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FILED IN THE
UNITED STATES DISTRICT COURT
DISTRICT OF HAWAII

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SUE BEITIA, CLERK

Attorneys for Plaintiffs

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF HAWAII

MATHEW ISHAM and
ROXANNE BEST ISHAM,

Plaintiffs,

vs.

PADI WORLDWIDE
CORPORATION, a California
Corporation, INTERNATIONAL
PADI, INC., aka PROFESSIONAL
ASSOCIATION OF DIVING
INSTRUCTORS, a California
Corporation, DIVING SCIENCE
AND TECHNOLOGY CORP. aka
DSAT, a California Corporation,
Defendants.

CIVIL NO: 6 00382 DAE BMK

COMPLAINT FOR PERSONAL
INJURY DAMAGES AND LOSS OF
CONSORTIUM

Jury Trial Requested

COME NOW THE PLAINTIFFS, MATTHEW ISHAM and ROXANNE ISHAM, who complain against the Defendants, and each of them, and for causes of action allege:

PRELIMINARY ALLEGATIONS
(Capacity of the Parties, Jurisdiction & Venue)

1. At all times material herein, Plaintiff MATTHEW ISHAM (hereafter ISHAM) was a resident of the State of Hawaii, Island of Kauai, and specifically resided there on or before July 20, 2004.

2. At all times material herein, and specifically on July 20, 2004, Plaintiff ISHAM was a member in good standing of the Professional Association of Diving Instructors (hereafter PADI), holding the position of Open Water Instructor.

3. At all times material herein, as a member in good standing of PADI and as an Open Water Instructor, ISHAM was required, upon penalty of expulsion from PADI, and, *inter alia*, denial of coverage by his professional liability insurance, to comply specifically with all rules, regulations, training standards, and specific course requirements relating to any PADI course which he taught, including but not limited to Discover Scuba Diving (hereafter "DSD").

4. At all times material herein, Plaintiff ROXANNE ISHAM (hereafter

ROXANNE) was and remains the lawful wife of Plaintiff Matthew Isham.

5. Plaintiffs are informed and believe, and thereupon allege that at all times material herein, PADI Worldwide Corporation was a corporation incorporated under the laws of the State of California, authorized to do business in the State of Hawaii.

6. Plaintiffs are informed and believe, and thereupon allege that Defendant International PADI, Inc. aka Professional Association of Diving Instructors, was at all times mentioned herein, a California corporation, authorized to do business in the State of Hawaii.

7. Plaintiffs are informed and believe, and thereupon allege that Defendant Diving Science and Technology Corporation (DSAT), was at all times mentioned herein a California corporation, authorized to do business in the State of Hawaii.

8. At all times material herein, and specifically on July 20, 2004, each of the Defendants was the agent of the other, and each of the Defendants, to an extent unknown at this time to Plaintiffs, was the author, distributor, promulgator, and otherwise controlling party as to the standards of membership for diving instructors to belong to PADI, the standards required of such PADI members, and

the training standards required for PADI members to teach or instruct DSD, a course involving an underwater experience utilizing self-contained underwater breathing apparatus (SCUBA), including, but not limited to the specific information and skills for PADI instructors such as ISHAM to convey to students and to follow.

9. Plaintiffs are informed and believe, and thereon allege, that at all relevant times mentioned herein, each of the Defendants was the agent and employee of each of the remaining Defendants, and in doing the things hereinafter alleged, was acting within the course and scope of such agency and employment with the knowledge, consent and approval of their Co-Defendants. The conduct of each Defendant was ratified by each of the Co-Defendants.

PREAMBLE

10. Prior to, and concluding in or about August 1999, Plaintiff ISHAM began a course of instruction leading to certification as a PADI Open Water Instructor; the course requirements included, but were not limited to, certification as an Open Water Diver, an Advanced Open

Water Diver, a Rescue Diver, a Dive Master, and ultimately and finally Open Water Instructor.

11. Additionally, Plaintiff ISHAM qualified for and was certified in the following PADI specialty areas, which allowed him to instruct students in the following areas of specialization:

PADI Medic First Aid, September 1, 1999;

PADI Enriched Air Diver, October 1, 1999;

PADI Night Diver, October 1, 1999;

PADI Search & Recovery, October 1, 1999;

PADI Wreck Diver, October 1, 1999;

PADI Underwater Navigator, October 1, 1999;

PADI Deep Diver, October 1, 1999;

PADI Boat Diver, October 11, 1999;

PADI Multilevel Diver, October 11, 1999;

PADI Underwater Photographer, October 11, 1999;

PADI Equipment Specialist, October 11, 1999;

PADI Drift Diver, October 11, 1999;

PADI Underwater Naturalist, October 12, 1999;

12. Plaintiff ISHAM further qualified for, and was certified in the

following additional areas of specialization:

TDI Rebreather Diver, October 13, 1999;

TDI Rebreather Instructor, October 13, 1999;

TDI Nitrox/Blending Technician, September 29, 1999;

DAN Oxygen First Aid Instructor, August 31, 1999;

PDI Resort Operations Specialist, September 24, 1999.

13. On or about July 20, 2004, Plaintiff ISHAM was a member in good standing of PADI, and was authorized by PADI to instruct students such as Dennis Claypool in the DSD experience.

14. On July 20, 2004, at the Makole Anchorage located in the territorial waters of the Island of Kauai, State of Hawaii, Plaintiff ISHAM was instructing his student DENNIS CLAYPOOL (hereinafter CLAYPOOL), and others, in a PADI DSD experience; at that time and place, and as a direct result of the deficiencies in the DSD program as promoted, offered, and mandated for use by PADI for all PADI instructors, Claypool involuntarily surfaced, Plaintiff ISHAM attempted to rescue him, and both were struck by a passing vessel, resulting in grievous, permanent, and life threatening injuries to both.

FIRST CAUSE OF ACTION
(Negligence)

15. Plaintiffs herewith refer to, and by that reference incorporate as though fully set forth herein, each and every allegation contained in Paragraphs 1 through 14 hereinabove.

16. This cause of action arises under the Diversity Jurisdiction of this Court conferred by 28 U.S.C. 1332, and the provisions of the General Maritime Law of the United States, as hereinafter more fully appears, and by the "Savings to Suitors" Clause in 28 U.S.C. § 1333(a).

17. The Defendants, and each of them, on July 20, 2004, owed a duty to the PADI members to provide them with course materials that would not create an undue risk of harm to PADI members such as ISHAM, particularly since such members were required under PADI regulations and standards not to deviate in any manner from the published standards and procedures of such courses;

18. Defendants, and each of them, were aware such course materials were defective in certain respects, but nonetheless breached that duty by continuously, negligently, recklessly, and willfully to require strict compliance to such standards and requirements.

19. As a direct and proximate cause of the hereinabove alleged delicts of the Defendants, and each of them, Plaintiff ISHAM was severely injured while following such standards, resulting in the amputation of his left leg above the

knee, and other grievous injuries, including severe emotional distress.

SECOND CAUSE OF ACTION
(Strict Liability)

20. Plaintiffs herewith refer to, and by that reference incorporate as though fully set forth herein, each and every allegation contained in the First Cause of Action, save and accept those set forth in Paragraph 15.

21 This cause of action arises under the Diversity Jurisdiction of this Court conferred by 28 U.S.C. 1332, and the provisions of the General Maritime Law of the United States, as hereinafter more fully appears, and by the "Savings to Suitors" Clause in 28 U.S.C. § 1333(a).

22. That prior to July 20, 2004, PADI Defendants and each of them, created, designed, tested, edited, adopted, packaged, recommended, merchandised, advertised, updated, published, and sold, a specific product described as the copyrighted Discover Scuba Diving Experience materials, and placed them in the stream of commerce for use by PADI Instructors such as ISHAM..

23. In addition to the standards and procedures set forth for PADI certified instructors to follow, the PADI Defendants required use of such additional products as a DSD video, DSD flip chart, and course pamphlet, by instructors such as Isham.

24. All products distributed were required to be utilized by PADI instructors in the teaching of the DSD course, and all products were further designed to generate maximum profits for PADI, since each DSD participant was required to complete an original PADI DSD form, which could only be obtained by purchase from the PADI Defendants.

25. These products, including but not limited to the course standards and procedures, outline, flip chart, and video, were defective in, *inter alia*, the following particulars:

- a. That participants completely unfamiliar with SCUBA diving were allowed to engage in compressed air diving from a vessel, which the PADI Defendants knew, or in the exercise of reasonable care, should have known from prior accidents reported to them, created a high level of stress among the participants, and created an environment whereby a single dive instructor could not conduct this course and remain within the PADI standards for instruction;
- b. That, in conjunction with modifications to the course standards as set forth in the general course revisions published for PADI instructors in the *Undersea Journal*, the standards for Discover

Scuba Diving were completely contradictory, demanding that instructors maintain direct supervision and control over students, but at the same time allowing instructors such as ISHAM to separate from these students when leading some participants through an overhead environment (which also was a prohibited activity in the general standards and procedures) while simultaneously allowing other participants, such as CLAYPOOL to pass over the top, thereby creating an immediate obstacle (in this instance the roof of a lava tube) between the instructor and the neophyte student;

- c. That the PADI Defendants refused to allow PADI instructors such as ISHAM, upon pain of expulsion from PADI and denial of coverage under their professional liability insurance policy, to teach a critical skill to their DSD students, specifically rudimentary buoyancy control;
- d. Because of this specific failing, student CLAYPOOL was unable to arrest his ascent to the surface while on the dive on July 20, 2004, requiring the rescue attempt by Isham which resulted in the severe injuries suffered by both;

- e. The PADI Defendants knew of these and other deficiencies in the program prior to July 20, 2004, but wantonly, willfully, and intentionally ignored the need for this critical addition to the program, continued to require strict compliance to the standards and requirements set forth in those materials and as such are subject to punitive and exemplary damages.

WHEREFORE Plaintiffs MATTHEW ISHAM and ROXANNE ISHAM pray judgment against Defendants, and each of them, as is hereinafter set forth:

THIRD CAUSE OF ACTION
(Breach of Warranty)

26. Plaintiffs herewith refer to, and by reference incorporate as though fully set forth herein each and every allegation set in Paragraphs 1 through 25 herein, except Paragraphs 15 and 20.

27. This cause of action arises under the Diversity Jurisdiction of this Court conferred by 28 U.S.C. 1332, and the provisions of the General Maritime Law of the United States, as hereinafter more fully appears, and by the

"Savings to Suitors" Clause in 28 U.S.C. § 1333(a).

28. The Defendants' copyrighted DSD materials were created, designed, tested, edited, adopted, packaged, recommended, merchandised, advertised, updated, published, and sold for use by PADI Instructors such as ISHAM to use with beginning divers in the open water.

29. As said DSD material had material defects which could cause both the instructor and student users harm or even death when used in the manner for which they were created, designed, tested, edited, adopted, packaged, recommended, merchandised, advertised, updated, published, and sold, it was not fit for its ordinary, intended purpose.

WHEREFORE, Plaintiffs MATTHEW ISHAM and ROXANNE ISHAM pray judgement against Defendants, and each of them, as is hereinafter set forth.

FOURTH CAUSE OF ACTION

(Loss of Consortium)

30. Plaintiffs herewith refer to, and by reference incorporate as though fully set forth herein each and every allegation set in Paragraphs 1 through 29 herein, except Paragraphs 15, 20, and 26.

31. This cause of action arises under the Diversity Jurisdiction of this Court conferred by 28 U.S.C. 1332, and the provisions of the General Maritime Law of the United States, as hereinafter more fully appears, and by the "Savings to Suitors" Clause in 28 U.S.C. § 1333(a).

32. Plaintiff ROXANNE ISHAM was the lawful wife of Plaintiff, MATTHEW ISHAM on July 20, 2004, and thereafter through the present

33. Prior to his hereinabove alleged injuries, Plaintiff MATTHEW ISHAM was able to and did perform all of his duties, services and activities as the spouse of Plaintiff ROXANNE ISHAM. Subsequent to his aforesaid injuries, and as a direct and proximate result thereof, Plaintiff MATTHEW ISHAM has been unable, and will continue to be unable to perform said duties, services and activities. By reason thereof, Plaintiff ROXANNE ISAHM has been deprived, and will continue to be deprived, of the consortium of her husband, Plaintiff MATTHEW ISHAM, all to her general damage in an amount which exceeds the jurisdictional limits of the District Court.

WHEREFORE, Plaintiffs, and each of them, pray for judgment against Defendants, and each of them, as follows:

1. For general damages in excess of the jurisdictional limits of the District Court;
2. For special damages according to proof;
3. For pre-judgment interest according to the general maritime law;
4. For punitive and exemplary damages according to proof;
5. For the costs of suit herein;
6. For such other and further relief as this Court may deem proper.

Dated: July 13, 2006

LESSER & ASSOCIATES, PLC
Attorneys for Plaintiffs

By



RICHARD A. LESSER

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