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UNITED STATES DISTRICT COURT

CENTRAL OF CALIFORNIA

LYNN BROOKS, individually, and as Personal Representative of the Estate of HOWARD WELDON, Deceased, and ANDREW WELDON,

Plaintiffs,

vs.

PADI WORLDWIDE CORP., a California Corporation, PROFESSIONAL ASSOCIATION OF DIVING INSTRUCTORS, a California Corporation, and DIVING SCIENCE & TECHNOLOGY CORP., a California Corporation,

Defendants.

Civil No.: 8:19-cv-01314-JVS-JDE

NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FRCP RULE 12(b)(1) and (6) (Filed and served with separate Request for Judicial Notice and the separate Declaration of Mark M. Williams)

Date: October 7, 2019
Time: 1:30 p. m.
Courtroom: 10C

TO THE PLAINTIFFS AND TO THEIR ATTORNEYS OF RECORD:

PLEASE TAKE NOTICE that defendants will move and hereby move the court for an order dismissing the Complaint on the grounds that under Rule 12(b)(1) this honorable court lacks subject matter jurisdiction in admiralty, and, under Rule 12(b)(6) the plaintiffs have split their causes of action for wrongful death and survival, having first filed those

causes of action in United States District Court in Honolulu on April 26, 2019 styled *Lynn Brooks, et al. vs. Joe Green; Surf N' Sea and Juan "Adrian" Ramirez*, Case no. 1:19-cv-00219-JMS-RLP.

The hearing on this motion will take place on October 7, 2019 at 1:30 p. m. before the Honorable James V. Selna, District Judge, in courtroom 10C located at 411 W. 4th Street, Santa Ana, California 92701, 714-338-4710. This motion will be based upon the pleadings on file herein, this Notice and the memorandum of points and authorities filed and served herewith, the Request for Judicial Notice filed and served herewith and upon such written or oral evidence as may be introduced at the hearing.

This motion is made following the conference of counsel pursuant to L. R. 7-3, which took place on July 17, 2019 and on August 7th, 2019.

Dated: August 21, 2019

LA FOLLETTE, JOHNSON

By: _____

MARK M. WILLIAMS
Attorneys for Defendants, PADI WORLDWIDE CORP., PADI AMERICAS, INC. erroneously sued and served as the PROFESSIONAL ASSOCIATION OF DIVING INSTRUCTORS, and DIVING SCIENCE & TECHNOLOGY CORP.

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alleged to be engaged in a joint venture not only to develop and offer the DSD program in general but to offer it specifically to the plaintiffs. Both actions allege the DSD program is defective and that those defects harmed the plaintiffs. The opinion in *Efficient Frontiers* found that the greater specificity of the allegations in the second lawsuit does not prove the two actions do not arise out of the same nucleus of facts. Citing to the opinion in *Estrada v. City of San Luis*, 2008 U. S. Dist. LEXIS 111354, 2008 WL 3286112 at *2 (D. Ariz., Aug 7, 2008), Judge Pregerson observed that "courts have concluded that asserting new legal theories [in the second action] does not preclude a finding of improper claim splitting".

Allowing both actions to proceed risks inconsistent rulings and judgments on key factual issues. Namely, the operation of the express waiver of liability and assumption of risk agreements signed by both Howard and Andrew Weldon in favor of the Surf N' Sea, instructor Ramirez and PADI Americas, Inc. and its affiliate corporations; that PADI, Surf N' Sea and Ramirez are alter-egos, agents, or employees of one another or are engaged in a joint venture. Substantially similar evidence will be presented in both actions on these and other issues, including the damage issues.

This court is empowered to exercise its discretion to dismiss duplicative lawsuits to promote judicial economy and avoid the cost, confusion and turmoil that will result if these actions are each allowed to proceed. (See *Kerotest Mfg. Co. v. C—O—Two Fire Equip. Co.*, 342 U. S. 180, 183, 72 S.Ct. 219, L.Ed. 200, 1952 Dec. Comm'r Pat. 407 (1952); See also *Hartsel Spring Ranch of Colo., Inc. v. Blue Green Corp*, supra., 296 F.3d at 985 and *Curtis v. Citibank, N. A.*, supra., 226 F.3d at 139.) It is respectfully requested this court dismiss the California action.

III. THERE IS NO ADMIRALTY JURISDICTION

The undisputed facts of this accident are that this was a beach dive from the shore at Shark's Cove. (Ex. 1, ¶¶47 and 60; Ex. 2, ¶¶24 through 28) No vessel was involved and no vessel was used to rescue, treat or transport the decedent to the local ER. (Ex. 1, ¶¶47 and 60)

MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION

Pursuant to the Request for Judicial Notice filed herewith, this honorable Court is requested to take notice of the following: (1) Complaint for Wrongful Death Damages, Survival Damages and Personal Injury Damages filed by plaintiffs Lynn Brooks, individually, and as personal representative of the Estate of Howard Weldon; and Andrew Weldon in United States District Court for the District of Hawaii, case 1:19-cv-00219-JMS-RLP on April 26, 2019. (The "Hawaii action") (A true and correct copy of this Complaint was obtained by our offices with our PACER account and is **Exhibit 1** to the Request for Judicial Notice.) Attached as **Exhibit 2** to the Request for Judicial Notice is a true and correct copy of the Summons and Complaint and Notice of Pendency of Other Action served on these responding defendants. Attached as **Exhibit 3** to the Request for Judicial Notice is the Rule 16 Scheduling Order issued in the 'Hawaii Action'. Attached as **Exhibit 4** to the Request for Judicial Notice is a true and correct copy of defendants Joe Green's and Surf N' Sea, Inc.'s Answer in the Hawaii action. Attached as **Exhibit 5** to the Request for Judicial Notice is a true and correct copy of Green's and Surf N' Sea's Scheduling Conference Statement asserting the express waiver of liability defense. Attached as **Exhibit 6** to the Request for Judicial Notice is a true and correct copy of Juan Ramirez's Answer in the Hawaii action asserting waiver of liability and assumption of risk as affirmative defenses. Attached as **Exhibit 7** to the Request for Judicial Notice are the express waivers of liability and assumption of risk agreements. Exhibits 1 through 7 of the Request for Judicial Notice are incorporated by reference as though set forth fully and completely herein.

Howard Weldon and Andrew Weldon signed up for a Discover Scuba Diving ("DSD") experience with Surf N' Sea, Inc. dive shop in Haleiwa, Hawaii. (Ex. 2, ¶¶21 and 22) That introductory scuba dive took place at Sharks' Cove at Pupukea State Park on the North Shore of Oahu the morning of July 3, 2018. (Ex. 2, ¶¶24-28) The DSD leader was instructor Juan "Adrian" Ramirez who was, and is, a scuba instructor and member of

the Professional Association of Diving Instructors ("PADI"), the Surf N' Sea dive shop is also a member of PADI and the DSD program was developed by PADI.[1] (See Ex. 2, ¶¶21, and 22.) This was a beach or shore dive; no vessel was involved.

Plaintiffs have filed two lawsuits, one in federal court in Honolulu using one plaintiff attorney and a second lawsuit in federal court in the Central District of California (Santa Ana) using a second plaintiff attorney. The two lawsuits arise out of the same common nucleus of operative facts, to wit, a Discover Scuba Diving fatal accident involving the plaintiffs' decedent, Howard Weldon, which took place on July 3, 2018 at Pupukea State Park in Sharks' Cove on the North Shore of Oahu. Hawaii has a 24-month period of limitation for personal injury and wrongful death claims, as does California.

The DSD program was conducted by PADI instructor Ramirez working for Surf N' Sea located in Haleiwa on the North Shore. Surf N' Sea is owned by Joe Green. It offers PADI dive courses, and programs, from DSD and Open Water Diver to Divemaster. The Complaints in both actions allege that PADI Worldwide Corp, the Professional Association of Scuba Diving Instructors, Joe Green, Surf N' Sea and instructor Juan "Adrian" Ramirez were the agents of one another and designed, operated and implemented a defective program of introductory scuba diving marketed as Discover Scuba Diving®. Both lawsuits seek recovery for wrongful death, survival, personal injury (NIED) and punitive damages.

The basis for federal court jurisdiction in the California action against PADI is admiralty jurisdiction. (Ex. 2, ¶1) The basis for federal jurisdiction in the Honolulu action against the dive shop defendants is diversity of citizenship. (Ex. 1, ¶10) Ms. Brooks and her son, along with their decedent, are residents of La Verne, California. (Ex. 1, ¶6) PADI Worldwide Corp is a California corporation and Mr. Green, Surf N' Sea and Mr. Ramirez are residents of the state of Hawaii. The Professional Association of Diving Instructors is

[1] PADI Worldwide Corp, Inc. is the parent company of PADI Americas, Inc. Along with Diving Science & Technology Corp., all are California corporations. They are collectively referred to as "PADI."

no longer a corporate entity. Diving Science & Technology Corp is viable and was created decades ago as a California corporation to hold the patent for the PADI Recreational Dive Planner. PADI Americas, Inc. is a California corporation.

In the Hawaii action, at paragraphs 8 and 15 of Ex. 1, it is alleged that Surf N' Sea is a "PADI dive center" and that Mr. Ramirez is a "PADI professional." It is alleged at paragraph 18 of Ex. 1 that Mr. Green and Surf N' Sea had a duty to comply with PADI rules and policies. At paragraph 19 of Ex. 1, plaintiffs allege that Green, Surf N' Sea, the Dive Leader (Mr. Ramirez), **and PADI**:

> "were engaged in a joint venture to entice individuals with no diving experience to participate in PADI Discover Scuba Diving experience in order to generate profit, proceeds and revenue, and to encourage future business in that they:
>
> a. agreed to carry on an enterprise for profit;
>
> b. shared a common purpose and a common intent to be joint venturers;
>
> c. shared a community of interest;
>
> d. made mutual contributions of financing, services, skill, property, knowledge, or effort to the enterprise;
>
> e. exercised some degree of joint control over the venture; and
>
> f. agreed to share both profits and losses."
>
> (See Ex. 1, ¶19.)

At paragraph 27 of Ex. 1 it is alleged that "Defendants represented" DSD was "a safe and unchallenging dive." At paragraph 29, it is alleged Defendants represented that PADI DSD is suitable for beginner divers with no diving experience. At paragraph 43, it is alleged that under the Restatement 2nd of Torts §311 defendants had a duty to refrain from providing false information to the plaintiff Weldon and to the decedent.

In the California lawsuit it is alleged, by the same plaintiffs, at paragraph 11 that PADI designed, developed, published and marketed the DSD Experience. At paragraph 12 of the California complaint it is specifically alleged that:

"In designing, developing, marketing, implementing, publishing and administering the DSD Experience, Defendants, and each of them, together with the Surf N' Sea dive shop in Haleiwa, Oahu, that shop owner, Joe Green, and the shop's dive instructor, Juan "Adrian" Ramirez acted as one another's agents, alter egos, and/or maritime co-venturers, in that they each:

a. agreed to carry on an enterprise for profit;

b. shared a common purpose and a common intent to be joint venturers;

c. shared a community of interest;

d. made mutual contributions of financing, services, skill, property, knowledge, or effort to the enterprise;

e. exercised some degree of joint control over the venture; and

f. agreed to share both profits and losses."

(See Ex. 2, ¶12.)

The general rule against cause-splitting is that related claims must be brought in a single cause of action. *Katz v. Gerardi*, 655 F.3d 1212, 1217-1218 (10th Cir. 2011). The rule against claim splitting requires a plaintiff to assert all causes of action arising from a common set of facts in one lawsuit. By spreading claims around in multiple lawsuits in other courts or before other judges, parties waste "scarce judicial resources" and undermine the "efficient and comprehensive disposition of cases." *Id.* at 1217 (quoting *Hartsel Springs Ranch of Colo., Inc. v. Blue Green Corp*, 296 F.3d 982, 985-988 (10th Cir. 2002); see also *Curtis v. Citibank, N.A.*, 226 F.3d 133, 139 (2nd Cir. 2000).

It is well settled that a plaintiff may not file duplicative complaints in order to expand his or her legal right. *Greene v. H and R Block E. Enters., Inc.*, 727 F. Supp. 2d 1363, 1367 (S.D. Fla. 2010) (quoting *Curtis v. Citibank*, supra.,226 F.3d at 140).

The claim splitting doctrine ensures that a plaintiff may not split up his or her demand and prosecute it by piecemeal, or present only a portion of the grounds upon which relief is sought, and leave the rest to be preserved in a second suit, if the first fails. Id. (quoting

Stark v. Star, 94 U.S. 477, 485, 24 L. Ed. 276 (1876)). The claim splitting doctrine thus ensures fairness to litigants and conserves judicial resources. *Id.* Unlike *res judicata*, claim splitting is more concerned with the district court's comprehensive management of its docket, whereas *res judicata* focuses on protecting the finality of judgments. See *Katz*, supra, 655 F.3d at 1218.

II. THE PLAINTIFFS HAVE SPLIT THEIR CAUSES OF ACTION

A. The Common Allegations and Defenses

The "Hawaii action" filed on April 26, 2019 in federal district court in Honolulu (Ex. 1, pg. 1) is based on diversity of citizenship under 28 U. S. C. §1332 (Ex. 1, ¶10, pg. 3) and alleges causes of action for survival (Ex. 1, ¶¶65-74 at pgs. 11-13); for wrongful death (Ex. 1, ¶¶75-85 at pgs. 13-15); for NIED (Ex. 1, ¶¶86-93 at pgs. 15-16); and for gross negligence—wanton and willful indifference (Ex. 1, ¶¶94-95 at pg. 16). (There is no separate cause of action for gross negligence. See, *Mullaney v. Hilton Hotels Corp.* 634 F.Supp.2d 1130 (Hawaii Dist. Ct. 2009), U.S. Dist. LEXIS 53769; *Erickson v. Nunnick* (2011) 191 Cal.App.4th 826, 856, footnote 18.)

The "California action" was filed almost three months later on July 2, 2019 in the Central District of California against "PADI" alleging admiralty jurisdiction under Fed. R.Civ.P. 9(h) and under 28 USC §1333(1). (Ex. 2, ¶1.) The stated causes of action in the California action are (1) wrongful death (Ex. 3, ¶¶30-40 at pgs. 16-19); (2) survival (Ex. 3,¶¶41-46 at pgs. 19-21); and (3) personal injury for negligent infliction of emotional distress (NIED) (Ex. 2,¶¶21-51 at pgs. 21-23).

The California action alleges that Surf N' Sea, Inc. (the dive center), its owner, Joe Green, PADI instructor Juan "Adrian" Ramirez, and PADI worked together to design, develop, market, implement, publish and administer the Discovery Scuba Diving or "DSD" experience, acting as one another's agents, alter egos, and/or 'maritime coventurers'. (See Ex. 2, ¶12, pgs. 6 through 7)

The Hawaii action also alleges that defendants Joe Green, Surf N' Sea, Inc. and instructor Juan "Adrian" Ramirez were members of PADI engaged in offering the PADI

Discover Scuba Diving experience or program and that they were trained by PADI to offer the DSD experience to the public (See Ex. 1, ¶¶12-29.) Like the California action, the Hawaii action alleges that Mr. Green, Surf N' Sea, Mr. Ramirez and PADI "were engaged in a joint venture to entice individuals with no diving experience to participate in the PADI" DSD program. (See Ex. 1, pg. 5, ¶19; see also Ex. 2, ¶12.)

Of concern are the allegations in both actions that these collective defendants were the agents and alter egos of one another and acting in a joint venture (or joint maritime venture) to develop, market and offer the PADI DSD program. The alleged facts in both actions are that Howard Weldon and his adult son, Andrew Weldon, signed up for a PADI DSD experience with Surf N' Sea, a PADI dive center, and that Surf N' Sea assigned PADI scuba instructor Juan Ramirez to provide the PADI DSD experience, with the plaintiffs relying on the representations of the defendants, to include the representations in the PADI generated DSD documents. (See Ex. 1, ¶¶27-42 at pgs. 6-8; and Ex. 2, ¶¶12, and 21-25.)

PADI, the Surf N's Sea dive shop and the PADI certified scuba instructor, Juan Ramirez, will each premise their defense, in part, on the express waivers of liability and assumption of risk agreements signed by the Weldons before they participated in the DSD program. (See Ex. 7.) The dive shop and dive shop owner and the scuba instructor have each pleaded assumption of risk as affirmative defenses and have produced in the Hawaii action the waivers of liability and assumption of risk agreements signed by Howard and by Andrew Weldon. (See Exhibits 4 and 6 at paragraphs 14 and 16 and paragraph 3, respectively, and see the express waivers attached hereto as Exhibit 7.) PADI Americas, Inc. and its affiliate and subsidiary corporations are specifically named as released parties in these written agreements. (See Ex. 7, fourth paragraph of the Liability Release and Assumption of Risk Agreements.)

B. A Single Cause Shall Not be Split or Divided Among Several Suits

The majority of witnesses (with the exception of the plaintiffs and two or three PADI executives) are residents of Hawaii. The alleged grossly negligent administration of

the PADI DSD program for the Weldons occurred in Hawaii. PADI and the Hawaii defendants are entitled to have one trier of fact and/or one trial judge evaluate the evidence and determine issues of liability and damages. Moreover, the court(s) in particular should not be burdened with multiple trials involving common issues and the same witnesses. Finally, will the continued maintenance of these actions result in a judgment or evidentiary ruling in the Hawaii action that can then be used with the doctrines of *res judicata* or collateral estoppel against the defendants in the California action?

It is well settled that the pendency of the first action may be pleaded in abatement of the other actions. *Secor v. Sturgis*, 16 NY 548, 554. It is also well settled that for the "prevention of vexation and oppression, the court will enforce a consolidation of the actions. *Id.* at 554-555. How can the plaintiffs bring causes of action for wrongful death, survival, and NIED in multiple venues and collect, in effect, a double recovery on the value of their loss of care, comfort, society and support and on the value of their emotional distress from separate trial judges and juries? The court should exercise its discretion to dismiss the later-filed action. *Adams v. California Dept. of Health Services*, 487 F.3d 684, 688-689 (9th Cir. 2007).

Plaintiffs may argue that the rule against claim splitting does not prevent the prosecution of separate actions upon several causes of action against different defendants (*Id.* at 554-555) and that the California action raises new and independent claims against the PADI defendants, who are not parties to the claims filed in Hawaii. But, while the identity of the defendants differ, the claims are substantially similar (if not identical) and both lawsuits allege that the defendants were the agents and employees of one another and that they negligently and grossly negligently worked together to administer a program of scuba diving (DSD) that operated to mislead and harm the plaintiffs and their decedent. (*supra* at pgs. 5-10)

The most important factor in determining whether the two suits are 'the same' is whether the two suits arise out of the same transactional nucleus of facts. *Bojorquez v. Abercrombie Fitch Co.*, 193 F. Supp. 3d 1117, 1123 (C.D. Cal. 2016). Here, plaintiffs

allege that PADI developed the DSD program and acted in a grossly negligent and wanton and reckless manner by ignoring basic dive safety principals and offering the program to persons like the Weldon's in order to maximize profits at the risk of the lives and safety of the DSD participants. There would be no cause of action absent the specific common allegations the defendants in both actions combined to create and operate a defective program of scuba diving. In fact, plaintiffs admit in their California filings that the Hawaii action involves the same transaction or occurrence. (See Ex. 2, the Notice of Pendency of Other Action at pg. 3, lines 9 through 13 for an admission the Hawaii action "*arises out of the same transaction or occurrence.*")

The Central District Court decision in *Efficient Frontiers, Inc. v. Marchese*, 2016 U. S. Dist. LEXIS 168729, provides guidance for the application of the claim splitting doctrine. The opinion, citing to *Adams v. California Dept. of Health Servs*. 487 F.3d 684, 688-689 (9th Cir. 2006), looked at the parties, causes of action and relief sought in each action to see if they were the same. "In order to assess whether the causes of action and relief sought are the same, courts employ the four-prong transaction test, which asks: (1) whether the rights or interests established in the prior judgment would be destroyed or impaired by prosecution of the second action; (2) whether substantially the same evidence is presented in the two actions; (3) whether the two suits involve infringement of the same right; and (4) whether the two suits arise out of the same transactional nucleus of facts." Id. at pg. 3, citing to *Costantini v. Trans World Airlines*, 681 F.2d 1199, 1201-02 (9th Cir. 1982).

Noting that the court in *Constantini* found the question of whether the two suits arise out of the same transactional nucleus of facts to be the most important question, Judge Pregerson started with that test. In the Brooks/Weldon lawsuits, the same causes of action---wrongful death, survival and personal injury---arise out of the same set of operative facts, to wit, the development of the DSD program and the program's administration and the operation of the DSD dive in question. Each Hawaii defendant is identified as a professional member of PADI and PADI and the other defendants are

alleged to be engaged in a joint venture not only to develop and offer the DSD program in general but to offer it specifically to the plaintiffs. Both actions allege the DSD program is defective and that those defects harmed the plaintiffs. The opinion in *Efficient Frontiers* found that the greater specificity of the allegations in the second lawsuit does not prove the two actions do not arise out of the same nucleus of facts. Citing to the opinion in *Estrada v. City of San Luis*, 2008 U. S. Dist. LEXIS 111354, 2008 WL 3286112 at *2 (D. Ariz., Aug 7, 2008), Judge Pregerson observed that "courts have concluded that asserting new legal theories [in the second action] does not preclude a finding of improper claim splitting".

Allowing both actions to proceed risks inconsistent rulings and judgments on key factual issues. Namely, the operation of the express waiver of liability and assumption of risk agreements signed by both Howard and Andrew Weldon in favor of the Surf N' Sea, instructor Ramirez and PADI Americas, Inc. and its affiliate corporations; that PADI, Surf N' Sea and Ramirez are alter-egos, agents, or employees of one another or are engaged in a joint venture. Substantially similar evidence will be presented in both actions on these and other issues, including the damage issues.

This court is empowered to exercise its discretion to dismiss duplicative lawsuits to promote judicial economy and avoid the cost, confusion and turmoil that will result if these actions are each allowed to proceed. (See *Kerotest Mfg. Co. v. C—O—Two Fire Equip. Co.*, 342 U. S. 180, 183, 72 S.Ct. 219, L.Ed. 200, 1952 Dec. Comm'r Pat. 407 (1952); See also *Hartsel Spring Ranch of Colo., Inc. v. Blue Green Corp*, supra., 296 F.3d at 985 and *Curtis v. Citibank, N. A.*, supra., 226 F.3d at 139.) It is respectfully requested this court dismiss the California action.

III. THERE IS NO ADMIRALTY JURISDICTION

The undisputed facts of this accident are that this was a beach dive from the shore at Shark's Cove. (Ex. 1, ¶¶47 and 60; Ex. 2, ¶¶24 through 28) No vessel was involved and no vessel was used to rescue, treat or transport the decedent to the local ER. (Ex. 1, ¶¶47 and 60)

Allegations that this emergency "could have involved marine resources," (Ex. 2, ¶1(b)) or that PADI developed the DSD program so that it could be administered from a vessel (Ex. 2, ¶1(c)) are beside the point. The federal cases are legion that hold that recreational scuba diving, whether from shore or from a vessel, has no traditional connection with maritime commerce. In effect, the courts treat recreational scuba diving like recreational swimming from a vessel---no maritime connection and therefore no admiralty jurisdiction under Rule 9(h) or under the Savings to Suitors Clause of the 1789 Judiciary Act, modernly codified as 28 U. S. C. §1333(1).

Federal case law has established the general rule that recreational swimming and scuba diving do not relate to traditional maritime activity. *Delgado v. Reef Resorts Ltd.*, 364 F.3d 642, 2004 AMC 1109 (5th Cir. 2004), held that the death of a recreational scuba diver did not come within admiralty jurisdiction as it did not affect maritime commerce and did not involve a traditional maritime activity. In *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260, 1993 AMC 855 (9th Cir. 1993), it was held there was no admiralty jurisdiction over claims arising from a swimmer injured while diving from a pleasure vessel anchored in navigable waters because "aquatic recreation off a pleasure boat" does not have the requisite "substantial relationship to traditional maritime activity." In *In Re Complaint of Kanoa, Inc.* , 872 F. Supp 740 (D. Hi. 1994); and *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778 (D. Hi. 1994), the courts held that injuries to recreational divers were analogous to those of surface swimmers and there was no admiralty jurisdiction unless some aspect of the operation of a vessel was involved in the cause of the casualty. Specifically, the court in *In Re Complaint of Kanoa, Inc.* denied admiralty jurisdiction with respect to allegations of negligence of the dive boat's crew in supervising divers while they were in the water.

Hambrook v. Smith 2015 AMC 2156 (D. Hi. 2015) held that recreational scuba diving accidents may bear the necessary substantial relationship to traditional maritime activity if they involve operation or maintenance of a vessel. In *Hambrook*, there was an allegation that the crew of the dive vessel failed to properly render first aid aboard the

vessel. In *Sinclair v. Soniform*, 935 F.2d 599, 1991 AMC 2341 (3rd Cir. 1991), admiralty jurisdiction was determined to exist based on an allegation that the crew of the dive boat had failed to timely detect the symptoms of a scuba diver's decompression sickness while the vessel was transporting the diver back to port. In *Matthews v. Howell* , 359 Md. 152 (2000), it was held that wrongful death and survival actions for the drowning of a guest aboard a pleasure boat who either fell or was swimming from the boat at night was not maritime related because federal maritime law applies only to swimming casualties that involve negligent "driving" of the boat or other activities of vessel operation such as repair and maintenance, boarding and disembarking, warning of potential hazards and aiding guests in an emergency.

In *Duplechin v. Professional Asso. of Diving Instructors*, USDC Eastern Dist. of LA., Civil Action No. 86-3925, the court was asked to determine if plaintiff 's claim for personal injuries for having suffered decompression sickness ("the bends") was properly the focus of a claim in admiralty. The defendant was a dive shop that had taught the plaintiff how to scuba dive and issued him a PADI certification several years before the accident. In looking at what is necessary for maritime jurisdiction under *Executive Jet Aviation v. City of Cleveland*, 409 U. S. 249, 92 S. Ct. 493, 34 L. Ed.2d 454 (1972) , and after considering the factors set out in *Foremost Ins. Co. v. Richardson* , 457 U. S. 668, 102 S. Ct. 2654, 73 L. Ed.2d 300 (1982), the court found that providing scuba instruction has "no logical relationship to navigation." The court observed that while the vehicles involved (crew boats on charter to take divers to the offshore oil platforms) bore a relationship to traditional maritime activities, neither the crew boat nor the diving equipment were alleged by plaintiff to relate to his injuries.

In *Specker v. Kasma*, 2016 U. S. Dist. LEXUS 95516, a federal magistrate in the Southern District of California found that plaintiff had properly invoked admiralty jurisdiction in her suit against a shark diving excursion company where the company vessel conducted 'no cage' shark diving experiences in offshore waters and where it was alleged the vessel's captain was under the influence and his poor judgment led directly to

the plaintiffs' injury.

A party seeking to invoke admiralty jurisdiction over a tort claim must satisfy both a location test and a connection test. *Foremost Inc. Co. v. Richardson*, 457 U.S. 668, 674, 102 S. Ct. 2654, 73 L. Ed. 2d 300 (1982). The location test focuses on whether the tort occurred on navigable waters or whether injury suffered on land was caused by a vessel on navigable waters. *Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U. S. 527, 115 S.Ct. 1043, 130 L.Ed. 2d 1024 (1995). The connection test focuses on two points. First, a court must assess the general features of the incident to determine whether it has the potential to disrupt maritime commerce. Second, a court must determine whether the general character of the incident is substantially related to traditional maritime activity. *Sisson v. Ruby,* 497 U.S. 358, 364-365, 110 S.Ct. 2892, 111 L.Ed. 2d. 292 (1990). See also, *In Re Mission Bay Jet Sports, LLC.*, 570 F.3d 1124, 1126-1127 (9th Cir. 2009). If both parts of the connection test are met "then (presuming the location test is satisfied) the claim had the requisite maritime flavor to invoke admiralty jurisdiction". *Daniels v. United States,* 2017 U.S. Dist. LEXIS 129015 (S.D. Cal. 2017).

The main types of recreational scuba dives involve beach dives, where the participants wade into the water from shore to start their dive, and boat dives where participants enter the water from a vessel. This distinction is important because admiralty jurisdiction does not attach to cases involving recreational scuba diving unless a vessel is involved and transportation operational issues are prevalent, since those factors have the potential to disrupt maritime commerce and may be substantially related to traditional maritime activity. Plaintiffs know that the Weldons were on a shore dive with no negligent operation of a vessel involved. Plaintiffs simply conflate the facts to make it appear that there is a maritime connection, which decidedly there is not.

Applying the location test and connection test to this case, as the court must do (*In Re Mission Bay Jet Sports, LLC*, 50 F.3d at 11-26-1127), establishes that the plaintiffs' invocation of admiralty jurisdiction is unfounded. This is the rule in recreational scuba diving cases, not the exception. Simply stated, recreational swimming and scuba diving

on navigable waters generally does not satisfy the tests for admiralty jurisdiction because these activities have no connection to maritime commerce. *See Delgado v. Reef Resorts Ltd.*, 364 F.3d 642-646 (5th Cir. 2004) (holding the death of a recreational scuba diver did not come within admiralty jurisdiction, as it did not disrupt maritime commerce).

As to the locality test, the dive incident of July 3, 2018 did occur on navigable waters. Although the Shark's Cove location is heavily sheltered from the open sea by a multitude of lava rocks and rock outcroppings at low tide, it is not beyond imagination that a boat could enter the dive site.

Second, as to the connection test, the incident here had no potential disruptive impact on maritime commerce. Shark's Cove is not open to maritime commerce. It is strictly a recreational area, which is used almost exclusively in the summer by bathers, snorkelers and scuba divers. In addition, this shore dive has no relation to traditional maritime activity because no vessel was involved.

As noted, courts have consistently held that recreational diving and swimming do not fall within admiralty jurisdiction for that very reason. For example, in *Delta County Ventures, Inc. v. Magana,* 986 F.2d 1260, 1263 (9th Cir. 1993), the court held there was no admiralty jurisdiction over the claims of a swimmer who was injured while diving from a pleasure vessel anchored in navigable waters because recreational acts from a pleasure boat do not have a substantial relationship to a traditional maritime activity. In *Hambrook v. Smith,* 2015 U.S. Dist. LEXIS 70968, *18, 2015 AMC 2156 (D. HI. 2015), the court held that recreational scuba diving accidents may bear the necessary relationship to traditional maritime activities and impact maritime commerce but only if they involve the improper operation or inadequate maintenance of a vessel.

On July 3, 2018 no vessel was involved. Therefore, and admiralty jurisdiction does not attach.

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IV. CONCLUSION

This Court is respectfully requested to dismiss plaintiffs' action on the ground plaintiffs have impermissibly split their causes of action. In the alternative, this Court is respectfully requested to dismiss this action on the ground this matter does not involve admiralty jurisdiction.

Dated: August 21, 2019

LA FOLLETTE, JOHNSON

By: _____

MARK M. WILLIAMS
Attorneys for Defendants, PADI WORLDWIDE CORP., PADI AMERICAS, INC. erroneously sued and served as the PROFESSIONAL ASSOCIATION OF DIVING INSTRUCTORS, and DIVING SCIENCE & TECHNOLOGY CORP.

CERTIFICATE OF SERVICE

STATE OF CALIFORNIA]
] ss.
COUNTY OF LOS ANGELES]

I, the undersigned, certify and declare that I am over the age of 18 years, employed in the County of Los Angeles, State of California, and not a party to the above-entitled cause. On August 22, 2019, I served a true copy of **NOTICE OF MOTION AND MOTION TO DISMISS COMPLAINT FRCP RULE 12(b)(1) and (6)** on the interested parties in Re LYNN BROOKS v. PADI WORLDWIDE CORP., et al.,, Court Case No. 8:19-cv-01314-JVS-JDE, Our Matter No. 00111.40918MMW, by personally delivering it to the person (s) indicated below in the manner as provided in F.R.Civ.P. 5(b); by depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:

John R. Hillsman, Esq.
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Place of Mailing: LA FOLLETTE, JOHNSON, DeHAAS, FESLER & AMES, 865 South Figueroa Street, 32nd Floor, Los Angeles, California 90017-5431
Executed on August 22, 2019 at Los Angeles, California

Please check one of these boxes if service is made by mail:

____ I hereby certify that I am a member of the Bar of the United States District Court, Central District of California.

__X__ I hereby certify that I am employed in the office of a member of the Bar of this Court at whose direction the service was made.

__X__ I hereby certify under the penalty of perjury that the foregoing is true and correct.

MARQUISHA GATEWOOD

«FirmName»