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8 Attorneys for the Plaintiffs

9 UNITED STATES DISTRICT COURT

10 CENTRAL DISTRICT OF CALIFORNIA

11
12 LYNN BROOKS,

13 individually, and as Personal

14 Representative of the Estate

15 of HOWARD WELDON,

16 Deceased, and ANDREW

17 WELDON,

18 Plaintiffs,

19 vs.

20 PADI WORLDWIDE

21 CORP., a California

22 Corporation;

23 PROFESSIONAL

24 ASSOCIATION OF

25 DIVING INSTRUCTORS, a

26 California Corporation; and

27 DIVING SCIENCE &

28 TECHNOLOGY CORP., a

California Corporation,

Defendants.

) Case No. 8:19-CV-1314

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**COMPLAINT FOR WRONGFUL
DEATH DAMAGES, SURVIVAL
DAMAGES, AND PERSONAL
INJURY DAMAGES**

1 Plaintiff Lynn Brooks, acting both individually and as the duly appointed
2 Personal Representative of the Estate of Howard Weldon, Deceased, and Plaintiff
3 Andrew Brooks, acting individually, herewith complain against Defendants and for
4 Causes of Action allege as follows:
5

6 **PRELIMINARY ALLEGATIONS**
7 (Parties, Jurisdiction, and Venue)
8

9 *Jurisdiction and Venue*

10 1. This Court has subject matter over this action pursuant to 28 U.S.C. §
11 1333(1) in that this is an admiralty and maritime claim within the meaning of
12 Fed.R.Civ.P. 9(h). As is hereinbelow more fully alleged, the incident and activities
13 which gave rise to this action:
14

15 a. occurred upon actual, navigable waters within the State of Hawaii, in
16 that they took place in Shark's Cove, Oahu, less than one marine league from
17 shore;
18

19 b. had a potentially disruptive impact on maritime commerce, in that they
20 could have precipitated a response from the United States Coast Guard and/or
21 interrupted or diverted vessels operating in or near Shark's Cove from their
22 appointed voyages, and;
23

24 c. had a substantial relationship to traditional maritime activity, in that
25 Defendants and each of them specifically intended, designed, developed,
26 marketed and administered the introductory dive experience known as "the
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1 Discover Scuba Diving Experience” (“the DSD Experience”) to be conducted
 2 from and aboard commercial passenger vessels operating upon navigable
 3 waters.
 4

5 2. This Court has general, personal jurisdiction over Defendants, and each
 6 of them, under Cal. Code Civ. Pro. § 410.10, and the decisions in *Daimler AG v.*
 7 *Bauman* (2014) 571 U.S. 117 (2014) and *Goodyear Dunlop Tires etc. v. Brown*, 564
 8 U.S. 915 (2011), in that Defendants, and each of them, are domiciled in the State of
 9 California.
 10

11 3. Venue is properly laid in this Court under 28 U.S.C. § 1391(b)(2) in that
 12 Defendants, and each of them, maintain their principal places of business in this
 13 judicial district.
 14

15 *The Plaintiffs*

16 4. Plaintiff Lynn Brooks (“Plaintiff Brooks”) is the duly appointed
 17 Personal Representative of the Estate of Howard Weldon, Deceased and is also said
 18 Decedent’s “spouse,” as that term is used in 46 U.S.C. §30302, in that, at all times
 19 material hereto, she:
 20

- 21 a.) was his unmarried partner;
- 22 b.) was fiscally, physically, emotionally, morally, and socially dependant
- 23 upon him;
- 24 c.) was held out by Decedent as his wife, and;
- 25 d.) was, and is, the mother of Decedent’s natural son, Andrew Weldon.
- 26
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- 28

1 At all times material hereto, Plaintiff Brooks was and still is a resident of the State
2 of California.

3
4 *Plaintiff and Decedent's Son*

5 5. Andrew Weldon ("Plaintiff Weldon") was born on February 23, 2000,
6 and is the natural "child" of Plaintiff Lynn Brooks and Decedent Howard Weldon
7 as that term is used in 46 U.S.C. §30302. At the time of the filing of this Complaint,
8 Plaintiff Weldon was a resident of the State of California.
9

10
11 *The Decedent*

12 6. Decedent Howard Weldon ("Decedent") was born on January 14, 1957.
13 At all times herein mentioned, Decedent was a "nonseafarer" as that term is used in
14 *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199 (2006). Decedent was 61 at
15 the time of his death. Immediately prior to his death, he was an adult resident of the
16 State of California. He was in good physical and mental health and condition and
17 was the loving and supportive spouse of Plaintiff and the adoring and supportive
18 father of Andrew Weldon.
19
20

21
22 *The Defendants*

23 7. At all times herein mentioned, Defendant PADI WORLDWIDE CORP.
24 ("PADI") was and still is a corporation organized and existing under the laws of the
25 State of California and was and still is doing business in California and elsewhere
26 as a recreational scuba diving training and certification agency and the author and
27 publisher of recreational scuba diving manuals, protocols, and procedures.
28

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1 8. At all times herein mentioned, Defendant PROFESSIONAL
2 ASSOCIATION OF DIVING INSTRUCTORS was and still is a corporation
3 organized and existing under the laws of the State of California and was and still is
4 doing business in California and elsewhere as a recreational scuba diving training
5 and certification agency and the author and publisher of recreational scuba diving
6 manuals, protocols, and procedures.
7

8 9. At all times herein mentioned, Defendant DIVING SCIENCE &
9 TECHNOLOGY CORP. was and still is a corporation organized and existing under
10 the laws of the State of California and was and still is doing business in California
11 and elsewhere as a recreational scuba diving training and certification agency and the
12 author and publisher of recreational scuba diving manuals, protocols, and
13 procedures.
14

15 10. The delicts of each Defendant combined and cooperated with the delicts
16 of all the other Defendants so as to cause the subject incident and the resulting
17 damages to Plaintiffs.
18

19 11. Working together, the Defendants, and each of them, have created the
20 world's largest recreational diver training and certification organization. Together,
21 they have designed, developed, published, administered, and marketed recreational
22 dive-training and dive-touring programs that are conducted by professional PADI
23 members in approximately 175 countries worldwide. In addition to those dive-
24 training and dive-touring programs, Defendants, and each of them, have worked
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1 together to design, develop, publish, administer, and market the DSD Experience.
2 As is hereinabove and hereinbelow more fully alleged, the DSD Experience is a
3 one-time dive protocol for untrained, uncertified persons who are brand new to scuba
4 diving. During the 1980's, PADI and its Co-Defendants recognized that the oceanic
5 resort and cruise markets were lucrative, fast growing, and widespread sources for
6 recreational dive-certification candidates. Defendants, and each of them, designed
7 and developed the DSD Experience during the early 1990's to "tap into" those
8 markets for the purpose of funneling more candidates into PADI's dive-certification
9 programs. From the very start, Defendants, and each of them, thus intended,
10 designed, developed, and marketed the DSD Experience to take place not just from
11 resorts, dive shops, and beaches along the coast, but from commercial passenger
12 vessels operating on navigable waters.

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

- 22
23
24 (a) agreed to carry on the DSD Experience for profit;
25 (b) shared a common purpose and a common intent to be joint venturers;
26 (c) shared a community of interest;
27
28

- 1 (d) made mutual contributions of financing, services, skill, property,
 2 knowledge, or effort to the enterprise;
 3
 4 (e) exercised some degree of joint control over the venture; and
 5
 6 (f) agreed to a share both profits and losses.

7 **THE OPERATIVE FACTS**
 8 (The Charging Allegations)

9 *The DSD Experience as a "Diver Acquisition Tool"*

10 13. At all times material hereto, Defendants, and each of them, regarded the
 11 DSD Experience as an important source of revenue to PADI, PADI-certified
 12 Members, PADI-certified Dive Centers, and PADI-certified Dive Resorts, not only
 13 directly through operation of the DSD Experience itself, but also indirectly through
 14 the sale of training and certification courses, dive equipment, and dive experiences
 15 to DSD Experience participants and their families and friends. Defendants, and each
 16 of them, therefore designed, developed, implemented, and copyrighted the DSD
 17 Experience as "a diver acquisition tool." The protocols and procedures for that
 18 copyrighted diver acquisition tool are set forth in "the Discover Scuba Diving
 19 Instructor Guide" and "the Discovery Scuba Diving Participant's Pamphlet." That
 20 tool and those protocols and procedures were never meant to be used as part of a
 21 dive-training or dive-certification program, but were purportedly designed, adopted,
 22 published, implemented, marketed, and administered to:
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1 a. “introduce people to scuba diving in a highly supervised and relaxed
2 manner;”

3
4 b. “dispel common misconceptions about scuba by letting individuals try
5 it for themselves;”

6
7 c. “teach people the basic safety concepts” of scuba diving under the
8 “guidance of a PADI professional,” and;

9
10 c. allow non-divers and even non-swimmers “to put on equipment and
11 swim around underwater in a closely supervised environment.”

12 14. When designing, testing, developing, publishing, marketing,
13 implementing, and administering the copyrighted DSD Experience, Defendants and
14 each of them knew, or in the exercise of even slight care under the circumstances
15 should have known, on the one hand, that:

16
17 a. Close supervision and direct control by a PADI professional over the
18 novices the DSD Experience was designed to entice was essential to the safety
19 of those novices during the open water portion of that Experience, and;
20

21
22 b. The most critical factor in maintaining such supervision and control was
23 the student-instructor ratio.

24 On the other hand, Defendants and each of them also knew or, in the exercise of even
25 slight care under the circumstances should have known, that:

26
27 a. The more novices who participated in any particular DSD Experience,
28 the more difficult it would be for the instructor to maintain close supervision

1 and direct control over those novices; and,

2 b. To best use the DSD Experience as a diver acquisition tool, Defendants
3 would have to run as many people as possible through each introductory dive
4 in that the more novices Defendants could entice to participate in any open
5 water experience, the more potential candidates Defendants would acquire for
6 PADI's dive-training and dive-certification courses.
7

8
9 15. Before the DSD Experience was designed and developed, PADI and its
10 Co-Defendants had designed, tested, implemented, marketed, and administered other
11 introductory scuba diving programs in Hawaii and elsewhere ("pre-existing
12 programs"). The maximum depth of the open-water sites at which PADI members
13 were allowed to conduct introductory dives under the protocols and procedures
14 Defendants established for those pre-existing programs was 30 feet, and the
15 instructor-to-student ratio for those introductory dives was generally two-to-one.
16 The protocols and procedures for those pre-existing programs also required the
17 participants to complete a preliminary safety class and to don scuba equipment,
18 breathe compressed air, and undergo buoyancy-control training in a swimming pool
19 ashore before proceeding to any open water dive site. In May 1991, however, while
20 PADI and its Co-Defendants were designing and developing the DSD Experience,
21 those Defendants and each of them recognized that such a requirement might
22 interfere with their ability to use the DSD Experience as a diver acquisition tool in
23 the lucrative Hawaiian market because the Hawaiian Islands had relatively few
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1 swimming pools. Acting with reckless indifference for the safety and health of
2 participants like Decedent Weldon, ignoring the industry-wide Confined Water
3 Training Standards established for Introductory Scuba Experiences by the
4 Recreational Scuba Training Council, and failing to exercise even slight care under
5 the circumstances, PADI decided not only to eliminate any pool-training from the
6 DSD Experience but also to abbreviate the safety schooling and eliminate buoyancy-
7 control training altogether, and instead, to allow complete novices like Decedent
8 Weldon to take their first underwater breath of compressed air at open-water dive
9 sites that were often too deep to stand up in.

13 16. As part of the initial design and development process for the DSD
14 Experience, PADI sent a written survey to PADI members who had been conducting
15 introductory dives under the aforesaid pre-existing programs, and requested those
16 PADI members' thoughts and recommendations about the proper participant-to-
17 instructor ratio and maximum depth for introductory dives. A clear majority of the
18 PADI members who responded to those surveys recommended a participant-to-
19 instructor ratio of no more than two-to-one, and more than 85% of those respondents
20 urged PADI to conduct DSD dives in waters that were 30 feet or less.

24 17. Ignoring that consensus, acting with reckless disregard for the safety
25 and health of DSD participants like Decedent Weldon, and failing to exercise even
26 slight care under the circumstances, Defendants and each of them:
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28

- a.) Set the initial, participant-instructor ratio for the DSD Experience at six-to-one, and;
- b.) Set the maximum depth for the open-water sites at which DSD dives could be conducted at 40 feet.

18. In the early 1990's, after Defendants had developed and introduced the DSD Experience and published its protocols and procedures, PADI and its Co-Defendants received written complaints about the Experience from several longtime PADI members. As one of those written complaints admonished: "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 limit of 30 feet." According to another letter, submitted by a prominent PADI member who employed 102 PADI instructors and averaged 55 introductory divers a day: "Past experience has proven that even the most experienced of staff can have difficulty with only four participants even under 'ideal' conditions."

19. In the mid-1990's, after the DSD Experience had been up and running for a number of years, an uncertified participant suffered a fatal, pulmonary embolism during an open-water, DSD dive off the Hawaiian Islands. In 1997, another DSD Experience participant got separated from her group during an open-water, introductory dive off the Hawaiian Islands and died by drowning. The United States Coast Guard's Honolulu Marine Safety Office investigated both deaths and determined that they had occurred because of the subject DSD instructors' failure to

1 provide the victims with adequate supervision. The Coast Guard further determined
2 that the instructions, protocols, and procedures set forth in the Discover Scuba
3 Diving Instructor's Guide and the Discover Scuba Diving Participant's Pamphlet
4 were ambiguous with respect to the meaning of the phrase "direct supervision." The
5 Honolulu Marine Safety Office therefore "strongly" recommended that PADI revise
6 those Manuals and clarify those instructions, protocols, and procedures.
7

8
9 20. Disregarding the strong recommendation of the U.S. Coast Guard,
10 acting with reckless disregard for the safety and health of DSD participants like
11 Decedent Weldon, and failing to exercise even slight care under the circumstances,
12 PADI lowered the student-teacher ratio from six-to-one to four-to-one but made no
13 other changes to the protocols and procedures set forth in the Discover Scuba Diving
14 Instructor's Guide or the Discover Scuba Diving Participant's Pamphlet. Instead,
15 Defendants, and each of them, continued to provide DSD participants with a
16 perfunctory and "dumbed down" safety presentation, refused to give those
17 participants any buoyancy-control training, continued to conduct the DSD
18 Experience from coastal beaches and commercial passenger vessels without any
19 preliminary pool training, and continued to permit complete novices to put on scuba
20 equipment and take their first breath of compressed air in open waters.
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26 *The Subject Accident*

27 21. At all times material hereto, Decedent Weldon, Plaintiff Brooks, and
28 their son Plaintiff Weldon were visitors to the island of Oahu and complete novices

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1 when it came to scuba diving. On the morning of July 3, 2018, Decedent Weldon,
2 Plaintiff Brooks, and Plaintiff Weldon drove to the Surf N' Sea dive shop in
3 Haleiwa, Oahu. At all times material hereto, Surf N' Sea was owned by a PADI
4 professional member named Joe Green. After reviewing and relying upon the factual
5 representations that PADI and its Co-Defendants had published in the Discover
6 Scuba Diving Participant's Pamphlet and elsewhere about the safe, relaxed, and
7 closely supervised nature of the DSD Experience, Decedent and Plaintiff Weldon
8 agreed to let "Surf N' Sea" take them on such an Experience.
9
10
11

12 22. After Decedent and Plaintiff Weldon agreed to purchase the DSD
13 Experience from Joe Green and Surf N' Sea, Juan "Adrian" Ramirez introduced
14 himself as the PADI professional who would guide, direct, and supervise them
15 during their introductory, open-water dive. At all times material hereto, Ramirez
16 was a dive instructor trained and certified by PADI to supervise, guide, conduct, and
17 direct the DSD Experience in accordance with the protocols, procedures, and
18 instructions that PADI and its Co-Defendants had set forth in the Discover Scuba
19 Diving Instructor Guide and various supplementary training bulletins.
20
21
22

23 23. After introducing himself, Ramirez gave Decedent Weldon and Plaintiff
24 Weldon a perfunctory safety presentation and asked them to complete a 9-question,
25 true-or-false "Discover Scuba Diving Knowledge and Safety Review." Neither that
26 questionnaire, the advertising published by PADI, the Discover Scuba Diving
27 Participant's Pamphlet, Ramirez's informational presentation, the Discover Scuba
28

1 Diving Knowledge and Safety Review, nor anything else Decedent Weldon or
2 Plaintiff Weldon received from Defendants, Ramirez, or Surf N' Sea adequately
3 described the hazards of barotrauma, the risks of breathing compressed air
4 underwater, or the physiological demands of scuba diving.
5

6 24. Rodriguez thereafter grouped Decedent Weldon and Plaintiff Weldon
7 with a third scuba novice named Carl Senning and provided all three of them with
8 fins, masks, scuba tanks, weight belts, and buoyancy compensation devices. At no
9 time was Decedent required or even allowed to practice using scuba equipment,
10 breathe compressed air, or receive buoyancy-control training either in a swimming
11 pool or in any other relaxed and highly supervised environment. Instead, he was not
12 given an opportunity to do any of those things until Rodriguez took Decedent,
13 Plaintiff Weldon, and Carl Senning to Shark's Cove off Pupukea, Oahu, the tide-
14 driven, open-water dive site that Ramirez and Surf N' Sea had selected for
15 Decedent's introductory scuba dive.
16
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20 25. Although Shark's Cove satisfies the ambiguous criteria PADI and its
21 Co-Defendants had published for open-water dive sites in the Discover Scuba Diving
22 Instructor Guide and the Discover Scuba Diving Participant's Pamphlet, that Cove
23 is not suitable for introductory scuba dives involving untrained novices like
24 Decedent Weldon. Among other things it is large and unprotected, opens directly
25 onto the Pacific Ocean, is subject to surface waves and submarine currents, has a
26
27
28

1 steep and irregular bathymetry that quickly drops to depths well in excess of 40 feet,
2 and is regularly visited by propeller-driven vessels.

3
4 26. Decedent Weldon, Plaintiff Weldon, Carl Senning, and Adrian Ramirez
5 entered the open waters of Shark's Cove shortly after 11:00 a.m. HST. While
6 Ramirez purported to oversee and control the activities of all three novices
7 simultaneously, Decedent Weldon was permitted to descend from the surface in
8 water where it was too deep for him to stand with his head above the surface and
9 take his first, underwater breath of compressed air, under circumstances that were
10 neither relaxed nor closely supervised. Decedent Weldon's son, Plaintiff Weldon,
11 was also in the water, participating in the same DSD Experience, within sight and
12 sound of his father.

13
14
15
16 27. Shortly after Decedent took that unsupervised breath of compressed air,
17 he surfaced rapidly, embolized, and began showing signs of distress. As soon as
18 Decedent reached the surface, he complained that he could not breathe and coughed
19 up a pink, bloody foam.

20
21
22 28. Ramirez swam over and towed Decedent Weldon back to shore without
23 administering any in-water CPR. Someone thereafter summoned emergency first
24 responders who arrived at Shark's Cove and tried without success to revive
25 Decedent. Those first responders thereafter transported Decedent by ambulance to
26 a nearby hospital where he was pronounced dead at 12:41 p.m., HST.
27
28

1 29. The autopsy performed on Decedent Weldon concluded, *inter alia*, that
2 he had died from acute respiratory distress.
3

4 **FIRST CAUSE OF ACTION**

5 *(For Wrongful Death Damages Caused by Fraud and Gross Negligence)*

6 30. Plaintiff hereby incorporates all of the allegations contained in
7 Paragraphs 1-29 hereinabove as though fully set forth herein.
8

9 31. This action arises under the general maritime law of the United States
10 and invokes the remedies handed down in *Moragne v. States Marine Lines*, 398 U.S.
11 375 (1970), *Sea-Land Services, Inc. v. Gaudet*, 414 U.S. 573 (1974), and *Norfolk*
12 *Shipbuilding & Drydock Corp. v. Garriss*, 532 U.S. 811 (2001), as supplemented by
13 *Yamaha Motor Corp., USA v. Calhoun*, 516 U.S. 199 (1996), Haw. Rev. Stats. §
14 663-3, and *Restatement (2d) of Torts*, § 311.
15

16 32. Wantonly using the DSD Experience as a diver acquisition tool,
17 callously hoping to increase their profits, and acting with reckless disregard for the
18 safety and health of participants like Decedent, Defendants and each of them,
19 continuously and repeatedly represented to PADI members and instructors, like Joe
20 Green and Adrian Ramirez, and to consumers and members of the general public,
21 like Decedent and Plaintiff Weldon, that the DSD Experience:
22
23

24 a. was a perfectly safe way of introducing “people to scuba diving in a
25 highly supervised and relaxed manner;”
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1 b. thoroughly schooled participants in all the “basic safety concepts of
2 scuba diving” and;

3
4 c. allowed non-divers and even non-swimmers non-divers to “put on
5 equipment and swim around underwater in” a safe and “closely supervised
6 environment.”
7

8 33. At all times material hereto, and for all the reasons alleged in
9 Paragraphs 13 through 20 hereinabove, Defendants and each of them knew, or in the
10 exercise of even slight care under the circumstances should have known, that those
11 representations were false. In truth, the DSD Experience was an unsafe and
12 inherently dangerous way of introducing people to scuba diving in that, among other
13 things, it:
14

15
16 a. did not always introduce divers to scuba diving in a safe, shallow, and
17 relaxed environment;
18

19 b. did not adequately school participants about the hazards of barotrauma,
20 the risks of breathing compressed air underwater, or the physiological
21 demands of scuba diving;
22

23 c. did not provide participants with any buoyancy-control training, and;

24 d. did not require a student-to-instructor ratio that guaranteed close or
25 direct supervision.
26

27 34. At all times material hereto, Defendants and each of them knew, or in
28 the exercise of even slight care under the circumstances, should have known that

1 DSD participants like Decedent and Plaintiff Weldon would be placed in physical
2 peril by reason of the hereinabove alleged false representations.

3
4 35. On July 3, 2018, Decedent Weldon and his son, Plaintiff Weldon, acted
5 in reliance on Defendants' hereinabove alleged misrepresentations when they
6 purchased a DSD Experience from Joe Green and Surf N' Sea and took an
7 introductory scuba dive at Shark's Cove under the supervision and direction of
8 Adrian Ramirez.

9
10 36. Decedent was only 61 years old when he embolized and died of acute
11 respiratory failure as a direct, proximate, and legal result of Defendants' hereinabove
12 alleged delicts.

13
14 37. As a direct, proximate, and legal result of Decedent Weldon's death,
15 Plaintiff Brooks and Plaintiff Weldon have suffered the permanent loss of
16 Decedent's financial support, services, guidance, training, instruction, advice,
17 nurture, and example, all to their pecuniary damage in an amount to be proven at the
18 time of trial.

19
20 38. As a further direct, proximate, and legal result of Decedent Weldon's
21 death, Plaintiff Brooks and Plaintiff Weldon have suffered the permanent loss of
22 Decedent Weldon's love, society, affection, and consortium, all to their non-
23 pecuniary damage in an amount to be proven at the time of trial.

24
25 39. As a further direct, proximate, and legal result of Decedent's death,
26 Plaintiff Brooks has incurred funeral expenses in an amount to be proven at the time
27
28

1 of trial.

2 40. In performing the acts, committing the omissions, and making the
3 misrepresentations alleged herein, Defendants and each of them, were motivated in
4 whole or in part by a desire for financial gain, acted outrageously, and were guilty
5 of fraud, gross negligence, willful, wanton, and reckless indifference for the rights
6 of others, or behavior even more deplorable, justifying an award of punitive damages
7 in an amount to be determined at the time of trial herein.
8

9 WHEREFORE Plaintiff Brooks requests judgment against Defendants as is
10 hereinafter set forth.
11

12 **SECOND CAUSE OF ACTION**

13 *(For Survival Damages Caused by Fraud and Gross Negligence)*
14

15 41. Plaintiff incorporates all of the allegations contained in Paragraphs 1
16 through 40 hereinabove as though fully set forth herein, save and except the
17 allegation in Paragraph 36 that Plaintiff Brooks and Plaintiff Weldon have suffered
18 the permanent loss of Decedent's financial support.
19

20 42. This action arises under general maritime law and invokes the remedies
21 recognized in *Sutton v. Earles*, 26 F.3d 903 (9th Cir. 1994), *Evich v. Morris*, 819
22 F.2d 256 (9th Cir. 1987), *Rigsbee v. City & Cty. of Honolulu*, 2019 U.S. Dist. LEXIS
23 35944 (D.Haw. 2019), as supplemented by *Yamaha Motor Corp., USA v. Calhoun*,
24 516 U.S. 199 (1996), Haw. Rev. Stats. § 663-7, and *Restatement (2d.) Torts*, § 311.
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1 43. As a direct, proximate, and legal result of the hereinabove alleged
2 delicts of Defendants, and each of them, Decedent consciously suffered great
3 physical, mental, and emotional pain and distress before his death, all to his
4 nonpecuniary damage in an amount to be determined at the time of trial herein, and
5 for which Decedent's Estate is entitled to compensation.
6

7
8 44. As a further direct, proximate, and legal result of the hereinabove
9 alleged breaches of duty by Defendants, and each of them, Decedent incurred a loss
10 of future earnings and income all to his pecuniary damage in an amount to be
11 determined at the time of trial herein, and for which Decedent's Estate is entitled to
12 compensation.
13

14
15 45. Prior to the fatal injuries Decedent suffered on July 3, 2018, he was 61
16 years old, and in good health. As a further direct, proximate, and legal result of the
17 hereinabove alleged delicts of Defendants and each of them, Decedent suffered a
18 hedonic loss of his "enjoyment of life," as that phrase is used in Haw. Rev. Stats. §
19 663-8.5, *Montalvo v. Lapez*, 884 P.2d 345, 347 n.2 (Haw. 1994), and *Hambrook v.*
20 *Smith*, 2016 WL 4408991 (D.Haw.) at *40-41, all to his further nonpecuniary
21 damage in an amount to be determined at the time of trial herein, and for which
22 Decedent's Estate is entitled to compensation.
23
24

25
26 46. As a final direct, proximate, and legal result of the hereinabove alleged
27 delicts of Defendants and each of them, Decedent incurred ambulance and medical
28 expenses, all to his pecuniary damage in an amount to be determined at the time of

1 trial herein, and for which Decedent's Estate is entitled to compensation.

2 WHEREFORE, Plaintiff Brooks requests judgment against Defendants as is
3 hereinafter set forth.
4

5 **THIRD CAUSE OF ACTION**

6 *(Personal Injury Damages for Emotional Distress Caused by Fraud and Gross*
7 *Negligence)*

8 47. Plaintiffs herewith refer to, and by that reference incorporate each and
9 every allegation contained in Paragraphs 1 through 29 hereinabove as though fully
10 set forth herein.
11

12 48. This Cause of Action arises under general maritime law and invokes the
13 remedy recognized in *Plaisance v. Texaco, Inc.*, 937 F.2d 1004, 1009 (5th Cir.
14 1991), *Nelsen v. Research Corp. of the Univ. of Hawaii*, 805 F.Supp. 837, 849
15 (D.Haw. 1992), *Fawkner v. Atlantis Submarines, Ltd.*, 135 F.Supp.2d 1127 (D.Haw.
16 2001), and *Doe Parents No. 1 v. Dep't of Educ.*, 100 Haw. 34 (2002).
17
18

19 49. At all times material hereto, Plaintiff Weldon was present in the waters
20 of Shark's Cove and witnessed the events described in Paragraphs 26 and 27 as they
21 occurred.
22

23 50. At all times material hereto, Plaintiff Brooks was aware that Decedent
24 and Plaintiff Weldon were scuba diving in Shark's Cove and was waiting for them
25 in the vicinity of Shark's Cove.
26

27 51. As a further direct and proximate result of the aforesaid delicts of the
28 Defendants, and each of them, Plaintiffs Brooks and Plaintiff Weldon have suffered,

1 and will continue to suffer great mental, emotional, and nervous pain, distress, and
2 suffering, all to their respective general damage in an amount to be determined at the
3 time of trial.
4

5 WHEREFORE, Plaintiffs and each of them, pray judgment against
6 Defendants and each of them as follows:
7

8 Acting as the duly appointed Personal Representative of Decedent's Estate,
9 Plaintiff Brooks prays judgment against Defendants, and each of them, for:
10

- 11 1. Pecuniary damages according to the allegations of Paragraphs 37, 39, 44, and
12 46;
- 13 2. Non-pecuniary damages according to the allegations of Paragraphs 43
14 and 45;
- 15 3. Punitive damages according to the allegations of Paragraph 40;
- 16 4. The costs of suit herein;
- 17 5. Prejudgment and post-judgment interest according to law, and;
- 18 6. Such other and further relief as the Court deems just and proper.
19

20 Acting individually, and on their own behalf, Plaintiffs, and, each of them,
21 demand judgment against Defendants, and each of them, or:
22

- 23 1. General personal injury damages according to the allegations of
24 Paragraph 51;
- 25 2. Punitive damages according to the allegations of Paragraph 40;
- 26 3. The costs of suit herein;
- 27
- 28

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- 1 4. Pre-judgment and post-judgment interest according to law, and;
- 2
- 3 5. Such other and further relief as the Court deems just and proper.
- 4

5 Dated: July 2, 2019

6 McGUINN, HILLSMAN & PALEFSKY
7 Attorneys for Plaintiffs

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9 By: /S/ JOHN R. HILLSMAN
10 JOHN R. HILLSMAN

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