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20 Personal Representative of the Estate of
21 CHARLES SPENCER McILVAIN
22 Claimant/Respondent

23 UNITED STATES DISTRICT COURT
24 CENTRAL DISTRICT OF CALIFORNIA
25 IN ADMIRALTY

26 In the Matter of the Complaint of) Case No. CV 19-7693 PA (MRWx)
27 TRUTH AQUATICS, INC. and)
28 GLEN RICHARD FRITZLER and) **CLAIMANT/RESPONDENT**
DANA JEANNE FRITZLER,) **JASMINE LORD'S**
Individually and as Trustees of the) **COUNTERCLAIM FOR**
Fritzler Family Trust DTD 7/27/92 as) **COMPENSATORY AND**
owners and/or owners *pro hac vice* of) **PUNITIVE DAMAGES**
the dive vessel CONCEPTION,)
Official Vessel Number 638133, for)
Exoneration from or Limitation of)
Liability)

1 PLEASE TAKE NOTICE that Respondent/Counter Claimant JASMINE
2 LORD acting in her capacity as the specially appointed Personal Representative of
3 the Estate of CHARLES SPENCER McILVAIN (Deceased) (hereinafter “the
4 DECEDENT”), hereby makes due proof of her claim, under Rule F(5) of the
5 Supplemental Admiralty Rules of the Federal Rules of Civil Procedure, against
6 Petitioners TRUTH AQUATICS, INC. and GLEN RICHARD FRITZLER and
7 DANA JEANNE FRITZLER, Individually and as Trustees of the Fritzler Family
8 Trust DTD 7/27/92, as follows:
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12 1. The incident that gave rise to this claim occurred upon the navigable
13 waters of the United States within the territorial waters of the State of California, had
14 an actual and potential impact on maritime commerce, involved a traditional
15 maritime activity, and is subject to admiralty tort jurisdiction, as hereinafter more
16 fully appears.
17

18 2. At all times material hereto, Respondent/Counter Claimant JASMINE
19 LORD (“Respondent/Counter Claimant LORD”) was and still is an adult resident
20 of the State of California and the “spouse” of CHARLES SPENCER McILVAIN,
21 Deceased (“DECEDENT”) as that term is used in 46 U.S.C. § 30302. She is also the
22 duly appointed, Personal Representative of DECEDENT's Estate.
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25 3. DECEDENT was born in 1975. At all times material hereto, he was a
26 “passenger for hire,” as that phrase is used in 33 CFR § 101.105, aboard the dive
27 vessel *CONCEPTION* (O.V.N. 638133) and a “non-seafarer” within the meaning of
28 *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996). As hereinafter more
fully appears, he died aboard that vessel during the early morning hours of

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1 September 2, 2019, when it caught fire and sank in Platts Harbor off Santa Cruz,
2 Island, upon navigable waters within the territorial limits of the State of California,
3
4 see *Tidewater Marine Western, Inc. v. Bradshaw* 14 Cal.4th 557, 564 (1996) (citing
5 Cal. Const., art. III, § 2; Gov. Code, § 170, 171), less than one-hundred yards from
6 shore.

7
8 4. CLARK McILVAIN is DECEDENT’s father and a “parent” as that term
9 is used in 46 U.S.C. § 30302.

10 5. SUZANNE ADAMS is DECEDENT’s mother and a “parent” as that
11 term is used in 46 U.S.C. § 30302. He was born in 1996.

12 6. At all times material hereto, Petitioner TRUTH AQUATICS, INC. was
13 and still is a corporation organized and existing under the laws of the State of
14 California that maintained, and still maintains, its principal place of business at 301
15 Cabrillo Boulevard, Santa Barbara, California, 93101.

16 7. At all times material hereto, Petitioner RICHARD FRITZLER was and
17 still is an individual resident of the State of California.

18 8. At all times material hereto, Petitioner DANA JEANNE FRITZLER
19 was and still is an individual resident of the State of California.

20 9. At all times material hereto, Petitioners, and each of them, owned,
21 maintained, equipped, controlled, and operated the dive boat CONCEPTION as a
22 “small passenger vessel” within the meaning of 46 C.F.R. § 175.110(a).

23 10. On Monday, August 31, 2019, CHARLES SPENCER McILVAIN
24 departed the Port of Santa Barbara aboard the CONCEPTION, along with six crew
25 members and thirty-two other passengers, for a three-day voyage through the
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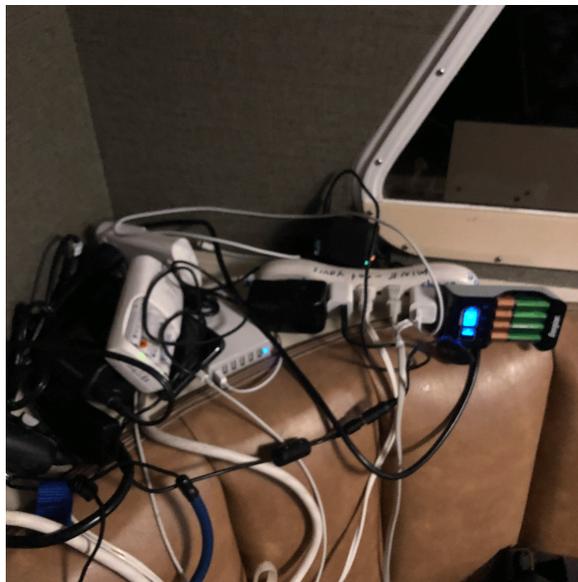
1 Channel Islands (“accident voyage”) that would take the vessel “between ports in the
2 United States” as that phrase is used in 46 U.S.C. § 30509(a)(1).

3
4 11. The CONCEPTION, which is depicted below, was built of wood and
5 fiberglass in 1981. She had a registered tonnage of 66 net tons, and as of August 31,
6 2019, was licensed by the United States Coast Guard to conduct overnight, near-
7 coastal voyages upon the territorial waters of California between Port San Louis and
8 Monterrey. The CONCEPTION had three decks. The pilot house and crew’s
9 quarters were located on the vessel’s uppermost, or “sun,” deck. The galley and
10 quarters were located on the vessel’s uppermost, or “sun,” deck. The galley and
11 salon were situated in a deck house at the forward end of the main deck, and the
12 passenger accommodations were located beneath the main deck, in a below-deck
13 space deep down in the hull itself that had no portholes, skylights, or windows. The
14 only ways into or out of that below-decks, accommodation space were via a narrow,
15 overhead escape hatch into the galley and a companionway from the salon. The
16 vessel’s engine room, generator space, and fuel tanks were also situated in the hull,
17 below the main deck, aft of the passenger accommodations.
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1 12. CONCEPTION was equipped with an onboard electrical system that
2 was powered by diesel generators. Petitioners, and each of them, not only permitted
3 but actively encouraged passengers like DECEDENT to use that electrical system
4 to charge digital cameras, video-cameras, smartphones, cell phones, strobe lights,
5 GoPros, lap top tablets, underwater-scooter power packs, and other battery-powered
6 electronic equipment. Petitioners, and each of them, even equipped
7 CONCEPTION’s galley – in the main deck house directly above the passenger
8 accommodations – with a battery-charging station comprising power strips and the
9 octopus charger depicted below.
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26 13. The CONCEPTION’s dive station was situated back on the fantail,
27 behind the galley and salon. Among other things, that station housed multiple high-
28 pressure air compressors, one or more nitrox membrane systems, high-pressure
piping, one or more banks of high-pressure, oxygen storage bottles, and thirty or
more scuba bottles.

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14. Some of the CONCEPTION’s passengers made a night dive on Tuesday, September 1, 2019, that concluded some time before 2400. By 0230, on Wednesday, September 2, 2019, everyone, including all six of the vessel’s crew members, were in their berths and sound asleep. The vessel lay at anchor, in Platts Harbor off Santa Cruz, Island. No roving watch was set; neither the master nor anyone else directed any crew members to patrol the vessel through the night, monitor the battery-charging station, or sound the alarm in the event of a fire, man-overboard, or other dangerous situation.

15. Some time after 0300, in the early morning hours of Monday, a fire started in or near the galley and quickly spread throughout the vessel, burning the CONCEPTION to the water line, and killing DECEDENT and everyone else in the below-deck, passenger accommodations. The five crew members berthed on the sun deck escaped with their lives and abandoned the vessel.

FIRST CAUSE OF ACTION

(Wrongful Death)

16. Respondent/Counter Claimant LORD herewith refers to, and by that reference incorporates as though fully set forth herein, each and every allegation set forth in paragraphs 1 through 15 hereinabove.

17. This Cause of Action arises under the General Maritime Law of the United States as handed down in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375 (1970), *Sea-Land Services v. Gaudet*, 414 U.S. 573 (1974), *Norfolk Shipbuilding & Drydock Corp. v. Garris*, 532 U.S. 811 (2001), and *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199 (1996), *inter alia*.

1 18. As the owners and operators of the dive vessel CONCEPTION,
2 Petitioners and each of them owned DECEDENT, and every other passenger aboard
3 that vessel on the morning of the accident, a duty of care under *Kermarec v.*
4 *Compagnie Generale Transatlantique*, 358 U.S. 625, 632 (1959), *Rainey v. Paquet*
5 *Cruises, Inc.* 709 F.2d 169, 170 (2d. Cir. 1983), and *In re Catalina Cruises, Inc.*, 137
6 F.3d 1422, 1425-1426 (9th Cir. 1998), *inter alia*. At all times material hereto,
7 Petitioners, and each of them, acting individually and by and through their managing
8 agents, violated that duty of care and acted in reckless disregard for the safety and
9 health of DECEDENT and his fellow passengers in that, among other things:
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- 11
- 12 a. They failed to exercise even scant care to equip the CONCEPTION
13 with an electrical system that was safe, suitable, and reasonably fit for its
14 intended use;
 - 15 b. They failed to exercise even scant care to equip the CONCEPTION
16 with a fire-detection system that was safe, suitable, and reasonable fit for its
17 intended use;
 - 18 c. They failed to exercise even scant care to equip the CONCEPTION
19 with fire-fighting equipment that was safe, suitable, and reasonably fit for its
20 intended purpose;
 - 21 d. They failed to exercise even scant care to equip the CONCEPTION's
22 below-decks passenger accommodations with emergency exits that were safe,
23 suitable, properly designed, and sufficient in size and number, and;
 - 24 e. They ignored a manifest duty and failed to maintain a proper watch
25 aboard the CONCEPTION on the morning of the accident, in violation of the
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black-letter provisions of 46 CFR § 185.410 and the requirements of the CONCEPTION’S vessel’s Certificate of Inspection.

19. As a direct, proximate, and legal result of the hereinabove delicts of Petitioners, and each of them, DECEDENT died, along with thirty-three others, in the CONCEPTION’S below-decks passenger accommodations during the fire described in Paragraph 15 hereinabove.

20. DECEDENT was only 44 years old on the date of this death. Immediately prior to his death, he was a devoted husband and a loving son in excellent physical and mental health and condition. As a direct, proximate, and legal result of DECEDENT’S death, Claimant/Respondent LORD has suffered and will continue to suffer the permanent loss of her husband’s services, support, nurture, and advice all to her pecuniary damage in an amount to be proven at the time of trial.

21. As a further direct, proximate, and legal result of DECEDENT’S death, CLARK McILVAIN and SUZANNE ADAMS, and each of them, have suffered and will continue to suffer the permanent loss of their son’s services, all to their pecuniary damage in an amount to be proven at the time of trial.

22. As a further direct, proximate, and legal result of DECEDENT’S death, Claimant/Respondent LORD has suffered and will continue to suffer the permanent loss of her husband’s love, affection, comfort, care, consortium, and society, all to her non-pecuniary damage in an amount to be proven at the time of trial.

23. As a further direct, proximate, and legal result of DECEDENT’S death, CLARK McILVAIN and SUZANNE ADAMS have suffered and will continue to suffer the permanent loss of their son’s love, affection, comfort, care, and society,

1 all to their non-pecuniary damage in an amount to be proven at the time of trial.

2 24. In performing the acts and committing the omissions alleged herein,
3 Petitioners, and each of them, acted outrageously, and were guilty of gross
4 negligence, willful, wanton, and reckless indifference for the rights of others, or
5 behavior even more deplorable, justifying an award of punitive or exemplary
6 damages in an amount to be determined at the time of trial herein.
7

8
9 WHEREFORE, Respondent/Counter Claimant LORD prays judgment
10 against Petitioners as is hereinafter more fully set forth.
11

12 **SECOND CAUSE OF ACTION**
13 *(Survival Damages)*

14 25. Respondent/Counter Claimant LORD herewith refers to and by that
15 reference incorporates, as though fully set forth herein, each and every allegation
16 averred in her First Cause of Action.
17

18 26. This Cause of Action arises under the General Maritime Law of the
19 United States as handed down in *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375
20 (1970), *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 211 (1996), *Davis v.*
21 *Bender Shipbuilding and Repair Co.*, 27 F.3d 426, 430 (9th Cir. 1994), and *Koirala*
22 *v. Thai Airways International, Ltd.*, 126 F.3d 1205, 1212 (9th Cir. 1997) *inter alia*.
23

24 27. On or about September 2, 2019, when the within cause of action arose
25 in his favor, DECEDENT, who would have been the Claimant in this action had he
26 lived, died by fire and asphyxiation.
27

28 28. As a direct, proximate, and legal result of the hereinabove alleged
delicts of the Petitioners, and each of them, DECEDENT was placed in great fear for
his life and physical well-being, and consciously suffered extreme, severe, and

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1 relentless mental and emotional anguish and physical pain, and continued to suffer
2 such pain and anguish for a substantial period of time, until he died by fire and
3 asphyxiation, all to his general, nonpecuniary damage in an amount to be proven at
4 the time of trial herein.
5

6 29. At the time of his death, DECEDENT had a statistical life expectancy
7 of another 23 years. As a further direct and proximate result of the hereinabove
8 alleged delicts of the Petitioners, DECEDENT has incurred a loss of future earnings
9 and income, all to his special, pecuniary damage in an amount to be determined at
10 the time of trial.
11

12 30. As a further direct and proximate result of the hereinabove alleged
13 delicts of the Petitioners, DECEDENT's Estate has incurred expenses of funeral and
14 cremation, all to the Estate's special, pecuniary damage in an amount to be
15 determined at the time of trial.
16

17 WHEREFORE, Respondent/Counter Claimant prays judgment against
18 Petitioners as follows:
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- 21 a. For funeral and cremation expenses in accordance with the allegations
22 in Paragraph 30 hereinabove;
 - 23 b. For pecuniary and nonpecuniary survival damages in accordance with
24 the allegations in Paragraphs 28 and 29 hereinabove;
 - 25 c. For pecuniary and nonpecuniary wrongful death damages in accordance
26 with the allegations of Paragraphs 12-23 hereinabove;
 - 27 d. For punitive damages in accordance with the allegations of Paragraph
28 24 hereinabove;

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- 1 e. For pre-judgment interest;
- 2 f. For costs of suit; and
- 3
- 4 g. For such other and further relief as the Court may deem just and proper.
- 5

6 Dated: January 29, 2019

MCGUINN, HILLSMAN & PALEFSKY
ROUDA FEDER TIETJEN & MCGUINN

By: /s/ JOHN R. HILLSMAN
JOHN R. HILLSMAN

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