APPENDIX A

[DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 18-11647
Non-Argument Calendar

D.C. Docket No. 1:17-cv-22827-MGC

MITCHELL MIORELLI
DANNAMARIE PROVOST,

Plaintiffs-Appellants,

versus

MARKELL HALL, JR.,
ANGELO WILLIAMS, JR.,
JAQUES CLAY WILLIAMS,
ROYAL CARIBBEAN CRUISE LINES, LTD.,

Defendants-Appellees.

Appeal from the United States District Court
for the Southern District of Florida

(December 10, 2018)

Before WILLIAM PRYOR, GRANT, and HULL, Circuit Judges.

PER CURIAM:

Mitchell Miorelli was injured on a cruise ship operated by Royal Caribbean Cruises Ltd.[1] He and his then-fiancée DannaMarie Provost filed a negligence suit against Royal Caribbean almost 20 months later. The district court granted summary judgment for Royal Caribbean based on the one-year limitation period contained in the cruise ticket contract. Plaintiffs appeal that ruling, arguing that the district court erred in determining that the contractual time limitation applied and was not subject to equitable tolling. We affirm.

I.

In November 2015, Miorelli and Provost took a cruise on a Royal Caribbean ship. Miorelli's father purchased their cruise tickets through a travel agent.[2] At

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[1] Named in the complaint as Royal Caribbean Cruise Line, Ltd.

[2] Although plaintiffs submitted affidavits stating that they never personally received their cruise tickets, they did not contend in the district court that they did not have access to the tickets or that they did not have an adequate opportunity to review the Contract terms. *See Estate of Myhra v. Royal Caribbean Cruises, Ltd.*, 695 F.3d 1233, 1246 n.42 (11th Cir. 2012) (whether the plaintiffs "chose to avail themselves of the notices and to read the terms and conditions is not relevant" to the question of whether the terms were reasonably communicated). To the extent that they contend on appeal that they had no such opportunity, therefore, we decline to consider that argument. *See Access Now, Inc. v. Sw. Airlines Co*., 385 F.3d 1324, 1331 (11th Cir. 2004) ("If we were to regularly address questions—particularly fact-bound issues—that district courts never had a chance to examine, we

the bottom of the front page of the Guest Ticket Booklet for Miorelli and Provost, the following notice alerted passengers to the existence and importance of the ticket contract:

IMPORTANT NOTICE TO GUESTS: [LOGO]

Your Cruise/Cruisetour Ticket Contract is contained in this booklet. The Contract contains important limitations on the rights of passengers. It is important that you carefully read all the terms of this Contract, paying particular attention to section 3 and sections 9 through 11, which limit our liability and your right to sue, and retain it for future reference. This Agreement requires the use of arbitration for certain disputes and waives any right to trial by jury to resolve those disputes.

The Contract referenced in this front-page notice began on page 13 of the Booklet. It was clearly labeled, in large, bold print: "**Cruise/Cruisetour Ticket Contract**." Immediately below this heading, another notice to passengers, written in all-capital, bold-print letters and again drawing attention to the limitation-of-liability provisions in the Contract, read:

IMPORTANT NOTICE TO GUESTS

YOUR CRUISE/CRUISETOUR TICKET CONTRACT CONTAINS IMPORTANT LIMITATIONS ON THE RIGHTS OF PASSENGERS. IT IS IMPORTANT THAT YOU CAREFULLY READ ALL

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would not only waste our resources, but also deviate from the essential nature, purpose, and competence of an appellate court.").

TERMS OF THIS CONTRACT, PAYING PARTICULAR ATTENTION TO SECTION 3 AND SECTIONS 9 THROUGH 11, WHICH LIMIT OUR LIABILITY AND YOUR RIGHT TO SUE, AND RETAIN IT FOR FUTURE REFERENCE.

THIS AGREEMENT REQUIRES THE USE OF ARBITRATION FOR CERTAIN DISPUTES AND WAIVES ANY RIGHT TO TRIAL BY JURY TO RESOLVE THOSE DISPUTES, PLEASE READ SECTION TO BELOW.

The Contract that followed was written in the same size font as the notice, but except for the referenced limitation-of-liability sections (sections 9 through 11), it was printed in standard sentence case rather than all-capital letters.

The first paragraph of section 10 of the Contract notified passengers that any personal-injury lawsuit against Royal Caribbean would be barred unless the injured passenger gave Royal Caribbean written notice of the claim within six months of the injury *and* filed the lawsuit within one year:

> **10. NOTICE OF CLAIMS AND COMMENCEMENT OF SUIT OR ARBITRATION; SECURITY:**
>
> a) TIME LIMITS FOR PERSONAL INJURY/ILLNESS/DEATH CLAIMS: NO SUIT SHALL BE MAINTAINABLE AGAINST CARRIER, THE VESSEL OR THE TRANSPORT FOR PERSONAL INJURY, ILLNESS OR DEATH OF ANY PASSENGER UNLESS WRITTEN NOTICE OF THE CLAIM, WITH FULL

> PARTICULARS, SHALL BE DELIVERED TO CARRIER AT THE FOLLOWING ADDRESS, C/O ROYAL CARIBBEAN CRUISES LTD., 1050 CARIBBEAN WAY, MIAMI, FL 33132, WITHIN SIX (6) MONTHS FROM THE DATE OF THE INJURY, ILLNESS OR DEATH AND SUIT IS COMMENCED (FILED) WITHIN ONE (1) YEAR FROM THE DATE OF SUCH INJURY, ILLNESS OR DEATH AND PROCESS SERVED WITHIN 120 DAYS AFTER FILING, NOTWITHSTANDING ANY PROVISION OF LAW OF ANY STATE OR COUNTRY TO THE CONTRARY.

The text of the one-year limitation provision was written in the same size print as the rest of the Contract, but like the "IMPORTANT NOTICE TO GUESTS" at the beginning of the Contract and the surrounding sections related to liability, it was printed in all-capital letters.

On the third day of plaintiffs' cruise, November 25, 2015, Miorelli got into a physical altercation with three other passengers and sustained injuries. Six months later, on May 31, 2016, an attorney retained by plaintiffs wrote to Royal Caribbean to provide notice of their claims. In his letter, plaintiffs' counsel discussed the merits of their negligence claim against Royal Caribbean and stated that the letter was "**provided to you in accordance with Paragraph 10(a) of the Royal Caribbean Cruise Line Contract. Injuries were suffered November 24, 2015**. It is our intention to file suit on or before November 24, 2016, in the United

States District Court for the Southern District of Florida unless reasonable settlement is reached." (emphasis in the original).

On November 9, 2016—16 days before the expiration of the contractual limitations period—a Royal Caribbean claims adjustor wrote to plaintiffs' counsel, inviting him to make a settlement demand. The letter contained the following closing: "This letter, subsequent correspondence, discussions or negotiations are in no way to be construed as either an admission of liability or as a waiver of any rights, defenses or limitations available to the vessel, her owners or underwriters whether contained in the ticket contract or otherwise." Plaintiffs claim that they thereafter attempted, without success, to engage Royal Caribbean in settlement negotiations, but there is no record on appeal of any further presuit correspondence between the parties.

Plaintiffs filed suit against Royal Caribbean and the three other passengers involved in the altercation with Miorelli on July 27, 2017. Royal Caribbean moved to dismiss the complaint as barred by the one-year time limitation in the ticket contract. The district court converted the motion to dismiss into a motion for summary judgment and, after a hearing, granted the motion based on the contractual time limit.

II.

We first address the question of the district court's subject matter jurisdiction. *See Mallory &*

Evans Contractors & Eng'rs, LLC v. Tuskegee Univ., 663 F.3d 1304, 1304 (11th Cir. 2011) ("We are obligated to raise concerns about the district court's subject matter jurisdiction *sua sponte*."). In response to our jurisdictional question,[3] plaintiffs clarified that they wished to proceed on the basis of admiralty jurisdiction on all claims. We therefore granted plaintiffs' motion to amend their complaint to strike the diversity jurisdiction allegations and denied Royal Caribbean's motion to dismiss the appeal for lack of jurisdiction.

The district court had admiralty jurisdiction over plaintiffs' tort claims because (1) the injury forming the basis for the claims occurred on navigable waters, (2) the type of incident involved (injury from a fight among passengers aboard a cruise ship) "has a potentially disruptive impact on maritime commerce," and (3) "the general character of the activity giving rise to the incident"—transporting passengers aboard a cruise ship—"shows a substantial relationship to traditional maritime activity." *Doe v. Celebrity Cruises, Inc.*, 394 F.3d 891, 900 (11th Cir. 2004) (quoting *Jerome*

[3] The Complaint asserted that the district court had diversity jurisdiction, 28 U.S.C. § 1332, as well as admiralty or maritime jurisdiction, but the facts alleged in the Complaint did not establish complete diversity of the parties. We asked the parties to clarify (1) whether the district court's subject matter jurisdiction was based on diversity or admiralty, (2) the parties' citizenship for purposes of diversity jurisdiction, including Royal Caribbean's place of incorporation, (3) whether complete diversity existed, and (4) insofar as the allegations in the Complaint were inadequate to establish diversity jurisdiction, whether and how the deficiencies could be corrected. No. 18-11647-D, Jurisdictional Question issued May 22, 2018.

B. Grubart, Inc. v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534, 115 S. Ct. 1043, 1048 (1995)). Thus, federal maritime law applies to plaintiffs' negligence claims. *See id.* at 902; *Keefe v. Bahama Cruise Line, Inc.*, 867 F.2d 1318, 1320 (11th Cir. 1989).

III.

This Court reviews a district court's grant of summary judgment de novo, "construing the facts and all reasonable inferences from the facts in favor of the nonmoving party." *Stardust, 3007 LLC v. City of Brookhaven*, 899 F.3d 1164, 1170 (11th Cir. 2018). A district court's rulings on discovery motions, including requests to delay ruling on a summary judgment motion to allow additional discovery, are reviewed for an abuse of discretion. *See Iraola & CIA, S.A. v. Kimberly-Clark Corp.*, 325 F.3d 1274, 1286 (11th Cir. 2003).

Summary judgment should be granted "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a); *Stardust*, 899 F.3d at 1170. A disputed fact that is irrelevant to the dispositive issue raised by the movant is not material; only "disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248, 106 S. Ct. 2505, 2510 (1986).

Whether the terms of a cruise-ticket contract were adequately communicated to passengers is a question

of law that we review de novo. *Nash v. Kloster Cruise A/S*, 901 F.2d 1565, 1567 (11th Cir. 1990). We also review de novo the district court's decision regarding the application of equitable tolling. *Chang v. Carnival Corp.*, 839 F.3d 993, 996 n.4 (11th Cir. 2016).

A.

Plaintiffs contend that the district court should have denied Royal Caribbean's motion for summary judgment as premature and allowed them to conduct factual discovery regarding the altercation, Royal Caribbean's shipboard security practices, and alcohol consumption by the alleged assailants. But plaintiffs have not identified—in the district court or on appeal—any discovery that they wished to conduct that was related to the timeliness of their lawsuit.

A defendant may move for summary judgment "at any time" from the commencement of the lawsuit until 30 days after the discovery period closes. Fed. R. Civ. P. 56(b). While the nonmovant generally should be given an opportunity to conduct relevant discovery before a motion for summary judgment is decided, district courts are not required to postpone ruling until discovery is complete. *Fla. Power & Light Co. v. Allis Chalmers Corp.*, 893 F.2d 1313, 1316 (11th Cir. 1990). A party seeking additional time for discovery may not rely on vague assertions that more discovery is needed; instead, he must show that the discovery he seeks will enable him to demonstrate the existence of a genuine issue of material fact. *Id.*; *Reflectone, Inc. v. Farrand*

Optical Co., Inc., 862 F.2d 841, 843 (11th Cir. 1989). If the party cannot make such a showing, it is appropriate to proceed with the summary judgment ruling even if the party has not yet conducted any discovery. *Reflectone, Inc.*, 862 F.2d at 843–44.

Here, although plaintiffs claimed that they did not have all the facts necessary to enable them to respond to Royal Caribbean's motion for summary judgment, the discovery that they proposed was related to the merits of their negligence claim and irrelevant to the dispositive issue of timeliness raised by Royal Caribbean. And while plaintiffs state—without explanation—that "there were sharply disputed issues of material fact," they do not identify any genuine factual dispute related to the timeliness of the lawsuit. The district court therefore did not abuse its discretion in denying plaintiffs' request to conduct discovery.

B.

Maritime tort claims like this one generally are subject to a three-year statute of limitation. 46 U.S.C. § 30106. But the statute does not prohibit contracts setting shorter limitation periods. *Id*.; *see Heimeshoff v. Hartford Life & Acc. Ins. Co.*, 571 U.S. 99, 107, 134 S. Ct. 604, 611 (2013) (absent a statutory prohibition of such agreements, parties may set a shorter limitations period by contract than is provided in the applicable statute of limitations). Under 46 U.S.C. § 30508(b)(2), cruise lines may set a contractual time limit of no less than one year for bringing a personal injury action. A

valid contractual time bar is binding on the parties; there is "'no essential difference'" in that regard between a contractual limitation period and one set by statute. *Chang*, 839 F.3d at 996 n.3 (quoting *Bailey v. Carnival Cruise Lines, Inc.*, 774 F.2d 1577, 1579 n.3 (11th Cir. 1985)).

A limitation on the time for filing suit contained within a cruise ticket contract will be enforced if the passenger had "reasonably adequate notice that the limit existed and formed part of the passenger contract." *Nash*, 901 F.2d at 1566. Plaintiffs contend that they did not have adequate notice of the time limitation in the Contract because the typeface used for that provision was not bold, highlighted, or printed in a contrasting color. But we have previously held that cruise ticket contracts printed in a similar size and typeface were sufficient "as a matter of physical presentation" to provide reasonable notice to passengers where, as here, the relevant provision was clearly labeled and an additional notice in a prominent location (such as the cover of the ticket booklet) directed ticket-holders to the contract section of the booklet. *See Myhra*, 695 F.3d at 1245–46; *Nash*, 901 F.2d at 1567–68.

Moreover, plaintiffs clearly had actual notice of the one-year time limit for bringing suit before the November 25, 2016 deadline passed, given their attorney's May 2016 correspondence specifically referring to the Contract, acknowledging the limitation provision, and notifying Royal Caribbean that plaintiffs intended to file suit—in the contractually-required forum—before the one-year time limit expired. The district court did

not err in determining that the one-year contractual limitation in plaintiffs' ticket contract was valid and enforceable.

C.

Equitable tolling "is an extraordinary remedy which should be extended only sparingly." *Chang*, 839 F.3d at 996 (citation and punctuation omitted). The plaintiff bears the burden of demonstrating that equitable tolling should apply. *Id.* Tolling may be applied where a claimant has been misled into inaction by the opposing party, or where he "timely files a technically defective pleading and in all other respects acts with 'the proper diligence.'" *Justice v. United States*, 6 F.3d 1474, 1479 (11th Cir. 1993) (quoting *Burnett v. New York Central R. Co.*, 380 U.S. 424, 430, 85 S. Ct. 1050, 1056 (1965)). But tolling is not warranted where a plaintiff knows or reasonably should know that the limitations period is running and still fails to file on time. *Id.* at 1479–80. Courts generally will not apply equitable tolling when the late filing is caused by "garden-variety" neglect. *Id.* at 1480.

Plaintiffs' counsel's May 31, 2016 correspondence showed that plaintiffs knew that the limitations period was running, and that it would expire on or before November 25, 2016. Plaintiffs imply that they were misled into missing the one-year deadline by Royal Caribbean's November 9, 2016 letter inviting them to send a settlement demand (which plaintiffs' counsel reportedly did on December 6, 2016). But the same

correspondence in which Royal Caribbean offered to reopen settlement discussions also specifically notified plaintiffs' counsel that Royal Caribbean had not waived any of its rights or limitations of liability, including those contained in the ticket contract. And while plaintiffs claim—without record support—that they "actively engaged in settlement negotiations" with Royal Caribbean "until early 2017," they also state that Royal Caribbean "made no genuine efforts to engage in settlement negotiations" with them, and there is no evidence that Royal Caribbean communicated with plaintiffs' counsel about settlement after November 9, 2016, or otherwise encouraged plaintiffs to delay filing their lawsuit until July 2017. Nor is there any indication that plaintiffs ever asked Royal Caribbean to consent to an extension of the contractual limitation period while the parties engaged in settlement negotiations. Under the circumstances, equitable tolling was not warranted.

Because the district court correctly determined that plaintiffs' lawsuit was barred by the one-year contractual limitation period provided in their cruise tickets, the court did not err in entering summary judgment for Royal Caribbean based on that time bar.

The judgment is **AFFIRMED**.

APPENDIX B

UNITED STATES COURT OF APPEALS
For the Eleventh Circuit

No. 18-11647

District Court Docket No.
1:17-cv-22827-MGC

MITCHELL MIORELLI,
DANNAMARIE PROVOST,

Plaintiffs—Appellants,

versus

MARKELL HALL, JR.,
ANGELO WILLIAMS, JR.,
JAQUES CLAY WILLIAMS,
ROYAL CARIBBEAN CRUISE LINES, LTD.,

Defendants—Appellees.

Appeal from the United States District Court
for the Southern District of Florida

JUDGMENT

It is hereby ordered, adjudged, and decreed that the opinion issued on this date in this appeal is entered as the judgment of this Court.

App. 15

Entered: December 10, 2018
For the Court: DAVID J. SMITH, Clerk of Court
By: Djuanna Clark

APPENDIX C

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

Case No. 17-22827-Civ-COOKE/GOODMAN

MITCHELL MIORELLI and
DANNAMARIE PROVOST,

Plaintiffs,

vs.

ROYAL CARRIBEAN
CRUISE LINE, LTD., et al.,

Defendants. /

FINAL JUDGMENT

Pursuant to Federal Rule of Civil Procedure 58, and for the reasons stated at the March 28, 2018 hearing in this matter, **FINAL JUDGMENT** is hereby entered in favor of Defendants Royal Caribbean Cruise Line, Ltd., Markell Hall, Jr., Angelo Williams, Jr., and Jacques Clay Williams, and against Plaintiffs Mitchell Miorelli and Dannamarie Provost. The Clerk shall **CLOSE** this case. All pending motions, if any, are **DENIED *as moot***.

DONE and ORDERED in Chambers, in Miami, Florida, this 28th day of March 2018.

/s/ Marcia G. Cooke
MARCIA G. COOKE
United States District Judge

Copies furnished to:
Jonathan Goodman, U.S. Magistrate Judge
Counsel of Record

APPENDIX D

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
MIAMI DIVISION
CASE NO. 1:17-CV-22827-MGC

MITCHELL MIORELLI AND DANNA MARIE PROVOST	Miami, Florida
PLAINTIFFS	March 28, 2018 Wednesday
vs.	Scheduled for 9:30 a.m. 9:44 a.m. to 10:01 a.m.
MARKEL HALL, JR., ET AL. AND ROYAL CARIBBEAN CRUISE LINE, LTD.	Pages 1 – 18
DEFENDANTS	

MOTION HEARING

ROYAL CARIBBEAN'S MOTION FOR FINAL SUMMARY JUDGMENT

BEFORE THE HONORABLE MARCIA G. COOKE
UNITED STATES DISTRICT JUDGE

APPEARANCES:

FOR THE PLAINTIFFS:

JAIME T. HALSCOTT, ESQ.
Halscott Megaro, P.A.
33 East Robinson Street
Suite 210
Orlando, Florida 32801

FOR THE DEFENDANT	**NICHOLAS ALLEN APPLIN, ESQ.**
ROYAL CARIBBEAN CRUISE LINE, LTD:	Royal Caribbean Cruises Ltd. 1080 Caribbean Way Miami, Florida 33132
STENOGRAPHICALLY REPORTED BY:	GLENDA M. POWERS, RPR, CRR, FPR Official Court Reporter United States District Court 400 North Miami Avenue, Room 08S33 Miami, Florida 33128

[2] (Call to the order of the Court:)

COURTROOM DEPUTY: All rise. Court is in session. Please come to order.

Your Honor, we have our motion hearing this morning, Mitchell Miorelli, et al. versus Markel Hall, Jr., et al., 17-22827, civil matter.

THE COURT: For the record – I don't think we have mics yet, Ivan.

Appearing on behalf of the plaintiff.

MR. HALSCOTT: Jaime Halscott, Your Honor.

THE COURT: And appearing on behalf of Markel – wrong – what?

COURTROOM DEPUTY: It's one of the other parties in this.

THE COURT: Okay.

– versus Royal Caribbean Cruise Line. All right, we'll do that. We've got all the parties here. Okay. So, appearing on behalf of the plaintiffs.

MR. HALSCOTT: Jaime Halscott, Your Honor.

THE COURT: Appearing on behalf of Royal Caribbean Cruise Line.

MR. APPLIN: Nicholas Applin, Your Honor.

THE COURT: Sorry for that confusion, counsel.

This is Docket Entry Number 11, motion for final summary judgment.

[3] Counsel for Royal Caribbean, you may proceed.

MR. APPLIN: Yes, Your Honor. I believe that this is a fairly straightforward issue here. The motion for summary judgment is not on the merits of the case.

The motion was filed as a motion to dismiss and/or for summary judgment, and it's on the limited issue of whether or not the plaintiffs' action against Royal Caribbean is time-barred, and I believe it is, Your Honor.

Royal Caribbean has a cruise ticket contract that contains several terms, provisions, limitations.

One of those is the cruise ticket contract has a forum selection clause that requires the suit to be brought here in federal court, as you well know.

THE COURT: I have a boat load of cruise cases, but keep going.

MR. APPLIN: I know you do. I believe I have several with you.

But that cruise ticket contract also contains a limitation provision. Part of that limitation provision, it requires that a plaintiff or claimant provide notice of a claim within six months.

And then it also requires that a plaintiff –

THE COURT: Did they fulfill the first part, the six-month part?

MR. APPLIN: Your Honor, I believe it's arguable. [4] I believe that's a closer call than the actual one year limitation provision. There was a communication – there was a letter –

THE COURT: Because I think they started – the accident was May – was November 25th, that's three days to the cruise; right?

MR. APPLIN: Correct.

THE COURT: And then they notified you in a letter dated May 31st of their injury; correct?

MR. APPLIN: Correct. Then, I believe, if my math is correct, that letter came just a few days outside of the six months there, but that's not the focus of my –

THE COURT: The focus is the July 27th suit that would have been – it should have been time-barred as of November 25th, 2016?

MR. APPLIN: Correct.

THE COURT: According to your math.

What about their argument on equitable tolling, that you guys were trying to work this out, and that sort of stops the clock?

MR. APPLIN: First, Your Honor, I'd like to just point out that the concept of equitable tolling, it's an extreme remedy. It's sparingly applied to these types of cases, under the case law that I've cited in my motion – in, actually, my response, and so it's an extreme remedy that's applied.

[5] And here, I don't believe it should apply, because I'm aware that the plaintiffs have argued that there were some type of settlement negotiations that were continuing on and that's justification for filing of the lawsuit untimely.

I think what's really important here is that the lawsuit was filed almost eight months after the limitation period expired.

The last communications between the parties were, I think, what we can definitively identify was end of December.

Let me back up, Your Honor.

THE COURT: End of December 2016?

MR. APPLIN: Correct. In the last communication that Royal Caribbean's representatives sent to plaintiff was November 9th, 2016.

That was a letter from a guest adjuster to plaintiffs' counsel which identified that the claim was being reviewed and that the plaintiffs needed to submit the demand in order for discussions to continue.

What's also very important about that letter is that it expressly identified that that communication was not to be construed as any type of waiver of any of the limitations in the contract.

Now, notwithstanding that, the next communication from the plaintiff came in a letter dated December 6th, 2016, and that's at the time that the plaintiffs provided a demand in [6] response to Royal Caribbean's guest adjuster's request.

THE COURT: Was there any communication after the December demand before the lawsuit?

MR. APPLIN: On Royal Caribbean's end, no.

There was one additional letter that was sent by plaintiffs' counsel to the Royal Caribbean guest adjuster dated December 23rd, 2016. This is now almost a month after the limitations period expired.

And in that letter the plaintiffs' attorney just simply filed additional documentation. There was no other communication from Royal Caribbean's guest

adjuster following this November 9th, 2016, letter, which was before the limitations period expired.

And then the other communications in December from the plaintiffs' counsel was after the limitations period expired, no further discussions.

There was some suggestion by the plaintiff that there might have been maybe an oral discussion with this guest adjuster sometime in early January of 2017.

I spoke with the adjuster. The adjuster has no recollection of this. There's nothing in Royal Caribbean's claims file that would suggest that there was any further communication on the adjuster's end.

Notwithstanding, I don't think that comes into play with the equitable tolling argument here because after – say [7] that there was a communication early January 2017 between the guest claims adjuster and plaintiffs' counsel, the lawsuit wasn't filed for another seven months after that.

And so if the lawsuit was filed in early January, sometime thereabouts, I think perhaps the equitable tolling argument could get by here. I still don't think it would be justifiable based on the timely communications.

But I think in this case it's very clear that the equitable tolling shouldn't apply because the delay in filing the lawsuit, again, eight months after the limitations period expired, at least seven months after the

plaintiff is claiming they last had communication with the Royal Caribbean's guest claims adjuster.

THE COURT: Counsel, let me hear from plaintiff on this issue.

MR. HALSCOTT: Yes, Your Honor. Thank you very much. And I think defense laid out the –

THE COURT: You don't dispute that for – I mean, I'm not going to say it's not without authority, but you don't dispute that the major way you would prevail here and get by the limitation that's provided in the contract would be some form of equitable tolling?

MR. HALSCOTT: Not necessarily. Equitable tolling, I think, certainly, is the fall-back position.

Realistically, this is a modification. When you have [8] the counsel – or the claims adjuster specifically asking for these things and continuing to push that goal line down, when –

THE COURT: But doesn't this communication letter say we're not – this doesn't obviate things that might be in the contract, the fact that we're still negotiating?

MR. HALSCOTT: Except for the November 9th, when we look at the November 9th claim being reviewed, that's different than the prior notification and discussion that happened.

Certainly, there can be no real reasonable argument on the defendant's side that this doesn't form

some kind of a modification or some kind of equitable tolling.

Once you send a demand – they asked for a demand –

THE COURT: But is there any case law this sending of the demand somehow tolls the limitations requirement?

MR. HALSCOTT: It's a common law modification of contract. I mean, this is – you know, any time anyone can modify that contract.

And when we look at this as through a lens of reasonability, the demand said, okay, send me a demand.

Well, what if we had sent that demand the next day and they sat on it, are they still expecting us to file suit within two weeks because they didn't get back to us?

THE COURT: No. And I think counsel said if seven months hadn't elapsed that this might be an argument where you [9] would say that was a reasonable amount of time for the delay, it's seven months; and at some point in time, there's nothing – unless you can show me something that was missed – where you said, hey, cruise line, what's up, what's going on?

Nothing's happening.

And they're like, okay, we told you where we were, you tell us where you are. They make a demand, but I don't know that in and of itself stops your clock from running.

MR. HALSCOTT: Well, there were follow-ups in our conversations and counsel did his due diligence, of course, and met with the claims adjuster.

They don't recall this, these follow-up discussions. But there were, you know, I, myself, was part of it, so was my partner Mr. Megaro, and so was our associate attorney, Mr. McCulloch, during a –

THE COURT: Are there any notes to file or anything – I mean, this is your burden to come forward and say that the statute – excuse me – the limitation should be tolled equitably because of the settlement.

He went back, he talked with people.

Tell me, were there any other conversations that could be – or notes where we could say that it is reasonable to say counsel relied on this and we should toll the limitation as noted in the contract?

MR. HALSCOTT: Well, we have internal case notes, of [10] course, going all the way into March and April where there were conversations between Mr. McCulloch and the claims adjuster.

So that's what we have internally in our firm, I think –

THE COURT: Did you ever share them with defense counsel?

MR. HALSCOTT: I have not spoken with defense counsel on this matter. I don't know if my partner has spoken to you previously about the follow-up sessions and the dates on those.

MR. APPLIN: He did not.

MR. HALSCOTT: Okay. But that was going on internally in our firm and the discussion was made, okay, we're not getting anything back from Royal Caribbean, we've got to file suit. We can't give them anymore time to come back with answer/response to our demands.

We figured that was a reasonable amount of time for them. And that's where the equitable tolling, we believe, is applicable here. And we didn't sit on our rights on this, as, you know, was seen there.

We look at, say, the *Racca* case and we're looking at a year between times for counsel being retained and then a two-year period for filing that, and this is completely factually distinguishable.

There were ongoing negotiations between the parties, which has pushed this – which pushed this beyond that, you know.

[11] And certainly, too, beyond that, once this Court changed this to a motion for summary judgment, we would have to – through the case law that we've laid out in our response, we'd have to be able to get that discovery, look at it, see what happened there.

And I would like to know, you know, how often Royal Caribbean's in this same position, where it had ongoing negotiations, where they've opened up negotiations and then suit hasn't been filed.

I don't know if this is – I don't think it has anything to do with counsel's work, but if the claims adjuster had been in the same position before, or if there's an internal policy as such, we'd have to have discovery to see that for this Court to really make a determination as to whether or not for the tolling to apply.

THE COURT: Anything else from the defendant before I rule?

MR. APPLIN: Yes, Your Honor. In terms of an argument that any further communication between the guest claims adjuster and plaintiffs' counsel modified the terms of the contract, I don't think that's supported anywhere in the filings here.

Again, all communications from this particular guest claims adjuster that we've referred to, there was a letter from a previous guest claims adjuster, they all contain the language [12] specifying that any further communications between the adjuster and plaintiffs' counsel is not meant to be construed as a waiver of the limitation provisions of the contract.

Now, addressing Mr. Halscott's point about how often this type of thing happens with Royal Caribbean, in terms of ongoing settlement negotiations coming up against the limitations deadline.

Your Honor, this is something that happens all the time. However – and a lot of times the attorneys that we see in the maritime world, it's the same attorneys we deal with all the time.

But what happens is the guest claims adjusters are very aware of when that statute of limitations has expired, and the plaintiffs' counsel will routinely ask for extensions to the limitations period in order to continue to try to negotiate to get a claim resolved. That happens very often.

Those types of discussions are reflected in the claims file notes. I looked at the claim files notes here. There were no discussions about that.

I also personally reviewed that, and there were no claim file notes here suggesting that there were continuing discussions into April and May with this case.

From my review of the claim file, I don't believe Royal Caribbean ever responded to that demand that was sent in December. So I don't think that that suggests that there were [13] ongoing negotiations here that would justify equitable tolling, again, seven months after the expiration of the limitations period.

And then in terms of needing additional discovery in this case, again, this motion for summary judgment is on a very limited issue of time-bar; and I believe that plaintiffs have had the opportunity to present everything that they needed in this case. They were able to respond to my motion.

They also filed the plaintiffs' opposition – it would have been Docket Entry 22 – where plaintiffs – and this is in response to your order converting my motion into motion for summary judgment – plaintiffs' file in

opposition where they submitted several other types of materials:

Affidavits from each plaintiff, some of the criminal investigation records, medical records from one of the plaintiffs.

Plaintiffs have had the opportunity to respond to the limited issue of time-bar and they don't need any additional evidence.

All the submissions that they made in response – along with their opposition, Docket Entry 22 – all that went to the merits of the case, and that's not what we're here about today.

So I believe plaintiff has had plenty of opportunity to present everything they have on their side to address the time-bar issue and that the motion should be ruled upon today.

[14] THE COURT: Thank you.

For the following reasons the defendant's motion for summary judgment is granted:

First and foremost, I do not find that there is any evidence to support equitable tolling in this case.

As the defendant aptly points out, the plaintiff, even in their early communications, are very aware of what the limitations period is under the contract.

Secondly, even when the negotiations were ongoing up until December of 2016, the communication

makes clear that the contract has not tolled the limitations period.

And also, at some point in time, in this seven-month delay period, there does not seem to be any requests between counsel and the guest adjuster to toll any limitations period.

I also find that there's no need for further discovery on the limitations period.

The burden is on the plaintiff to show that there should be some fact for which equitable tolling would be available in this case. None has been presented.

Therefore, the defendant, Royal Caribbean's motion for final summary judgment, Docket Entry Number 11 is granted.

Thank you very much. Court is in recess.

MR. APPLIN: Thank you, Your Honor.

(Proceedings concluded at 10:01 a.m.)

CERTIFICATE

I hereby certify that the foregoing is an accurate transcription of the proceedings in the above-entitled matter.

May 16th, 2018
DATE

/s/Glenda M. Powers
GLENDA M. POWERS, RPR, CRR, FPR
United States District Court
400 North Miami Avenue, 08S33
Miami, Florida 33128

APPENDIX E

Relevant Rules and Constitutional Provision

Rule 56. Summary Judgment

(a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense—or the part of each claim or defense—on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that

an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials—including the facts considered undisputed—show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party; or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact—including an item of damages or other relief—that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court—after notice and a reasonable time to respond—may order the submitting party to pay the other party

the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Rule 12. Defenses and Objections: When and How Presented; Motion for Judgment on the Pleadings; Consolidating Motions; Waiving Defenses; Pretrial Hearing

(a) Time to Serve a Responsive Pleading.

(1) In General. Unless another time is specified by this rule or a federal statute, the time for serving a responsive pleading is as follows:

(A) A defendant must serve an answer:

(i) within 21 days after being served with the summons and complaint; or

(ii) if it has timely waived service under Rule 4(d), within 60 days after the request for a waiver was sent, or within 90 days after it was sent to the defendant outside any judicial district of the United States.

(B) A party must serve an answer to a counterclaim or crossclaim within 21 days after being served with the pleading that states the counterclaim or crossclaim.

(C) A party must serve a reply to an answer within 21 days after being served with an order to reply, unless the order specifies a different time.

(2) United States and Its Agencies, Officers, or Employees Sued in an Official Capacity. The United States, a United States agency, or a United States officer or employee sued only in an official capacity must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the United States attorney.

(3) United States Officers or Employees Sued in an Individual Capacity. A United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf must serve an answer to a complaint, counterclaim, or crossclaim within 60 days after service on the officer or employee or service on the United States attorney, whichever is later.

(4) Effect of a Motion. Unless the court sets a different time, serving a motion under this rule alters these periods as follows:

(A) if the court denies the motion or postpones its disposition until trial, the responsive pleading must be served within 14 days after notice of the court's action; or

(B) if the court grants a motion for a more definite statement, the responsive pleading must be served within 14 days after the more definite statement is served.

(b) How to Present Defenses. Every defense to a claim for relief in any pleading must be asserted in the

responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

(c) Motion for Judgment on the Pleadings. After the pleadings are closed—but early enough not to delay trial—a party may move for judgment on the pleadings.

(d) Result of Presenting Matters Outside the Pleadings. If, on a motion under Rule 12(b)(6) or 12(c), matters outside the pleadings are presented to and not excluded by the court, the motion must be treated as one for summary judgment under Rule 56. All parties

must be given a reasonable opportunity to present all the material that is pertinent to the motion.

(e) Motion for a More Definite Statement. A party may move for a more definite statement of a pleading to which a responsive pleading is allowed but which is so vague or ambiguous that the party cannot reasonably prepare a response. The motion must be made before filing a responsive pleading and must point out the defects complained of and the details desired. If the court orders a more definite statement and the order is not obeyed within 14 days after notice of the order or within the time the court sets, the court may strike the pleading or issue any other appropriate order.

(f) Motion to Strike. The court may strike from a pleading an insufficient defense or any redundant, immaterial, impertinent, or scandalous matter. The court may act:

(1) on its own; or

(2) on motion made by a party either before responding to the pleading or, if a response is not allowed, within 21 days after being served with the pleading.

(g) Joining Motions.

(1) Right to Join. A motion under this rule may be joined with any other motion allowed by this rule.

(2) Limitation on Further Motions. Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was

available to the party but omitted from its earlier motion.

(h) Waiving and Preserving Certain Defenses.

(1) When Some Are Waived. A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) When to Raise Others. Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) Lack of Subject-Matter Jurisdiction. If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

(i) Hearing Before Trial. If a party so moves, any defense listed in Rule 12(b)(1)–(7)—whether made in a

pleading or by motion—and a motion under Rule 12(c) must be heard and decided before trial unless the court orders a deferral until trial.

United States Constitution, Article III, Section 2

The judicial power shall extend to all cases, in law and equity, arising under this Constitution, the laws of the United States, and treaties made, or which shall be made, under their authority;—to all cases affecting ambassadors, other public ministers and consuls;—to all cases of admiralty and maritime jurisdiction;—to controversies to which the United States shall be a party;—to controversies between two or more states;—between a state and citizens of another state;—between citizens of different states;—between citizens of the same state claiming lands under grants of different states, and between a state, or the citizens thereof, and foreign states, citizens or subjects.

In all cases affecting ambassadors, other public ministers and consuls, and those in which a state shall be party, the Supreme Court shall have original jurisdiction. In all the other cases before mentioned, the Supreme Court shall have appellate jurisdiction, both as to law and fact, with such exceptions, and under such regulations as the Congress shall make.

The trial of all crimes, except in cases of impeachment, shall be by jury; and such trial shall be held in the state where the said crimes shall have been committed; but when not committed within any state, the trial shall be

at such place or places as the Congress may by law have directed.