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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT 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.	Case No. 8:19-cv-01314 JVS (IDE) **PLAINTIFFS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO DEFENDANTS' MOTION TO DISMISS COMPLAINT** Sugpo1ting documents: Declaration of John R. Hillsman with Exhibits 1-3 Date: October 7, 2019 Time: 1:30 p.m. Courtroom: 10C

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INTRODUCTION

This case springs from the wrongful death of 61-year-old Howard Weldon. *ECF No. 1* at 4: 12-21. Weldon died of "acute respiratory distress" on July 3, 2018, during a "Discover Scuba Diving Experience™" ("DSD") in Shark's Cove, Oahu. *Id.* at Pars. 26-29. He left a widow, Plaintiff Lynn Brooks, *id.* at 3: 16-4:2, and an 18-year-old son, Plaintiff Andrew Weldon. *Id.* at 4:12-21. Plaintiff Brooks is the duly appointed Personal Representative of Decedent's Estate. *Id.* at 3:16-4:2. She has brought derivative claims for wrongful-death and survival damages under *Yamaha Motor Corp., USA v. Calhoun,* 516 U.S. 199 (1996). *ECF No. 1* at 16:8-16. Plaintiff Weldon was diving alongside his father at Shark's Cove. *Id.* at 15:4-15. He has brought his own claim for bystander distress under *Fawkner v. Atlantis Submarines, Ltd.,* 135 F.Supp.2d 1127 (D.Haw. 2001). *ECF No. 1* at 22, Par. 48.

Plaintiffs Brooks and Weldon reside in California. *Id.* So does Defendant PADI Worldwide Corp. ("PADI"). *Id.* at 4:2-28. But the tortfeasors who presided over Decedent's DSD Experience - the Haleiwa dive shop "SurfN' Sea, Inc.," Surf N' Sea's owner Joe Green, and its dive instructor Jose Ramirez- reside in Hawaii. *ECF No. 23-1* at 3. None of them has the type of contacts with California that would enable this Court to exercise long arm jurisdiction under *Bristol-Myers Squibb Co. v. Superior Court,* 137 S.Ct. 1773 (2017). Alleging diversity jurisdiction under 28 U.S.C. § 1332, Brooks and her son have therefore sued those parties in

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Honolulu. See *ECF No. 23-1* at 2-17. That suit concerns the errors and omissions which,were committed at Shark's Cove on July 3, 2018. *Id.* at 5-11.

This lawsuit is very different. The frauds and misdeeds that gave rise to this suit did not take place at Shark's Cove on July 3, 2018. They began in California almost thirty years earlier and took decades to commit. As another district court summed up in a decision addressing those same frauds and misdeeds:

> Defendant PADI is the world's largest recreational diver training organization. It has developed diver programs that are conducted by professional PADI members in approximately 175 countries and territories. In addition to diver training programs, PADI has developed an introductory dive experience, which is a one-time dive for persons new to scuba diving, known as the Discover Scuba Diving Experience[™] program ('Discover Scuba Experience').
>
> The Discover Scuba Experience was developed as a way for PADI to spur growth into its diving certification process. PADI recognized that the vacation resort market was an important and increasing source of dive-certification candidates. In the 1980's, PADI believed that the introductory dive experiences that were being offered in the vacation resort and cruise markets should be standardized, data should be disseminated to dive stores and dive participants, resort students should be registered, and a referral and follow-up program should be developed to route students to dive stores for PADI certification. PADI thereafter developed and used the Discover Scuba Experience for these purposes as a means of growing its certification business. PADI views the Discover Scuba Experience as a diver acquisition tool.
>
> The Discover Scuba Experience includes a PADI 'Discover Scuba Diving Instructor Guide' and a 'Discovery Scuba Diving'

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participant's pamphlet. The Discover Scuba Experience is designed to 'introduce people to scuba diving in a highly supervised and relaxed manner.' 'Under the guidance of a PADI professional,' the Discover Scuba Experience teaches new divers about 'basic safety concepts' and how to 'put on equipment and swim around underwater in a closely supervised environment.' The Discover Scuba Experience allows for non- divers, and in some instances non-swimmers, to dive in open waters at depths of 40 feet.

PADI recognized that close supervision of the dive participants by the instructor was important, especially in the open water part of the experience, and that a critical factor in determining whether close supervision could be maintained was the student-instructor ratio. PADI understood that the more participants there were, the more difficult it was for the instructor to maintain direct control and close supervision of each student. PADI also recognized, however, that as the number of Discover Scuba Experience participants increased, the number of persons seeking to become PADI certified through PADI courses also increased, thereby increasing their business. PADI initially set the participant-instructor ratio for the Discover Scuba Experience at six-to-one. PADI selected this ratio after having conducted a survey via open-ended questions of its members regarding the Discover Scuba Experience. The survey results revealed that while 89% of the PADI members responded that the number of students per instructor should be six or less, 65% of the respondents believed that the ideal number of students that should dive with one instructor in very favorable conditions was three or less, and 56% responded that the ideal ratio would be two-to-one.

Prior to launching the Discover Scuba Experience in 1993, PADI's introductory dive experiences were taught in a pool or in confined water that was shallow enough to stand up in. In May 1991, PADI noted that this presented a problem in areas such as Hawaii that

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had few pools and PADI considered allowing dives off of the rear of a boat. In the survey of its members discussed above, PADI asked its members about the maximum depth that should be allowed for these open water introductory dives in the Discover Scuba Experience. 85% of the respondents stated that the maximum depth of the introductory dive should be 30 feet or less. Despite this response, PADI set the introductory dive depth at 40 feet.

In addition to the survey results, PADI received letters from its members who ran PADI dive instruction classes. One such letter said 'Please-consider changing the ratio to 2: 1 (but whatever you do - DO NOT increase the ratio and **PLEASE-PLEASE-PLEASE-DO** NOT change the maximum depth ratio limit of 30 feet.' (emphasis in original). Shortly after the Discover Scuba Experience was released, PADI received another letter, which was written by a PADI member who employed 102 PADI instructors and averaged 55 introductory divers a day. The letter stated that 'past experience has proven that even the most experienced of staff can have difficulty with only four participants even under 'ideal conditions.' The letter also stated that the member was disappointed that he was not consulted because his experience in the field must be considered invaluable in ensuring that the standards were the safest and most enjoyable. This **PADI** member was considered one of the top instructors in terms of the numbers of introductory dives he conducted per day.

Despite the survey results and the letters, PADI changed the maximum depth from 30 feet to 40 feet and set the participant-instructor ratio at six-to-one. ****

In the mid-1990s, a male diver participant died during a Discover Scuba Experience after experiencing an embolism from a rapid assent. In 1997, a participant in the Discover Scuba Experience got separated from the group and died by drowning. The Coast Guard investigated that death and determined that the drowning occurred

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> because of the participant's diving inexperience and the lack of direct supervision by the dive instructor. The Coast Guard further determined that the Discover Scuba Experience instructions were ambiguous with respect to the meaning of direct supervision and in other respects. The Coast Guard strongly recommended that PADI clarify their Discover Scuba Experience manual and that it was imperative that they provide clear instructions to help prevent dive casualties.

Isham v. Padi Worldwide Corp., 2008 U.S. Dist. LEXIS 27325, *4-* 10 (D.Haw. 2008) (internal brackets, ellipses, and citations omitted) (emphasis original); see also *ECF No. 1* at 5:21-12:24.

Plaintiffs filed this suit in admiralty, under 28 U.S.C. § 1333, because the general character and overall purpose of PADI's reckless, May 1991 decisions to eliminate shore-based training "in areas such as Hawaii that had few pools" and allow DSD instruction to take place from commercial passenger vessels in open, ocean waters, *ECF No. 1* at 9:23-10: 1, are "so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart v. Great Lakes Dredge & Dock Co.,* 513 U.S. 527, 539-540 (1995). Plaintiffs filed the suit at hand before the Central District of California because PADI is headquartered in nearby Rancho Santa Margarita. *ECF No. 1* at 4:21-28.

THE MOTION AT BAR

We apologize for the length of our opposition; PADI's double-barreled papers challenge our Complaint with two separate motions. The first requests dismissal

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under Fed.R.Civ.P. 12(b)(6) for failure to state a claim, and the second seeks dismissal under Fed.R. Civ. 12(b)(1) for lack of subject matter jurisdiction. *ECF No. 22* at 1:25-28. The 12(b)(6) motion argues that "Plaintiffs split their cause of action" when they failed to sue PADI in Honolulu, ***id.*** at 7:6-11 :23, and the 12(b)(1) motion insists that "admiralty jurisdiction does not attach" because "no vessel was used to rescue, treat, or transport the decedent" on July 30, 2018. ***Id.*** at 14:14-15: 15. Those arguments are inverted and flawed on the merits.

SUMMARY OF OPPOSITION

PADI's arguments are inverted because federal courts are "courts of limited jurisdiction that have not been vested with unlimited open-ended lawmaking powers." *Northwest Airlines, Inc.* v. *Trans. Workers,* 451 U.S. 77, 95 (1981)). Challenges to federal, subject matter jurisdiction therefore contest the court's very "power to adjudicate the case." *Steel Co.* v. *Citizens for a Better Env't,* 523 U.S. 83, 89 (1998). It follows perforce that a "district court must determine questions of subject matter jurisdiction first, before determining the merits of the case." 2 Moore's *Federal Practice* (3rd ed. 2014) § 12.30[1], p. 12-39 (compiling cases).

PADI' s arguments are flawed on the merits because the Complaint adequately alleges admiralty tort jurisdiction and does not split Plaintiffs' cause of action. Where, as here, the defendant contests subject matter jurisdiction on the face of the complaint, the court must "accept the plaintiffs allegations as true, construing them

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most favorably to the plaintiff, and will not look beyond the face of the complaint to determine jurisdiction." 2 Moore's, *supra,* at § 12.30[4], pp. 12-50.2(3)-12.50.2(4). A facial challenge cannot be granted "'unless it appears beyond doubt that the plaintiff can prove no set of facts"' which would support jurisdiction. *Scheuer v. Rhodes,* 416 U.S. 232, 236 (quoting *Conley v. Gibson,* 355 U.S. 41, 45-46 (1957)). Our Complaint alleges that "the incident and activities which gave rise to this action:

> a) occurred upon actual, navigable waters within the State of Hawaii, in that they took place in Shark's Cove, Oahu, less than one marine league from shore;
>
> b) had a potentially disruptive impact on maritime commerce, in that they could have precipitated a response from the United States Coast Guard and/or interrupted or diverted vessels operating in or near Shark's Cove from their appointed voyages, and;
>
> c) had a substantial relationship to traditional maritime activity, in that Defendants and each of them specifically intended, designed, developed, marketed and administered the introductory dive experience known as "the Discover Scuba Diving Experience™ " ("the DSD Experience") to be conducted from and aboard commercial passenger vessels operating upon navigable waters.

ECF No. 1 at 2:10-3:4.

PADI's 12(b)(1) motion sinks or swims on that third allegation - the so-called "substantial-relationship" factor. Reducing that factor to a simplistic rule of thumb, PADI argues that: "On July 3, 2018 no vessel was involved [so] admiralty

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jurisdiction does not attach." *ECF No. 22* at 15: 14-15. But that argument just won't float. First of all, as the Fifth Circuit explained in *Wallace v. Oceaneering Int'l.*, 727 F.2d 427 (5th Cir. 1984), "when a diver descends from the surface, braving the darkness, temperature, lack of oxygen, and high pressures, he embarks on a marine voyage in which his body is now the vessel." *Id.* at 436. More importantly, as the Eastern District of Louisiana explained in *Dredging Supply Rental, Inc. v. USA Debusk,* LLC, 2018 U.S. Dist. LEXIS 135205 (E.D.La. 2018), it is not the involvement or noninvolvement of a vessel which establishes or eliminates admiralty tort jurisdiction. *Id.* at *9-* 12. The dispositive question is whether '"'the general character"'" and "'"overall purpose"'" of "'"the activity giving rise to the incident"'" are "'"so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand."'" *Id.* at *8 (quoting *In re La. Crawfish Producers,* 772 F.3d 1026, 1029 (5th Cir. 2014) (quoting *Grubart,* 513 U.S. at 539-540)).

The activity giving rise to the instant lawsuit was PADI's May-1991 decision to eliminate the requirement for "training in a swimming pool ashore" so that the Discover Scuba Diving Experience™ could "be conducted from and aboard commercial passenger vessels operating upon navigable waters." *ECF No. 1* at 2:25-3:4 and 9:9-10: 12. The overall purpose of that reckless decision was to enable PADI to "use the DSD Experience as a diver acquisition tool" in "the lucrative

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Hawaii market" where there are "relatively few swimming pools." *Id.* at 9:27-10: 1. Since that wrong exposed "non-divers and even non-swimmers" to open-ocean waters that are "subject to waves and submarine currents" and "regularly visited by propeller-driven vessels," *id.* at 8:9-11 and 14:26-15:3, its general character is obviously and intimately related to the types of traditionally maritime activity that call for the uniform application of special admiralty rules. PADI's arguments to the contrary are fatally flawed. So is PADI's cause-splitting argument.

While federal courts have long had discretion to dismiss, stay, or consolidate duplicative actions, see *Adams v. Cal. Dept. of Health Servs.,* 487 F.3d 684, 688, that discretion hinges on "the equities of the case," *id.* at 688, and cannot be exercised "as a matter of law" under Rule 12(b)(6). Even if it could, there is no "clear and consistent test for claim-splitting." *Hartse! Springs Ranch etc. v. Bluegreen Corp.,* 296 F.3d 982, 986 (10th Cir. 2002). Recent cases analyze the problem "as an aspect of *res judicata.* " *Id.* Under that analysis, courts ask themselves "whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Adams,* 487 F.3d at 688. As we will explain on pages 23-25 *infra,* the causes of action asserted and relief sought in this case are demonstrably different from the ones Plaintiffs are litigating in Honolulu, and whatever the moving papers might pretend, neither PADI nor the Defendants in the Hawaiian litigation are prepared to admit that they are in privity with one another.

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ARGUMENT

I. PADI'S ARGUMENTS ARE INVERTED

A. WITHOUT A THRESHOLD FINDING OF SUBJECT MATTER JURISDICTION, THIS COURT HAS NO POWER TO PROCEED ANY FURTHER

PADI argues, first, that Plaintiffs' Complaint should be dismissed on the merits, under Fed.R.Civ.P. 12(b)(6), for failure to state a cause of action, *ECF No. 22* at 8:26-11 :23, and second, that it should be dismissed without prejudice, under Fed.R.Civ.P. 12(b)(1), for lack of subject matter jurisdiction. *ECF No. 22* at 11 :25-15 :25. But those arguments put the cart before the horse.

Federal courts have limited jurisdiction, *Scott,* 306 F.3d at 654, so PADl's second argument undermines this Court's power to adjudicate the first. See *Wachovia Bank v. Schmidt,* 546 U.S. 303, 316-317 (2006). To quote the Ninth Circuit, "questions of subject matter jurisdiction, 'i.e., the courts' statutory or constitutional power to adjudicate the case,' must generally be decided before the merits.". *Wilbur v. Locke,* 423 F.3d 1101, 1106 (9th Cir.2005) (quoting *Steel,* 523 U.S. at 89). That is because: "Without a finding that there is federal jurisdiction over a particular claim for relief, the federal courts are without power to proceed." *Memphis American Fed. of Teachers Local 2032 v. Board of Education,* 534 F.2d 699, 701 (6th Cir. 1976).

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B. IF THIS COURT DECIDES THAT IT LACKS ADMIRALTY JURISDICTION, IT CANNOT MAKE ANY OTHER DETERMINATIONS AND MUST DISMISS THE CASE WITHOUT PREJUDICE

If "a court determines it lacks jurisdiction over a claim, it perforce lacks jurisdiction to make any determination of the merits of the underlying claim" and must dismiss the case "without prejudice." *Brereton v. Bountiful City Corp.,* 434 F.3d 1213, 1217 and 1217 n. 3 (10th Cir. 2006) *(citing* Steel, 523 U.S. at 89 and *Frederiksen v. City of Lockport,* 384 F.3d 437, 438 (7th Cir. 2004); see also *Saleh v. Wiley,* 2012 U.S. Dist. LEXIS 136101, *9-* 10 (D.Col. 2012) ("absent the power to proceed to an adjudication, a court must dismiss without prejudice because it cannot enter a judgment on the merits") (internal brackets, quotation marks, and emphasis omitted). That rule rests on "the belief that a dismissal with prejudice has claim-preclusive effects that cannot be afforded a decision by a court without jurisdiction." *Steele v. Federal Bureau of Prisons,* 355 F.3d 1204, 1215 (10th Cir. 2003) (Hartz, J., concurring). It follows *afortiori* that Your Honor may not decide or even consider PADI's 12(b)(6) motion unless he concludes that this Court has admiralty jurisdiction over Plaintiffs' claims.

Our learned opponents may nonetheless urge Your Honor to take a "peek at merits" of their 12(b)(6) argument, whatever happens with their 12(b)(1) argument, if only to determine whether the case should be transferred to Hawaii. See e.g. *Haugh v. Booker,* 210 F.3d 1147, 1150 (10th Cir. 2000). Such a peek might have

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made sense if PADI were asking Your Honor to transfer the case. *Id.* But PADI is not asking for a transfer under 28 U.S.C. §§ 1406 or 1631, it is asking for a dismissal under Rule 12(b)(6). What is more, if this federal district does not have admiralty jurisdiction over Plaintiffs' claims against PADI, no federal district does.

II. PADI'S ARGUMENTS ARE ALSO FLAWED ON THE MERITS

A. PADI IS WRONG TO SUGGEST THAT PLAINTIFFS HAVE NOT SATISFIED THE REQUIREMENTS FOR ADMIRALTY TORT JURISDICTION

1. This Court Should Deny PADI's 12(b)(l) Motion Unless It Appears Beyond Doubt That Plaintiffs Can Prove No Set of Facts to Support Their Allegation of Admiralty Jurisdiction

Even when it comes to a 12(b)(1) challenge, the burden of proof is on the party asserting jurisdiction. *Kokkonen* v. *Guardian Life etc.* 511 U.S. 375, 377 (1994).

> A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the challenger asserts that the allegations contained in a complaint are insufficient on their face to invoke federal jurisdiction.

Safe Air For Everyonev. Meyer, 373 F.3d 1035, 1039 (9th Cir. 2004). Although the moving papers invite Your Honor to consider some parol evidence in connection with their claim-splitting argument, see *ECF No. 23-1- 23-3,* PADI'sjurisdictional challenge is limited to the face of the Complaint. When considering that challenge, this Court must "accept[] the plaintiffl:s'] version ofjurisdictionally-significant facts as true," "draw all reasonable inferences from them in [plaintiffs'] favor," and

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"assess whether [the plaintiffs' version] has propounded an adequate basis for subject-matter jurisdiction." *Valentin* v. *Hosp. Bella Vista,* 254 F.3d 358, 363 (1st Cir. 2001). A facial challenge cannot be granted "'unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief.'" *Scheuer,* 416 U.S. at 236 (quoting *Conley,* 355 U.S. at 45-46).

2. **It Is By No Means Beyond Doubt that Plaintiffs Can Prove No Set of Facts in Support of Admiralty Jurisdiction**

> Under the modem "two-part formula" for admiralty tort jurisdiction: [A] tort claim must satisfy conditions both of location and of connection with maritime activity. A court applying the location test must determine whether the tort occurred on navigable water or whether injury suffered on land was caused by a vessel on navigable water. The connection test raises two issues. A court, first, must assess the general features of the type of incident involved, to determine whether the incident has a potentially disruptive impact on maritime commerce. Second, a court must determine whether the general character of the activity giving rise to the incident shows a substantial relationship to traditional maritime activity.

Grubart v. Great Lakes Dredge & Dock Co., 513 U.S. 527, 534 (1995) (internal quotation marks and citations omitted).

To state a maritime-tort claim that can withstand a 12(6)(1) challenge, "the plaintiff must allege facts sufficient to satisfy the 'location test' and 'connection test.'" *In re La. Crawfish Producers,* 772 F.3d at 1029. Even the moving papers

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concede that our Complaint satisfies the locality test. *ECF No. 22* at 15:5-6. While PADI committed its frauds and misdeeds ashore: "In applying the 'locality' test for admiralty jurisdiction, the tort is deemed to occur, not where the wrongful act or omission has its inception, but where the impact of the act or omission produces such injury as to give rise to a cause of action." *Wilson v. Transocean Airlines,* 121 F. Supp. 85, 92 (N.D.Cal.1954); see also *Taghadomi v. U.S.,* 401 F.3d 1080, 1984 (9th Cir. 2004) ("the situs of a tort for the purpose of determining admiralty jurisdiction is the place where the injury occurs"). The injury in this case occurred on the coastal waters of Shark's Cove, Oahu. *ECF No. 1* at 2:16-19. Hawaii's coastal waters are "subject to the ebb and flow of the tides" and are therefore navigable *per se* even when they are shallow or reef strewn. *In re Paradise Holdings, Inc.,* 795 F.2d 756, 758-759 (9th Cir. 1986) (waters off Point Panic, Oahu, are navigable even though "[b]oating is prohibited in Point Panic, and navigation is at best treacherous due to shallow water and large reefs); see also *Courtney v. Pacific Adventures,* 5 F.Supp.2d 874, 877 (D.Haw. 1998) (waters off Shark Fin Rock, Lanai are navigable).

Plaintiffs' allegations also satisfy both parts of the "connection test." *ECF No. 1* at 2: 19-3 :4. PADI argues, first, that "the incident here had no potential disruptive impact on maritime commerce" because "Shark's Cove is not open to maritime commerce" but "is used almost exclusively in the summer by bathers,

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snorkelers and scuba divers." *ECF No. 22* at 15:9-12. That argument not only steps outside the four corners of the Complaint, it also misstates the "potential-impact factor."

When determining whether an offshore incident like the one at bar has a potential impact on maritime commerce, courts must view the "incident at an intermediate level of possible generality." *Grubart,* 457 U.S. at 538. That view does not focus on the "particular facts of the incident" but queries in the abstract whether such incidents, when viewed as a "class," have a "'potential"' to impact waterborne commerce. *Grubart,* 513 U.S. at 538 (quoting *Sisson v. Ruby,* 497 U.S. 358, 363 (1990)). In *Sisson,* for example, the Supreme Court held that a fire in the "washer/dryer unit" of a pleasure boat berthed on Lake Michigan had a "potentially disruptive impact on maritime commerce" because it could have "spread to nearby commercial vessels or made the marina inaccessible to such vessels." *Id.* at 360 and 362. When viewed as a class, incidents like the one in this case - involving persons in trouble on coastal waters - have a potentially disruptive impact on maritime commerce because they could precipitate a response from the United States Coast Guard and/or interrupt or divert nearby vessels from their appointed voyages. See *ECF No. 1* at 2: 19-24; see also *In re Germain,* 824 F.3d 258, 273-274 (2d Cir. 2016) ("maritime rescues on open navigable waters could divert resources that would be called upon in the event of an incident involving a commercial vessel, require

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commercial boats themselves to aid in the rescue efforts, or otherwise disrupt commercial shipping by, for example, using federal shipping lanes to transport injured passengers to safety"). PADI's arguments to the contrary are all wet.

PADI argues, next, that Plaintiffs' s allegations do not satisfy the "substantial-relationship factor" because "recreational scuba diving, whether from shore or from a vessel, has no traditional connection with maritime commerce." *ECF No. 22* at 12:3-5. That argument suffers from several flaws. For starters, as maritime law's leading commentator explains: "Diving and some swimming incidents are [] commonly held to meet the connection tests." 1 Schoenbaum, *Admiralty & Maritime Law* (6th ed. 2018) § 3.5, p. 176; see also *Sinclair v. Soniform,* 935 F.2d 599, 602 (3rd Cir. 1991) (scuba-diving accident covered); *McCenahan v. Paradise Cruises,* 888 F. Supp. 120, 121-121 (D.Haw. 1995) (same); *Courtney,* 5 F. Supp.2d at 878-879 (same); *In re Kanoa, Inc.,* 872 F. Supp. 740, 745 n.3 (D. Haw. 1994) (same); *Hambrookv. Smith,* 2015 U.S. Dist. LEXIS 70968, *18-* 19 (D.Haw. 2015) (same); *Smith v. Carnival Corp.,* 584 F. Supp. 2d 1343, 1348 (S.D.Fla. 2008) (snorkel accident covered); *Strickert v. Neal,* 2015 U.S. Dist. LEXIS 160442, *11-*14 (D.Haw. 2015) (same). Diving, after all, *"necessarily* involves exposure to numerous marine perils, and is inherently maritime because it cannot be done on land." *Wallace,* 727 F.2d at 436 (original emphasis).

Furthermore, whatever PADI may suppose, the Ninth Circuit has long

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recognized that "the nature of the tortfeasors' activities is 'not dispositive' of the traditional maritime activity issue" and that "the focus should be on the 'wrong' underlying the claim rather than on" the particular activities of "either party." *In re Paradise Holdings,* 795 F.2d at 760 (quoting *Foremost Ins. Co. v. Richardson,* 457 U.S. 668,674 (1982)). The wrong here is PADI's May-1991 decision to eliminate pool training and allow maiden DSD Experiences to occur on open-ocean waters. *ECF No. 1* at 2:25-3:4 and 9:23-10:12. The moving papers ignore that underlying wrong and distort the focus of the substantial-relationship factor by concentrating on Decedent Weldon's activities and urging this Court to eschew admiralty tort jurisdiction because he was attempting a recreational "dive from the shore." See *ECF No. 22* at 11:25-28.

The mere fact that a maritime activity is "recreational" does not place it beyond the reach of admiralty. See e.g. *In re Mission Bay Jet Sports, LLC,* 570 F.3d 1124, 1126-1128 (9th Cir. 2009) (holding that a recreational, jet ski accident "in an area where no commercial shipping occurs" has a "significant relationship to traditional maritime activity) (citing *Foremost,* 457 U.S. at 674 and *Sisson,* 497 U.S. at 364-367). Nor need Plaintiffs show that a vessel "was used to rescue, treat, or transport the decedent" on July 30, 2018. *ECF No. 22* at 14: 14-15: 15. It has been said that "virtually every activity involving a vessel on navigable waters would be a traditional maritime activity sufficient to invoke maritime jurisdiction." *Grubart,*

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513 U.S. at 542. But it has also been said that a diver like Decedent Weldon "embarks on a marine voyage in which his body is now the vessel." *Wallace,* at 727 F.2d at 436.

More importantly, the fact that activities involving vessels ordinarily invoke admiralty jurisdiction does not mean that the presence or absence of a vessel is dispositive of admiralty jurisdiction. When all is said and done, the critical question is "whether the general character" and "overall purpose" of "a tortfeasor's activity, commercial or noncommercial, on navigable waters is so closely related to activity traditionally subject to admiralty law that the reasons for applying special admiralty rules would apply in the suit at hand." *Grubart,* 513 U.S. at 539-540. That is why the Eastern District of Louisiana refused to exercise admiralty tort jurisdiction over an incident in which the dredge KATHY sank beneath the Yellowstone River while clearing sediment from a water intake used by an oil refinery. *Dredging Supply Rental,* 2018 U.S. Dist. LEXIS 135205 at *2-*3. That incident clearly involved a vessel on navigable waters, but the court looked "to the overall purpose of the project, not the immediate means used to carry out that purpose," and concluded that the sinking did not satisfy the substantial-relationship requirement because the KATHY's job "was maintenance work of a refinery performed from a vessel." *Id.* at *10-* 11. "Such activity is not substantially related to traditional maritime activity" because it involves "purely local, land-based interests" that do not call for the

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application of uniform admiralty rules. *Id.* at* 11.

In *Grubart,* by contrast, the Supreme Court upheld admiralty tort jurisdiction over a claim involving a crane barge that had damaged an underwater tunnel while driving fender piles around a drawbridge on the Chicago River. That project too comprised "maintenance work on a navigable waterway performed from a vessel," but its overall purpose implicated the uniform principles of admiralty law because the protective, fender pile the barge was driving benefitted both the bridge and the maritime traffic that passed beneath it. See *Grubart,* 513 U.S. at 541-542. The differing results in *Grubart* and *Dredging Supply Rental* point the way to admiralty jurisdiction in this case.

If we focus on the general characteristics of the "wrong" underlying the Plaintiffs' claims, rather than on the particular activities of Decedent Weldon on the day of the accident, and consider "the overall purpose" of the DSD Experience and "not the immediate means used to carry out that purpose," the reasons for applying the uniform rules of admiralty become obvious. The need for uniformity in admiralty is rooted Art. IV, cl. 2 of the Constitution, *In re Exxon Valdez,* 484 F.3d 1098, 1101 (9th Cir. 2007) (citing U.S. Const. Art. VI, cl. 2), and "calls for federal supremacy in maritime affairs through a system of uniform federal maritime laws." *Birrer v. Flota Mercante Grancolombiana,* 386 F. Supp. 1105, 1108 (D.Or. 1974) (citing *Southern Pacific Co. v. Jensen,* 244 U.S. 205, 215 (1917)). Unlike the

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situation in *Dredging Supply Rental,* the concerns at hand are neither purely local nor land-based. To the contrary, the wrong at issue here permitted DSD novices to train on ocean waters in 175 countries worldwide. *ECF No. 1* at 5:23-27, 6:10-27; see also *Isham, supra,* at *4 and *5. What is more, as in *Grubart,* PADI's decision to conduct the DSD Experience "from commercial passenger vessels" benefitted maritime commerce. That profit-driven decision allowed "novices like Decedent Weldon to take their first underwater breath of compressed air at open-water dive sites" that were "subject to surface waves and submarine currents" and "regularly visited by propeller-driven vessels." *ECF No. 1* at 9:23-10:12 and 4:26-15:3.

The general character and overall purpose of PADI's global, DSD program thus call for the uniform application of special admiralty rules. *Grubart,* 513 U.S. at 539-540. If those uniform rules do not apply to the DSD Experience, the victims of PADI's wrongs would have different legal rights, depending on whether they made the accident dive from a boat or a beach, even when they were victimized side-by-side in the same stretch of navigable water.

B. PADI IS ALSO WRONG TO ARGUE THAT PLAINTIFFS SPLIT THEIR CAUSE OF ACTION

1. PADI's Reliance on Rule 12(b)(6) Is Inapt

Although "no precise rule has evolved," district courts have long had discretion to control duplicative actions on their dockets. *Colo. River Water Conservation Dist. v. United States,* 424 U.S. 800, 817 (1976). That discretion

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empowers them to: 1) "dismiss a duplicative later-filed action," 2) "stay that action pending resolution of the previously filed action," or 3) "consolidate both actions." *Adams,* 487 F.3d at 688. But Rule 12(b) is too blunt an instrument to mete out those nuanced remedies. It does not permit courts to stay or consolidate actions, and even the decision to dismiss a duplicative claim turns on "the equities of the case," *id.,* while 12(b)(6) dismissals can be ordered only "if as a matter of law 'it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.'" *Neitzke v. Williams,* 490 U.S. 319, 327 (1989) (quoting *Hishon v. King & Spalding,* 467 U.S. 69, 73 (1984).

What is more, far from abiding by the requirements of Rule 12(b)(6), PADI has presented its claim-splitting argument as a speaking motion. A "speaking motion" is "a motion that includes evidentiary matters outside the pleadings[.]" *Kamen v. Am. Tel.,* 791 F.2d 1006, 1010-1011 (2nd Cir. 1986).

> In passing on a Rule 12(b)(6) motion to dismiss the complaint, a court cannot consider the facts supplied by a 'speaking motion' - facts not found within the four corners of the complaint itself. To do so converts the Rule 12(b)(6) motion into one for summary judgment under Rule 56.

Carver Middle Sch. etc. v. Sch. Bd. of Lake County, 2 F. Supp. 3d 1277, 1282 (M.D.Fla. 2014). While judicial notice is permissible under Rule 12(b)(6), e.g., *Norris v. Hearst Trust,* 500 F.3d 454, 461 n.9 (5th Cir. 2007), a "court may not take judicial notice of proceedings or records in another cause so as to supply, without

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formal introduction of evidence, facts essential to support a contention in a cause then before it." *M/V Am. Queen* v. *San Diego Marine Constr. Corp.,* 708 F.2d 1483, 1491 (9th Cir. 1983). "Taking judicial notice of the truth of the contents of a filing from a related action could reach, and perhaps breach, the boundaries of proper judicial notice." *Werner* v. *Werner,* 267 F.3d 288, 295 (3rd Cir. 2001). As we will explain on pages 24-25 *infra,* PADI's papers cross that line.

2. PADI Did Not and Cannot Show That This Action Is Precluded under Principles of *Res Judicata*

Federal courts "have not developed one clear and consistent test for claim-splitting," *Hartse! Springs Ranch of Colo., Inc.* v. *Bluegreen Corp.,* 296 F.3d 982, 986 (10th Cir. 2002), but the basic idea is that "plaintiffs have no right to maintain two actions on the same subject in the same court, against the same defendant at the same time." *Curtis* v. *Citibank, N.A.,* 226 F.3d 133, 139 (2d Cir. 2000). That idea dates back to the hidebound notion that:

> When the pendency of a [previously filed] suit is set up to defeat another, the case must be the same. There must be the same parties, or, at least, such as represent the same interests; there must be the same rights asserted and the same relief prayed for; the relief must be founded upon the same facts, and the title, or essential basis, of the relief sought must be the same.

The Haytian Republic, 154 U.S. 118, 124 (1894) (internal quotation marks and citations omitted).

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"[M]ore recent cases analyze claim-splitting as an aspect of *res judicata." Hartse/,* 296 F.3d at 986. Here in the Ninth Circuit, "we borrow from the test for claim preclusion." *Adams,* 487 F.3d. at 688. "'In the claim-splitting context, the appropriate inqui$_{ry}$ is whether, assuming that the first suit were already final, the second suit could be precluded pursuant to claim preclusion.'" *Id.* (quoting *Hartse/,* 296 F.3d at 987 n.1) (brackets omitted). "Thus, in assessing whether the second action is duplicative of the first, we examine whether the causes of action and relief sought, as well as the parties or privies to the action, are the same." *Id.* at 689.

In order to determine whether the causes of action and relief sought are the same, the courts of this circuit ask:

> (1) whether 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. The last of these criteria is the most important.

Id. (internal quotation marks and citation omitted).

PADI did not and cannot show that any of those questions can be answered in the affirmative. PADI is not party or privie to the Honolulu action, so its rights or interests cannot be destroyed by the prosecution thereof. Plaintiffs are suing the Honolulu tortfeasors for the negligence they committed on July 3, 2017, and PADI for the decades of frauds and misdeeds it has been perpetrating since the 1980's, so

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the evidence in the two actions will be very different. Plaintiffs seek only compensatory damages in Honolulu action but are praying for punitive damages in this action, so the two suits vindicate different rights. Finally, although both actions concern 'the wrongful death of Decedent Weldon, the one in Honolulu begins and ends at Shark's Cove while this one addresses transactions and occurrences that took place in 175 countries worldwide. Those two actions are not duplicative.

Nor has PADI shown that it is in privity with the Honolulu defendants. Privity "is a legal conclusion designating a person so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved." *US. v. Sehimmels,* 127 F.3d 875, 881 (9th Cir. 1997). Plaintiffs have alleged that PADI and the Honolulu defendants were engaged in "a joint venture," and the moving papers insist that this Court may therefore conclude, as a matter of law, that they are privies of one another. *ECF No. 22* at 4:10-5:15. But this Court cannot accept the truth of those allegations, *M/V Am. Queen,* 708 F.2d at 1491, because the Honolulu defendants have already denied our joint venture allegation. See *Hillsman Deel., Exhibit 1* at 2, Par. 3 and *Exhibit 2* at 5, Par. 16; see also *Hillsman Deel.* at 3:20-4:4. When PADI finally answers our Complaint, it will deny that allegation too. See *Hillsman Deel., Exhibit 3.* To put it as politely as possible, the moving papers' suggestion that PADI and the Honolulu Defendants are in privity is premature.

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At this stage, all one can say for certain is that PADI, Green, SurfN' Sea, and Ramirez are joint tortfeasors. "There is no privity between joint tortfeasors for *res judicata* purposes, because all are jointly and severally liable." *Hermes Automation etc. v. Hyundai Electronics etc.,* 915 F.2d 739, 752 (1st Cir. 1990) (internal brackets, quotation marks, and citation excluded). That is definitely the case under maritime tort law. See e.g. *McDermott v. AmClyde & Riverdon Castings Ltd.* (1994)511 U.S. 202, 220; *Coats v. Penrod Drilling Corp.* (5th Cir. 1995) 61 F.3d 1113, 1116;; *Miller v. Christopher* (9th Cir. 1989) 887 F.2d 902, 904 (same). PADI's claim-splitting arguments don't hold water.

CONCLUSION

WHEREFORE, Plaintiffs urge the Court to deny PADI's motion in all respects.

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