UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

CIVIL MINUTES—GENERAL

Case No. CV 23-1267-MWF (RAOx) **Date: April 9, 2024**
Title: William Ollerton v. National Steel and Shipbuilding Company, et al.

Present: The Honorable MICHAEL W. FITZGERALD, U.S. District Judge

Deputy Clerk:	Court Reporter:
Rita Sanchez	Not Reported
Attorneys Present for Plaintiff:	**Attorneys Present for Defendant:**
None Present	None Present

Proceedings (In Chambers): ORDER GRANTING IN PART AND DENYING IN PART DEFENDANT'S MOTION TO DISMISS [113]

Before the Court is Defendant National Steel and Shipbuilding Company's ("NASSCO") Motion to Dismiss First Amended Complaint (the "Motion"), filed on January 3, 2024. (Docket No. 113). Plaintiffs Mary Ollerton and James Ollerton filed an Opposition on January 12, 2024. (Docket No. 117). NASSCO filed a Reply on January 22, 2024. (Docket No. 118).

The Court has read and considered the parties' submissions and held a hearing on **February 5, 2024**.

The Motion is **GRANTED *in part without leave to amend*** **and DENIED *in part*** as follows:

- The Motion is **DENIED** to the extent it argues that Plaintiffs lack standing to bring their survival and wrongful death claims.

- The Motion is **GRANTED** with respect to Plaintiffs' claims for breach of express and implied warranties and strict liability because the First Amended Complaint ("FAC") fails to allege that NASSCO manufactured, designed, or sold any products containing asbestos.

- The Motion is **GRANTED** to the extent it seeks dismissal of Plaintiffs' request for punitive damages, loss of society damages, and lost income damages. However, the Motion is **DENIED** with respect to pain and suffering damages.

I. BACKGROUND

The Court previously summarized the central facts of this action in its Order Denying Plaintiff's Motion for Remand (the "Remand Order" (Docket No. 63)) and Order Granting Plaintiff's Motion to Substitute Parties and for Leave to Amend (the "Substitution Order" (Docket No. 95)). The Court incorporates by reference the Background Section of the Remand Order and Substitution Order and limits its recitation of facts to events related to the Motion at issue.

On January 13, 2023, William Ollerton ("Decedent") commenced this action in Los Angeles County Superior Court for his asbestos-related injuries, including mesothelioma. (Docket No. 1-1). NASSCO subsequently removed this action based on "federal officer grounds" under 28 U.S.C. § 1442(a)(1). (Docket No. 1 ¶ 8).

After Decedent passed away on August 5, 2023, the Court granted leave to file the FAC so that Plaintiffs – Decedent's siblings – could pursue this action on his behalf. (*See* Substitution Order at 1). In the FAC, Plaintiff Mary Ollerton alleges survival claims on behalf of Decedent pursuant to California Code of Civil Procedure section 377.30. (FAC (Docket No. 98) ¶¶ 1–2). Plaintiffs Mary Ollerton and James Ollerton also allege their own wrongful death claims pursuant to California Code of Civil Procedure section 377.60. (*Id.*). Based on these allegations, the FAC asserts four claims: (1) negligence; (2) breach of express and implied warranties; (3) strict liability; and (4) premises owner/contractor liability. (*Id.* ¶¶ 13–92). In bringing these claims, Plaintiffs seek both pecuniary and non-pecuniary damages. (*Id.* at 31–32).

NASSCO now moves to dismiss the FAC for lack of standing and failure to state a claim. NASSCO also seeks dismissal of Plaintiffs' prayer for non-pecuniary damages.

II. LEGAL STANDARD

"Dismissal under Rule 12(b)(6) is proper when the complaint either (1) lacks a cognizable legal theory or (2) fails to allege sufficient facts to support a cognizable legal theory." *Somers v. Apple, Inc.*, 729 F.3d 953, 959 (9th Cir. 2013). "Federal Rule of Civil Procedure 8(a)(2) requires only 'a short and plain statement of the claim showing that the pleader is entitled to relief,' in order to 'give the defendant fair notice of what the claim is and the grounds upon which it rests.'" *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (quoting *Conley v. Gibson*, 355 U.S. 41, 47 (1957)).

In ruling on the Motion under Rule 12(b)(6), the Court follows *Twombly*, *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and their Ninth Circuit progeny. "To survive a motion to dismiss, a complaint must contain sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Iqbal*, 556 U.S. at 678 (quoting *Twombly*, 550 U.S. at 570). The Court must disregard allegations that are legal conclusions, even when disguised as facts. *See id*. at 681 ("It is the conclusory nature of respondent's allegations, rather than their extravagantly fanciful nature, that disentitles them to the presumption of truth."); *Eclectic Props. E., LLC v. Marcus & Millichap Co*., 751 F.3d 990, 996 (9th Cir. 2014). "Although 'a well-pleaded complaint may proceed even if it strikes a savvy judge that actual proof is improbable,' plaintiffs must include sufficient 'factual enhancement' to cross 'the line between possibility and plausibility.'" *Eclectic Props.*, 751 F.3d at 995 (quoting *Twombly*, 550 U.S. at 556–57).

The Court must then determine whether, based on the allegations that remain and all reasonable inferences that may be drawn therefrom, the complaint alleges a plausible claim for relief. *See Iqbal*, 556 U.S. at 679; *Cafasso, U.S. ex rel. v. Gen. Dynamics C4 Sys., Inc.*, 637 F.3d 1047, 1054 (9th Cir. 2011). "Determining whether a complaint states a plausible claim for relief is 'a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.'" *Ebner v. Fresh, Inc.*, 838 F.3d 958, 963 (9th Cir. 2016) (quoting *Iqbal*, 556 U.S. at 679).

III. DISCUSSION

A. Statutory Standing

NASSCO reiterates many of the same arguments that the Court addressed in its Substitution Order, arguing that Plaintiffs lack standing to bring wrongful death and survival claims. (Motion at 15–16, 17–19). In so arguing, NASSCO relies on the Death on the High Seas Act ("DOHSA"), 46 U.S.C. § 30302, and the Jones Act, 45 U.S.C. § 51, which "limit recovery to specific classes of heirs" to dependent relatives. (*Id.* at 15).

DOHSA provides, in relevant part, as follows:

> When the death of an individual is caused by wrongful act, neglect, or default occurring on the high seas beyond 3 nautical miles from the shore of the United States, the personal representative of the decedent may bring a civil action in admiralty against the person or vessel responsible. The action shall be for the exclusive benefit of the decedent's spouse, parent, child, or dependent relative.

46 U.S.C. § 30302. Similarly, the Jones Act provides that "damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee." 45 U.S.C. § 51.

But contrary to NASSCO's assertions, DOHSA and the Jones Act are inapplicable for purposes of the Court's standing analysis. While DOHSA applies to injuries occurring "beyond 3 nautical miles from the shore of the United States," *see* 46 U.S.C. § 30302, the FAC alleges that Decedent was exposed to asbestos at NASSCO's facility in San Diego, California. (FAC ¶ 10). Similarly, the Jones Act does not apply since there are no allegations that Decedent was employed by NASSCO. *See Dennis*,

2021 WL 3555720, at *27 (finding the Jones Act inapplicable "because while [the plaintiff was] a Jones Act seaman, the defendant manufacturers were not his employers"); *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 428 (9th Cir. 1994) ("[T]he only proper defendant in a Jones Act action is the seaman's employer."). The Court therefore concludes that general maritime law controls. *See Bell v. Foster Wheeler Energy Corp.*, No. 15-CV-6394, 2017 WL 889074, at *3 (E.D. La. Mar. 6, 2017) ("[W]here a seaman dies from an indivisible injury which occurred both in territorial waters and on the high seas, [the] prohibition on survival actions in DOHSA cases does not apply and the plaintiff may pursue a survival action under general maritime law.").

Although Plaintiffs do not bring their claims under either statute, NASSCO argues that DOHSA and the Jones Act should nevertheless guide the Court's standing analysis pursuant to the Supreme Court's holding in *The Dutra Grp. v. Batterton*, 588 U.S. 358 (2019). (Motion at 17–19; Reply at 1 ("Under the *Batterton* analysis, Decedent's non-dependent heirs lack standing to recover wrongful death or survival damages."). However, the Supreme Court's holding in *Batterton* applies to whether certain types of ***damages*** are available under maritime law. *See* 588 U.S. at 369. NASSCO's suggestion that *Batterton* applies to all issues pertaining to a maritime claim, such as statutory standing, is an overexpansive reading unsupported by case law. As such, the Court declines to extend *Batterton*'s holding in this manner and instead examines whether Plaintiffs have standing under federal maritime law.

As the Court previously noted in the Substitution Order, the Court finds the Ninth Circuit's decision in *Evich v. Connelly*, 759 F.2d 1432, 1434 (9th Cir. 1985), instructive. In *Evich*, the Ninth Circuit held that the decedent's non-dependent brothers could "maintain a general maritime survival action as his personal representatives." 759 F.2d at 1434. In so holding, the Ninth Circuit determined that "there is no bar to maritime survival actions." *Id.*

California law is also helpful on this point. Indeed, *Evich* made clear that state statutes can help determine whether a person can sue under general maritime law. *Id.* at 1433. In California, a wrongful death action may be brought by a decedent's

personal representative or on behalf of a person "entitled to the property of the decedent by intestate succession." Cal. Code Civ. Proc. § 377.60. California law further provides that a "cause of action for or against a person is not lost by reason of the person's death, but survives subject to the applicable limitations period." Cal. Code Civ. Proc. § 377.20; *see also Yamaha Motor Corp., U.S.A. v. Calhoun*, 516 U.S. 199, 207 (1996) (recognizing that state survival statutes are compatible with substantive maritime policies).

Here, the FAC alleges that Plaintiff Mary Ollerton is Decedent's successor-in-interest. (FAC ¶ 1). The FAC also alleges that Plaintiffs are Decedent's "[h]eirs at [l]aw." (*Id.* ¶ 2). Based on these allegations, the Court concludes that Plaintiffs have standing to bring their wrongful death and survival claims. *See* Cal. Code Civ. Proc. §§ 377.70, 377.20.

At the hearing, NASSCO argued that *Evich* actually undercuts Plaintiffs' argument that they have standing to bring their wrongful death claims. While NASSCO is correct that *Evich* affirmed dismissal of the non-decedent siblings' wrongful death claims, the Ninth Circuit relied on the fact that both DOHSA ***and*** Alaska's wrongful death statute required the claims to be brought by the decedent's spouse, child, or dependent relative. *See Evich*, 759 F.2d at 1433–34. But California's wrongful death statute is more expansive and allows Plaintiffs to pursue their claims as beneficiaries.

Accordingly, the Motion is **DENIED** with respect to NASSCO's contention that Plaintiffs lack standing.

B. Failure to State a Claim

NASSCO also contends that the FAC fails to articulate a claim for breach of express and implied warranties (claim 2) or strict liability (claim 3). (Motion at 2; Declaration of Michele C. Barnes ("Barnes Decl.") (Docket No. 113-1) ¶ 2, Exhibit A). Plaintiffs fail to address this point in their Opposition and therefore concede that it is a persuasive reason for dismissal of the two claims against NASSCO. *See Shorter v.*

L.A. Unified Sch. Dist., No. CV 13-3198-ABC (AJWx), 2013 WL 6331204, at *5 (C.D. Cal. Dec. 4, 2013) (collecting cases holding that a plaintiff's failure to address arguments raised in a defendant's motion to dismiss in an opposition brief amounts to a concession of the unaddressed issue).

The argument is also well taken on the merits. The two claims at issue concern allegations of manufacturing, designing, labeling, supplying, and selling asbestos-containing products. (FAC ¶¶ 38, 47). However, there are no allegations that NASSCO engaged in such conduct; instead, the sole allegation against NASSCO is that it used asbestos-containing products and failed to protect Decedent from asbestos dust on its premises. (*Id.* ¶ 10). The FAC also suggests that NASSCO's liability is limited to "negligent exposure to asbestos dust." (*Id.* ¶ 10).

Because the FAC fails to allege that NASSCO manufactured, designed, or sold any products containing asbestos, the Motion is **GRANTED** as to the breach of express and implied warranties claim and strict liability claim against NASSCO.

C. Non-Pecuniary Damages

Finally, NASSCO contends that Plaintiffs cannot recover non-pecuniary damages as a matter of law. (Motion at 16–17, 19). In so arguing, NASSCO primarily relies on *Miles v. Apex Marine Corp.*, 498 U.S. 19 (1990), and *Batterton*, 588 U.S. at 369–70.

In *Miles*, the Supreme Court held that the mother of a deceased seaman could not recover loss of society damages in a general maritime wrongful death action or the decedent's lost future earnings in a general maritime survival action. 498 U.S. at 21, 37. The Supreme Court reasoned that the Jones Act limited recovery to pecuniary damages and that it would be "inconsistent . . . to sanction more expansive remedies in a judicially created cause of action in which liability is without fault than Congress has allowed in cases of death resulting from negligence." *Id.* at 32–33, 36.

The Supreme Court further limited the availability of non-pecuniary damages in *Batterton* by holding that a seaman could not recover punitive damages for injuries sustained during his employment. 588 U.S. at 368–69. In deciding this issue, the Supreme Court held that courts must "look primarily to [] legislative enactments for policy guidance" and "may depart from the policies found in the statutory scheme in discrete instances based on long-established history." *Id.* at 361 (citation omitted). Specifically, courts should consider three factors before permitting damages that fall outside the statutory remedial scheme: (1) whether the requested damages have "traditionally been awarded" for the claims alleged; (2) "whether conformity with parallel statutory schemes would require such damages"; and (3) whether policy grounds compel such damages. *Id.* at 2283. Applying these factors, the Supreme Court concluded that "there [was] no historical basis for allowing punitive damages in unseaworthiness actions." *Id.* at 369.

The Court notes that, since *Batterton*, district courts have rejected many of the arguments raised by Plaintiffs – as discussed in more detail below – and have generally found that non-pecuniary damages are unavailable in similar cases. *See, e.g.*, *Elorreaga v. Rockwell Automation, Inc.*, No. 21-cv-05696-HSG, 2022 WL 2528600, at *5 (N.D. Cal. July 7, 2022) (holding that punitive damages and loss of consortium damages were unavailable for the decedent's claims of asbestos exposure on a navy ship); *Banks, et al. v. 3M Co., et al.*, No. CV 22-06892-JLS (Ex), 2024 WL 1134973, at *4–6 (C.D. Cal. Feb. 13, 2024) (dismissing claims for damages for loss of society, damages for loss of future earnings, and punitive damages); *Spurlin v. Air & Liquid Sys. Corp.*, 537 F. Supp. 3d 1162, 1179–81 (S.D. Cal. 2021) (dismissing loss of consortium and punitive damages under *Miles*).

Here, based on the Court's review of the FAC and the arguments raised at the hearing, there appears to be four categories of non-pecuniary damages requested by Plaintiffs: (1) punitive damages; (2) loss of society damages; (3) loss of income; and (4) compensatory damages. The Court discusses the availability of each in turn.

1. Punitive Damages

Plaintiffs seek "exemplary or punitive damages according to proof." (FAC at 31). As *Batterton* made clear, "courts have uniformly held that punitive damages are not available under the Jones Act." *Id.* at 359. Therefore, the Court must determine whether the *Batterton* factors justify a departure from this statutory scheme.

Under the first factor, the Court considers whether the requested damages were traditionally available for negligence claims under federal maritime law. NASSCO argues that general maritime law did not traditionally recognize a "general negligence" claim and, therefore, non-pecuniary damages were unavailable to seamen for such claims. (Motion at 16). Indeed, as recognized in *The Osceola*, injured seamen were limited to maintenance and cure claims and could not recover damages for negligence. 189 U.S. 158, 175 (1903); *see also Batterton*, 588 U.S. at 363 (explaining that claims for failure to maintain and cure were distinct from negligence claims because the former did not rest upon the defendant's culpability). Wrongful death claims were also prohibited under federal maritime law until the 1920s. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 393 (1970) ("From the date of *The Harrisburg* until 1920, there was no remedy for death on the high seas caused by breach of one of the duties imposed by federal maritime law.").

Plaintiffs do not meaningfully contend with NASSCO's arguments and, instead, urge the Court to follow *Atlantic Sounding Co. v. Townsend*, 557 U.S. 404 (2009). (Opp. at 6–7). There, the Supreme Court held that punitive damages were available for maintenance and cure claims since such damages were generally available at common law. *Atlantic Sounding*, 557 U.S. at 411 (citing *Lake Shore & Mich. S. R. Co. v. Prentice*, 147 U.S. 101, 108 (1893) ("Courts of admiralty proceed, in cases of tort, upon the same principles as courts of common law, in allowing exemplary damages.")).

However, as *Batterton* explained, *Atlantic Sounding* is inapposite because it "justified [its] departure from the statutory remedial scheme [under the Jones Act] based on the established history of awarding punitive damages for certain maritime

torts, including maintenance and cure." 588 U.S. at 369. Here, by contrast, Plaintiffs "have not pointed to any decision in the formative years of ***maritime negligence claims*** in which punitive damages were awarded." *Spurlin v. Air & Liquid Sys. Corp.*, 537 F. Supp. 3d 1162, 1180 (S.D. Cal. May 7, 2021) (emphasis added).

At the hearing, Plaintiffs argued that *Yamaha* supports their position regarding the historical availability of punitive damages. But *Yamaha* made no such finding. Instead, the Supreme Court declined to limit the remedies available to a child killed in a jet ski accident and justified its departure from the federal statutory scheme by determining that "Congress ha[d] not prescribed remedies for the wrongful deaths of ***nonseafarers*** in territorial waters." 516 U.S. at 215 (emphasis added). But the same cannot be said for Plaintiffs, who seek punitive damages on behalf of Decedent who qualifies as a Jones Act seaman. Additionally, *Yamaha* is not a decision "from the formative years" of maritime negligence claims. *See Batterton*, 588 U.S. at 372 (finding no tradition of allowing punitive damages because the plaintiff presented "no decisions from the formative years of the personal injury unseaworthiness claim in which exemplary damages were awarded"). The Court is therefore unpersuaded that punitive damages have traditionally been available for the claims alleged on behalf of a Jones Act seaman, like Decedent.

Next, under the second factor, the Court considers whether punitive damages are typically recognized under parallel statutory schemes. NASSCO argues that the Court should rely on DOHSA and the Jones Act, which courts have interpreted to limit recovery to pecuniary damages. (Motion at 16–17). NASSCO is correct that DOHSA limits recovery to "fair compensation for the pecuniary loss sustained by the individuals whose benefit the action is brought." 46 U.S.C. § 30303. Courts have similarly interpreted the Jonas Act as limiting recovery to pecuniary loss. *See Batterton*, 588 U.S. at 373–74.

In response, Plaintiffs argue that neither federal statute is relevant to the Court's analysis since Decedent's injuries fall outside the scope of DOHSA and the Jones Act. (Opp. at 8–9). Instead, according to Plaintiffs, the Court should turn to California law, which permits non-pecuniary damages in negligence suits. (*Id.*).

While Plaintiffs are correct that the Jones Act does not apply to this action, the Ninth Circuit has held that "[t]he identity of the defendant is irrelevant" to the question of whether certain damages are available in connection to a maritime death. *Davis v. Bender Shipbuilding & Repair Co.*, 27 F.3d 426, 430 (9th Cir. 1994); *see also Spurlin*, 537 F. Supp. 3d at 1180 ("Although Plaintiffs do not bring a case under the Jones Act, it is a statutory cause of action for compensatory damages, on the ground of negligence. . . . As such, the Jones Act is a parallel statutory scheme that provides an appropriate benchmark in considering whether non-pecuniary losses are allowable here." (internal quotation marks and citation omitted)). Additionally, relying on the more expansive remedies available under California law as Plaintiffs suggest would ignore *Batterton*'s teachings to avoid "sanction[ing] a novel remedy [] unless it is required to maintain uniformity with ***Congress's*** clearly expressed policies." 588 U.S. at 372 (emphasis added). Therefore, the second factor also weighs against granting punitive damages.

Finally, regarding the third factor, Plaintiffs do not offer any policy reasons that weigh in favor of allowing them to recover punitive damages. On this point, NASSCO argues that *Batterton* explains why there is no compelling policy reasons justifying recovery of punitive damages. (Motion at 10, 17, 19). The Court is particularly persuaded by the judicial restraint exercised in *Batterton* in light of "the increased role that legislation has taken over the past century of maritime law." *Id.* at 374. Moreover,

Accordingly, the Motion is **GRANTED** with respect to Plaintiffs' request for punitive damages.

2. Loss of Society

Plaintiffs also seek "damages for loss of love, companionship, comfort, affection, solace, moral support and/or society according to proof caused by [D]ecedent's death." (FAC at 30–31).

As already discussed, *Miles* held that "there is no recovery for loss of society in a general maritime action for the wrongful death of a Jones Act seaman." 498 U.S. at 32–33; *see also Smith v. Trinidad Corp.*, 992 F.2d 996 (9th Cir. 1993) (per curiam) (affirming summary judgment denying a spouse's claim for loss of consortium because *Miles* precluded actions for loss of society under the Jones Act). Therefore, whether Plaintiffs can recover loss of society damages turns on the question of whether such damages have traditionally been awarded.

In response, Plaintiffs provide three cases in which courts have permitted loss of society damages in similar contexts: (1) *Sugden v. Puget Sound Tug & Barge Co.*, 796 F. Supp. 455 (W.D. Wash. 1992); (2) *Emery v. The Rock Island Boatworks, Inc.*, 847 F. Supp. 114 (C.D. Ill. 1994); and (3) *Dennis v. Air & Liquid Sys. Corp.*, No. CV 19-9343-GW (KSx), 2021 WL 3555720 (C.D. Cal. Mar. 24, 2021). (Opp. at 6–7). But none of these cases stands for the proposition that courts have traditionally awarded loss of society damages in ***maritime negligence cases***. *See Sugden*, 796 F. Supp. at 457 (allowing loss of society damages against a non-employer because *Miles*, which involved claims against an employer, was factually distinct); *Emery*, 847 F. Supp. at 117 (same); *Dennis*, 2021 WL 3555720, at *25–28 (declining to dismiss the plaintiff's request for loss of society damages because nonpecuniary damages were available for negligence or product liability claims generally and the defendants failed to argue otherwise). Moreover, the same reasoning regarding the second and third factors as to punitive damages applies here. The Court therefore concludes that *Batteron* also bars recovery of loss of society damages.

Accordingly, the Motion is **GRANTED** as to Plaintiffs' request for loss of society damages.

3. Loss of Income and Future Income

Additionally, Plaintiffs seek loss of income on behalf of themselves and Decedent. (FAC 30–31). Again, the Court concludes that the *Batteron* factors weigh against Plaintiffs' request.

As already discussed, *Miles* held that a plaintiff cannot seek lost income in a general maritime survival action. *See Miles*, 498 U.S. at 37; *Davis v. Bender Shipbuilding and Repair Co., Inc*., 27 F.3d 426, 430 (9th Cir. 1994) (holding that, under general maritime law, the estate of a deceased seaman could not bring claims for loss of future income against non-Jones Act defendants). Plaintiffs have not provided any evidence or cases demonstrating that such damages have traditionally been available in maritime cases. Nor do they contend that parallel statutory schemes or public policy grounds require such damages.

Accordingly, the Motion is **GRANTED** with respect to Plaintiffs' request for lost income.

4. Compensatory Damages

Finally, based on the representations made by counsel at the hearing, the Court interprets Plaintiffs' request for "general" damages on behalf of Decedent as one for compensatory damages, including damages for pain and suffering. (SAC at 30–31).

As Plaintiffs noted at the hearing, the Jones Act permits recovery of personal injury to a seaman. Specifically, the Jones Act provides that "[a] seaman injured in the course of employment or, if the seaman dies from the injury, the personal representative of the seaman may elect to bring a civil action at law" and that the [l]aws of the United States regulating recovery for personal injury to, or death of, a railway employee apply to an action under this section." 46 U.S.C. § 30104(a). Historically, the Supreme Court has also allowed personal representatives in similar contexts to recover damages for a decedent's pre-death pain and suffering. *See St. Louis, I.M. & S. Ry. Co. v. Craft*, 237 U.S. 648, 658 (1915) (holding that a deceased railway worker's right to recover damages pertaining to his "loss and suffering" survived to his personal representative).

Therefore, the Motion is **DENIED** with respect to Plaintiffs' request for damages for Decedent's pain and suffering.

IV. LEAVE TO AMEND

Although Plaintiffs did not request leave to amend, the Court addresses whether doing so would be appropriate here.

Rule 15 requires that leave to amend "be freely given when justice so requires." Fed. R. Civ. P. 15(a)(2). "This policy is to be applied with extreme liberality." *Eminence Cap., LLC v. Aspeon, Inc.*, 316 F.3d 1048, 1051 (9th Cir. 2003). The Supreme Court identified five factors a court should consider when deciding whether to grant leave to amend: (1) bad faith; (2) undue delay; (3) prejudice to the opposing party; (4) futility of amendment; and (5) whether the plaintiff has previously amended its complaint. *See Foman v. Davis*, 371 U.S. 178, 182 (1962). Of these, "the consideration of prejudice to the opposing party carries the greatest weight." *Sonoma Cnty. Ass'n of Retired Emps. v. Sonoma Cnty.*, 708 F.3d 1109, 1117 (9th Cir. 2013) (quoting *Eminence Cap., LLC*, 316 F.3d at 1052); *see also Sharkey v. O'Neal*, 778 F.3d 767, 774 (9th Cir. 2015) (indicating a court should explain reasons for denying leave to amend); *Parsittie v. Schneider Logistics, Inc.*, 859 F. App'x 106, 107 (9th Cir. 2021) (same).

Here, the fourth and fifth factors weigh against further amendment. Plaintiffs do not seek leave to amend nor do they identify facts that could be added to the complaint. For example, Plaintiffs do not contend that they can allege NASSCO manufactured, designed, or sold products containing asbestos that caused Decedent's injuries. Any amendment regarding damages would also be futile because, as a matter of law, Plaintiffs cannot seek certain non-pecuniary damages in this action. Further, the Court already granted Plaintiffs leave to amend once. (*See* Substitution Order at 1).

The Court therefore declines to grant leave to amend.

V. CONCLUSION

Based on the foregoing, the Court rules as follows:

- The Motion is **DENIED** with respect to NASSCO's standing arguments.

- With respect to Defendant's arguments regarding the claims for breach of express and implied warranties (claim 2) and strict liability (claim 3), the Motion is **GRANTED *without leave to amend***.

- With respect to Plaintiffs' request for punitive damages, loss of society damages, and lost income damages, the Motion is **GRANTED *without leave to amend***. However, the Motion is **DENIED** as to Plaintiffs' request for damages for Decedent's pain and suffering.

NASSCO is **ORDERED** to file an Answer to the SAC with respect to the remaining claims for negligence (claim 1) and premises owner/contractor liability (claim 4) by **April 29, 2024**.

IT IS SO ORDERED.