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9 **UNITED STATES DISTRICT COURT**
10 **SOUTHERN DISTRICT OF CALIFORNIA**

11 COLIN R. CROSS, individually, and as)
12 successor in interest to Ronda Cross,)
13 deceased, pursuant to Code of Civil)
14 Procedure §377.30,)

15 Plaintiffs)

16 v.)

17 PADI AMERICA’S INC., a California)
18 corporation, WYNDHAM HOTELS AND)
19 RESORTS, LLC, a Delaware Limited)
20 Liability Company, AMX BAJA)
21 HOLDINGS, a business entity of unknown)
22 form; STEADFAST COMPANIES, a)
23 business entity of unknown form;)
24 SUNSHINE DIVE & CHARTER, a business)
25 entity of unknown form)

26 Defendants.)

Case No.: 3:13-cv-00837-L-MDD

**~~[PROPOSED]~~ FIRST AMENDED
COMPLAINT FOR NEGLIGENCE,
LOSS OF CONSORTIUM, SURVIVAL
ACTION, UNFAIR BUSINESS
PRACTICES**

27 Plaintiff alleges:

28 **JURISDICTION AND VENUE**

1. This Court has jurisdiction of this matter on the basis of diversity of citizenship. 28 U.S.C. §1332. Venue is properly laid in this Court as Defendants do business in this Judicial District.

THE PARTIES

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2 2. Plaintiff Colin R. Cross (Cross) is, and at all relevant times mentioned
3 herein was a resident of British Columbia, Canada, and was the husband of
4 Ronda Cross, deceased who was also a resident of British Columbia, Canada.

5 3. Plaintiff Cross is informed and believes, and based thereon alleges that
6 Defendant PADI Americas, Inc. (PADI) is a corporation, duly organized and
7 existing under the laws of the State of California, and has its world headquarters
8 in Rancho Santa Margarita, California.

9 4. Plaintiff Cross is informed and believes, and based thereon alleges that
10 Defendant Hotels and Resorts, LLC, (Wyndham) is a Delaware Limited
11 Liability Company, and has its business center in San Diego County, California.
12 Plaintiff Cross is further informed and believes, and based thereon alleges that it
13 is a franchisor to Defendants AMX and Steadfast, as hereinafter alleged.

14 5. Plaintiff Cross is informed and believes, and based thereon alleges that
15 Defendant AMX Baja Holdings (AMX) is a business of unknown form; and is a
16 franchisee of Defendant Wyndham. Plaintiff Cross is further informed and
17 believes, and based thereon alleges that Defendant AMX is a wholly-owned
18 subsidiary of Defendant Steadfast Companies. Plaintiff Cross is further informed
19 and believes, and based thereon alleges that Defendants AMX and Steadfast
20 Companies are located in Irvine, California. Plaintiff Cross is further informed
21 and believes, and based thereon alleges that AMX and Steadfast Companies are
22 franchisees of Wyndham, in that Wyndham controls and enforces the use of its
23 name, logo, and brand, and AMX and Steadfast Companies uses that name,
24 logo, and brand with the consent of Wyndham.

25 6. Plaintiff Cross is informed and believes, and based thereon alleges that
26 Defendant Steadfast Companies, (Steadfast), a business of unknown form, is the
27 owner of Defendant AMX. Plaintiff Cross is further informed and believes, and
28

1 based thereon alleges that Defendants AMX and Steadfast Companies are
2 located in Irvine, California.

3 7. Plaintiff Cross is informed and believes, and based thereon alleges that
4 Defendant Sunshine Dive and Charter (Sunshine) [also possibly known as “Dive
5 Cabo”] is a business of unknown form located in Cabo San Lucas, Baja
6 California Sur, Mexico, and is doing business in San Diego County, California.
7 Plaintiff Cross is further informed and believes, and based thereon alleges that
8 Sunshine has its office in San Juan Capistrano, California. Plaintiff Cross is
9 further informed and believes that at all relevant times, Defendant Sunshine held
10 itself out to be PADI certified as to diving tank filling and maintenance. Plaintiff
11 Cross is further informed and believes, and based thereon alleges that Sunshine
12 is American owned. Plaintiff Cross is further informed and believes, and based
13 thereon alleges that Sunshine is a franchisee of PADI, in that PADI controls and
14 enforces the use of its name, logo, and brand, and Sunshine uses that name,
15 logo, and brand with the consent of PADI.

16 8. Plaintiff is informed and believe, and based thereon allege that each of
17 the named Defendants sued herein were the agents, servants, and employees of
18 their named Co-Defendants, and in doing the things hereinafter alleged, were
19 acting within the scope of their authority as such servants, agents, and
20 employees, franchisor/franchisee with the permission and consent of their
21 named Co-Defendants.

22 **PRELIMINARY ALLEGATIONS**

23 9. At all relevant times mentioned herein, from its world headquarters in
24 Rancho Santa Margarita, California, Defendant PADI was the Professional
25 Association of Dive Instructors. Plaintiff Cross is informed and believes that
26 Defendant PADI promulgates, tests, and enforces rules and standards undersea
27 diving, diving equipment and maintenance thereof, and promulgates rules,
28 standards, and certification of divers (whether professional or recreational),

1 diving equipment, dive masters, dive instructors, and diving equipment
2 maintenance throughout the world. Plaintiff Cross is informed and believes, and
3 based thereon alleges that PADI certification of diving equipment means that the
4 dive equipment has been maintained to the highest standards, and is safe for a
5 diver to use. Moreover, through its training, advertising PADI specifically
6 asserts that PADI certified diving is safer than non-PADI certified diving.
7 Plaintiff is further informed and believes, and based thereon alleges that PADI is
8 a franchisor of its name, identity, and brand, in that it controls and enforces who
9 may use its name, logo, and brand.

10 10. At all relevant times mentioned herein, and from in or during 1987 to
11 the present, Plaintiff Cross has been a PADI nitrox-certified diver with over
12 200+ dives. Plaintiff received his PADI certification from PADI.

13 11. At all relevant times mentioned herein, and from in or during 2002 to
14 the present, Ronda Cross (Ronda) (born May 31, 1970), deceased wife of
15 Plaintiff Cross was a PADI nitrox-certified diver. Ronda Cross received her
16 PADI certification from PADI.

17 12. On or about March 3, 2012, Ronda Cross went diving with her cousin
18 Roxanne in Cabo San Lucas, Baja California Sur, Mexico. Plaintiff Cross is
19 informed and believes, and based thereon alleges that the divemaster engaged by
20 Ronda Cross was Jorge Duchampeau (phonetic) of Conquest Divers of Cabo
21 San Lucas, Baja California Sur, Mexico. Said business and divemaster
22 advertises themselves as PADI certified. Plaintiff Cross is informed and
23 believes, and based thereon alleges that the airtanks use by Ronda Cross were
24 filled by Defendant Sunshine upon the request of Conquest Divers. Sunshine
25 advertises itself as PADI certified.

26 13. On or about March 3, 2012 Ronda Cross went diving with her cousin
27 in Cabo San Lucas, Baja California Sur, Mexico. The divemaster from Conquest
28 Divers accompanied Ronda Cross and her cousin on this dive. The airtanks used

1 by Ronda Cross, her cousin, and the divemaster were filled by Defendant
2 Sunshine at the request of Conquest Divers. The dive was at a depth of no
3 greater than 40 feet below the surface at Cabo San Lucas, Baja California Sur,
4 Mexico.

5 14. On or about March 3, 2012, during the dive of Ronda Cross, her
6 cousin, and the divemaster, Roxanne Cross (Plaintiff's cousin) began to have
7 difficulties with her dive mask. The divemaster went to aid the cousin Roxanne.
8 The cousin Roxanne and the divemaster surfaced together, and left Ronda Cross
9 underwater. Concurrently, the divemaster suffered difficulties with his heart and
10 legs. Plaintiff is informed and believes, and based thereon alleges that the PADI
11 divemaster did not follow PADI protocol by leaving Ronda Cross alone and
12 submerged. Plaintiff is further informed and believes, and base thereon alleges
13 that the dive master and the tank filler did not get PADI training, or was exempt
14 from such training by PADI. This fact was unknown to Plaintiff and the
15 decedent. The divemaster was trained or should have been trained not to leave a
16 diver alone under water. Ronda, still underwater, asphyxiated and died on
17 March 3, 2012. Plaintiff Cross is informed and believes and based thereon
18 alleges that the airtank used by Ronda Cross, and filled and maintained by
19 Defendant Sunshine, at the request of Charter Divers was negligently and
20 carelessly filled and maintained so as to allow dangerous and toxic substances to
21 be in Ronda Cross' airtank.

22 15. Plaintiff Cross is informed and believes that Defendant Sunshine is a
23 tenant of Defendant Wyndham at the Cabo San Lucas, Baja California Sur,
24 Mexico resort, and that Defendant Wyndham recommended and advertised the
25 existence and services of Defendant Sunshine to the public and to Decedent in
26 particular.

27 **FIRST CLAIM FOR RELIEF**

28 Negligence

By Plaintiffs, as Against Defendant PADI

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3 16. Plaintiff refers to and realleges Paragraphs 1 through 15, inclusive, of
4 this First Amended Complaint, and incorporate the same by reference as though
5 fully set forth at length herein.

6 17. Plaintiff Cross is informed and believe, and based thereon allege, that
7 at all relevant times mentioned herein, Defendant PADI was engaged in the
8 business of designing, promulgating rules and standards for the certification of
9 divers, dive equipment, and dive equipment maintenance, including the dive
10 equipment used by Ronda Cross on or about March 3, 2012. Plaintiff is
11 informed and believes, and based thereon alleges that said PADI rules and
12 standards can be accessed by all divers, dive equipment manufacturers, and dive
13 equipment maintenance persons and organizations throughout the world on the
14 PADI website, operated and maintained at PADI world headquarters in Rancho
15 Santa Margarita, California.

16 18. Plaintiff Cross is informed and believes, and based thereon alleges
17 that Defendant PADI had a duty to design, test, develop, market, supply,
18 modify, and/or provide the various PADI rules and standards and in a
19 reasonably safe and current condition. Plaintiff Cross is further informed and
20 believes, and based thereon alleges that Defendant PADI had a duty to
21 publically promulgate to its members, including Plaintiff Cross and Ronda
22 Cross, deceased, that the PADI rules and standards for dive equipment did not
23 apply in Mexico.

24 19. Plaintiff Cross is informed and believes, and based thereon alleges
25 that at all relevant times mentioned herein, Defendant PADI knew, or in the
26 exercise of reasonable care, PADI certifies dive equipment providers and
27 divemasters world-wide. In order to obtain and maintain certification, these
28 entities must follow PADI rules and regulations. PADI has exempted Mexico,
without explicitly informing or providing sufficient notice to their members,

1 including Plaintiff and Ronda Cross, of such exemption. Thus, unreasonably,
2 negligently, and carelessly resulting in the likelihood of severe injuries and/or
3 death to the users of Mexican provided and maintained dive equipment.

4 20. Plaintiff Cross is informed and believes, and based thereon alleges
5 that at all relevant times mentioned herein, that Defendant PADI negligently,
6 carelessly, and/or recklessly failed to notify Plaintiff Cross, Ronda Cross,
7 deceased, and its dive equipment providers named herein that PADI certification
8 of dive equipment and divemasters in Mexico may maintain and/or obtain PADI
9 certification despite the fact that Mexico is exempt from the PADI rules and
10 regulations.

11 21. As a direct and proximate result of the negligent, careless, or reckless
12 acts of Defendant PADI, as aforesaid, Plaintiffs' wife Ronda Cross was fatally
13 injured.

14 22. As a directly and proximate result of the negligent, careless, or
15 reckless acts of Defendant PADI, as aforesaid, said injuries have resulted in
16 general damages in an amount presently unknown, but according to proof at
17 trial.

18 23. As a further direct and proximate result of the above-described
19 conduct of Defendant PADI, which caused the death of Ronda Cross, Plaintiff
20 has sustained the loss of love, affection, society, service, comfort, support, right
21 of support, expectations of future support, counseling, companionship, solace,
22 and mental support, as well as other benefits and assistance of the decedent, all
23 to his general damage in an amount according to proof at trial.

24 24. As a further direct and proximate result of the above-described
25 conduct of Defendant PADI, which caused the death of Ronda Cross, said
26 injuries include, but are not limited to Ronda Cross' pain and suffering, lost
27 wages, medical costs, transportation, and funeral expenses in an amount
28 according to proof at trial.

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SECOND CLAIM FOR RELIEF
Loss of Consortium
Plaintiff Cross as against all Defendants

25. Plaintiff Cross refers to and realleges paragraphs 1 through 24, inclusive, of this First Amended Complaint, and incorporates the same by reference as though fully set forth at length herein.

26. As a result of the defective and dangerous condition of the dive equipment used by Ronda Cross, as aforesaid, and the severe injuries and wrongful death of his wife Ronda Cross, as a proximate result thereof, Plaintiff Cross has suffered the loss of his wife’s consortium, including, but not limited to a substantial loss of his wife’s companionship, comfort, affection, society, solace, moral support, sexual relations, and physical assistance in the operation and maintenance of the family home, all to Plaintiff Cross’ general damage in an amount according to proof at trial.

THIRD CLAIM FOR RELIEF
Negligence

By Plaintiff as Successor in Interest as Against Defendant Sunshine

27. Plaintiff Cross refers to and realleges Paragraphs 1 through 26, inclusive, of this First Amended Complaint, and incorporates the same by reference as though fully set forth at length herein.

28. Plaintiff Cross is informed and believes, and based thereon alleges that Defendant Sunshine held itself out to be PADI certified as to diving tank maintenance and filling.

29. Plaintiff Cross is informed and believes, and based thereon alleges that Defendant Sunshine maintained and filled the diving tanks used by decedent on or about March 3, 2012, when decedent died while diving in Cabo San Lucas, Baja California Sur, Mexico.

1 35. Plaintiff Cross is informed and believes, and based thereon alleges
2 that Defendants Wyndham, AMX, and Steadfast owns, operates, supervises, and
3 maintains the operation of the Wyndham Resort in Cabo San Lucas, Baja
4 California Sur, Mexico. Plaintiff is further informed and believes, and based
5 thereon alleges that there is a franchisor/franchisee relationship between
6 Wyndham, AMX, and Steadfast.

7 36. Plaintiff Cross is informed and believes, and based thereon alleges
8 that Defendant Sunshine is a tenant of Defendant Wyndham Resort in Cabo San
9 Lucas, Baja California Sur, Mexico.

10 37. Plaintiff Cross is informed and believes, and based thereon alleges
11 that Defendants Wyndham, AMX, and Steadfast recommend and refer
12 customers to Defendant Sunshine to the general public, and to Decedent in
13 particular.

14 38. Plaintiff Cross is informed and believes, and based thereon alleges
15 that Defendants Wyndham, AMX and Steadfast had a duty to supervise
16 Defendant Sunshine as Defendant Wyndham, AMX, and Steadfast recommend
17 and refer customers to Defendant Sunshine to the general public, and to
18 Decedent in particular.

19 39. Plaintiff Cross is informed and believes, and based thereon alleges
20 that Defendants Wyndham, AMX, and Steadfast negligently failed and refused
21 to supervise and/or vet Defendant Sunshine on or about March 3, 2012, when
22 Defendant Sunshine maintained and filled the diving tanks that contained fatally
23 toxic substances which were used by decedent on or about March 3, 2012, when
24 decedent died while diving in Cabo San Lucas, Baja California Sur, Mexico.

25 40. As a directly and proximate result of the negligent, careless, or
26 reckless acts of Defendants Wyndham, AMX, and Steadfast, as aforesaid, said
27 injuries have resulted in general damages in an amount presently unknown, but
28 according to proof at trial.

1 particular, were likely to be deceived by the failure of PADI to notify its
2 members that the PADI certification of Defendant Sunshine was withdrawn.

3 **SEVENTH CLAIM FOR RELIEF**

4 Unfair Business Practices, Business and Professions Code §17200, et.seq.
5 By Plaintiff as Successor in Interest as Against Defendant WYNDHAM

6 51. Plaintiff Cross refers to and realleges Paragraphs 1 through 50,
7 inclusive, of this First Amended Complaint, and incorporates the same by
8 reference as though fully set forth at length herein.

9 52. Plaintiff Cross is informed and believes, and based thereon alleges
10 that Defendant PADI falsely and fraudulently failed to advise its members,
11 Plaintiff and Decedent in particular, that the PADI certification of Defendant
12 Sunshine was paid for by Sunshine and not given to Sunshine by PADI as a
13 result of inspection and conforming with PADI standards. Plaintiff is informed
14 and believes, and based thereon alleges that said failure by PADI is false
15 advertising in violation of Business and Professions Code §17200, et.seq. and
16 California common law, which prohibits the dissemination of "false, misleading
17 or deceptive advertising." Plaintiff Cross is informed and believes, and based
18 thereon that Defendant Wyndham referred and recommended Sunshine to its
19 guests and others without knowing how Sunshine ran its business or whether the
20 PADI certification of Sunshine was earned on merit or was paid for by Sunshine

21 53. Plaintiff Cross is informed and believes, and based thereon alleges
22 that the acts of Wyndham, as aforesaid, that the public, and Plaintiff and
23 Decedent in particular, were likely to be deceived by the failure of Wyndham to
24 notify its guests and others that Wyndham employees recommended Sunshine
25 because of its location within the Wyndham property, in order to protect its
26 interest in keeping Sunshine as a tenant.

27 **WHEREFORE**, Plaintiff Cross prays judgment as follows:

- 28 1. For compensatory damages in an amount according to proof at trial;

- 1 2. For medical and funeral expenses in an amount according to proof at
- 2 trial;
- 3 3. For lost wages in an amount according to proof at trial;
- 4 4. For restitution under Business and Professions Code §17200, et.seq.
- 5 5. For costs of suit herein; and
- 6 6. For such other and further relief as the Court may deem just and
- 7 proper.

8 Dated: May 10, 2013

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s/ Joshua D. Hale
Joshua D. Hale
Attorney for Plaintiff
Colin R. Cross