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9 INC., a California Corporation

10 **UNITED STATES DISTRICT COURT**
11 **FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

12 COLIN R. CROSS, individually, and as
13 successor in interest to RONDA
14 CROSS, deceased pursuant to Code of
15 Civil Procedure 337.30,

16 Plaintiff(s),

17 vs.

18 PADI AMERICA'S INC., a California
19 Corporation, WYNDHAM HOTELS
20 AND RESORTS, LLC, a Delaware
21 Limited Liability Company,
22 SUNSHINE DIVE & CHARTER, a
23 business entity of unknown form, and
24 DOES 1 through 50, inclusive,,

25 Defendant(s).

Case No. 13 CV0837 L MDD

**ANSWER OF PADI AMERICAS,
INC. TO THE FIRST AMENDED
COMPLAINT**

26 **TO THE COURT AND TO THE PLAINTIFF AND TO HIS ATTORNEY OF
27 RECORD:**

28 COMES NOW defendant PADI Americas, Inc. and for its answer to the
unverified First Amended Complaint (hereafter "FAC") on file herein, denies and
alleges as follows:

1. In response to the FAC, Paragraph 1, answering defendant admits this
case was removed based on diversity of citizenship. Answering defendant lacks
sufficient knowledge as to the truth of the other allegations and denies same on

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1 information and belief. Additionally, as to the facts of the subject accident and
2 the alleged business transactions that took place in Cabo San Lucas, this
3 answering defendant denies that it was doing business in the County of San
4 Diego in connection with the matters alleged in the FAC.

5 2. In response to the FAC, paragraph 2, answering defendant admits that
6 Colin R. Cross is a Canadian citizen who resides at all times relevant in British
7 Columbia, and that decedent Ronda Cross at all times relevant was a Canadian
8 citizen residing in British Columbia.

9 3. In response to the FAC, paragraph 3, admit that defendant PADI
10 Americas, Inc. is a California corporation with its principal place of business in
11 Rancho Santa Margarita, Orange County, California.

12 4. In response to the FAC, paragraph 4, answering defendant admits that
13 defendant Wyndham Hotels & Resorts, LLC is a Delaware limited liability
14 company. Answering defendant lacks sufficient knowledge as to the truth of the
15 other allegations therein and denies same on information and belief.

16 5. In response to the FAC, paragraph 5, answering defendant lacks
17 sufficient knowledge as to the truth of the allegations therein and denies same on
18 information and belief.

19 6. In response to the FAC, paragraph 6, answering defendant lacks
20 sufficient knowledge as to the truth of the allegations therein and denies same on
21 information and belief.

22 7. In response to the FAC, paragraph 7, answering defendant admits that
23 defendant Sunshine Dive and Charter is a business that at all times relevant was
24 located in Cabo San Lucas, Baja California Sur, Mexico. Answering defendant
25 lacks sufficient knowledge as to the truth of the other allegations and denies
26 same on information and belief.

27 8. In response to the FAC, paragraph 8, answering defendant lacks
28 sufficient knowledge as to the truth of the allegations therein and denies same on

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1 information and belief.

2 9. In response to the FAC, paragraph 9, answering defendant admits that
3 its worldwide headquarters is located in Rancho Santa Margarita, Orange
4 County, California and that "PADI" stands for the Professional Association of
5 dive Instructors. Answering defendant lacks sufficient knowledge as to the truth
6 of the other allegations as alleged therein and denies same on information and
7 belief.

8 10. In response to the FAC, paragraph 10, answering defendant lacks
9 sufficient knowledge as to the truth of the allegations therein and denies same on
10 information and belief.

11 11. In response to the FAC, paragraph 11, answering defendant lacks
12 sufficient knowledge as to the truth of the allegations therein and denies same on
13 information and belief.

14 12. In response to the FAC, paragraph 12, answering defendant admits
15 that on March 3, 2012 Ronda Cross went scuba diving with her cousin Roxanne
16 Amundson in Cabo San Lucas, Baja California Sur, United States of Mexico.
17 Answering defendant also admits that Jorge Duchampeau of Conquest Divers of
18 Cabo San Lucas, Baja California Sur, Mexico, was the divemaster who took
19 Ronda Cross and Roxanne Amundson scuba diving on March 3, 2012.
20 Answering defendant lacks sufficient knowledge as to the truth of the other
21 allegations as alleged therein and denies same on information and belief.

22 13. In response to the FAC, paragraph 13, answering defendant admits that
23 Ronda Cross went diving with her cousin in Cabo San Lucas, Baja California
24 Sur, United States of Mexico, and it admits that the divemaster, Jorge
25 Duchampeau from Conquest Divers, accompanied Ronda Cross and her cousin
26 on this dive. Answering defendant lacks sufficient knowledge as to the truth of
27 the other allegations as alleged therein and denies same on information and
28 belief.

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1 14. In response to the FAC, paragraph 14, answering defendant lacks
2 sufficient knowledge as to the truth of the allegations therein and denies same on
3 information and belief.

4 15. In response to the FAC, paragraph 15, answering defendant lacks
5 sufficient knowledge as to the truth of the allegations therein and denies same on
6 information and belief.

7 16. In response to the FAC, paragraph 16, answering defendant lacks
8 sufficient knowledge as to the truth of the allegations therein and denies same on
9 information and belief.

10 17. In response to the FAC, paragraph 17, answering defendant admits that
11 it is an educational dive training organization and that it is engaged in designing
12 recreational dive training educational materials and standards for the instruction
13 of recreational scuba divers. Answering defendant denies that it manufactures
14 dive equipment. Answering defendant lacks sufficient knowledge as to the truth
15 of the other allegations therein and denies same on information and belief.

16 18. In response to the FAC, paragraph 18, answering defendant lacks
17 sufficient knowledge as to the truth of the allegations therein and denies same on
18 information and belief.

19 19. In response to the FAC, paragraph 19, answering defendant lacks
20 sufficient knowledge as to the truth of the allegations therein and denies same on
21 information and belief.

22 20. In response to the FAC, paragraph 20, answering defendant denies all
23 of the allegations set forth therein.

24 21. In response to the FAC, paragraph 21, answering defendant denies all
25 of the allegations set forth therein.

26 22. In response to the FAC, paragraph 22, answering defendant denies all
27 of the allegations set forth therein.

28 23. In response to the FAC, paragraph 23, answering defendant denies all

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1 of the allegations set forth therein.

2 24. In response to the FAC, paragraph 24, answering defendant denies all
3 of the allegations set forth therein.

4 25. In response to the FAC, paragraph 25, answering defendant denies all
5 of the allegations set forth therein.

6 26. In response to the FAC, paragraph 26, answering defendant lacks
7 sufficient knowledge as to the truth of the allegations therein and denies same on
8 information and belief.

9 27. In response to the FAC, paragraph 27, answering defendant denies all
10 of the allegations set forth therein.

11 28. In response to the FAC, paragraph 28, answering defendant lacks
12 sufficient knowledge as to the truth of the allegations therein and denies same on
13 information and belief.

14 29. In response to the FAC, paragraph 29, answering defendant lacks
15 sufficient knowledge as to the truth of the allegations therein and denies same on
16 information and belief.

17 30. In response to the FAC, paragraph 30, answering defendant lacks
18 sufficient knowledge as to the truth of the allegations therein and denies same on
19 information and belief.

20 31. In response to the FAC, paragraph 31, answering defendant lacks
21 sufficient knowledge as to the truth of the allegations therein and denies same on
22 information and belief.

23 32. In response to the FAC, paragraph 32, answering defendant lacks
24 sufficient knowledge as to the truth of the allegations therein and denies same on
25 information and belief.

26 33. In response to the FAC, paragraph 33, answering defendant lacks
27 sufficient knowledge as to the truth of the allegations therein and denies same on
28 information and belief.

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1 34. In response to the FAC, paragraph 34, answering defendant denies all
2 of the allegations set forth therein.

3 35. In response to the FAC, paragraph 35 answering defendant lacks
4 sufficient knowledge as to the truth of the allegations therein and denies same on
5 information and belief.

6 36. In response to the FAC, paragraph 36, answering defendant lacks
7 sufficient knowledge as to the truth of the allegations therein and denies same on
8 information and belief.

9 37. In response to the FAC, paragraph 37, answering defendant lacks
10 sufficient knowledge as to the truth of the allegations therein and denies same on
11 information and belief.

12 38. In response to the FAC, paragraph 38, answering defendant lacks
13 sufficient knowledge as to the truth of the allegations therein and denies same on
14 information and belief.

15 39. In response to the FAC, paragraph 39, answering defendant lacks
16 sufficient knowledge as to the truth of the allegations therein and denies same on
17 information and belief.

18 40. In response to the FAC, paragraph 40, answering defendant lacks
19 sufficient knowledge as to the truth of the allegations therein and denies same on
20 information and belief.

21 41. In response to the FAC, paragraph 41, answering defendant lacks
22 sufficient knowledge as to the truth of the allegations therein and denies same on
23 information and belief.

24 42. In response to the FAC, paragraph 42, answering defendant lacks
25 sufficient knowledge as to the truth of the allegations therein and denies same on
26 information and belief.

27 43. In response to the FAC, paragraph 43, answering defendant denies all
28 of the allegations set forth therein.

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1 44. In response to the FAC, paragraph 44, answering defendant lacks
2 sufficient knowledge as to the truth of the allegations therein and denies same on
3 information and belief.

4 45. In response to the FAC, paragraph 45, answering defendant lacks
5 sufficient knowledge as to the truth of the allegations therein and denies same on
6 information and belief.

7 46. In response to the FAC, paragraph 46, answering defendant admits that
8 medical expenses were incurred in connection with Ronda Cross' accidental
9 death and that expenses were incurred for the costs associated with attending to
10 the remains of the decedent. Answering defendant lacks sufficient knowledge as
11 to the truth of the other allegations therein and denies same on information and
12 belief.

13 47. In response to the FAC, paragraph 47, answering defendant lacks
14 sufficient knowledge as to the truth of the allegations therein and denies same on
15 information and belief.

16 48. In response to the FAC, paragraph 48, answering defendant lacks
17 sufficient knowledge as to the truth of the allegations therein and denies same on
18 information and belief.

19 49. In response to the FAC, paragraph 49, answering defendant denies all
20 of the allegations set forth therein.

21 50. In response to the FAC, paragraph 50, answering defendant denies all
22 of the allegations set forth therein.

23 51. In response to the FAC, paragraph 51, answering defendant denies all
24 of the allegations set forth therein.

25 52. In response to the FAC, paragraph 52, answering defendant denies all
26 of the allegations set forth therein.

27 53. In response to the FAC, paragraph 53, answering defendant lacks
28 sufficient knowledge as to the truth of the allegations therein and denies same on

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1 information and belief.

2 55. As to plaintiff's prayer commencing at page 13 of the FAC, line 28,
3 answering defendant denies the claims set forth against it and therefore denies
4 plaintiff is entitled to any damages against answering defendant.

5
6 **FIRST AFFIRMATIVE DEFENSE**

7 **(Forum Non-Conveniens)**

8 56. The causes of action in the FAC occurred in Cabo San Lucas, Baja
9 California Sur, within the United States of Mexico. As a result, the laws of the
10 United States of Mexico are applicable to this claim, and in particular the
11 Political Constitution of the United States of Mexico; the laws of the Political
12 Constitution of Baja California Sur; the Code of Civil Procedure of the State of
13 Baja California Sur; the Organic Law of the Judiciary Power for the State of Baja
14 California Sur. The plaintiff and his decedent are and were residents of and
15 citizens of British Columbia, Canada. The witnesses to the fatal accident and all
16 of the events leading up to the fatal accident are residents of Cabo San Lucas or
17 are otherwise citizens of the United States of Mexico and are residing in Mexico.
18 Pursuant to the rules in *Sinchem Intel. Co. Ltd. v. Malasian International*
19 *Shipping Corp.*, 549 U. S. 422 (2007) and *Loya v. Starwood Hotels and PADI*
20 *Americas, Inc. et al.*, 583 F.3d 656 (2009), the FAC is subject to dismissal under
21 the doctrine of *forum non conveniens*.

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23 **SECOND AFFIRMATIVE DEFENSE**

24 **(Death on the High Seas Act)**

25 57. This action involves a death that occurred while the plaintiff's decedent
26 was scuba diving outside of the territorial waters of the United States on the high
27 seas. (46 USC §30302) If the laws of the United States of America are deemed
28 applicable to this loss, this action is controlled by 46 U.S.C. §30301, *et seq.*,

1 Death of the High Seas Act (“DOHSA”). DOHSA preempts all other United
 2 States remedies. (*Dooley v. Korean Airlines, Inc.* (1998) 524 U. S. 116, 123)
 3 State wrongful death statutes are inapplicable. (*Moyer v. Klosters Rederi* (S.D.
 4 Fla. 1986) 645 F.Supp. 620) Plaintiff is therefore limited to a claim for pecuniary
 5 losses only and is precluded from claiming for loss of care, comfort,
 6 companionship or protection. (46 USC §30303) DOHSA does not allow for the
 7 recovery of lost future earnings of the decedent. The only allowable pecuniary
 8 losses under DOHSA are nurture to the decedent’s minor children, support and
 9 contribution of the decedent to any financial dependents, funeral expenses and
 10 the value of the loss of services of the decedent. (*Verdin v. C&B Boat Co.* 860
 11 F.2d 150 (5th Cir. 1988); *Sea-Land Services, Inc. v. Gaudet* 414 U.S. 573 (1974).)

THIRD AFFIRMATIVE DEFENSE

(Negligence of Others)

15 58. The acts or omissions of third persons other than this answering defendant
 16 legally caused or contributed to the events leading up to and the occurrences by
 17 which the plaintiff claims injury and damages. This answering defendant is
 18 entitled to a judicial determination of the percentage of fault of each third person
 19 or entity that is a legal cause of the alleged injuries and damages, if any,
 20 sustained by the plaintiff and to a corresponding reduction in the liability, if any,
 21 of this answering defendant in proportion thereto.

FOURTH AFFIRMATIVE DEFENSE

(Statute of Limitation)

25 59. The underlying FAC and each cause of action contained therein are
 26 barred by the applicable statute of limitations, including, but not limited to, Code
 27 of Civil Procedure § 335.1 and 366.1 and 46 U. S. C. §30301. *et seq.* and the
 28 doctrine of laches.

FIFTH AFFIRMATIVE DEFENSE

(Lack of Standing)

60. This defendant lacks personal knowledge as to the standing of the plaintiff and therefore, on information and belief, alleges that plaintiff lacks standing to bring the claims asserted in the FAC because, among other things, it is not alleged that plaintiff is the personal representative of the decedent's estate.

SIXTH AFFIRMATIVE DEFENSE

(Intervening Cause)

61. Plaintiff's claims are barred because the death of Ronda Cross was legally caused by the intervening, superceding or illegal conduct of independent third parties or events that were not reasonably foreseeable by this answering defendant.

SEVENTH AFFIRMATIVE DEFENSE

(Lack of Causation)

62. Plaintiff's claims for relief in the within matter are barred as against this answering defendant because Ronda Cross's death was not legally caused by the alleged negligent acts or omissions of this answering defendant.

EIGHTH AFFIRMATIVE DEFENSE

(Comparative Fault or Negligence)

63. The acts or omissions of the plaintiff's decedent, if any, legally caused or contributed to the alleged injuries, damages and losses in this matter. This answering defendant is entitled to a determination of the percentage of fault of the plaintiff's decedent and to a reduction in the amounts of plaintiff's damages in proportion to that negligence.

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NINTH AFFIRMATIVE DEFENSE

(Failure to State a Cause of Action)

65. The Complaint fails to state facts sufficient to constitute a cause of action against this answering defendant

TENTH AFFIRMATIVE DEFENSE

(Primary Assumption of Risk)

66. The plaintiff's decedent, Ronda Cross, signed a clear, plain and unambiguous waiver of liability and assumption of risk agreement in favor of her retained scuba diving divemaster and scuba instructor, Jorge Duchampeau of Conquest Divers of Cabo San Lucas, and in favor of "*International PADI, Inc. and its affiliate or subsidiary corporations*" to include PADI Americas, Inc. Said waiver of liability and assumption of risk agreement operates under the laws of the United States of America, the State of California and the laws of the United States of Mexico to hold this answering defendant harmless for any and all of its alleged negligent acts or omissions.

TWELFTH AFFIRMATIVE DEFENSE

(Improper Venue)

67. The FAC has been brought in an improper venue pursuant to 28 USC §§1391, et seq., 1404, et seq. and 1406 et seq. As such, the FAC is subject to transfer pursuant to 28 USC §§ 1404 and 1406.

WHEREFORE, having fully answered the First Amended Complaint on file herein, defendant prays as follows:

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1. That plaintiff take nothing by way of his First Amended Complaint and that he go hence with his costs of suit and attorney fees;
2. That this answering defendant recover its costs of suit and attorney fees; and
3. For such further relief as the Court may deem just and proper.

DATED: July 30, 2013

LA FOLLETTE, JOHNSON, DE HAAS,
FESLER & AMES

By: /s/ MARK M . WILLIAM

MARK M. WILLIAMS
Attorneys for Defendant PADI
AMERICAS, INC.

LA FOLLETTE, JOHNSON, DE HAAS, FESLER & AMES

PROOF OF SERVICE

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

I am employed in the County of Los Angeles, State of California. I am over the age of 18 and not a party to the within action; my business address is 865 South Figueroa Street, 32nd Floor, Los Angeles, California 90017-5431.

On July 22, 2013, I served the foregoing document described as **ANSWER OF PADI AMERICA, INC. TO THE FIRST AMENDED COMPLAINT** on the interested parties in Re COLIN R. CROSS, ET AL., v. PADI AMERICA'S INC, a California Corporation, ET AL..., Court Case No. 13-CV-00837-L-MDD, Our Matter No. 6431.36481 MMW, by placing a true copy thereof enclosed in a sealed envelope addressed as follows:

TO ALL ADDRESSEES AS PER ATTACHED MAILING LIST

X **BY MAIL:** I caused such envelope with postage thereon fully prepaid to be placed in the United States mail at Los Angeles, California. I am "readily familiar" with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with U.S. postal service on that same day with postage thereon fully prepaid at Los Angeles, California, in the ordinary course of business. I am aware that on motion of the party served, service is presumed invalid if postal cancellation date or postage meter date is more than one day after date of deposit for mailing in affidavit.

____ **BY FACSIMILE:** I sent via facsimile, a copy of said document(s) to the following addressee(s) at the following facsimile number(s) in accordance with the written confirmation of counsel in this action.

____ **BY OVERNIGHT DELIVERY:** I deposited such envelope in a facility regularly maintained by FEDERAL EXPRESS with delivery fees fully provided for or delivered the envelope to a courier or driver of FEDERAL EXPRESS authorized to receive documents at LA FOLLETTE, JOHNSON, DE HAAS, FESLER & AMES, 865 South Figueroa Street, 32nd Floor, Los Angeles, California 90017-5431.

____ **BY PERSONAL SERVICE:** I caused such envelope to be delivered by hand to the offices of the addressee(s).

X **BY ELECTRONIC TRANSMISSION VIA ECF:** I electronically filed the foregoing document(s) with the Clerk of the Court through the CM/ECF system for the United States District Court, Southern District of California, which sent Notification of Electronic Filing to the persons listed. Upon completion of transmission of said documents, a certified receipt is issued to the filing party acknowledging receipt by the CM/ECF system.

I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on July 30, 2013, at Los Angeles, California.

/s/ MARK M. WILLIAMS

MARK M. WILLIAMS

LA FOLLETTE, JOHNSON, DE HAAS, FESLER & AMES

COLIN R. CROSS, ET AL., v. PADI AMERICA'S INC, a California Corporation, ET AL.,

Our File Number: 6431.36481 MMW

Case No.: 13-CV-00837-L-MDD

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