Celebrity. The Amended Complaint was the first pleading filed by Plaintiffs
21 naming Royal Caribbean Cruises Ltd. and Celebrity Cruises Inc. as defendants. Royal
22 Caribbean Cruises Ltd. and Celebrity Cruises Inc. were *not* named as defendants or otherwise
23 sued in Plaintiffs' initial Complaint. Plaintiffs' claims against Celebrity should be dismissed
24 with prejudice because they are barred by the applicable statutes of limitations.

25 Claims for alleged violations of RICO are subject to a four year statute of limitations.
See, e.g., Agency Holding Corp. v. Malley-Duff & Associates, Inc., 483 U.S. 143, 156 (1987).

2:09-MD-2076-RSL

1 This means that Plaintiffs had until September 2006, at the latest, to assert their RICO claim
2 against Celebrity. Plaintiffs, however, waited until July 2009 assert the RICO claim against
3 Celebrity. Count II should be dismissed with prejudice because it is barred by the applicable
4 statute of limitations.

5 Plaintiffs also have asserted state law claims against Celebrity for unjust enrichment
6 and civil conspiracy. Regardless of which state's law supplies the statute of limitations for
7 those claims – Michigan (the transferor court), Washington (the transferee court), Florida
8 (Celebrity's headquarters, and the forum designated by the parties' mandatory forum selection
9 clause), or New York (the location of Plaintiffs' residence) – the claims are time barred and
10 should be dismissed with prejudice.

11 With respect to the claim for unjust enrichment, Michigan has a six year statute of
12 limitations, Washington has a three year statute of limitations, Florida has a four year statute of
13 limitations, and New York has a six year statute of limitations. *See, e.g., Romeo Inv. v.*
14 *Michigan Consolidated Gas Co.*, , 2007 Mich. App. LEXIS 1190 (Mich. Ct. App. May 1,
15 2007); *K-Mart Corp. v. Logan*, , 2003 Mich. App. LEXIS 1672 (Mich. Ct. App. July 10,
16 2003); *Huhtala v. Travelers Ins. Co.*, 401 Mich. 118, 125 (1977) (Michigan); *Davenport v.*
17 *Washington Education Association*, 197 P.3d 686, 704 (Wash. Ct. App. 2008); Wash. Rev.
18 Code §4.16.080(3); *Swafford v. Schweitzer*, 906 So.2d 1194, 1195 (Fla. 4th DCA 2005); *Elliott*
19 *v. Qwest Communications Corp.*, 808 N.Y.S.2d 443, 445 (N.Y. App. Div. 2006). Because
20 Plaintiffs waited seven years to assert the claim for unjust enrichment, the claim is barred
21 under each of those state's statutes of limitation, and Count IX should be dismissed with
22 prejudice.

23 With respect to the claim for civil conspiracy, Plaintiffs allege that Celebrity conspired
24 to commit fraud (Am. Compl., ¶216). Florida has a stand-alone four year statute of limitations
25 for civil conspiracy; *see Olson v. Johnson*, 961 So.2d 356, 359 (Fla. 2d DCA 2007), but in

2:09-MD-2076-RSL

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1 Michigan, Washington, and New York, the statute of limitations for civil conspiracy is the
2 same as the statute of limitations for the underlying wrong, which, as pleaded by Plaintiffs, is
3 fraud. *See, e.g., Terlecki v. Stewart*, 278 Mich. App. 644, 652-653 (Mich. Ct. App. 2008);
4 *Collier v. Momah*, 2008 WL 2581864 at *6 (Wash. Ct. App 2008); *Oreskovich v. Eymann*,
5 2005 WL 2271885 at *2 (Wash. Ct. App. 2005); *Schlotthauer v. Sanders*, 545 N.Y.S.2d 731,
6 732 (N.Y. App. Div. 1989).

7 The statute of limitations for fraud in Michigan and New York is six years; in
8 Washington it is three years. *See, e.g., Badon v. General Motors Corp.*, 470 N.W.2d 436, 439
9 (Mich. Ct. App. 1991); Wash. Rev. Code §4.16.080(4); N.Y. CPLR Law §213(8).

10 Under any of these states' statutes of limitations, Plaintiffs waited too long to bring their
11 claim for civil conspiracy against Celebrity, and Count X should be dismissed with prejudice.

12 In apparent recognition of these problems, Plaintiffs allege in the Amended Complaint
13 that the "fraudulent concealment" of various facts prevented them from bringing their claims
14 sooner (Am. Coml., ¶¶107-116). The fatal problem with these allegations – at least as they
15 relate to Celebrity – is that Plaintiffs have not made a single allegation of fact that Celebrity
16 concealed anything from them about the value of the artwork, that Celebrity knew anything
17 about the value of the artwork, or that Celebrity did anything to prevent Plaintiffs from
18 discovering they might have a claim arising from their purchase of artwork from Park West.

19 Plaintiffs' conclusory statements about Celebrity do not satisfy the heightened standard
20 required by Rule 9(b) of the Federal Rules of Civil Procedure for allegations of fraudulent
21 concealment. *See, e.g., Moore v. Kayport Package Express*, 885 F.2d 531, 540 (9th Cir. 1989)
22 ("mere conclusory allegations of fraud are insufficient").

23 Plaintiffs' claims against Celebrity should be dismissed with prejudice because they are
24 time-barred.

25

2. Plaintiffs' Claim For Alleged Violations Of RICO Fails.

Count II purports to state a claim against Celebrity under 18 U.S.C §1962(d), which relates to conspiracies to commit substantive violations of RICO. Plaintiffs allege that Celebrity conspired to violate 28 U.S.C. §1962(c), with mail and wire fraud being the alleged predicate acts (Am. Compl., ¶¶142-44). Civil claims under RICO are not considered or treated as ordinary civil claims because

Civil RICO is an unusually potent weapon – the litigation equivalent of a thermonuclear device. The very pendency of a RICO suit can be stigmatizing and its consummation can be costly For these reasons, it would be unjust if a RICO plaintiff could defeat a motion to dismiss simply by asserting an inequity attributable to a defendant's conduct and tacking on the self-serving conclusion that the conduct amounted to racketeering.

See Miranda v. Ponce Federal Bank, 948 F.2d 41, 44 (1st Cir. 1991). Count II should be dismissed with prejudice because Plaintiffs are misusing and have not stated a claim under this draconian statute that was enacted to stop and penalize organized crime syndicates.

In the context of claims under §1962(d):

A conspirator must intend to further an endeavor which, if completed, would satisfy all the elements of a substantive criminal offense, but it suffices that he adopt the goal of furthering or facilitating the criminal endeavor. A defendant must also have been aware of the essential nature and scope of the enterprise and intended to participate in it. To establish a violation of section 1962(d), Plaintiffs must allege either an agreement that is a substantive violation of RICO or that the defendants agreed to commit, or participated in, a violation of two predicate offenses.

* * *

Even if Plaintiffs properly claimed that the defendants agreed to be a part of an enterprise, the failure to allege substantive violations precludes their claim that there was a conspiracy to violate RICO.

See Howard v. America Online, Inc., 208 F.3d 741, 751 (9th Cir. 2000) (internal quotation marks and citations omitted).

1 The Ninth Circuit has adopted the following explanation “of what constitutes an
2 agreement with regard to RICO conspiracy:”

3 “From a conceptual standpoint a conspiracy to violate RICO can be analyzed as
4 composed of two agreements (in reality they would be encompassed by the
5 same manifestations of the defendant): an agreement to conduct or participate
6 in the affairs of an enterprise and an agreement to the commission of at least
7 two predicate acts. Thus, a defendant who did not agree to the commission of
8 crimes constituting a pattern of racketeering activity is not in violation of
9 section 1962(d), even though he is somehow affiliated with a RICO enterprise,
10 and neither is the defendant who agrees to the commission of two criminal acts
11 but does not consent to the involvement of an enterprise. If either aspect of the
12 agreement is lacking then there is insufficient evidence that the defendant
13 embraced the objective of the alleged conspiracy. Thus, mere association with
14 the enterprise would not constitute an actionable §1962(d) violation. In a RICO
15 conspiracy, as in all conspiracies, agreement is essential.”

16 *See Baumer v. Pacht*, 8 F.3d 1341, 1346 (9th Cir. 1993) (quoting *United States v. Neapolitan*,
17 791 F.2d 489, 499 (7th Cir. 1986)).

18 The core of Plaintiffs' claim is that Park West, through the use of the mails and wire,
19 allegedly made intentional misrepresentations of fact to Plaintiffs regarding the value of the
20 artwork Plaintiffs purchased from Park West. Plaintiffs do not and cannot allege that Celebrity
21 agreed with Park West to misrepresent to Plaintiffs the value of the artwork, or otherwise to
22 make misrepresentations to Plaintiffs about any aspect of the artwork Plaintiffs purchased from
23 Park West. Plaintiffs do not and cannot allege that Celebrity had any knowledge about
24 misrepresentations supposedly made to Plaintiffs by Park West about artwork, or that Celebrity
25 intended to participate in the making of misrepresentations about artwork.

Plaintiffs have made the following allegations relating to Celebrity, but those
allegations are facially insufficient to state a claim against Celebrity under §1962(d):

- Park West sells art on Celebrity's ships, and Celebrity allows art to be sold while the ships are in international waters (Am. Compl., ¶¶34, 42);
- Park West pays Celebrity for the art sales concession on Celebrity's ships (¶36);

2:09-MD-2076-RSL

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- 1 • Passengers may elect have the purchase price for their art put on their bill for the cruise (§43);
- 2 • Park West's shipboard auctions "occur[] within earshot of" "and within the hearing and knowledge of" Celebrity employees (§§50, 56, 82); and
- 3 • Celebrity has received complaints from passengers relating to Park West (§86).

4 Plaintiffs have taken what is – at the absolute most – a garden variety claim against
 5 Park West for common law fraud, and attempted to convert it into a claim against Celebrity for
 6 RICO conspiracy. Plaintiffs, however, do not and cannot allege that Celebrity specifically
 7 intended to enter into an agreement with Park West to break the law. Celebrity's mere
 8 "affiliation" with Park West is insufficient to state a claim against Celebrity under §1962(d);
 9 see *Howard*, 208 F.3d at 751; *Baumer*, 8 F.3d at 1346; as are Plaintiffs' conclusory statements
 10 that Celebrity conspired in violation of §1962(d), which are unsupported by any allegations of
 11 fact. See, e.g., *Ashcroft v. Iqbal*, __ U.S. __, 129 S.Ct. 1937, 1949-50 (2009).

12 [T]he pleading standard Rule 8 announces does not require detailed factual
 13 allegations, but it demands more than an unadorned, the-defendant-unlawfully-
 14 harmed-me accusation.

15 * * *

16 [T]he tenet that a court must accept as true all of the allegations contained in a
 17 complaint is inapplicable to legal conclusions. Threadbare recitals of the
 18 elements of a cause of action, supported by mere conclusory statements, do not
 suffice.

19 Count II should be dismissed with prejudice.

20 3. Plaintiffs' Claim For Unjust Enrichment Fails.

21 Count IX purports to state a claim against Celebrity for unjust enrichment. Plaintiffs'
 22 theory is that Celebrity was unjustly enriched because Plaintiffs purchased allegedly
 23 overvalued artwork from Park West and, in return for Celebrity allowing Park West to sell art
 24 on Celebrity's ships, Park West pays Celebrity a percentage of the proceeds Park West receives
 25 from the sale of art on Celebrity's ships.

2:09-MD-2076-RSL

1 The problem with this theory is that Plaintiffs did not purchase artwork from Celebrity,
 2 and regardless of which state's laws apply – Washington, Michigan, Florida, or New York –
 3 unjust enrichment requires Plaintiffs, through their purchase, to have provided a benefit
 4 *directly* to Celebrity, and for Celebrity to have retained the benefit provided directly to it,
 5 which Plaintiffs do not and cannot allege happened here. *See, e.g., Dragt v. Dragt/DeTray,*
 6 *LLC*, 161 P.3d 473, 482 (Wash. Ct. App. 2007) (citing *Farwest Steel Corp. v. Mainline Metal*
 7 *Works, Inc.*, 741 P.2d 58 (Wash. Ct. App. 1987)) (emphasis added) (“Enrichment alone will
 8 not trigger the doctrine [of unjust enrichment]; the enrichment must be unjust under the
 9 circumstances and *as between the two parties to the transaction.*”); *Barber v. SMH (US), Inc.*,
 10 509 N.W.2d 791, 796 (Mich. Ct. App. 1993) (emphasis added) (“The elements of a claim of
 11 unjust enrichment are: (1) receipt of a benefit *by the defendant from the plaintiff* and (2) an
 12 inequity resulting to plaintiff because of the retention of the benefit by defendant.”); *Swafford,*
 13 906 So.2d at 1195 (Fla. 4th DCA 2005) (elements of a claim for unjust enrichment include
 14 “plaintiff has conferred a benefit on the defendant” and “defendant voluntarily accepts and
 15 retains the benefit conferred”); *MT Property, Inc. v. Ira Weinstein and Larry Weinstein, LLC,*
 16 855 N.Y.S.2d 627, 628 (N.Y. App. Div. 2008) (““To prevail on a claim of unjust enrichment, a
 17 plaintiff must establish that it conferred a benefit upon the defendant”).

18 Put simply, Celebrity is not liable for unjust enrichment in these circumstances, where
 19 it did not engage in a direct transaction with Plaintiffs. Count IX should be dismissed with
 20 prejudice.

21 4. Plaintiffs' Claim For Civil Conspiracy Fails.

22 Count X purports to state a claim for civil conspiracy. Plaintiffs allege that Celebrity
 23 participated in a conspiracy to commit fraud (Comp., ¶217). Count X should be dismissed for
 24 two reasons.

25

1 First, a claim for civil conspiracy does not exist independently; its viability hinges upon
2 the existence of a cognizable, separate underlying tort or wrong. *See, e.g., Northwest*
3 *Laborers-Employers Health & Security Trust Fund v. Philip Morris, Inc.*, 58 F.Supp.2d 1211,
4 1216 (W.D. Wash. 1999) (“In Washington, as elsewhere, a civil conspiracy must be premised
5 on underlying actionable wrongs, overt acts, or a tort working damage to the plaintiffs. A
6 conspiracy fails if the underlying act or claim is not actionable.”) (internal citations and
7 quotation marks omitted); *Advocacy Organization for Patients & Providers v. Auto Club*
8 *Insurance Association*, 670 N.W.2d 569, 580 (Mich. Ct. App. 2003) (“a claim for civil
9 conspiracy may not exist in the air; rather, it is necessary to prove a separate, actionable tort”);
10 *Florida Fern Growers Association, Inc. v. Concerned Citizens of Putnam County*, 616 So.2d
11 562, 565 (Fla. 5th DCA 1993) (“An actionable conspiracy requires an actionable underlying
12 tort or wrong.”); *Pappas v. Passias*, 707 N.Y.S.2d 178, 180 (N.Y. App. Div. 2000) (“New
13 York does not recognize civil conspiracy to commit a tort as an independent cause of action.
14 Since the fraud cause of action was dismissed, the ninth cause of action, which alleged a
15 conspiracy to defraud the plaintiff, was also properly dismissed.”) (internal citations omitted).

16 Here, Plaintiffs allege that the underlying wrong is “the fraud described in this
17 Complaint” (Am. Compl., ¶216). Plaintiffs have not pleaded a separate claim for fraud, and
18 the only allegations of fraud in the Amended Complaint relate to Plaintiffs' claims for
19 substantive RICO violations. Thus, Count X should be dismissed with prejudice because (a)
20 Plaintiffs did not plead a claim for fraud, which means there cannot be a claim for conspiracy
21 premised upon fraud, or (b) the “fraud” upon which Count X is premised is the fraud alleged in
22 the substantive RICO claims, which means that the conspiracy claim in Count X is duplicative
23 of the RICO conspiracy claim contained in Count II. Either way, Count X fails.

24 Second, Plaintiffs' claim for conspiracy to commit fraud is not pled with the requisite
25 specificity:

1 Although Rule 9(b) does not list conspiracy as a cause of action which must be
2 pled with particularity, a complaint will be dismissed where the allegations are
3 conclusory and vague. *See Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir.
4 1985) (recognizing that if a plaintiff intends to allege conspiracy to commit
fraud, she must do so with particularity, as required by Rule 9(b)). In other
words, a plaintiff may not simply aver that a conspiracy existed, a factual basis
for the legal conclusion that a conspiracy existed must be pled.

5 *See In re: Phenylpropanolamine (PPA) Products Liability Litigation*, 2005 WL 2090675 at *2
6 (W.D. Wash. 2005) (citing *Semegen v. Weidner*, 780 F.2d 727, 731 (9th Cir. 1985)) (citation
7 and parenthetical in original).

8 Plaintiffs have not pled – with anything approaching the specificity required by Rule
9 9(b) – that Celebrity agreed with anyone to knowingly make false statements of material fact to
10 Plaintiffs regarding artwork or the value of artwork, and to do so with the intent of inducing
11 Plaintiffs to rely on any such false statements. *See, e.g., Stiley v. Block*, 925 P.2d 194, 204
12 (Wash. 1997) (listing elements of fraud); *City of Novi v. Robert Adell Children's Funded Trust*,
13 701 N.W.2d 144, 152 n.8 (Mich. 2005) (same); *Lance v. Wade*, 457 So.2d 1008, 1011 (Fla.
14 1984) (same); *Barclay Arms, Inc. v. Barclay Arms Associates*, 540 N.E.2d 707, 709 (N.Y.
15 1989) (same). Plaintiffs' conclusory statements about a conspiracy involving Celebrity are
16 insufficient to state a claim.

17 **B. The Amended Complaint Should Be Dismissed For Improper Venue.**

18 Even if Plaintiffs had stated claims against Celebrity – which they have not – the
19 Amended Complaint would nonetheless have to be dismissed because Plaintiffs' contract with
20 Celebrity required them to bring suit, if at all, in Miami, Florida. Plaintiffs were not permitted
21 to bring suit against Celebrity in Michigan, and the Court should not insulate that choice of an
22 improper venue by permitting them to maintain this action in Washington.

1 Plaintiffs' relationship with Celebrity is governed by the terms of their cruise ticket
2 contract (the "Ticket Contract") (Declaration of David Banciella, ¶(6)).¹ Section 11 of the
3 Ticket Contract contains a mandatory forum selection clause requiring Plaintiffs to litigate
4 their claims in Miami, Florida:

5 IT IS AGREED BY AND BETWEEN PASSENGER AND CARRIER THAT
6 ALL DISPUTES AND MATTERS WHATSOEVER ARISING UNDER, IN
7 CONNECTION WITH OR INCIDENT TO THIS CONTRACT SHALL BE
8 LITIGATED, IF AT ALL, IN AND BEFORE A COURT LOCATED IN
9 MIAMI, FLORIDA, U.S.A., TO THE EXCLUSION OF THE COURTS OF
10 ANY OTHER STATE, TERRITORY OR COUNTRY. PASSENGER HEREBY
11 WAIVES ANY VENUE OR OTHER OBJECTION THAT HE MAY HAVE TO
12 ANY SUCH ACTION OR PROCEEDING BEING BROUGHT IN ANY
13 COURT LOCATED IN MIAMI, FLORIDA. (all capitals in original).

14 (*Id.*, ¶¶8, 12). As shown below, this mandatory forum selection clause is enforceable against
15 Plaintiffs because it satisfies the "reasonable communicativeness" test.

16 "A cruise line passage contract is a maritime contract governed by federal maritime
17 law." *See Wallis v. Princess Cruises, Inc.*, 306 F.3d 827, 834 (9th Cir. 2002).² "In this circuit,
18 we employ a two-pronged 'reasonable communicativeness' test . . . to determine under federal
19 common law and maritime law when the passenger of a common carrier is contractually bound
20 by the fine print of a passenger ticket." *See id.* at 835 (internal citation omitted); *see also*
21 *Oltman v. Holland America Line, Inc.*, 538 F.3d 1271, 1276 (9th Cir. 2008). "The
22 "reasonableness" of notice under this test is a question of law to be determined by the court."
23 *See Dempsey v. Norwegian Cruise Line*, 972 F.2d 998, 999 (9th Cir. 1992) (quoting *Deiro v.*
24 *American Airlines, Inc.*, 816 F.2d 1360, 1364 (9th Cir. 1987)).

25 ¹ Because motions to dismiss premised upon the enforcement of forum selection clauses are brought under Rule 12(b)(3) of the Federal Rules of Civil Procedure, the Court is permitted to consider facts and materials outside the four corners of the complaint. *See, e.g., Argueta v. Banco Mexicana, S.A.*, 87 F.3d 320, 324 (9th Cir. 1996).

² Where, as here, an action is transferred under the statute relating to multidistrict litigation, the court to which the action is transferred (the transferee court) applies the law of the circuit in which it is located when deciding issues of federal law. *See, e.g., In re: Korean Air Lines*, 829 F.2d 1171, 1174-77 (D.C. Cir. 1987); *Newton v. Thomason*, 22 F.3d 1455, 1460 (9th Cir. 1994) (citing and adopting *Korean Air Lines*, 829 F.2d 1171) (arising in context of transfer under 28 U.S.C. §1404); *In re: Temporomandibular Joint (TMJ) Implant Products Liability Litigation*, 97 F.3d 1050, 1055 (8th Cir. 1996).

1 “The first prong of the reasonable communicativeness test focuses on the physical
2 characteristics of the ticket. Here we assess '[f]eatures such as size of type, conspicuousness
3 and clarity of notice on the face of the ticket, and the ease with which a passenger can read the
4 provisions in question.’” See *Wallis*, 306 F.3d at 835-36 (quoting *Deiro*, 816 at 1364); see also
5 *Dempsey*, 972 F.2d at 999.

6 “The second prong of the reasonable communicativeness test requires us to evaluate
7 'the circumstances surrounding the passenger’s purchase and subsequent retention of the
8 ticket/contract.' 'The surrounding circumstances to be considered include the passenger's
9 familiarity with the ticket, the time and incentive under the circumstances to study the
10 provisions of the ticket, and any other notice that the passenger received outside of the ticket.’”
11 See *Wallis*, 306 F.3d at 836 (quoting *Deiro*, 816 F.2d at 1364) (emphasis removed and internal
12 citations omitted).

13 The *first prong* is satisfied in the following three ways: through the cover of the Guest
14 Vacation Documents booklet, the first passage on the first page of the Ticket Contract, and
15 Section 11 of the forum selection clause, itself. These factors, individually and collectively,
16 satisfy the first prong.

17 Guest Vacation Documents Booklet: Plaintiffs (and the other people on Plaintiffs'
18 cruise) received the Ticket Contract in a spiral-bound Guest Vacation Documents booklet (the
19 “Booklet”) (Banciella Decl., ¶6).

20 The outside front cover of the Booklet provides:

21 **IMPORTANT NOTICE TO GUESTS:** Your Cruise Ticket Contract is
22 contained in the “Important Documents” section of this booklet. The Contract
23 contains important limitations on the rights of passengers. It is important that
24 you carefully read all terms of the Contract, paying attention to Sections 11 and
25 12, and retain it for future reference.

(Banciella Decl., ¶¶7, 10) (bold and all capitals in original).

2:09-MD-2076-RSL

1 The cover of the Booklet satisfies the first prong because it plainly, clearly, and
2 conspicuously advised Plaintiffs that the Ticket Contract was contained within the Booklet, that
3 the Ticket Contract limited their rights, that it was important they “carefully” read the entire
4 Ticket Contract, and that they “pay[] attention” to the section (Section 11) containing the forum
5 selection clause.

6 First Passage of the First Page of the Ticket Contract: The first passage on the first
7 page of Plaintiffs' Ticket Contract provides:

8 **Important – Passenger Cruise/Cruise Tour Ticket Contract 1**

9 **Read All Clauses**

10 Whether or not signed by Passenger, this ticket shall be deemed to be an
11 undertaking and acknowledgement by Passenger that he accepts on behalf of
12 himself and all other persons traveling under this ticket, all the terms and
13 conditions set out herein.

14 (Banciella Decl., ¶¶8, 11) (bold in original).

15 The first passage on the first page of the Ticket Contract satisfies the first prong because it
16 plainly, clearly, and conspicuously advised Plaintiffs to “Read All Clauses” contained in the
17 Ticket Contract, and informed them that their cruise was subject to the terms and conditions
18 contained in the Ticket Contract.

19 The Forum Selection Clause, Itself: Section 11 of the Ticket Contract – as set out
20 above – contains the mandatory forum selection clause establishing the courts in Miami,
21 Florida as the exclusive venue for litigation between the passenger and Celebrity (Banciella
22 Decl., ¶¶8, 12). Section 11 of the Ticket Contract satisfies the first prong because it plainly,
23 clearly, and conspicuously advised Plaintiffs that if they were to assert claims against Celebrity,
24 then such claims could be litigated only in Miami – and could not be litigated anywhere else.
25 Additionally, §11 is printed in all capital letters and is the first section in the Ticket Contract that
is printed in all capital letters (*Id.*, ¶¶8, 13).

The first prong of the reasonable communicativeness test is satisfied.

1 With respect to the *second prong*, Celebrity does not collect the Ticket Contract (or the
2 Booklet) from passengers (*Id.*, ¶9). Instead, the Ticket Contract (and the Booklet) was retained
3 by Plaintiffs, which means they cannot claim she did not have an opportunity – before filing
4 suit – to familiarize themselves with the terms of the Ticket Contract governing where they
5 were required to file suit:

6 Although the [plaintiffs] may not have read the terms and conditions before departing,
7 they were free to read them at their leisure and presented no evidence that their travel booklets
8 were taken away from them during or after the cruise trip. Because the [plaintiffs] had the
9 opportunity to read the contract at any point before filing their first complaint, they had the
10 “ability to become meaningfully informed,” and the second prong of the reasonable
11 communicativeness test is met.

12 See *Oltman*, 538 F.3d at 1277 (9th Cir. 2008); see also *Davis v. Wind Song Limited*, 809
13 F.Supp. 76, 79 (W.D. Wash. 1992) (finding second prong satisfied where the
14 plaintiff/passenger retained the ticket contract and “had both the time and the incentive to study
15 the contract following her injury”).

16 The Ticket Contract satisfies each prong of the reasonable communicativeness test.
17 Plaintiffs' claims should be dismissed because §11 of the Ticket Contract requires them to
18 litigate them in Miami.

19 **III. CONCLUSION**

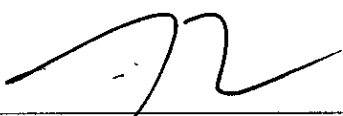
20 For these reasons, Plaintiffs' claims against Celebrity should be dismissed with
21 prejudice.

22 //
23 //
24 //
25 //

2:09-MD-2076-RSL

1 DATED this 29th day of September, 2009.

2 DANIELSON HARRIGAN LEYH & TOLLEFSON LLP

3
4 By 
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9 Cruises

10 **CERTIFICATE OF SERVICE**

11 I, Linda Bledsoe, swear under penalty of perjury under the laws of the State of
12 Washington to the following:

- 13 1. I am over the age of 21 and not a party to this action.
14 2. On the 29th day of September, 2009, I caused the preceding document to be

15 served on counsel of record in the following manner:

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