

District Judge Thomas S. Zilly

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

MICHAEL POWERS,
Plaintiff,
vs.

UNITED STATES OF AMERICA,
Defendant.

) Case No.: 2:21-cv-00517-TSZ
)
) In Admiralty
)
) **NOTICE OF MOTION AND MOTION TO**
) **DISMISS: MEMORANDUM OF POINTS**
) **AND AUTHORITIES IN SUPPORT OF**
) **MOTION**
) [Fed. R. Civ. P. 12\(b\)\(1\)](#)
)
) NOTED ON MOTION CALENDAR:
)
) January 6, 2023
)
) Hon. Thomas S. Zilly
)
)
)

TABLE OF CONTENTS

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

MOTION AND RELIEF SOUGHT 1

MEMORANDUM OF POINTS AND AUTHORITY..... 1

FACTUAL BACKGROUND 1

DISCUSSION 4

 I. STANDARDS FOR MOTIONS TO DISMISS UNDER FRCP 12(b)(1) 4

 II. THE DFE BARS CHALLENGES TO THE COAST GUARD’S SAR
 POLICY 5

 A. *Gaubert* Prong #1: No Mandatory Requirement to Conduct a SAR 7

 1. Applicable Statutes Provide Discretion 8

 2. Applicable Policies and Guidelines Provide Discretion 9

 a. IAMSAR Manuals, Volumes I-II 9

 b. The National Search and Rescue Plan of the United States 10

 c. The National Search and Rescue Supplement to the IAMSAR
 Manual 10

 d. U.S. Coast Guard Addendum to the SAR Supplement 11

 e. U.S. Coast Guard District Thirteen Search and Rescue Plan 12

 f. SPS Joint Harbor Operation Center (JHOC) SOP 12

 3. None of Plaintiff’s Challenged Actions Involve Mandatory
 Requirements 13

 a. Not Mandatory to Conduct a SAR Investigation in a Particular
 Manner 13

 b. Not Mandatory to Create a Search Plan 13

 c. Not Mandatory to Keep UMIB Open 15

 d. When to Close a SAR Investigation is Discretionary 16

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

B. *Gaubert* Second Prong: Coast Guard SAR Responses Susceptible
To Policy Analysis 16

C. Brightline Rule – Coast Guard SAR Responses are Protected by DFE 21

CONCLUSION 24

TABLE OF AUTHORITIES

Page(s)

Cases

America Cargo Transport v. U.S.,
625 F.3d 1176 (9th Cir. 2010) 5

Anderson v. United States,
2016 WL 320076 (D.S.C. 2016) 23

Azille v. United States,
2008 WL 4911205 (D.V.I. 2008) 1, 21, 22

B & F Trawlers, Inc. v. U.S.,
841 F.2d 626 (5th Cir. 1988) 5

Bailey v. United States.,
623 F.3d 855 (9th Cir. 2010) 17

Baum v. United States,
986 F.2d 716 (4th Cir. 1993) 22

Berkovitz v. United States,
486 U.S. 531 (1988) 6, 20

Brower v. United States,
2020 WL 4261118 (W.D. Wash. 2020) 5

Chadd v. U.S.,
794 F.3d 1104 (9th Cir. 2015) 7, 13, 23, 24

Compagnie Maritime Marfret v. San Juan Bay Pilots,
532 F.Supp.2d 369 (D.P.R. 2008) 19

Cranford v. U.S.,
466 F.3d 955 (11th Cir. 2006) 5

GATX/Airlog Co. v. United States,
79 F.Supp.2d 1208 (W.D. Wash. 1999) 17

GATX/Airlog Co. v. United States,
286 F.3d 1168 (9th Cir. 2002) 17

1 *Gonzalez v. U.S.*,
 2 814 F.3d 1022 (9th Cir. 2016) 14, 17
 3 *Harborview Fellowship v. Inslee*,
 4 521 F.Supp.3d 1040 (W.D. Wash. 2020)..... 4, 5
 5 *Harrell v. United States*,
 6 443 F.3d 1231 (10th Cir. 2006) 7
 7 *Huber v. United States*,
 8 838 F.2d 398 (9th Cir.1988) 23
 9 *Hurd v. United States*,
 10 134 F.Supp.2d 745 (D.S.C. 2001)..... 23, 24
 11 *In re American Oil Co.*,
 12 417 F.2d 164 (5th Cir. 1969) 8
 13 *In re Complaint of ADRIAN AVENA*,
 14 1:21-cv-00515 (D.N.J. 2022)..... 1, 21, 22
 15 *In re Dynamic Random Access Memory Antitrust Litig.*,
 16 546 F.3d 981 (9th Cir. 2008) 4
 17 *In re U.S. Coast Guard Cutter POINT JUDITH*,
 18 1987 WL 90270 (C.D. Cal. 1987)..... 1, 22
 19 *Indian Towing Co. v. United States*,
 20 350 U.S. 61, 76 S.Ct. 122, 100 L.Ed. 48 (1955)..... 7
 21 *Iron Partners, LLC v. Maritime Admin.*,
 22 2009 WL 577539 (W.D. Wash. 2009)..... 7
 23 *Jahr v. U.S.*,
 24 259 F.Supp.3d 1158 (W.D. Wash. 2017)..... 6
 25 *Kelly v. United States*,
 26 924 F.2d 355 (1st Cir. 1991)..... 15, 16
 27 *Kennewick Irr. Dist. v. United States*,
 28 880 F.2d 1018 (9th Cir. 1989) 7, 23, 24
Kokkonen v. Guardian Life Ins. Co. of America,
 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994)..... 4

1 *Lam v. United States,*
 2 979 F.3d 665 (9th Cir. 2020) 1, 6-7, 13-16, 23-24

3 *Lane v. United States,*
 4 2020 WL 1427419 (D. Mass. 2020) 1, 7, 8, 22

5 *Lewis v. United States,*
 6 2002 WL 34104078 (M.D. Fla. 2002) 1, 22

7 *Matter of Moore,*
 8 488 F. Supp. 3d 231 (D. Md. 2020) 1, 21, 22

9 *Miller v. United States,*
 10 992 F.3d 878 (9th Cir. 2021) 17

11 *Northern Voyager Ltd P’ship v. Thames Shipyard & Repair Co.,*
 12 214 F. Supp. 2d 47 (D. Mass. 2002) 8

13 *Ochran v. United States,*
 14 117 F.3d 495 (11th Cir. 1997) 22

15 *Robinson v. United States,*
 16 586 F.3d 683 (9th Cir. 2009) 5

17 *Sabow v. U.S.,*
 18 93 F.3d 1445 (9th Cir. 1996) 17

19 *Safe Air for Everyone v. Meyer,*
 20 373 F.3d 1035 (9th Cir. 2004) 5

21 *Sauk-Suiattle Indian Tribe v. City of Seattle,*
 22 2021 WL 5712163 (W.D. Wash. 2021) 4

23 *Sierra Club v. McLerran,*
 24 2015 WL 1188522 (W.D. Wash. 2015) 15, 16

25 *Sierra Club v. Train,*
 26 557 F.2d 485 (5th Cir. 1977) 15, 16

27 *Sinochem Int’l Co. Ltd. v. Malaysia Int’l Shipping Corp.,*
 28 549 U.S. 422, 127 S.Ct. 1184, 167 L.Ed.2d 15 (2007) 4

Steel Co. v. Citizens for Better Env’t,
 523 U.S. 83 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998) 4

1 *Stock West, Inc. v. Confederated Tribes,*
 2 873 F.2d 1221 (9th Cir. 1989) 4
 3 *Taghadomi v. United States,*
 4 401 F.3d 1080 (9th Cir. 2005) 5
 5 *Tam v. United States.,*
 6 905 F.Supp. 2d 1221 (W.D. Wash. 2012)..... 17
 7 *Terbush v. United States,*
 8 516 F.3d 1125 (9th Cir. 2008) 7, 23, 24
 9 *Tew v. U.S.,*
 10 86 F.3d 1003 (10th Cir. 1995) 19
 11 *Thames Shipyard and Repair Co. v. U.S.,*
 12 350 F.3d 247 (1st Cir. 2003)..... 1, 5, 7, 8, 22
 13 *Tobar v. United States,*
 14 639 F.3d 1191 (9th Cir. 2011) 5
 15 *U.S. v. Gaubert,*
 16 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991)..... 1, 5-7, 16-17, 19, 22-24
 17 *United States. v. Sherwood,*
 18 312 U.S. 584, 61 S.Ct. 767, 85 L.Ed. 1058 (1941)..... 5
 19 *United States. v. Thompson,*
 20 98 U.S. 486, 25 L.Ed. 194 (1878)..... 5
 21 *United States v. Mitchell,*
 22 445 U.S. 535, 100 S.Ct. 1349, 63 L.Ed.2d 607 (1980)..... 5
 23 *United States v. Mitchell,*
 24 463 U.S. 206, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983)..... 5
 25 *United States v. S.A. Empresa de Viaco Aerea Rio Grandense (Varig Airlines),*
 26 467 U.S. 797, 104 S.Ct. 2755, 81 L.Ed.2d 660 (1984).....6, 13, 17, 21-22
 27 *Vickers v. U.S.,*
 28 228 F.3d 944 (9th Cir. 2000) 21
Wilder v. United States,
 2000 WL 1881198 (D.S.C. 2000)..... 1, 22

Woodyer v. U.S.,

334 F.Supp.2d 1263 (W.D. Wash. 2004).....5, 17, 23

Wright v. P.J. St. Pierre Marine, Inc.,

1989 WL 211485 (S.D. Tex. 1989) 1, 22

Statutes

14 U.S.C. § 521.....7

14 U.S.C. § 521(a)8

14 U.S.C. § 521(b)(1)9

14 U.S.C. § 701(a)9

14 U.S.C. § 701(b)9

28 U.S.C. § 2680(a)5, 7

46 U.S.C. §§ 30901-309185

Rules

Fed. R. Civ. P. 12(b)(1)..... 1, 4, 5, 22

MOTION AND RELIEF SOUGHT

The United States hereby moves this Court for an order dismissing Plaintiff’s entire Amended Complaint. The United States’ motion is made pursuant to [Fed. R. Civ. P. 12\(b\)\(1\)](#), on the ground that the Court lacks subject matter jurisdiction over this action as a result of the discretionary function exception (“DFE”) to the United States’ waiver of sovereign immunity. The United States’ motion is based upon this Notice of Motion and Motion, the accompanying Memorandum of Points and Authorities, the Declaration of Frank J. Anders in support of the motion, Exhibits A-Q, and all pleadings and papers on file in this action.

The basic framework of the two-prong DFE analysis examines (1) whether an act involves an element of judgment or choice, and (2) whether the act is susceptible to considerations of public policy. [U.S. v. Gaubert](#), 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991), [Lam v. United States](#), 979 F.3d 665, 673 (9th Cir. 2020). Critically, and as re-affirmed in *Lam*, the Court is not to consider the alleged fault or negligence of the United States as part of this analysis since the DFE applies “whether or not the discretion involved be abused.”¹

Plaintiff claims the Coast Guard negligently performed a search and rescue (“SAR”) investigation in response to his boating accident on the waters of Puget Sound.² However, Coast Guard decisions about whether, when, or how to perform a SAR are discretionary, susceptible to policy analysis, and barred by the DFE.³ The Court should thus dismiss this action with prejudice.

MEMORANDUM OF POINTS AND AUTHORITY

FACTUAL BACKGROUND

This action involves a tragic boating accident on the waters of Puget Sound. On May 2, 2019, the opening day of Halibut season, at approximately 4:30 a.m., plaintiff and Richard Seay

¹ [Lam](#), 979 F.3d at 673; *see Jahr v. U.S.*, 259 F.Supp.3d 1158, 1167 (W.D. Wash. 2017).

² Amended Complaint, ECF 43, ¶¶6.1-6.9, ¶¶12:17-14:19.

³ *See* Order of Dismissal, *In re Complaint of ADRIAN AVENA*, No. 1:21-cv-00515 (D.N.J. Nov. 4, 2022)([ECF 96](#)); Transcript of Oral Argument, *In re Complaint of ADRIAN AVENA*, No. 1:21-cv-00515 (D.N.J. Nov. 2, 2022)([ECF 99](#)), filed herewith with Request for Judicial Notice (Exh. Q); [Thames Shipyard and Repair Co. v. U.S.](#), 350 F.3d 247 (1st Cir. 2003); [Matter of Moore](#), 488 F. Supp. 3d 231 (D. Md. 2020); [Lewis v. United States](#), 2002 WL 34104078 (M.D. Fla. 2002); [Lane v. United States](#), 2020 WL 1427419 (D. Mass. 2020); [Azille v. United States](#), 2008 WL 4911205 (D.V.I. 2008); [Wright v. P.J. St. Pierre Marine, Inc.](#), 1989 WL 211485 (S.D. Tex. 1989); [Wilder v. United States](#), 2000 WL 1881198 (D.S.C. 2000); [In re U.S. Coast Guard Cutter POINT JUDITH](#), 1987 WL 90270 (C.D. Cal. 1987).

1 launched Mr. Powers' 20-foot boat from the Cornet Bay Marina boat ramp into the waters of
 2 Puget Sound.⁴ Heading westward through Deception Pass underneath the Deception Pass Bridge,
 3 the boat started experiencing heavy waves. At approximately 4:45 a.m., just west of the bridge,
 4 their boat was hit by a "rogue wave" that capsized the boat and threw them both into the water.⁵

5 The incident occurred within Coast Guard Sector Puget Sound's ("SPS") general area of
 6 responsibility.⁶ On the morning of the incident, there were four people on watch at the SPS
 7 Command Center ("SCC") in Seattle – the Command Duty Officer ("CDO"), the Operations Unit
 8 watchstander ("OU"), the Situation Unit watchstander ("SU"), and the Communications Unit
 9 watchstander ("CU").⁷ The SCC's mission is to "support safe and effective operations in support
 10 of all Coast Guard strategic goals."⁸ The SPS SAR Mission Coordinator ("SMC") was not on
 11 watch at the time of the incident.⁹ The SMC has overall responsibility for the prosecution of a
 12 SAR response¹⁰ and the SCC team works up SAR response.¹¹

13 A recreational boater called 911 via cell phone to report that he lost sight of a nearby boat
 14 near Deception Pass Bridge, and he was concerned that it may have capsized, and at 5:01 a.m.,
 15 the OU received the 911 relay.¹² At 5:04 a.m., the OU contacted the boat operator directly, who
 16

17 ⁴ Amended Complaint, ECF 43, ¶5.1. Exh. J, Plaintiff deposition, 26:17-21.

18 ⁵ Amended Complaint, ECF 43, ¶¶5.2-5.3. Exh. J, Plaintiff deposition, 29:2-6, 31:14-32:16.

19 ⁶ SPS conducts a number of operational missions, including SAR. *See* Exh. I, USA's Verified Response to Plaintiff
 20 Interrogatory #13, 24:27-27:8. (CDR Matthew Mitchell, the Chief of the Policy Division for the Coast Guard's Office
 21 of Search and Rescue in Washington, D.C., verified this Interrogatory response, which asked the United States to
 22 provide evidence to support its DFE affirmative defense. CDR Mitchell also served as the United States' non-
 23 retained expert for DFE and also testified in deposition as the USA's FRCP30(b)(6) witness with regard to both the
 24 DFE and about facts of the case known to the Coast Guard.)

25 ⁷ *See* Exh. H, USCG SAR Case Study, #4(1)–#4(30), at 4-9. The CDO was Chris Florschler (Exh. L, Chris Florschler
 26 deposition, 94:21-23). The OU was Alexander Polyak (Exh. M, Alexander Polyak deposition, 9:7-22; 26:14-27:1).
 27 The CU was Jason Guy (Exh. O, Jason Guy deposition, 7:14-19, 8:2-12). The SU was Cynthia Torres (Exh. N,
 28 Cynthia Torres deposition, 9:17-21. She was not involved in the SAR response. Exh. N., 9:22-10:2-6). At the time
 of the incident the OU, SU, and CU were on the watch floor and the CDO was within walking distance from the
 watch floor. Exh. M, Polyak deposition, 30:11-17.

⁸ Exh. G, Sector Puget Sound Joint Harbor Operation Center (JHOC) Standard Operating Procedures ("SPS JHOC
 SOP"), at 7. The others are Maritime Security, Maritime Safety, Protection of Natural Resources, Maritime Mobility,
 and Homeland Security/National Defense.

⁹ The SMC at the time of the incident was LCDR Blair Sweigart. *See* Exh. K, Blair Sweigart deposition, 7:21-8:6.

¹⁰ *See* Exh. E, Coast Guard's Addendum to the SAR Supplement, COMDTINST M16130.2F ("Addendum"), §§
 1.2.2.1–1.2.2.6., at 1-8 to 1-13; Exh. P., Matthew Mitchell deposition, 91:14-92:24. CDR Mitchell is the Chief of
 the Policy Division for the Coast Guard's Office of Search and Rescue. (Exh. P., 7:17-19).

¹¹ Exh. K, Sweigart deposition, 11:4-24.

¹² Exh. H, USCG SAR Case Study, ¶8, at 5.

1 described losing sight of the boat but that he did not feel comfortable turning around to assist
2 because of the high waves.¹³

3 The Coast Guard assigns one of three emergency phases to a SAR response – Uncertainty,
4 Alert, or Distress.¹⁴ SPS assumed SAR Mission Coordinator (“SMC”) in the Alert phase.¹⁵
5 During the SAR response that morning, the Coast Guard classified the incident as “Alert Phase”
6 and never elevated the incident to “Distress Phase.”¹⁶ The SMC has discretion to determine
7 whether a case should be classified as Uncertainty, Alert, or Distress.¹⁷

8 At 5:10am, the CU issued an Urgent Marine Information Broadcasts (“UMIB”) at the
9 direction of the OU.¹⁸ “[UMIBs] are a tool used by Coast Guard SAR Mission Coordinators to
10 alert the maritime public to a distress or potential distress situation.”¹⁹ At 5:11 a.m., vessel
11 KRAKEN responded to the UMIB and contacted the SCC reporting that he had observed a
12 recreational vessel west of Deception Pass Bridge that had turned around and was currently east
13 bound.²⁰ Between 5:11 a.m. and 5:22 a.m., the CU had a series of communications with the
14 KRAKEN,²¹ after which time the Coast Guard concluded that this was the same vessel involved
15 with the UMIB and that the vessel had turned around due to rough sea conditions and safely
16 returned to the boat ramp.²² At 5:29 a.m., the CDO called the SMC and advised the SMC he
17 believed this case was a false alert and that the case should be closed.²³ The SMC agreed,
18 concluded that the subject of the 911 report was the same boat reported as safe by KRAKEN,
19 ordered the UMIB cancelled and the case closed.²⁴ At 5:33 a.m., the CU cancelled the UMIB by
20 sending a radio broadcast advising mariners that there was no vessel in distress.²⁵ The Coast
21

22 ¹³ Exh. H, USCG SAR Case Study, ¶¶8-9, at 5-6.

23 ¹⁴ Amended Complaint, ¶5.15. Exh. E, Addendum, § 3.1.2.2, at 3-4.

¹⁵ *Id.*, ¶3.c., at 3; ¶10, at 6.

24 ¹⁶ *Id.*, ¶12, at 6. Exh. P, Mitchell deposition, 212:23-213:23. Exh. L, Florschler deposition, 46:3-12.

¹⁷ Exh. P, Mitchell deposition, 68:8-17; 69:18-22.

25 ¹⁸ Exh. H., USCG SAR Case Study, ¶12, at 6; Exh. P, Mitchell deposition, 37:7-8.

¹⁹ Exh. E, Addendum, § 2.6.1, at 2-33. Exh. P, Mitchell deposition, 208:2-7, 17-20.

26 ²⁰ Exh. H., USCG SAR Case Study, ¶13, at 6. Exh. M, Polyak deposition, 31:2-11.

²¹ Exh. H., USCG SAR Case Study, ¶¶14-19, at 6-7.

27 ²² *Id.*, ¶¶14-19, at 6-7. Exh. L, Chris Florschler deposition, 45:14-46:1.

²³ Exh. K, Sweigart deposition, 8:4-6; 8:17-10:1; 13:1-10.

28 ²⁴ *Id.*, 13:9-10; Exh. H, USCG SAR Case Study, ¶22, at 7.

²⁵ Exh. H., USCG SAR Case Study, ¶24, at 8. Exh. P, Mitchell deposition, 207:6-13.

1 Guard advises the public over the radio as to why a UMIB is cancelled so that more people will
2 respond to UMIBs when they are issued.²⁶ That morning, the Coast Guard neither launched assets
3 nor otherwise commenced a search and rescue mission for Plaintiff's vessel.

4 However, the Coast Guard mistakenly concluded, based upon the information relayed to
5 it by the KRAKEN, that plaintiff's vessel had returned to port. It had in fact capsized and plaintiff
6 and Mr. Seay were in the water. Mr. Seay survived in the water for approximately 20 minutes.
7 Plaintiff remained in the water until he was rescued by a passing fishing boat at around 12:30
8 p.m., unconscious and hypothermic. He was transported to the hospital and survived.

9 DISCUSSION

10 The Court should dismiss Plaintiff's Amended Complaint in its entirety, with prejudice,
11 as Plaintiff has not met his burden of proving that subject matter jurisdiction exists. The
12 applicable waiver of sovereign immunity in this admiralty action is the Suits in Admiralty Act
13 ("SIAA"), and the DFE applicable to the SIAA precludes holding the United States liable for any
14 of the alleged actions pled in the Amended Complaint. Because the DFE applies, the United
15 States has not waived its sovereign immunity and has not consented to be sued herein.

16 I. STANDARDS FOR MOTIONS TO DISMISS UNDER FRCP 12(b)(1)

17 The United States moves to dismiss the Amended Complaint under [Fed. R. Civ. P.](#)
18 [12\(b\)\(1\)](#) for lack of subject matter jurisdiction. A court "generally may not rule on the merits of
19 a case without first determining that it has jurisdiction over the category of claim in suit (subject
20 matter jurisdiction).²⁷ If the district court lacks subject matter jurisdiction, dismissal is required
21 and "[a] federal court is presumed to lack subject matter jurisdiction until plaintiff establishes
22 otherwise."²⁸ "Once a defendant has invoked Rule 12(b)(1) in a challenge to a court's competence
23 to hear a claim, the plaintiff 'bears the burden of establishing subject matter jurisdiction.'"²⁹ In

24 ²⁶ Exh. P, Mitchell deposition, 207:19-208:1.

25 ²⁷ *Sinochem Int'l Co. Ltd. v. Malaysia Int'l Shipping Corp.*, 549 U.S. 422, 430–31, 127 S.Ct. 1184, 167 L.Ed.2d 15
(2007) (citing *Steel. Co. v. Citizens for Better Env't*, 523 U.S. 83, 93-102 118 S.Ct. 1003, 140 L.Ed.2d 210 (1998)).

26 ²⁸ *Harborview Fellowship v. Inslee*, 521 F.Supp.3d 1040, 1046 (W.D. Wash. 2020)(citing *Kokkonen v. Guardian Life*
Ins. Co. of America, 511 U.S. 375, 114 S.Ct. 1673, 128 L.Ed.2d 391 (1994) and *Stock West, Inc. v. Confederated*
Tribes, 873 F.2d 1221, 1225 (9th Cir. 1989).)

27 ²⁹ *Sauk-Suiattle Indian Tribe v. City of Seattle*, 2021 WL 5712163, *3 (W.D. Wash. 2021)(citing *In re Dynamic*
Random Access Memory Antitrust Litig., 546 F.3d 981, 984-85 (9th Cir. 2008) and *Kokkonen*, 511 U.S. at 377.

1 resolving a Rule 12(b)(1) motion, the Court is not to presume the truthfulness of plaintiff’s
 2 allegations.³⁰ “When considering a motion to dismiss pursuant to Rule 12(b)(1), the court is not
 3 restricted to the face of the pleadings, but may review any evidence to resolve factual disputes
 4 concerning the existence of jurisdiction.”³¹

5 Rule 12(b)(1) motions can either be a facial attack, accepting the pled allegations as true,
 6 or it can go beyond the allegations, challenging the facts upon which jurisdiction is based.³² Here,
 7 the United States makes a facial attack on some of the allegations pled in the Amended Complaint
 8 and attacks the factual basis of some of the allegations, so “[a]ccordingly, the Court can consider
 9 evidence outside the ... Amended Complaint in resolving whether it has jurisdiction without
 10 converting the motion into a motion for summary judgment.”³³

11 **II. THE DFE BARS CHALLENGES TO THE COAST GUARD’S SAR POLICY.**

12 The United States is immune from suit unless it expressly waives its sovereign immunity
 13 and, absent an unequivocal waiver, federal courts lack subject matter jurisdiction.³⁴ Waivers of
 14 sovereign immunity are to be strictly construed in favor of the sovereign and “The waiver of
 15 sovereign immunity is a prerequisite to federal-court jurisdiction.”³⁵ Here, the applicable waiver
 16 is the SIAA,³⁶ and the SIAA is subject to the same DFE contained in the Federal Tort Claims Act
 17 (“FTCA”).³⁷ Under the DFE, courts lack subject matter jurisdiction over tort actions based upon
 18 the United States’ performance of discretionary functions.³⁸

19
 20 ³⁰ *Robinson v. United States*, 586 F.3d 683, 685 (9th Cir. 2009).

21 ³¹ *Brower v. United States*, 2020 WL 4261118, *2 (W.D. Wash. 2020)(Citations omitted.).

22 ³² *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004).

23 ³³ *Harborview Fellowship*, 521 F.Supp.3d at 1043. (Citing *Safe Air for Everyone*, 373 F.3d at 1039.)

24 ³⁴ *United States v. Mitchell*, 445 U.S. 535, 538, 100 S.Ct. 1349, 1351, 63 L.Ed.2d 607 (1980); *United States v. Thompson*, 98 U.S. 486, 489, 25 L.Ed. 194 (1878); *United States v. Sherwood*, 312 U.S. 584, 586, 61 S.Ct. 767, 85 L.Ed. 1058 (1941).

25 ³⁵ *Tobar v. United States*, 639 F.3d 1191, 1195 (9th Cir. 2011), citing *United States v. Mitchell*, 463 U.S. 206, 212, 103 S.Ct. 2961, 77 L.Ed.2d 580 (1983).

26 ³⁶ 46 U.S.C. §§ 30901-30918. See Amended Complaint, ECF 43, ¶2.1. Under the SIAA, “the waiver of sovereign immunity applies only where a private party would be liable under admiralty law for the same conduct.” *America Cargo Transport v. U.S.*, 625 F.3d 1176, 1181 (9th Cir. 2010)(Citing *Taghadomi v. United States*, 401 F.3d 1080, 1083 (9th Cir. 2005).)

27 ³⁷ 28 U.S.C. § 2680(a). *Tobar*, 639 F.3d at 1196; *Thames Shipyard & Repair Co.*, 350 F.3d at 254; *B & F Trawlers, Inc. v. U.S.*, 841 F.2d 626, 630 (5th Cir. 1988); *Cranford v. U.S.*, 466 F.3d 955, 958 (11th Cir. 2006); *Woodyer v. U.S.*, 334 F.Supp.2d 1263, 1270 (W.D. Wash. 2004).

28 ³⁸ *U.S. v. Gaubert*, 499 U.S. 315, 111 S.Ct. 1267, 113 L.Ed.2d 335 (1991).

1 The DFE “marks the boundary between Congress’ willingness to impose tort liability
 2 upon the United States and its desire to protect certain governmental activities from exposure to
 3 suit by private individuals.”³⁹ Recognizing that tort actions challenging the United States’
 4 discretionary policy judgments could “seriously handicap efficient government operations,”⁴⁰
 5 Congress retained the United States’ sovereign immunity in this area.”⁴¹ The DFE is anchored in
 6 the constitutional doctrine of separation of powers and is designed “to prevent judicial second
 7 guessing of legislative and administrative decisions grounded in social, economic, and political
 8 policy through the medium of an action in tort.”⁴²

9 Critically, and as re-affirmed by the Ninth Circuit in *Lam*, any alleged fault or negligence
 10 of the United States is irrelevant to the DFE analysis since it applies “whether or not the discretion
 11 involved be abused.”⁴³ This is made clear by the Ninth Circuit in *Lam*, wherein it held:

12 Moreover, whether the discretion involved was abused makes no difference;
 13 the government will still prevail. This means that even if the employee’s
 14 discretionary act is negligent, the district court should dismiss plaintiff’s case.
 15 Indeed ... the Supreme Court repeatedly states that *negligence is not an issue in the*
 16 *DFE analysis*. And the “degree of care used in performing the activities are
 17 irrelevant to the application of that doctrine.” Thus, courts should put the
 18 negligence issue aside on a DFE-based motion to dismiss and focus its inquiry on
 19 whether the employee’s acts were discretionary. This most often means that the
 20 court must examine the applicable government policies to see if they authorize or
 21 imply discretion or if they mandate specific duties. (Citations omitted.)

22 *Lam*, 979 F.3d at 673. (Emphasis added.)

23 The Court must initially identify the conduct that allegedly caused the harm.⁴⁴ Then, to
 24 determine if the DFE applies, the Supreme Court has set forth the two-prong DFE analysis, which
 25 examines (1) whether the act involves *an element* of judgment or choice, and (2) whether the act
 26 is *susceptible* to considerations of public policy, such as the economic, social, and political
 27 considerations. *Gaubert*, 499 U.S. at 322. See also *Berkovitz v. United States*, 486 U.S. 531
 28 (1988). “[W]here there is room for policy judgment and decision there is discretion.’ So, if the

39 *United States v. S.A. Empresa de Viaco Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 808, 104 S.Ct. 2755,
 81 L.Ed.2d 660 (1984).

40 *Id.*, at 814.

41 *Id.*

42 *Gaubert*, 499 U.S. at 323 (citing *Varig Airlines*, 467 U.S. at 813); see *Lam*, 979 F.3d at 665.

43 *Lam*, 979 F.3d at 673; *Jahr*, 259 F.Supp.3d at 1167.

44 *Gaubert*, 499 U.S. at 322.

1 policies allow an employee to make independent policy judgments, then the DFE defeats
2 plaintiff's claim.”⁴⁵

3 This Court has stated that “in order to survive a motion to dismiss, the claimant must
4 allege facts which would support a finding that the challenged actions are not the kind of conduct
5 which can be said to be grounded in the policy of a regulatory scheme.”⁴⁶ “The government has
6 the burden to prove [the DFE] defense, so to win dismissal, it must show that the DFE applies
7 because the employee's acts were discretionary. If the employee acted with discretion, the DFE
8 restores the government's immunity, and plaintiff loses.”⁴⁷ Finally, protected “[d]iscretionary
9 conduct is not confined to the policy or planning level.” *Gaubert*, 499 U.S. at 325.⁴⁸

10 **A. Gaubert Prong #1: No Mandatory Requirement to Conduct a SAR.**

11 In determining whether the first DFE prong is met, the a court “must determine whether
12 the challenged actions involve an “element of judgment or choice.”⁴⁹ The first prong will be
13 satisfied if plaintiff fails to identify a mandatory statute, regulation, or policy prescribing a
14 “specific” course of action embodying a fixed or readily ascertainable standard for an employee
15 to follow. *Gaubert*, 499 U.S. at 322-23. The Court, “should look at all the relevant policies in
16 their totality and how they fit together to determine if they are discretionary or mandatory.”⁵⁰

17 The first prong of the *Gaubert* test is met. Plaintiff claims the Coast Guard negligently
18 performed a SAR investigation.⁵¹ However, there is no legal duty for the Coast Guard to
19 undertake a SAR.⁵² In making the discretionary decisions as to whether, when, and how to

20 ⁴⁵ *Lam*, 979 F.3d at 673. (Citation omitted.)

21 ⁴⁶ *Iron Partners, LLC v. Maritime Admin.*, 2009 WL 577539, *3 (W.D. Wash. 2009)(citing *Gaubert*, at 325.)

22 ⁴⁷ *Lam*, 979 F.3d at 673.

23 ⁴⁸ *Gaubert* reversed a line of cases that had mistakenly relied on *Indian Towing Co. v. United States*, 350 U.S. 61, 76
24 S.Ct. 122, 100 L.Ed. 48 (1955) for the proposition that the DFE only applied to the “policy/planning” level of
25 government and did not apply to the “operational” level of government. *Indian Towing* is not relevant to a DFE
26 analysis (since the United States did not argue DFE in that case) and, since *Gaubert*, the planning/operational
27 distinction is no longer valid in any DFE analysis. *Terbush v. United States*, 516 F.3d 1125, 1130 (9th Cir. 2008);
28 *Lam v. United States.*, 979 F.3d 665, 685 (9th Cir. 2020)(Royal, R., concurring); *Chadd v. U.S.*, 794 F.3d 1104, 1108
(9th Cir. 2015)(Citing 28 U.S.C. § 2680(a)); *Kennewick Irr. Dist. v. United States*, 880 F.2d 1018, 1024-25 (9th Cir.
1989); *Thames Shipyard and Repair Co. v. United States*, 350 F.3d 247, 256 (1st Cir. 2003); *Harrell v. United States*,
443 F.3d 1231, 1237 (10th Cir. 2006).

⁴⁹ *Terbush*, 516 F.3d at 1129. (Citing *Gaubert*, 499 U.S. at 322.)

⁵⁰ *Lam*, 979 F.3d at 676.

⁵¹ Amended Complaint, ECF 43, ¶¶6.1–6.9.

⁵² See 14 U.S.C. § 521; *Lane*, 2020 WL at *6. Exh. P., Mitchell deposition, 59:23-60:14.

1 conduct a SAR, the Coast Guard looks to various policy documents, most notably the Coast
 2 Guard's Addendum to the SAR Supplement, COMDTINST M16130.2F (the "Addendum")⁵³
 3 These documents are not binding on the Coast Guard and impose "no extra statutory pre-existing
 4 legal duty on the Coast Guard."⁵⁴ The Addendum states, "This document creates no duties,
 5 standard of care, or obligations to the public and should not be relied upon as a representation by
 6 the Coast Guard as to the manner of proper performance in any particular case."⁵⁵

7 SAR decisions are rooted in experience and judgment, not explicit policy directives. The
 8 various statutes and guidelines under which the Coast Guard investigates possible distress
 9 situations and decides whether, how, and when to conduct a SAR expressly give discretion and
 10 state that SARs involve judgment and the consideration of different factors.⁵⁶ There is no
 11 mandatory requirement as to how to investigate a potential SAR, or whether, when, or how to
 12 conduct a SAR. SAR planning is an art that necessarily depends on the circumstances of each
 13 individual incident.⁵⁷ As CDR Matthew Mitchell stated clearly and succinctly in his deposition:

14 [I]t would be impossible to manage all aspects of a [SAR] case without
 15 exercising judgment. Judgment is embedded in every single action. This is not an
 16 easy flowchart type of process that you can follow mechanically. If it was, we'd
 have computers managing search and rescue. This requires judgment and
 discretion based on a myriad of facts.⁵⁸

17 **1. Applicable Statutes Provide Discretion.**

18 The applicable statutes pertaining to SAR provide complete discretion for the Coast Guard
 19 to decide whether, when, and how to conduct a SAR response (Emphasis added):

- 20 • **14 U.S.C. § 521(a)** (formerly cited as 14 U.S.C. § 88) states: "In order to render aid to
 21 distressed individuals, vessels, and aircraft on and under the high seas and on and under
 22 the waters over which the United States has jurisdiction ... the Coast Guard *may*: (1)
 perform any and all acts necessary to rescue and aid individuals...."

23 ⁵³ *Lane*, 2020 WL at *6. See Exh. E, Addendum.

24 ⁵⁴ *Lane*, 2020 WL at *5. (Citing *In re American Oil Co.*, 417 F.2d 164, 170 (5th Cir. 1969).

25 ⁵⁵ Exh. E, Addendum, § 4.D., at 2.

26 ⁵⁶ Exh. P, Mitchell deposition, 90:1-8; 90:17-21. Exh. E, Addendum, § 4.1.6.1, at 4-9 to 4-10, Exh. B, IAMSAR Vol.
 27 II, § 4.2.1, at 4-2 to 4-3.

28 ⁵⁷ See *Northern Voyager Ltd P'ship v. Thames Shipyard & Repair Co.*, 214 F. Supp. 2d 47, 51 (D. Mass. 2002) ("Not
 only does the very premise of emergency rescue logically suggest that decisions be made quickly and responsively,
 without the constraints of inflexible procedures, Coast Guard regulations and procedural handbooks specifically
 mandate as much.") aff'd in part, vacated and remanded in part on other grounds sub nom., *Thames Shipyard &
 Repair Co. v. United States*, 350 F.3d 247 (1st Cir. 2003).

⁵⁸ Exh. P, Mitchell deposition, 93:1-7.

- 1 • 14 U.S.C. § 521(b)(1) (formerly cited as 14 U.S.C. § 88) states, "...the Coast Guard *may*
2 render aid to individuals and protect and save property at any time and at any place at
3 which Coast Guard facilities and personnel are available and can be effectively utilized."
- 4 • 14 U.S.C. § 701(a) states in relevant part: "The Coast Guard *may* ... assist any Federal
5 agency, State, Territory, possession, or political subdivision thereof, or the District of
6 Columbia, to perform any activity for which such personnel and facilities are especially
7 qualified."
- 8 • 14 U.S.C. § 701(b) states: "(b) The Coast Guard ... *may* avail itself of such officers and
9 employees, advice, information, and facilities of any Federal agency, State, Territory,
10 possession, or political subdivision thereof, or the District of Columbia as be helpful in
11 the performance of its duties.

2. Applicable Policies and Guidelines Provide Discretion.

12 Various policies, procedures, plans, manuals, and instructions, also provide broad
13 discretion for the Coast Guard for deciding whether, when, and how to conduct a SAR:

a. IAMSAR Manuals, Volumes I-II

14 The International Aeronautical and Maritime Search and Rescue (IAMSAR) Manual,
15 Volumes I-III is published by the International Maritime Organization and the International Civil
16 Aviation Organization and says the following (Emphasis added):

- 17 • "Every SAR has unique transportation, climate, topography and physical characteristics.
18 *These factors create a different set of problems for SAR operations in each SAR.* Such
19 factors influence the choice and composition of the services, facilities, equipment and
20 staffing required by each SAR service." Exh. A, §2.1.2, at 2-1.
- 21 • "...*considerable experience and judgement are needed to handle typical SAR
22 situations....*" *Id.*, § 3.1.2, at 3-1
- 23 • "[M]anagers must determine what is appropriate to individual circumstances.... (b) *Avoid
24 policies which pre-empt the judgement of SAR professionals on whether it is safe and
25 appropriate to render assistance in a particular situation.*" *Id.*, §5.3.11, at 5-7.
- 26 • "While *no two SAR operations follow exactly the same pattern*, SAR incidents do
27 generally pass through defined stages, which can be used to help organize response
28 activities. These stages are discussed in general terms below and expanded discussion is
found in the remaining chapters of this volume. *These stages should be interpreted with
flexibility*, as many of the actions described may be performed simultaneously or in a
different order to suit specific circumstances." Exh. B, § 1.6.1., at 1-7.
- "*Since no two SAR operations follow exactly the same pattern, it is not possible to
develop comprehensive procedures that apply at all times.* Basic procedures, as outlined
below, may be adopted for each phase of emergency. *These procedures should be
interpreted with flexibility* as many of the actions described may be performed
simultaneously or in a different order to suit specific circumstances." *Id.*, § 3.5.1, at 3-6.

- 1 • “The many diverse criteria involved in estimating the likely location(s) and condition(s)
2 of the survivors make it impossible to give detailed, step-by-step instructions on how to
3 make such estimates. ***Sound judgement and careful analysis of all available clues are
4 therefore required to produce a valid assessment on which to base a search.***” *Id.*, § 4.2.2,
5 at 4-3. *See* § 4.2.1 for the discretionary factors to be considered regarding searches.
- 6 • “Computers and appropriate software can provide a great deal of assistance to the search
7 planner. Even relatively inexpensive computer systems can support most of the activities
8 listed above. However, computers and computer-based aids do have their limitations, as
9 discussed below. — ***Computers are tools which can enhance and aid, but cannot
10 replace, the human search planner’s judgement or analytical and co-ordination skills.***”
11 *Id.*, § 4.8.3, at 4-36.

12 **b. The National Search and Rescue Plan of the United States.**

13 The National Search and Rescue Plan of the United States (“NSP”) is an inter-agency
14 agreement designed to continue “the effective use of all available resources in all types of SAR
15 operations to enable the United States to satisfy its humanitarian, national, and international
16 commitments and obligations.” Exh. C, NSP, at 1. The NSP states that, “This Plan is solely
17 intended to provide ***guidance*** to the Participants.” *Id.*, at 4.

18 **c. The National Search and Rescue Supplement to the IAMSAR Manual.**

19 The National Search and Rescue Supplement to the International Aeronautical and
20 Maritime Search and Rescue Manual (“SAR Supplement”) “Provides comprehensive information
21 and guidance for Federal ... and local SAR Coordinators and authorities information on the
22 implementation of the U.S. national SAR system as detailed in the National Search and Rescue
23 Plan (NSP) ... Serves as the U.S. supplement to the IAMSAR Manual for aeronautical and
24 maritime SAR....” Exh. D., SAR Supplement, at lxvi. The SAR supplement states:

- 25 • “SAR facilities ***may*** be dispatched or diverted to provide assistance if it is believed that
26 conditions might worsen or that SAR facilities might not be available or able to provide
27 assistance if conditions did worsen at a later time.” *Id.* at 2-10. (Emphasis added.)
- 28 • “While ***no two SAR operations follow the same pattern***, SAR operations do generally
pass through defined stages, which can be used to help organize response activities. ...
The SAR operations stages ***should be interpreted with flexibility***, as many of the actions
described may be performed simultaneously or in a different order to suit specific
circumstances.” *Id.*, at 2-13. (Emphasis added.)
- “Three emergency phases (see Section 2-2) have been established for classifying incidents
and to help in determining the actions to be taken for each incident: • Uncertainty Phase;
• Alert Phase; and • Distress Phase. ***Depending on how the situation develops***, the incident
may have to be reclassified.” *Id.*, at 2-15. (Emphasis added.)

- 1 • “Coast Guard personnel are expected to exercise broad discretion and to exercise sound
2 judgment in performing the functions discussed. The Coast Guard retains the discretion
3 to deviate from or change this guidance without notice.” *Id.*, at PPO-10.
- 4 • “While no two SAR operations follow exactly the same pattern, SAR incidents generally
5 pass through defined stages, which can be used to help organize response activities. *These
6 stages should be interpreted with flexibility, as many of the actions described may be
7 performed simultaneously or in a different order to suit specific circumstances* SAR
8 operations generally proceed through the five stages: Awareness, Initial Action, Planning,
9 Operations, and Conclusion.” *Id.*, § 3.1.2, at 3-3.

6 e. **U.S. Coast Guard District Thirteen Search and Rescue Plan.**

7 The purpose of the District Thirteen Search and Rescue Plan (“D13 SAR Plan”) is “[t]o
8 provide **guidance** and establish policy for conducting Search and Rescue (SAR) operations within
9 the Seattle Search and Rescue Region (SRR) and the Thirteenth Coast Guard District.” Exh. F,
10 at 1. (Emphasis added.)

- 11 • “This **guidance** is not a substitute for applicable legal requirements, nor is it itself a rule.
12 *It is intended to provide operational guidance for Coast Guard personnel and is not
13 intended to nor does it impose legally-binding requirements on any party outside the
14 Coast Guard.*” *Id.*, at 2.
- 15 • “Case Termination. *This action shall be terminated at the conclusion of the affected case
16 at the SMCs discretion.*” *Id.*, at 5-6.

16 f. **SPS Joint Harbor Operation Center (JHOC) SOP.**

17 The purpose of the Sector Puget Sound Joint Harbor Operation Center (JHOC) Standard
18 Operating Procedures (“SPS JHOC SOP”) is “to provide specific procedures and guidelines to
19 effectively manage the SCC, thereby ensuring proper accountability, training, and usage of
20 applicable doctrine.” Exh. G, at 2. The SOP states in relevant part:

- 21 • “*Because it is not practical to establish separate policy and procedures for every
22 conceivable situation, Sector Puget Sound SCC supervisors are to exercise sound
23 judgment consistent with the included approved policy and procedures whenever
24 presented with a situation that does not fit neatly within the guidelines of this policy.*”
25 *Id.*, at 18-19. (Emphasis added.)
- 26 • “This instruction is a **guideline** for all SPS JHOC personnel, SPS subordinate units and
27 units requesting services from the SPS JHOC.” *Id.*, at 1. (Emphasis added.)
- 28 • The Section of the SPS JHOC SOP entitled DISCLAIMER states, “This document is
intended to provide operational requirements for Coast Guard personnel and is not
intended to nor does it impose legally binding requirements on any party outside the Coast
Guard.” *Id.*

1 **3. None of Plaintiff’s Challenged Actions Involve Mandatory Requirements.**

2 Plaintiff alleges that the Coast Guard improperly conducted a SAR response: (a)
3 Negligently investigated the incident; (b) Negligently failed to create a search plan; (c)
4 Negligently cancelled the UMIB; and (d) Negligently closed the SAR case.⁵⁹ None of these
5 challenged actions are mandatory – they are broadly discretionary. And to reemphasize, the fact
6 that the Coast Guard may have made mistakes while making these discretionary decisions does
7 not remove these decisions from the protection of the DFE, since the DFE applies “whether or
8 not the discretion involved be abused.” *Varig Airlines*, 467 U.S. at 808; *Lam*, 979 F.3d at 673.
9 *Chadd*, 794 F.3d at 1108.

10 **a. Not Mandatory to Conduct a SAR Investigation in a Particular Manner.**

11 Plaintiff first challenges the specific manner in which the Coast Guard investigated the
12 incident.⁶⁰ Plaintiff does not allege the Coast Guard violated any mandatory duties regarding
13 SAR investigations. The Addendum discusses SAR Incident Data Collection and makes it clear
14 that each SAR incident is different and may warrant using different methods and manners of
15 investigation based on the unique circumstances of each response.⁶¹ The SMC has discretion to
16 determine what is an appropriate response to any particular SAR incident.⁶² There simply is no
17 mandatory requirement as to how the Coast Guard must investigate a potential SAR incident.

18 **b. Not Mandatory to Create a Search Plan.**

19 Plaintiff next claims the Coast Guard did not “use appropriate search planning methods
20 as required by the Coast Guard’s official standards and polices” during the course of the SAR
21 investigation.⁶³ However, Plaintiff selectively quotes only a portion of the Addendum in his
22 Amended Complaint.⁶⁴ What the Addendum actually says is, “Coast Guard Search planners shall
23 plan searches in one of two ways, subject to the guidance provided in this Appendix: Manually
24

25 ⁵⁹ Amended Complaint, ECF 43, ¶6.6, 13:4-14:5.

26 ⁶⁰ *Id.*, bullet points #1-5, 13:6-22.

27 ⁶¹ Exh. E, Addendum, §§ 3.1.3 to 3.1.4.1, at 3-5 to 3-6.

28 ⁶² Exh. P, Mitchell deposition, 69:18-70:14; 81:24-82:7; 83:15-20; 85:12-16; 89:18-90:8; 96:1-5; 103:25-104:5; 119:17-19; 119:25-120:3.

⁶³ Amended Complaint, ECF 43, ¶6.6, bullet point #7, 13:23-24.

⁶⁴ *Id.*, ¶5.16, 6:23-7:3.

1 in accordance with the IAMSAR Manual and this Appendix, or with SAROPS. SAROPS shall
 2 be used whenever practicable.”⁶⁵ It does not say that the Coast Guard must create a search plan
 3 for every SAR, or that it must use any particular planning method, it merely advises Coast Guard
 4 personnel that once the Coast Guard has made the discretionary decision to create a search plan,
 5 the Coast Guard planner then has two search plan methods she can use, manual or SAROPS.
 6 Discretion is further evidenced by the use of the word “practicable” – which indicates the SMC
 7 has discretion to determine which planning method to use in any given situation.⁶⁶

8 The conclusion that the decision to create a search plan is discretionary is supported by
 9 the clarifying language in the above passage: “subject to the guidance provided in this Appendix.”
 10 The very first sentence of Appendix H entitled “Search Planning” states that “This Appendix
 11 provides U. S. Coast Guard policy and guidance for planning searches.”⁶⁷ That “guidance”
 12 necessarily includes discretion as to whether to create a search plan.

13 The first two pages of the Addendum – in an overview that applies to *all* functions in the
 14 Addendum, states, “Coast Guard personnel are expected to exercise broad discretion in
 15 performing the functions discussed. The Coast Guard retains the discretion to deviate from or
 16 change this guidance without notice. ... This Addendum does not cover occurrences best handled
 17 through experience and sound judgment. The CGADD is not intended to place undue restrictions
 18 on use of sound judgment.”⁶⁸ The Addendum’s broad discretion applies to creating search plans.

19 Under *Lam*, a Court must analyze what appear to be mandatory words within the overall
 20 context of government guidelines. The presence of the words “shall” or “must” in Appendix H
 21 of the Addendum do not make creating a search plan mandatory under the DFE analysis:

22 This decision [[Gonzalez v. U.S.](#), 814 F.3d 1022 (9th Cir. 2016)] teaches the
 23 importance of analyzing policies that contain mandatory words in their overall
 24 context. The panel said that “the presence of a few, isolated provisions cast in
 mandatory language does not transform an otherwise suggestive set of guidelines

25 ⁶⁵ Exh. E, Addendum, Appendix H, § H.1.6, at H-7. (Emphasis in original.)

26 ⁶⁶ Exh. E, Addendum, §§ 1.2.2.1–1.2.2.6., at 1-8 to 1-13; Exh. P., Mitchell deposition, 91:14-92:20; Exh. B,
 27 IAMSAR Vol. II, § 4.8.3, at 4-36. (“[C]omputers and computer-based aids do have their limitations ... Computers
 are tools which can enhance and aid, but cannot replace, the human search planner’s judgement or analytical and co-
 ordination skills.”)

28 ⁶⁷ Exh. E, Addendum, Appendix H, at H-3.

⁶⁸ *Id.*, at 2.

1 into binding agency regulations.” *Id.* at 1030. Furthermore, viewed in the context
 2 of that case, “mandatory-sounding language such as ‘shall’ does not overcome the
 3 discretionary character of the Guidelines.” *Id.* As a result, the DFE immunized the
 4 FBI’s actions. Hence, we must compare any mandatory words in the Lake
 Mendocino policies with the overall scope of the policies to see if, in their totality,
 the policies are mandatory or discretionary. The use of a few mandatory words like
 “shall” does not create a mandatory policy if the policy otherwise allows for
 discretion.⁶⁹

5 This Court has stated, “Proper statutory construction requires more than linguistic
 6 examination and review of the rules of statutory construction. The interpretation should be
 7 reasonable, and where the result of one interpretation is unreasonable, while the result of another
 8 interpretation logical, the latter should prevail.”⁷⁰ Given the broad discretion given to the Coast
 9 Guard by all the applicable statutes and policy documents, it would be unreasonable to conclude
 10 that the Coast Guard has a mandatory duty under the DFE to create a search plan for every SAR
 11 investigation, when this action is just one component of a larger discretionary SAR policy scheme.

12 The SMC retains discretion as to whether to create a search plan based on the particular
 13 circumstances of each SAR response. Once the SMC decided this was a false alert, no further
 14 action was necessary,⁷¹ which would obviate any need for a search plan. Not only did the SMC
 15 have discretion as to whether to create a search plan, it would have made no sense to create a
 16 search plan since the Coast Guard had already determined there was no distress situation.

17 **c. Not Mandatory to Keep UMIB Open.**

18 Plaintiff next challenges the decision to cancel the UMIB and, in when it canceled the
 19 UMIB, advising the public that Plaintiff’s vessel was not in distress.⁷² However, it is neither
 20 mandatory to keep a UMIB open nor are there mandatory requirements dictating the specific
 21 communications the Coast Guard must provide to the public with regard to canceling a UMIB.⁷³
 22 The Coast Guard had broad discretion as to when to cancel the UMIB.

23 ⁶⁹ *Lam*, 979 F.3d at 677. See *Kelly v. United States*, 924 F.2d 355 (1st Cir. 1991)(“Although words like “will” and
 24 “must” are generally of mandatory effect, they may have other meanings and may be used, as here, in merely a
 25 directory sense.”); *Sierra Club v. Train*, 557 F.2d 485, 488–90 (5th Cir. 1977)(Use of shall” in prescribing
 discretionary duty).

26 ⁷⁰ *Sierra Club v. McLerran*, 2015 WL 1188522, *5 (W.D. Wash. 2015)(Citing *Sierra Club v. Train*, 557 F.2d 485
 27 (5th Cir. 1977); *Kelly v. United States*, 924 F.2d 355, 360-61 (1st Cir. 1991)(Applying same rule of statutory
 construction to federal agency manual.)

28 ⁷¹ Exh. P., Mitchell deposition, 157:17-22.

⁷² Amended Complaint, ECF 43, ¶6.6, Bullets #7-8, 13:25-14:3.

⁷³ See Exh. E, Addendum, § 2.6, at 2-33 to 2-34.

1 **d. When to Close a SAR Case is Discretionary.**

2 Plaintiff lastly challenges the decision to close the SAR case once it was determined there
 3 was no distress situation.⁷⁴ However, the Coast Guard has broad discretion to close SAR cases.
 4 The Addendum states, “When the search object(s) is located, assistance to the object is completed,
 5 and no other SAR issues arise, the search and rescue case is considered closed. No further SAR
 6 related action by the Coast Guard is necessary or contemplated.”⁷⁵ The D13 SAR Plan states that
 7 a SAR case should be closed as a False Alarm if the vessel is not in distress.⁷⁶ Since the SMC
 8 determined there was no distress situation, classifying the case as a false alert, the Addendum and
 9 D13 SAR Plan directed that the case be closed. The SMC had the discretion to classify the case
 10 as a false alert and close the SAR case based on the information provided to him by the CDO.⁷⁷

11 Further, as discussed in more detail in the earlier section regarding the creation of search
 12 plans, even if Section 3.8.1.1 of the Addendum⁷⁸ applied to the closure of this SAR particular
 13 case – which it does not – the mere presence of the words “must” and “cannot” in that section
 14 does not mandate the Coast Guard keep a SAR case open under the DFE, given that the applicable
 15 statutes and guidelines give broad discretion to the Coast Guard for how to investigate a possible
 16 distress situation and whether, when, and how to conduct a SAR mission.⁷⁹

17 **B. Gaubert Second Prong: Coast Guard SAR Responses Susceptible to Policy Analysis.**

18 Confirming that none of the challenged Coast Guard actions are mandatory, we now move
 19 onto the second step of the *Gaubert* analysis – are the alleged acts are *susceptible* to considerations
 20 of public policy? The answer is unquestionably “yes” since decisions regarding whether, when,
 21 and how to conduct a SAR are grounded in social and economic policy considerations.

22
 23
 24 ⁷⁴ Amended Complaint, ECF 43, ¶6.6, bullet #9, 14:4-5; ¶5.18, 43:9-15.

⁷⁵ Exh. E, Addendum, § 3.8.1, at 3-93. See Exh. D, SAR Supplement, §2-13, at 2-59.

⁷⁶ Exh. F, D13 SAR Plan, Chapter 2, § A.4.a.(1)(b). See Chapter 5, § F.3., at 5-6.

⁷⁷ Exh. P. Mitchell deposition, 126:11-16.

⁷⁸ “Persons who are the object of a search must all be accounted for in order for a case to be closed. When persons remain missing at the conclusion of SAR efforts, the case cannot be closed.”

⁷⁹ *Lam*, 979 F.3d at 677. (“[T]he presence of a few, isolated provisions cast in mandatory language does not transform an otherwise suggestive set of guidelines into binding agency regulations.”); *Sierra Club v. McLerran*, 2015 WL 1188522, *5 (W.D. Wash. 2015)(Citing *Sierra Club v. Train*, 557 F.2d 485 (5th Cir.1977); *Kelly*, 924 F.2d at 360-61.)

1 This Court must *presume* that the Coast Guard’s discretionary decisions were grounded
 2 in policy.⁸⁰ Moreover, the Court must consider categorically, not case-specifically, whether a
 3 SAR investigation is subject to policy considerations, and it is irrelevant whether the government
 4 employees made an actual decision regarding policy factors.⁸¹ “Under Ninth Circuit law, ‘so long
 5 as a decision involves even two competing interests, it is “susceptible” to policy analysis and is
 6 thus protected by the discretionary function exception.’”⁸² As stated by the Ninth Circuit in
 7 *Gonzalez v. U.S.*, 814 F.3d 1022, 1027-28 (9th Cir 2016):

8 The focus of this second step is “not on the agent's subjective intent in
 9 exercising the discretion conferred by statute or regulation,” but rather “on the
 10 nature of the actions taken and on whether they are susceptible to policy
 11 analysis.” *Gaubert*, 499 U.S. at 325, 111 S.Ct. 1267. “The decision need
 12 not *actually* be grounded in policy considerations so long as it is, by its nature,
 13 susceptible to a policy analysis.” *GATX/Airlog Co. v. United States*, 286 F.3d
 14 1168, 1174 (9th Cir. 2002)(internal quotation marks omitted). According to the
 15 Court, “if a regulation allows the employee discretion, the very existence of the
 16 regulation creates a strong presumption that a discretionary act authorized by the
 17 regulation involves consideration of the same policies which led to the
 18 promulgation of the regulations.” *Gaubert*, 499 U.S. at 324, 111 S.Ct. 1267. Thus,
 19 “[w]hen established governmental policy, as expressed or implied by statute,
 20 regulation, or agency guidelines, allows a Government agent to exercise
 21 discretion, it must be presumed that the agent's acts are grounded in policy when
 22 exercising that discretion.” *Id.* We refer to this as the “policy judgment”
 23 prong. See *Sabow v. U.S.*, 93 F.3d 1445, 1451 (9th Cir. 1996).

24 SAR investigations and missions require Coast Guard personnel to balance multiple
 25 competing interests. SAR watchstanders make on-the-fly, life-or-death decisions, often with
 26 limited information, while contemporaneously considering weather and balancing safety to Coast
 27 Guard personnel. Additionally, the Coast Guard has to balance its SAR mission with a number
 28

⁸⁰ *Gaubert*, 499 U.S. at 316 (“When established governmental policy, as expressed or implied by statute, regulation, or agency guidelines, allows a Government agent to exercise discretion, it must be presumed that the agent's acts are grounded in policy when exercising that discretion.”); See *GATX/Airlog Co. v. United States*, 79 F.Supp.2d 1208, 1211 (W.D. Wash. 1999).

⁸¹ *Miller v. United States*, 992 F.3d 878, 888 (9th Cir. 2021)(Citations omitted.); *Woodyer*, 334 F.Supp.2d at 1270; see, *Varig Airlines*, 467 U.S. at 813.

⁸² *Tam v. United States.*, 905 F.Supp. 2d 1221, 1233 (W.D. Wash. 2012)(Citing *Bailey v. United States.*, 623 F.3d 855, 863 (9th Cir. 2010).

1 of other mission areas and, moreover, it operates globally, with limited assets, limited personnel,
2 and a limited budget assigned to it by Congress. These are the hallmarks of government policy.⁸³

3 The multi-mission nature of the Coast Guard and the competing demands upon its
4 equipment and personnel demonstrate the policy considerations behind these decisions. The
5 Coast Guard has eleven operational missions, including, among others, defense readiness, aids to
6 navigation, search and rescue, marine environmental protection, and marine safety.⁸⁴ The Coast
7 Guard has 40,757 military personnel, 8,739 civilian personnel, 6,240 reservists, and
8 approximately 26,000 volunteer Auxiliarists.⁸⁵ The Coast Guard operates 259 cutters, 1602 other
9 boats, and 200 aircraft.⁸⁶ SPS has over 780 Active Duty, Reserve, and Civilian personnel, over
10 600 Coast Guard Auxiliary Volunteers and is responsible for 3,500 square miles of waterways.⁸⁷
11 The Coast Guard cannot devote all of its assets and personnel to performing SAR responses – it
12 has to balance its available resources to accomplish all of its missions.

13 To accomplish these missions on a global scale, Congress annually provides the Coast
14 Guard with a budget to accomplish its various missions. The FY 2023 President’s Budget requests
15 \$13.82 billion for the Coast Guard, including \$11.54 billion in discretionary funding.⁸⁸ The Coast
16 Guard expects to spend \$1.2 billion for vessels, \$170 million for requisite military pay and
17 allowances, and \$53 million for workforce readiness.⁸⁹ “[T]he Coast Guard spends more than
18 \$50 million annually on [SAR] searches in operating costs alone.”⁹⁰ SPS has an Annual
19
20

21 ⁸³ Exh. I, USA’s Verified Response to Interrogatory #13 20:4-32:9 provides a myriad of facts showing the Coast
22 Guard operations, to include missions, assets, personnel, and budgetary considerations, all of which support a finding
23 that the Coast Guard’s SAR responses are susceptible to policy analysis.

24 ⁸⁴ *Id.*, 20:9-24:2. <https://www.gocoastguard.com/about-the-coast-guard/discover-our-roles-missions;>
25 [https://uscga.edu/careers/roles-and-missions/.](https://uscga.edu/careers/roles-and-missions/)

26 ⁸⁵ *Id.*, 24:3-4. [https://www.uscg.mil/About/Workforce/.](https://www.uscg.mil/About/Workforce/)

27 ⁸⁶ *Id.*, 24:4-6. [https://www.uscg.mil/About/Assets/.](https://www.uscg.mil/About/Assets/)

28 ⁸⁷ *Id.*, 25:18-27:11. [https://www.pacificarea.uscg.mil/Our-Organization/District-13/Units/Sector-Puget-Sound/;](https://www.pacificarea.uscg.mil/Our-Organization/District-13/Units/Sector-Puget-Sound/)
29 [https://www.pacificarea.uscg.mil/Portals/8/District_13/lib/doc/factsheet/SectorBriefingBook.pdf?ver=wfKRZtNvlK95NBOOYVxkQg%3d%3d×tamp=1626888077248.](https://www.pacificarea.uscg.mil/Portals/8/District_13/lib/doc/factsheet/SectorBriefingBook.pdf?ver=wfKRZtNvlK95NBOOYVxkQg%3d%3d×tamp=1626888077248)

30 ⁸⁸ *Id.* 28:9-10. [https://www.uscg.mil/budget/.](https://www.uscg.mil/budget/)

31 ⁸⁹ *Id.* 28:10-29:25.

32 [https://www.uscg.mil/Portals/0/documents/budget/2023/FY%202023%20President's%20Budget%20Fact%20Sheet](https://www.uscg.mil/Portals/0/documents/budget/2023/FY%202023%20President's%20Budget%20Fact%20Sheet.pdf?ver=gcTYiFH9QRw%3d×tamp=1648484095919)
33 [.pdf?ver=gcTYiFH9QRw%3d×tamp=1648484095919.](https://www.uscg.mil/Portals/0/documents/budget/2023/FY%202023%20President's%20Budget%20Fact%20Sheet.pdf?ver=gcTYiFH9QRw%3d×tamp=1648484095919)

34 ⁹⁰ Exh. E, Addendum, § 3.1.1, at page 3-3.

1 Operating Budget of \$4.1M.⁹¹ The Congressional budget necessarily limits the amount of
 2 equipment and personnel available to the Coast Guard, to include the number of assets that can
 3 be assigned to SAR missions, the number of personnel the Coast Guard can assign to various duty
 4 stations, and for training the Coast Guard can provide its personnel. “Economic considerations
 5 such as these are a proper basis for the exercise of discretion.”⁹²

6 The geographic scope of the Coast Guard’s responsibilities is also a basis for policy
 7 analysis. The coastline of the United States is 95,471 miles long.⁹³ In addition to providing
 8 various services along the entire coastline of the United States, the Coast Guard also provides
 9 such services on the inland rivers of the United States, including the Mississippi and Missouri
 10 Rivers, which is 3,710 miles long.⁹⁴ Puget Sound covers a total of 1,020 square miles and its
 11 coastline is 1,332 miles long.⁹⁵ The Coast Guard also has a presence throughout the world.⁹⁶ The
 12 Coast Guard has to balance where to assign personnel in order to best fulfill the Coast Guard’s
 13 mission areas with its inherent budgetary and manning limitations.

14 The unique nature of each SAR case and the need for Coast Guard personnel to balance
 15 various factors when making SAR decisions also support a finding that these decisions are
 16 susceptible to policy analysis.⁹⁷ Each SAR situation is unique, and responses require flexibility
 17 and judgment.⁹⁸ For example, there are times where the Coast Guard has to respond to multiple
 18 SAR incidents simultaneously.⁹⁹ In those situations, watchstanders must make hard decisions –

19 _____
 20 ⁹¹ Exh. I, USA’s Verified Response to Interrogatory #13, 25:18-27:11. <https://www.pacificarea.uscg.mil/Our-Organization/District-13/Units/Sector-Puget-Sound/>;
 21 https://www.pacificarea.uscg.mil/Portals/8/District_13/lib/doc/factsheet/SectorBriefingBook.pdf?ver=wfKRZtNv1K95NBOOYVxkQg%3d%3d×tamp=1626888077248.

22 ⁹² *Tew v. U.S.*, 86 F.3d 1003, 1006 (10th Cir. 1995)(citing *Gaubert*, 499 U.S. at 323). *See also*, *Compagnie Maritime Marfret v. San Juan Bay Pilots*, 532 F.Supp.2d 369, 382 (D.P.R. 2008))

23 ⁹³ Exh. I, USA’s Verified Response to Interrogatory #13, 27:27-28:1.
 24 <https://oceanservice.noaa.gov/facts/shorelength.html#:~:text=NOAA's%20official%20value%20for%20the,how%20the%20shoreline%20is%20defined>.

25 ⁹⁴ *Id.*, at 4-7. <https://www.nps.gov/miss/riverfacts.htm>.

26 ⁹⁵ *Id.*, at 7-8. The University of Washington, *The Puget Sound Model*, <https://www.eopugetsound.org/articles/puget-sound-model>.

27 ⁹⁶ Exh. I, USA’s Verified Response to Interrogatory #13, 24:12-22. <https://www.uscg.mil/About/Force-Laydown/>.

28 ⁹⁷ Exh. P., Mitchell deposition, 133:10-23. *See* Exh. E, Addendum, § 4.1.6.1, at 4-9 to 4-10, Exh. B, IAMSAR Vol. II, § 4.2.1, at 4-2 to 4-3

⁹⁸ *See e.g.*, Exh. A, IAMSAR, Vol. 1, § 2.1.2, at 2-1. Exh. B, IAMSAR, Vol. 2, § 3.1.5, at 3-6. Exh. E, Addendum, § 4.1.6.1, at 4-9 to 4-10. Exh. G, SPS JHOC SOP, at 18-19. Exh. P, Mitchell deposition, 93:16-94:4.

⁹⁹ Exh. P, Mitchell deposition, 70:10-14.

1 with limited assets, manpower, and time – as to how to respond. They must consider the weather
2 and safety to Coast Guard personnel, weighing the risks of conducting a search against the
3 likelihood of success.¹⁰⁰ Given the finite resources at the Coast Guard’s disposal, decisions have
4 to be made about when to engage SAR assets, knowing they may need to be available later in the
5 same day.¹⁰¹ These decisions inherently involve a balancing of economic and social
6 considerations, are susceptible to policy analysis, and fall within the coverage of the DFE.¹⁰²

7 To impose liability for its discretionary SAR decisions would severely handicap the Coast
8 Guard. For example, if the Coast Guard is required to investigate a SAR situation a particular
9 way and create a search plan every time it receives notice of a possible SAR, it may have to assign
10 more people to watchstanding duty and allocate money and time to train these additional
11 watchstanders, which would divert money and people away from other missions. It may also
12 divert money away from purchasing and maintaining assets like ships and aircraft, which would
13 negatively impact SAR missions. A requirement to use SAROPS in every possible SAR situation
14 could degrade SAR responses, since SAROPS may not be the most effective use of a
15 watchstander, and this could take personnel away from communicating with boaters and assets
16 responding to an incident. Requiring the Coast Guard to not cancel UMIBs and to keep SAR
17 cases open, even when it concludes that there is no person or ship in distress, could expose would-
18 be rescuers to unnecessary danger, since these would-be rescuers may continue to put their own
19 lives at risk for no reason. Leaving SAR cases open may also have the effect of diverting the
20 attention of Coast Guard personnel away from responding to actual emergencies.

21 The above facts and analysis demonstrate why all the discretionary decisions for SAR
22 responses are susceptible to policy analysis. There would be cascading ramifications – many of
23 which unknown – if liability were imposed for such choices. The Coast Guard has many missions
24 around the world, limited budget, assets, and personnel. Requiring the Coast Guard to take
25
26

27 ¹⁰⁰ Exh. P, Mitchell deposition, 130:8-131:16.

¹⁰¹ *Id.*, 132:10-133:9.

28 ¹⁰² *Berkovitz*, 486 U.S. at 536-7.

1 particular actions for all SARs would take needed discretion and judgment out of the hands of
2 Coast Guard professionals and would negatively impact SAR responses and other mission areas.

3 Discretionary decisions made during Coast Guard SAR responses are susceptible to policy
4 analysis. “By fashioning an exception for discretionary governmental functions, including
5 regulatory activities, Congress took “steps to protect the Government from liability that would
6 seriously handicap efficient government operations.”¹⁰³

7 **C. Brightline Rule – Coast Guard SAR Responses are Protected by DFE.**

8 The body of caselaw in this area has developed into a bright line rule – the DFE precludes
9 negligence claims against the Coast Guard pertaining to SAR responses. Only a month ago, in *In*
10 *re Complaint of ADRIAN AVENA*, No. 1:21-cv-00515 (D.N.J. Nov. 4, 2022) that court dismissed
11 the United States involving an alleged negligent Coast Guard SAR response. During oral
12 argument, District Judge Karen Williams stated (Emphasis added):

13 The third-party plaintiff attaches to her opposition papers the Coast Guard's
14 addendum search and rescue policy, which purportedly prescribes specific, non-
15 discretionary actions the Coast Guard must take when responding to maritime
16 emergencies.

17 ***... I find that plaintiff ignores the SAR policy's plain language, expressly
18 that its prescriptions are unconstrained and always subject to the Coast Guard's
19 discretion.*** There's a disclaimer that is apparent on the face of this document and
20 the provisions cited come with qualifications that suggest discretion to this Court.

21 Further, numerous courts have found that this very document and its
22 guidance does not circumvent, much less substitute itself for the judgment and
23 sound discretion of the Coast Guard. See for example, *Matter of Moore*, 488 F.
24 *Supp. 3d 231, 239-40 (D. Md. 2020)*. In that case, granting motion to dismiss on
25 the basis that discretionary function exception applied after reviewing the SAR
26 addendum.

27 Also, in *Azille vs. United States*, 2008 WL 4911205 (D.V.I., November 13,
28 2008), concluding that “The Coast Guard's decision to search for plaintiffs and its
judgments about how to conduct the search were discretionary acts.”

For all of these reasons, the Court finds that the government is entitled to
sovereign immunity based on the claims in this matter. As such, the government's
motion to dismiss pursuant to [Federal Rule of Civil Procedure 12\(b\)\(1\)](#) is granted
and all claims against it are dismissed with prejudice.¹⁰⁴

¹⁰³ *Varig Airlines*, 467 U.S. at 814. (Citation omitted.) *Vickers v. U.S.*, 228 F.3d 944, 949 (9th Cir. 2000).

¹⁰⁴ Transcript of Oral Argument at 37:13-38:15, *In re Complaint of ADRIAN AVENA*, No. 1:21-cv-00515-KMW-EAP (D.N.J. Nov.2, 2022)([ECF 99](#)), filed herewith with Request for Judicial Notice (Exh. Q). (Emphasis added.)

1 *Matter of Moore*, 488 F. Supp. 3d 231, 240 (D. Md. 2020) states:

2 It's easy to understand why USCG rescue operations like these should be
3 protected from suit: the Coast Guard must make decisions in rapidly-unfolding
4 and dangerous situations. Second-guessing those decisions with the leisurely
5 benefit of hindsight fails to account for the inherent stresses, difficulties, and other
6 factors that characterize the difficulty with which they must be undertaken. It
7 further fails to take into consideration such discretionary factors as limited
8 resources or competing demands for the same resources. Decisions undertaken
9 during a search and rescue are those that “we would expect inherently to be
10 grounded in considerations of policy,” *Baum v. United States*, 986 F.2d 716, 721
11 (4th Cir. 1993) and are “susceptible to policy analysis.” *Gaubert*, 499 U.S. at 324-
12 25, 111 S.Ct. 1267. Relitigating those decisions after the fact promises to
13 undermine subsequent attempts to execute rescues on the high seas. They embody
14 the exercise of discretion, and consequently divest this Court of jurisdiction to hear
15 this case.

16 And *Lewis v. United States*, 2002 WL 34104078, *7-*8 (M.D. Fla. 2002):

17 “Search and rescue” is only one of the Coast Guard's missions. Thus, the
18 allocation of money and time for the execution of its missions or duties invokes
19 policy considerations. *See, e.g., United States v. Varig Airlines*, 467 U.S. 797, 820
20 (1984) (explaining that decisions requiring an agency “to establish priorities for
21 the accomplishment of its policy objectives by balancing the objectives sought to
22 be obtained against such practical considerations as staffing and funding” are
23 protected by the discretionary function exception); *Ochran v. United States*, 117
24 F.3d 495, 502 (11th Cir. 1997) (recognizing that “budgetary constraints are almost
25 always important to government decisions” and that the allocation of limited
26 government resources implicates policy considerations protected by the
27 discretionary function exception). This allocation of funds and time necessarily
28 includes Coast Guard Mayport's decisions about staffing and training its personnel
and its decisions regarding whether or not to commit outside resources to a rescue.
These decisions are quintessential examples of the kind of judicial “second-
guessing” and intervention in policymaking decisions that the discretionary
function exception was designed to prevent. *Varig Airlines*, 467 U.S. at 820.

The list of cases that have gone the way of *Avena*, *Moore*, and *Lewis* literally goes on and
on. *See, Thames Shipyard and Repair Co. v. U.S.*, 350 F.3d 247 (1st Cir. 2003); *Lane v. United
States*, 2020 WL 1427419, *5 (D. Mass. 2020); *Azille v. United States*, 2008 WL 4911205, *4
(D.V.I. 2008); *Wright v. P.J. St. Pierre Marine, Inc.*, 1989 WL 211485, at *8 (S.D. Tex. 1989);
Wilder v. United States, 2000 WL 1881198, *5 (D.S.C. 2000); and *In re U.S. Coast Guard Cutter
POINT JUDITH*, 1987 WL 90270, at *3 (C.D. Cal. 1987).

See id., at 30:5-32:6 (Counsel for the United States explaining inapplicability of planning/operational distinction.)
Importantly, the Court dismissed this action under the DFE where, as in this case, the sole alleged acts of negligence
were for Coast Guard actions that took place before any search and rescue had been commenced.

1 Plaintiff will almost certainly point to *Hurd v. United States*, 134 F.Supp.2d 745 (D.S.C.
 2 2001) *aff'd* on other grounds, 34 Fed.Appx. 77 (4th Cir.2002) (unpublished) to support his claim
 3 that the DFE does not apply in this case. However, the holding in *Hurd* cannot be applied in this
 4 case since its DFE analysis – employing a planning/operational distinction – directly conflicts
 5 with *Gaubert* and Ninth Circuit binding precedent regarding DFE.¹⁰⁵ The DFE reasoning in *Hurd*
 6 was wrong at the time it was decided since the planning/operational distinction had already been
 7 expressly rejected by the Supreme Court in *Gaubert*:

8 Under the discretionary function exception, the Coast Guard cannot be held
 9 liable for making the decision whether to act or not. However, once the Coast
 10 Guard exercises discretion and makes a decision to institute a search and rescue
 11 operation, and/or render aid to distressed persons, it is obligated to use due care.
 12 *See, e.g., Huber v. United States*, 838 F.2d 398, 400–01 (9th Cir.1988). Thus,
 13 assuming that the Fourth Circuit would imply a discretionary function exception
 14 to Defendants' waiver of sovereign immunity under the SIAA, it would not apply
 15 to the facts of this case because this court has found that the Coast Guard exercised
 16 its discretion by making the policy decision to render aid in the search and rescue
 17 operation, and concomitantly was obligated to exercise reasonable care in the
 18 operation....

19 While Sass had no affirmative legal duty to do so, Sass did, in fact, decide
 20 to render aid and assistance. Once Sass made the decision to render aid, Sass's
 21 decisions were not grounded in social, economic, or political policy. Rather, he
 22 merely implemented, under objective criteria, the clear mandates of the Coast
 23 Guard.¹⁰⁶

24 According to *Hurd*, the DFE applied to the decision as to whether to commence a search
 25 and rescue but did not apply to the search and rescue itself. This was and is an improper
 26 application of the DFE and *Hurd* ignored the express language in *Gaubert* that states that
 27 protected “[d]iscretionary conduct is not confined to the policy or planning level.”¹⁰⁷ *Hurd*'s
 28 reasoning has since been rejected by the District of South Carolina,¹⁰⁸ and both the Ninth Circuit
 and this Court have clearly confirmed there is no such distinction in the DFE analysis.¹⁰⁹

¹⁰⁵ *Terbush*, 516 F.3d at 1130; *Lam*, 979 F.3d at 685 (Royal, R., concurring); *Kennewick Irr. Dist.*, 880 F.2d at 1024-25; *Chadd*, 794 F.3d at 1111.

¹⁰⁶ *Hurd*, 134 F.Supp.2d at 768-69.

¹⁰⁷ *Gaubert*, 499 U.S. at 325.

¹⁰⁸ *Anderson v. United States*, 2016 WL 320076 (D.S.C. 2016).

¹⁰⁹ *Terbush*, 516 F.3d at 1130; *Lam*, 979 F.3d at 685 (Royal, R., concurring); *Kennewick Irr. Dist.*, 880 F.2d at 1024-25; *Chadd*, 794 F.3d at 1111; *Woodyer*, 334 F.Supp.2d at 1270.

1 As an afterthought, after it had already concluded that the DFE did not apply because the
 2 Coast Guard commenced a rescue effort, the *Hurd* Court inexplicably concluded that, “Once Sass
 3 made the decision to render aid, his actions were not discretionary because Coast Guard policy
 4 specifically prescribes a course of action for him to follow.”¹¹⁰ This was and is simply wrong as
 5 a matter of fact. The *Hurd* court does not state what specific Coast Guard policy required Sass to
 6 render aid in a specific manner – *because there is none*. The applicable statutes and policies give
 7 broad discretion as to whether, when, and how to conduct a SAR response. *Hurd* not only got it
 8 wrong two decades ago, but its analysis is just as wrong today. *Hurd* must be rejected because it
 9 is counter to binding precedent set forth in *Gaubert*, *Terbush*, *Lam*, *Kennewick*, and *Chadd*.

10 The DFE protection applies to *all* aspects of a SAR response, to include both the
 11 discretionary decisions made during the investigation of a potential distress situation, as well as
 12 the resulting discretionary decisions as to whether, when, and how to conduct a SAR mission.¹¹¹

CONCLUSION

14 Plaintiff’s Amended Complaint fundamentally challenges the way in which the Coast
 15 Guard conducts SAR investigations and missions and seeks to hold the Coast Guard negligent for
 16 discretionary decisions made during the incident giving rise to this action. “Competing interests
 17 and policy concerns require balancing and weighing; balancing and weighing involve discretion;
 18 and policy discretion invokes the DFE.” *Lam*, 979 F.3d at 682. Although the tragic nature of
 19 this accident is undeniable, the United States has not waived its sovereign immunity and has not
 20 consented to be sued herein. The Court lacks subject matter jurisdiction over this action and the
 21 United States respectfully requests that the Amended Complaint be dismissed with prejudice.

23 Dated: December 14, 2022.

24 BRIAN T. MORAN
 25 United States Attorney
 26 KERRY KEEFE
 27 Assistant United States Attorney
 28 Western District of Washington

¹¹⁰ *Hurd*, 134 F.Supp.2d at 769.

¹¹¹ The government notes that even if the now-defunct “planning/operational” distinction used by *Hurd* was applied to this case, the DFE would still preclude this action since the alleged acts of negligence only took place in the “planning” stage. The response never reached the “operational” stage since no SAR mission was commenced.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

BRIAN BOYNTON
Principal Deputy Assistant Attorney General

ERIC KAUFMAN-COHEN
Attorney in Charge

s/Frank J. Anders
FRANK J. ANDERS
Trial Attorney
SCOTT PERRYGO
Trial Attorney
Aviation, Space & Admiralty Litigation
Torts Branch, Civil Division, West Coast Office
U.S. Department of Justice

Attorneys for United States of America

CERTIFICATE OF SERVICE

I hereby certify that, on December 14, 2022, a true and correct copy of the foregoing NOTICE OF MOTION AND MOTION TO DISMISS: MEMORANDUM OF POINTS AND AUTHORITIES IN SUPPORT OF MOTION, DECLARATION OF FRANK J. ANDERS, and EXHIBITS A-P was served electronically through CM/ECF on:

Tomas Gahan
Michael S. Wampold
Sara K. Leonetti
Peterson| Wampold| Rosato| Feldman| Luna
1001 Fourth Avenue, Suite 4131
Seattle, WA 98101-3677

Joseph B Pipinich
Pipinich Law PLC
110 James St., Suite 300
Edmonds, WA 98020

s/ Frank J. Anders
FRANK J. ANDERS