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UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA---SOUTHERN DIVISION

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

REPLY BRIEF TO OPPOSITION TO RULE 12 MOTION TO DISMISS

DATE: October 7, 2019
TIME: 1:30 P.M.
LOCATION: Courtroom 10c

COME NOW defendants PADI Worldwide, Corp., PADI Americas, Inc. and Diving Science & Technology Corp., and submit their reply to the plaintiffs' opposition to the Motion to Dismiss Pursuant to Rule 12(b)(1) and (6).

Dated: September 17, 2019

LA FOLLETTE, JOHNSON, DeHAAS, FESLER & AMES

By: M. Williams

MARK M. WILLIAMS
Attorneys for Defendants

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MEMORANDUM OF POINTS AND AUTHORITIES

I. INTRODUCTION:

Defendants filed a Rule 12(b)(1) and (6) motion to dismiss the Complaint as facial attacks on jurisdiction and on splitting the causes of action. Plaintiffs' opposition raises specific factual allegations on the issue of admiralty jurisdiction based on very specific claims about the design and nature of the PADI Discover Scuba® Diving ("DSD") program over the decades, which is their theory of liability on causes of action for wrongful death, survival and NIED. When the question of jurisdiction and the merits of the action are so intertwined as they are here, the court may leave the resolution of the material factual disputes as to jurisdiction to the trier of fact. *Courtyard v. California Franchise Tax Board*, 729 F3d 1279, 1284 (9th Cir. 2013); *Intelisoft, Ltd. v. Acer AM Corp.* , U. S. Dist. LEXIS 8380.

It cannot be overemphasized that the case before this court involves a shore dive from the beach on the North Shore of Oahu. No vessel was involved. The Coast Guard and the marine resources of the State of Hawaii were not involved in this response. The only allegations in the California Complaint in this area are that PADI designed a DSD program that could be offered from a vessel and the marine resources of the Coast Guard could have been involved in this emergency. These are bootstrap arguments designed to confuse the court and to obscure the facts. No vessel was involved and PADI's DSD program procedures for conducting a DSD from a vessel were not involved. Those claims are, quite frankly, irrelevant.

2. AUTHORITY TO DISMISS THE COMPLAINT:

Plaintiffs argue that the motion to dismiss under Rule 12(b)(6) should have been a motion to transfer based on venue under 28 U S C §§1406 or 1631. (Opposition papers, pgs. 11 to 12.) Plaintiffs also argue that defendants have made a factual attack or "speaking motion" on the issue of claim splitting (Opposition pg. 21), and they also assert that the court's analysis should be along the lines of *res judicata*. (Opposition papers, pgs. 22-25.)

This court was asked to take judicial notice of the plaintiffs' Hawaii action. Plaintiffs in the California action filed a document with this Court listing the Hawaii action as a related action. Without the court's acknowledgment of the existence of the Hawaii lawsuit and its causes of action for wrongful death, survival and NIED, the claim of impermissible cause of action splitting would not lie.

The Hawaii defendants' Answers raise the defense of express waiver of liability and assumption of risk, which is supported by the plaintiffs' production in the Hawaii discovery of those waiver agreements. Plaintiffs now object in California that taking notice of these waivers of liability is inappropriate in the context of the instant motion. (Opposition pgs. 21-22) Those waivers of liability and assumption of risk agreements are the "elephant(s) in the living room" that plaintiffs would prefer this Court ignore. By filing separate actions to enforce the same rights and carving PADI out for separate treatment in a California courtroom, plaintiffs have deprived PADI of the opportunity to directly defend itself on the issues involving the operation of those agreements notwithstanding the fact PADI is a released party to each of those contracts.

This court has inherent power to police its docket and order the plaintiffs to take their action to Hawaii where the Hawaii courts can determine if this action belongs in federal court under admiralty rules of jurisdiction. The Hawaii court should make that jurisdictional call, not the court in California where the claims against PADI do not belong.

The California Complaint and the plaintiffs' opposition papers are replete with complicated and convoluted factual allegations and assertions concerning PADI's development of the original resort introductory dive and what ultimately, in the 1990's and early 2000's, became the Discover Scuba® Diving program. The plaintiffs have woven their claim of admiralty subject matter jurisdiction within these many scuba program development allegations. In particular, the plaintiffs claim that PADI ultimately designed or re-designed Discover Scuba® to include the option of offering the program from a vessel in navigable waters. That claim, however irrelevant to the facts of this case,

is offered as evidence of facts showing the sued upon program was designed and in fact operates to impact traditional maritime activities.

The Ninth Circuit set forth when it was proper to dismiss an action under FRCP Rule 12(b)(1) despite the intermingling of the jurisdictional and merits based arguments in the matter *of Williston Basin Interstate Pipeline Co. v. An Exclusive Gas Storage Leasehold & Easement in the Cloverly Subterranean Geological Formation*, 524 F.3d 1090, 1094 (9th Cir. 2008) ("Williston"). In *Williston*, the Court set forth the rule as follows:

> "As a general rule, when "[t]he question of jurisdiction and the merits of [the] action are intertwined," dismissal for lack of subject matter jurisdiction is improper. See *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004). Such an intertwining of jurisdiction and merits may occur when a party's right to recovery rests upon the interpretation of a federal statute that provides both the basis for the court's subject matter jurisdiction and the plaintiff's claim for relief. See id. (citing *Sun Valley Gas., Inc. v. Ernst Enters.*, 711 F.2d 138, 139 (9th Cir. 1983)). As the Court explained in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 118 S. Ct. 1003, 140 L. Ed. 2d 210 (1998), "if 'the right of the petitioners to recover under their complaint will be sustained if the Constitution and laws of the United States are given one construction and will be defeated if they are given another,' " then the court has jurisdiction over the dispute, and cannot dismiss on jurisdictional grounds. Id. at 89 (quoting *Bell v. Hood*, 327 U.S. 678, 685, 66 S. Ct. 773, 90 L. Ed. 939 (1946)).

Here, the Court's subject matter jurisdiction as well as the merits as asserted against PADI all rest upon plaintiff's contention that this matter arises under admiralty

law, which is exclusively a federal question. Thus, pursuant to the general rule set forth in *Williston*, the ultimate finder of fact is charged with determining: (1) whether admiralty jurisdiction of this Court is triggered based upon the facts of this matter; (2) whether PADI is liable on the merits for plaintiff's damages under the relevant admiralty law. The answer to both of these questions can be decided in the negative at this time based upon those matters for which judicial notice has been requested. Thus, the Court can, based upon the facts alleged and judicially noticed, determine that the Court has no jurisdiction over plaintiff's claims against the defendants herein and that the plaintiff has no claims arising out of admiralty jurisdiction which cannot be adjudication by the companion action filed in Hawaii for which they are attempting to split claims.

Still further, based upon the plaintiff's overreach in having this matter heard pursuant to admiralty jurisdiction of this Court, the exception to the general rule in *Williston*, governs here. As provided in *Williston,* supra, '"a suit may sometimes be dismissed for want of jurisdiction where the alleged claim under the Constitution or federal statutes clearly appears to be immaterial and made solely for the purpose of obtaining jurisdiction or where such a claim is wholly insubstantial and frivolous.'" *Bell*, 327 U.S. at 682-83; see also *Steel Co.*, 523 U.S. at 89."

Here, plaintiff argues that the defendants should be held to account under admiralty jurisdiction where applicable case and statutory law, when applied to the alleged facts which involve recreational SCUBA diving from a beach and do not involve the use of any vessel either for the dive or the rescue. Thus, the Court can determine under both 12(b)(1) that no jurisdiction lies because, under 12(b)(6) plaintiffs have failed to state a claim under admiralty law.

On the other hand, if the Court deems that it cannot properly determine both jurisdiction and the merits of this matter based upon what is before the Court, then it is appropriate for this Court to control its own docket and to preserve judicial resources by ordering this matter transferred and heard with the case pending in the District of Hawaii that arises out of the same nucleus of operative facts.

Accordingly, for the reasons set forth herein the Court should grant defendant's motion in its entirety or order this matter transferred so that a single finder of fact can decide the intertwined issues of jurisdiction and the merits of this action.

3. ADMIRALTY JURISDICTION AND PADI'S DSD PROGRAM:

Plaintiffs argument for admiralty jurisdiction is largely based upon claims that the DSD program was a program designed to be offered from a vessel in navigable waters. However, this argument misses the point of the long line of cases cited in the moving papers concerning recreational scuba diving, whether from shore or from a vessel. Federal courts have consistently held that recreational scuba diving from a vessel, like swimming from a recreational vessel, does not have a connection to traditional maritime activities. Of what relevance is the claim that PADI designed DSD to eliminate shore-based training in Hawaii in favor of DSD programs taking place from commercial passenger vessels when the facts of this case involve a shore dive from a state park on the North Shore of Hawaii? (See Opposition pg. 5, lines 11-24.)

Wallace v. Oceaneering International, 727 F.2d 427 (5th Cir. 1984), involved a Jones Act lawsuit and the issue of the Mariner & Seaman status of a commercial diver. *Id.* at 429. The entire context of the opinion of the court reads in terms of the activities and role of a commercial diver working in the oil field service industry in the Gulf.

Mission Bay Jet Sports v. Colombo, 570 F.3d 1124 (9th Cir. 2009), involved the use of a personal watercraft which both sides agreed was a vessel. The issue was whether the injuries to the two women who were thrown off a See Doo PWC in Mission Bay was an action under admiralty jurisdiction of the district court. The trial judge determined there was no potential impact on maritime commerce because the incident involved injuries from a single recreational vessel accident in an area of the bay where no commercial shipping occurs. The 9th Circuit concluded the accident occurred on navigable waters (*Id.* at 8) and looked to the *Foremost* opinion for guidance on whether the wrong had a significant relationship with traditional maritime activity. *Id.*

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Foremost Ins. Co. v. Richardson, 457 U. S. 668, 674, 115 S. Ct. 1043 (1982) involved the negligent operation of a vessel on navigable waters. *Sission v. Ruby*, 497 U. S. 358, 363, 364 n.2, 110 S. Ct. 2892 (1990), involved a fire aboard a pleasure boat docked at a marina that spread to the dock and to other vessels. Id. at 363. *Jerome B. Grubart v. Great Lakes Dredge & Dock*, 513 U. S. 527, 534, 115 S. Ct. 1043 (1995) involved a crane barge installing pilings in the Chicago River that weakened the underwater tunnel and led to flooding of the tunnel and adjacent buildings in The Loop.

In each the foregoing cases, the courts found potential detrimental effect on maritime commerce. Applying those lessons to the facts in the *Mission Bay Jet Sports* matter, the 9th Circuit ruled that "*a vessel from which a passenger goes overboard in navigable waters would likely stop to search and rescue, call for assistance from others—which in this case could include the Coast guard and in fact did involve another vessel—and ensnarl maritime traffic in the lanes affected.*" The matter was returned to the trial court for resolution of questions involving the LOLA action filed by the vessel owner. 570 F.3d 124 at 1129.

In *Sinclair v. Soniform*, 935 F.2d 599, 602-603 (3rd Cir. 1991), the issue was whether the negligence of a commercial dive boat crew in failing to recognize and provide appropriate first aid to recreational scuba divers suffering from decompression sickness after a dive rose to the level of affecting maritime commerce actually or potentially, The 3rd Circuit found that the potential for a significant impact was present. Id. at 602.

The holding of the 9th Circuit in *Tancredi v. Dive Makai Charters*, 823 F. Supp. 778; 1993 U. S. Dist. LEXIS 12326 (1993), provides guidance. There, the District Court in Hawaii, sitting in diversity, applied Hawaii state law, not federal maritime law. The defendant appealed and the 9th Circuit which looked to the holdings in the line of cases descending from *Executive Jet*, to include *Sisson v. Ruby*, *Foremost v. Richardson,* and *Sinclair v. Soniform* (citations omitted), and after examining its holding in *Delta Country Ventures, Inc. v. Magana*, 986 F.2d 1260 (9th Cir. 1993), the 9th Circuit determined that

"*there is nothing inherent in the sport of scuba diving itself that mandates that all tort actions involving scuba should fall under the general maritime law. While scuba diving conducted by commercial salvage divers may fall within general maritime law, recreational scuba diving is analogous to recreational swimming.*" Id. at 784.

Plaintiffs' citation to Schoenbaum, *Admiralty & Maritime Law* (6th ed. 2018) at pg. 16 of their brief was found at page 34, §1-5, Admiralty Tort Jurisdiction of the 2019 edition. The cases cited at footnote 234 by Schoenbaum in support of his statement that "diving and some swimming incidents are also commonly held to meet the connection tests" are cases involving a swimmer who dove off a pleasure boat anchored in navigable waters that required a large marine response (*German v. Ficarra*, 824 F.3d 258, 265-276) and a So Cal recreational shark dive in which the plaintiff alleged the captain of the dive boat was intoxicated (*Specker v. Kasma*, 216 AMC 2073).

Absent a recreational scuba dive involving the negligent operation of a vessel in navigable waters, the courts have consistently held there is no actual or potential impact on traditional maritime activities.

4. CONCLUSION:

The Court is requested to dismiss this action or, if appropriate, transfer this action to the District Court in Honolulu.

Dated: September 17, 2019

LA FOLLETTE, JOHNSON, DeHAAS, FESLER & AMES

By: M. Williams

MARK M. WILLIAMS
Attorneys for Defendants

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 September 20, 2019, I served a true copy of **REPLY BRIEF TO OPPOSITION TO RULE 12 MOTIONS TO DISMISS** 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 depositing it in the United States Mail in a sealed envelope with the postage thereon fully prepaid to the following:.

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Executed on September 20, 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.

/s/
FABIOLA DURAN

LA FOLLETTE, JOHNSON, DeHAAS, FESLER & AMES