UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA
IN ADMIRALTY

CASE NO.4:17-CV-10050-JLK

THE MATTER OF:
THE COMPLAINT OF HORIZON
DIVE ADVENTURES, INC., AS OWNER
OF THE M/V PISCES (HULL ID# FVL31002F707)
ITS ENGINES, TACKLE, APPURTENANCES,
EQUIPMENT, ETC., IN A CAUSE FOR
EXONERATION FROM OR LIMITATION OF LIABILITY,

Petitioner

vs.

PETER SOTIS, SANDRA STEWART, AS PERSONAL
REPRESENTATIVE OF THE ESTATE OF
ROBERT STEWART,

Respondents/Claimants

_____/

REVO BVBA'S MEMORANDUM OF LAW IN SUPPORT OF ITS MOTION TO INTERVENE

rEvo BVBA, dba rEvo Rebreathers ("REVO"), by and through its undersigned counsel, respectfully submits this Memorandum of Law in support of its motion to intervene pursuant to Federal Rule of Civil Procedure 24.

I. FACTUAL BACKGROUND

On January 31, 2017, Canadian filmmaker Robert Stewart died after making a series of deep technical dives to the *Queen of Nassau* shipwreck, which rests in nearly 230 feet of seawater, five miles off the coast of Islamorada, Florida. At the time of his death, Stewart was engaged in a commercial filmmaking operation to film *Sharkwater:Extinction*, a follow up to his 2007 film, *Sharkwater*. (D.E. 1 at ¶¶ 8-9.)

In the fall of 2016, Stewart's production company, SW2 Productions, entered into a private charter agreement with Petitioner HORIZON DIVE ADVENTURES, INC. ("HORIZON"), whereby HORIZON agreed to provide Stewart and his production team with a vessel and crew to take them to the *Queen of Nassau* shipwreck – where Stewart and his team had never been – for three days of diving, to guide them on the site, and assist the filmmakers in their efforts to film the critically endangered Smalltooth Sawfish. *Id*. At the time this agreement was made, HORIZON never asked Stewart's production company, Stewart or his producing partner, Brock Cahill, if they were qualified or certified to safely dive to the *Queen of Nassau* shipwreck, and HORIZON later learned that Stewart and Cahill were not certified. *See* Deposition of Daniel Dawson, attached hereto as Exhibit A, at 57:15-35, 126:23-127:14, 134:9136:6, 265:7-19; Deposition of Jeffrey Knapp, attached hereto as Exhibit B, at 38:13-50:11.

Nevertheless, HORIZON originally agreed that its owner, Dan Dawson, and another employee, Jeffrey Knapp, would act as safety divers for Stewart and Cahill. *Id*. This plan changed at the last minute, when Petitioner/Claimant PETER SOTIS and his wife, Claudia, were suddenly able to travel to Islamorada and act as safety divers for the first two days of the charter, January 30 and 31, 2017; with Knapp and Dawson acting as safety divers on the third day of the charter, February1, 2017. *Id*.

It is undisputed that, even though this charter was part of a commercial filmmaking operation, at no time did HORIZON, Stewart, Cahill, SW2 Productions or any of their employees attempt to comply with Occupational Safety and Health Standards ("OSHA"), 29 CFR Part 1910, Subpart T - Commercial Diving Operations. These OSHA Standards, which apply to commercial enterprises whenever employees are diving beyond recreational scuba diving limits, on closed circuit scuba diving equipment, where decompression is required, have

strict requirements for, among other things: verifying dive team members' credentials (29 CFR 1910.410); distribution and adherence to a safe diving practices manual (29 CFR 1910.420); predive briefing, planning and assessment (29 CFR 1910.421); procedures during a dive (29 CFR 1910.422); procedures after a dive (29 CFR 1910.423); and even more stringent procedures for employees engaged in scuba diving (29 CFR 1910.424). Either HORIZON or SW2 Productions, or both, should have been aware of these OSHA standards and adhered to them to ensure the safety of the participants in the commercial charter to film wildlife for a major motion picture.

After two days of diving in poor visibility, the production team had failed to find or film any sawfish. A discussion was had and the consensus was that conditions were unlikely to improve the next day, February 1, 2017, so Stewart decided to end the charter and come back another time. However, HORIZON had its grappling hook and mooring ball affixed to the wreck site (D.E. 12-1 at ¶ 12), but no crew with the qualifications or diving equipment necessary to retrieve the hook. *See* Ex. A at 199:8-204:16. Consequently, Stewart and SOTIS volunteered to perform a job as crew for HORIZON and to dive to the wreck and retrieve the grappling hook (D.E. 12-1 at ¶ 13), and HORIZON's Captain allowed these passengers to perform a third dive that day to a depth in excess of 220 feet simply to retrieve HORIZON's property. *See* Witness Statement of Capt. David Wilkerson dated January 31, 2017, attached hereto as Exhibit C.

According to the handwritten and notarized statement of HORIZON's Captain, David Wilkerson, taken on the night Stewart was lost, SOTIS and Stewart successfully completed their third dive but HORIZON failed to rescue Stewart when he exhibited signs of distress on the surface. *See* Ex. C. Wilkerson wrote:

> The 2 divers, Peter and Rob, surfaced after completing the dive and signaled "OK" … Peter was the 1st to board and after approximately 30 seconds [he] became immediately incoherent. Rob was 10 ft. behind the boat waiting to board.

> We use a tag line so the divers can be attached to the boat as we are drifting. He did not respond to commands to grab the line, and this is when I observed he to [sic] had possibly become incoherent. I repositioned the boat to get the line to Rob immediately, at which time he disappeared from the surface. This took approximately 10 seconds to reposition the boat.

Id.

According to the deposition testimony of HORIZON's owner, Dan Dawson, nobody jumped into the water to save Stewart when the Captain observed that he became incoherent because neither of HORIZON's crew members were supposed to go into the water, and it was up to the passengers to decide if they wanted to voluntarily enter the water to save a drowning man. *See* Ex. A at 199:8-204:16. The dive computer data downloaded from Stewart's scuba diving equipment shows that Stewart remained on the surface unattended for nearly three minutes – according to Wilkerson just 10 feet behind the boat and obviously in distress – during which time Wilkerson decided to drive the boat away from Stewart. *See* Ex. C; Dive Profiles of Robert Stewart for Dives 3 and 4 on Jan. 31, 2017, attached hereto as Exhibit D.[1] While Wilkerson was moving the boat, Stewart disappeared. Ex. C.

During this commercial filmmaking charter, Stewart was using a piece of scuba diving equipment known as a "closed circuit rebreather." Unlike traditional "open circuit" scuba diving equipment, where the diver's exhaled gas is transferred to the water in the form of bubbles, a rebreather recirculates the diver's gas in a closed "loop." Oxygen is added to the loop to maintain a safe partial pressure of oxygen ("ppO2") in the breathing gas, while carbon dioxide from the diver's exhaled gas is removed by a chemical scrubber material. The dive computer data downloaded from Stewart's rebreather shows that the breathing device, a rEvo III rebreather

[1] The rebreather's dive computer data was downloaded by the U.S. Coast Guard at the office of the ESTATE's counsel, with the assistance of REVO, on July 31, 2017. Copies of the data retrieved from Stewart's rebreather were provided to REVO and the ESTATE for analysis, and REVO has been advised by counsel for the ESTATE that a copy of this data also has been provided to HORIZON in discovery.

manufactured by REVO in Belgium, delivered a constant and safe flow of oxygen to Stewart before and during the 2 minutes and 45 seconds he was on the surface, maintaining a ppO2 level between 0.80 ATA and 0.9 ATA on the surface, more than 3-4 times the amount of oxygen in the air we breathe (0.21 ATA). *See* Ex. D; Surface PPO2 During Surface Interval, attached hereto as Ex. E; Rob Stewart Petrel 2 Controller Data - Surface Interval Dive 43 to 44, attached hereto as Exhibit F. This evidence negates both the Medical Examiner's finding that Stewart lost consciousness due to hypoxia, or lack of oxygen, and any claim that the rebreather malfunctioned.[2]

On January 31 or February 1, 2017, HORIZON retained the services of Donna E. Albert, Esq. and her associate, Craig Jenni, Esq. *See* Ex. A at 250:18-20. Jenni holds himself out as an investigator of scuba diving accidents through his company, Dive and Marine Consultants International, *see* Ex. B at 64:19-68:9; but, in fact, Jenni is not a licensed private investigator. Instead, he operates under an exception to Florida's private investigator licensing requirements for "Any attorney in the regular practice of her or his profession." *See* § 493.6102(6), Fla. Stat. (2014).

HORIZON and its employees returned to the *Queen of Nassau* wreck site on February 1, 2 and 3, 2017 to search for Stewart underwater, *see* Ex. A at 239:1-244:18; while the U.S. Coast Guard, Stewart's family and hundreds of volunteers searched an area the size of Connecticut in the false hope that Stewart would be found alive, floating on the ocean's surface. *See* "Missing

[2] The Monroe County Medical Examiner, Dr. Thomas Beaver, was invited to attend and participate in the data download performed on July 31, 2017, and to review the data, but he declined to do so. Thus, Dr. Beaver's conclusions regarding the cause of Stewart's death are not based on a complete review of the evidence – and especially not the evidence that would either support or refute his finding that Stewart succumbed to hypoxia.

documentary filmmaker's body found after underwater shoot gone wrong," *Miami Herald*, Feb. 3, 2017, attached hereto as Exhibit G. HORIZON's search was unsuccessful.

By February 2, 2017, HORIZON was joined by Jenni and his associate, Kell Levendorf; as well as the owner of a Key Largo dive shop, Rob Bleser; and one of Bleser's dive shop employees, Joe O'Keefe. *See* Ex. A at 249:2-253:6; Ex. B at 64:19-68:9. HORIZON, its counsel and friends searched underwater at the wreck site for a full day using a borrowed remotely operated vehicle ("ROV"), but again they found nothing. Ex. A at 249:2-253:6; Ex. B at 91:4-17.

On February 3, 2017, the HORIZON search team expanded to include Stewart's filmmaking partner, Brock Cahill; and another dive boat captain, Tuck Hall. *See* Ex. A at 253:717. By this time, HORIZON and its cohorts were masquerading as a dive team from the Key Largo Volunteer Fire Department ("KLVFD"). *See* Ex. G. But there were three problems with maintaining this charade:

1. Neither KLVFD nor any other fire department in Monroe County has a dive team. *See* "Fire department denies having a dive team," *Florida Keys News*, March 31, 2017, attached hereto as Exhibit H.

2. None of the individuals that were part of the HORIZON search team has ever held a current or valid Volunteer Firefighter Certificate of Completion issued by the Division of State Fire Marshal, Bureau of Fire Standards and Training, under § 633.408, Fla. Stat. (2013).

3. HORIZON itself has admitted that its search for Stewart was undertaken at the direction of its legal counsel in anticipation of litigation. (D.E. 27.)

HORIZON and its attorney searched all day on February 3rd for Stewart and they finally found him at approximately 5:00 p.m. Ex. A at 253:18-258:4. Not to be deterred by the law – including § 633.408, Fla. Stat. (2013); § 406.12, Fla. Stat. (2016); § 777.04(3), Fla. Stat. (2016); and § 843.08, Fla. Stat. (2016) – and failing to follow any legitimately recognized standards for

the preservation of evidence or documenting the scene of an accident, HORIZON's owner, its attorney and its key employee donned scuba gear, dove to the bottom and retrieved Stewart's body. Ex. A at 258:5-264:5; Ex. B at 91:18-100:5. Among other things, the divers tampered with evidence by using Stewart's breathing gas in an attempt to inflate his scuba gear, and they failed to photograph the scene using either the ROV or an underwater camera.[3] *Id*.

The divers spent approximately five minutes examining Stewart's body and equipment before they attached a lift bag to his rebreather and sent him to the surface. After this, Bleser used the radio to call the Monroe County Sheriff's Office dispatch, and he informed the Sheriff that they would turn over Stewart's body and equipment to the Coast Guard "after they do some forensics." Then, at approximately 6:04 p.m., the U.S. Coast Guard, not realizing that it had been duped by HORIZON, issued a tweet stating: "Body of diver Mr Stewart reportedly found @ depth of 220 ft by ROV assist to Key Largo Vol Fired Dept." *See* @USCGSoutheast Tweet, Feb. 3, 2017, attached hereto as Exhibit I. This litigation began shortly thereafter.

II. PROCEDURAL HISTORY

On March 28, 2017, SANDRA STEWART, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF ROBERT STEWART ("ESTATE"), filed a wrongful death suit against HORIZON, PETER SOTIS, Claudia Sotis and Add Helium, LLC in state court, alleging that

[3] Jenni, the so-called expert in underwater forensic investigations, supposedly failed to bring a camera with an underwater housing, as did Dawson, a certified Underwater Crime Scene Investigator Instructor, despite having three days to acquire the necessary equipment to properly document Stewart's body and equipment upon recovery. Ex. A at 258:5-264:5; Ex. B at 91:18-100:5. Meanwhile, Knapp was not certified to dive to 225 feet on a rebreather to recover Stewart, but he did so anyway, see Ex. B at 27:14-29:24, 69:19-70:14; and Bleser, the dive shop owner turned borrowed ROV pilot, dumped the ROV into the mud immediately after finding Stewart and failed to film the scene – but not before banging the ROV into Stewart's body, which fortunately awakened the rebreather's electronic controllers. The rebreather's dive computer subsequently recorded the recovery divers washing Stewart's breathing gas – critical evidence of HORIZON's negligence because HORIZON supplied Stewart with gas he was not certified to use – through Stewart's now open rebreather and into the water.

they breached their duty of care to Stewart and thereby caused his death. (D.E. 12-1.) The ESTATE's complaint does not mention REVO or a rebreather.

On May 23, 2017, HORIZON filed a Complaint For Limitation of Liability and or Exoneration in this court. (D.E. 1.) HORIZON's complaint mentions that Stewart was using a closed circuit rebreather, but not REVO. (D.E. 1 at ¶ 13.) HORIZON's complaint does not assert any claims against REVO and REVO was not served with a copy of the complaint or otherwise notified of the pendency of HORIZON's action. However, HORIZON's complaint requests that "a judgment and decree be entered discharging Petitioner and the vessel of and from all further liability and forever enjoining and prohibiting filing and prosecution of any claims against Petitioner or their property in consequence with the matters and happening referred to in this Complaint." (D.E. 1 Ad damnum clause (d).)

Although the parties initial pleadings did not assert claims against REVO, and REVO was never served with or formally notified of any pleadings, on September 6, 2017, HORIZON filed two documents attempting to avoid or limit its liability to the ESTATE by alleging:

> that persons or entities not presently a party to this action over whom Petitioner had no control, contributed in whole or in part to the loss and damages complained of, thus requiring the apportionment of damages according to the degree of fault of said non-parties. . . . Those other persons and entities are: ADD HELIUM, LLC, CLAUDIA SOTIS and ***the manufacturers of the equipment used by the decedent including but not limited to the manufacturer of the involved rebreather***.

(D.E. 18 at 6, ¶ 4; D.E. 19 at 6, ¶ 5)(emphasis added). As before, these pleadings were never served on REVO and REVO was never formally notified that HORIZON was asserting claims against it. Indeed, HORIZON's counsel, Jenni, visited REVO's booth at a trade show in Orlando in November 2017 and affirmatively represented to REVO that HORIZON was not attempting to hold REVO responsible for Stewart's death.

As this Court is aware, the adjudication of this case has been stalled by the extreme delay of the U.S. Navy and U.S. Coast Guard n issuing their reports into the death of Robert Stewart. (D.E. 38.) Depositions have only recently begun and it appears very little document discovery has been exchanged by the parties.

More importantly, despite the assurances of HORIZON's counsel last November, it is now obvious that HORIZON is attempting to hold REVO, and other companies loosely affiliated with REVO, responsible for the death of Stewart through the adjudication of its claims for apportionment of liability. On June 7, 2018, HORIZON served a Subpoena *Duces Tecum* dated June 5, 2018 upon "HEAD USA, INC., d/b/a MARES DIVING, DIVISION [sic] OF HEAD USA" at its offices in Boca Raton, Florida. (D.E. 63-1.) Upon receipt of this subpoena, HEAD contacted the undersigned counsel in Miami, Florida and asked its counsel to inform HORIZON that HEAD had no documents responsive to the subpoena and to obtain HORIZON's cooperation in withdrawing the subpoena and, if HORIZON wished, to reissue it to the proper party, REVO. This effort was unsuccessful. Among other things, HORIZON's counsel insisted (incorrectly) that a representative of HEAD was present at an equipment inspection in 2017 and that HEAD should obtain for HORIZON documents and other material that are in the possession of parties and non-parties including the U.S. Navy, U.S. Coast Guard, REVO, the ESTATE, and HORIZON itself.

On June 18, 2018, HEAD filed its Motion to Quash the Subpoena *Duces Tecum* on the basis that the subpoena was served to the wrong party, that HEAD is not in possession, custody or control of the documents sought by HORIZON, that the subpoena was unduly burdensome because it seeks documents in the possession of parties and non-parties including the U.S. Coast Guard, the U.S. Navy, REVO and HORIZON itself. (D.E. 63, 65.)

On July 2, 2018, HORIZON filed its Memorandum in Opposition to HEAD's Motion to Quash. (D.E. 73.) HORIZON's response makes it clear that HORIZON is using its subpoena to make an end run around the rules of discovery, pleadings and fairness to a non-party. HORIZON makes no substantive effort to address HEAD's arguments that HORIZON has equal or better access to records held by the U.S. Navy, U.S. Coast Guard, REVO, the ESTATE and HORIZON itself. Instead, HORIZON states – without providing any detail – that it made unidentified "good faith efforts" to obtain these parties' documents from the parties themselves, but these efforts were unsuccessful. HORIZON does not state how it tried to obtain, for example, U.S. Navy records, or why the U.S. Navy did not produce records in response to HORIZON's request, or even why it believes HEAD would have better success in obtaining records a party that is subject to the investigation cannot get.

Significantly, HORIZON's response makes it clear that HORIZON is interested in dragging non-parties, namely HEAD and Mares USA into this litigation, even though HORIZON knows full well that REVO is the manufacturer of Stewart's rebreather. (*Id*.) To this end, on June 22, 2018, HORIZON served an identical subpoena *duces tecum* on Mares USA, Inc. On July 9, 2018, MARES objected to the subpoena for the same reasons HEAD objected, including that it had no responsive documents in its possession, custody or control and that REVO was the correct party to serve. Counsel for HORIZON withdrew the subpoena directed to MARES on July 12, 2018, but HEAD's Motion to Quash the subpoena HORIZON served on HEAD on June 7, 2018 remains pending.

Moreover, it also appears that the ESTATE is interested in asserting claims against REVO in its wrongful death case, even though the apportionment of fault against REVO will be adjudicated in this case. If this happens, REVO could be collaterally estopped from defending against these future claims by the ESTATE, and it would be unable to assert cross-claims against

HORIZON in the state court action if HORIZON prevails in this limitation of liability case.

To combat these efforts, and to ensure that the proper party is present in this dispute, REVO moves to intervene in this action pursuant to Fed. R. Civ. P. 24(a)(2), or in the alternative, Rule 24(b). REVO is entitled to intervene as a matter of right under Rule 24(a)(2) because it has a direct, substantial, and legally protectable interest in the subject matter of this action and is so situated that the disposition of the action may as a practical matter impair or impede its ability to protect that interest. REVO is not adequately represented by the interests of any of the existing parties, and the discovery taken so far makes it clear that none of the existing parties in interested in properly adjudicating claims that Stewart's rebreather was responsible for causing his death. Alternatively, REVO seeks permissive intervention under Rule 24(b)(2) because its defense and this action have questions of law and fact in common, and intervention will not unduly prejudice or delay the adjudication of the rights of the original parties.[4]

III. LEGAL ARGUMENT A.

Standard

Fed. R. Civ. P. 24 states, in pertinent part:

> (a) Intervention of Right. On timely motion, the court must permit anyone to intervene who:
>
> …
>
> (2) claims an interest relating to the property or transaction that is the subject of the action, and is so situated that disposing of the action may as a practical matter impair or impede the movant's ability to protect its interest, unless existing parties adequately represent that interest.
>
> (b) Permissive Intervention.

[4] REVO attaches its proposed Answer and Affirmative Defenses to HORIZON's Complaint (D.E. 1), HORIZON's Objection, Answer, Affirmative Defenses and Counter Claim to Claims of Peter Sotis (D.E. 18) and HORIZON's Objection, Answer, Affirmative Defenses and Counter Claim to Claims of Peter Sotis (D.E. 19). *See* REVO's Proposed Answer and Affirmative Defenses, attached hereto as Exhibit J.

> (1) *In General.* On timely motion, the court may permit anyone to intervene who:
>
> …
>
> (B) has a claim or defense that shares with the main action a common question of law or fact.
>
> …
>
> (3) *Delay or Prejudice.* In exercising its discretion, the court must consider whether the intervention will unduly delay or prejudice the adjudication of the original parties' rights.
>
> (c) Notice and Pleading Required. A motion to intervene must be served on the parties as provided in Rule 5. The motion must state the grounds for intervention and be accompanied by a pleading that sets out the claim or defense for which intervention is sought.

Fed. R. Civ. P. 24.

Federal Rule of Civil Procedure 24 provides for two types of intervention—intervention as of right and permissive intervention. Under Rule 24(a)(2), a nonparty is entitled to intervene "as of right" where it can show:

> (1) that the intervention application is timely; (2) that an interest exists relating to the property or transaction which is the subject of the action; (3) that disposition of the action, as a practical matter, may impede or impair the ability to protect that interest; and (4) the existing parties to the lawsuit inadequately represent the interests.

Fed. Savs. & Loan Ins. Corp. v. Falls Chase Special Taxing Dist., 983 F.2d 211, 215 (11th Cir. 1993) (citing *Chiles v. Thornburgh*, 865 F.2d 1197, 1213 (11th Cir. 1989)). Any doubt concerning the propriety of allowing intervention should be resolved in favor of the proposed intervenors because it allows the court to resolve all related disputes in a single action. *Falls Chase*, 983 F.2d at 216 (citation omitted). Intervention as of right requires the movant to meet these four requirements, but, if met, a district court has no discretion to deny intervention. *See Purcell v. BankAtlantic Fin. Corp.*, 85 F.3d 1508, 1512 (11th Cir. 1996) (citation omitted).

Permissive intervention under Fed. R. Civ. Proc. 24(b) is appropriate where a party's claim or defense and the main action have a question of law or fact in common and the intervention will not unduly prejudice or delay the adjudication of the rights of the original parties. *Walker v. Jim Dandy Co.*, 747 F.2d 1360, 1365 (11th Cir. 1984).

B. REVO May Intervene As of Right Pursuant to Rule 24(a)(2)

1. REVO's application for intervention is timely

In determining the timeliness of a motion to intervene, the Court considers the following factors:

> (1) the length of time during which the proposed intervenor knew or reasonably should have known of the interest in the case before moving to intervene; (2) the extent of prejudice to the existing parties as a result of the proposed intervenor's failure to move for intervention as soon as it knew or reasonably should have known of its interest; (3) the extent of prejudice to the proposed intervenor if the motion is denied; and (4) the existence of unusual circumstances militating either for or against a determination that their motion was timely.

Georgia v. U.S. Army Corps of Eng'rs, 302 F.3d 1242, 1259 (11th Cir. 2002). "[T]imeliness is not a word of exactitude or of precisely measurable dimensions. The requirement of timeliness must have accommodating flexibility toward both the court and the litigants if it is to be successfully employed to regulate intervention in the interest of justice." *Chiles*, 865 F.2d at 1213.

REVO easily satisfies the timeliness requirement because REVO was unaware until recently that its interests were being adjudicated in this limitation of liability action; HORIZON has just recently sought discovery from REVO indirectly by serving other non-parties, HEAD and Mares USA; REVO's participation as an intervening party will permit discovery related to the rEvo rebreather to proceed without difficulty or delay; and REVO will be severely prejudiced if the Court adjudicates the merits of an apportionment of liability to REVO without permitting REVO to be heard or to defend against HORIZON's allegations. Indeed, it is disingenuous for

HORIZON, the party with the most culpability for the loss of Stewart's life, and a party with significant unclean hands as it relates to the recovery of the rebreather and the spoliation of evidence, to assert claims that the manufacturer of the rebreather is responsible for Stewart's death. Given HORIZON's history of obfuscation in this matter, the Court and other parties should welcome REVO's intervention to set matters straight.

HORIZON's Complaint, filed on May 23, 2017, makes no claim, defense or reference to the liability of REVO or any diving equipment manufacturers. (D.E. 1.) HORIZON did not raise its affirmative defenses regarding apportionment of liability to the manufacturers of Mr. Stewart's diving equipment until September 6, 2017, yet it still did not name REVO in its pleadings or seek discovery from REVO. (D.E. 18 at 6, ¶ 4; D.E. 19 at 6, ¶ 5.) It was not until HORIZON began seeking discovery from REVO, albeit indirectly through subpoenas HEAD and Mares USA, that REVO's interest was invoked. HORIZON inexplicably refuses to serve a subpoena on REVO, as it simultaneously tries to achieve a backdoor adjudication that unrelated non-parties are the manufacturers of Stewart's rebreather so it can hopefully apportion fault to these unrelated third-parties. Accordingly, REVO moves to intervene to protect its interests and ensure that the proper parties are present.

The existing parties will not be prejudiced by REVO's intervention. The discovery deadline is currently December 26, 2018. (D.E. 42 at 3.) REVO's intervention will allow the parties to properly conduct discovery regarding Stewarts' rebreather, just as it will allow REVO to fairly conduct discovery to test the validity of HORIZON and the ESTATE's current and future claims. *Cf. Chiles*, 865 F.2d at 1213 (citing *Diaz v. Southern Drilling Corp.*, 427 F.2d 1118, 1125-26 (5th Cir. 1970) (motion to intervene more than a year after the action was commenced was timely when there had been no legally significant proceedings other than the completion of discovery and motion would not cause any delay in the process of the overall

litigation), *cert. denied*, 400 U.S. 878 (1970)). Accordingly, REVO's proposed intervention is timely.

2. REVO has a direct, substantial and legally cognizable interest in the litigation

REVO has a direct, substantial and legally protectable interest in this litigation. "Under Rule 24(a)(2), a party is entitled to intervention as a matter of right if the party's interest in the subject matter of the litigation is direct, substantial and legally protectable." *Georgia*, 302 F.3d at 1249. A legally protectable interest "is something more than an economic interest." *United States v. South Fla. Water Mgmt. Dist*., 922 F.2d 704, 710 (11th Cir. 1991) (quotation marks and citation omitted). "What is required is that the interest be one which the substantive law recognizes as belonging to or being owned by the applicant." *Id.* A legally protectable interest is an interest that derives from a legal right. *Mt. Hawley Ins. Co. v. Sandy Lake Props., Inc.*, 425 F.3d 1308, 1311 (11th Cir. 2005).

REVO is the designer and manufacturer of the rEvo III closed circuit rebreather used by Stewart at the time of his death. HORIZON is seeking to apportion liability in the underlying wrongful death suit to the manufacturers of the [diving] equipment used by Stewart "including but not limited to the manufacturer of the rebreather used by Mr. Stewart." (D.E. 18 at 6, ¶ 4; D.E. 19 at 6, ¶ 5.) Therefore, REVO has a direct, substantial and legally protectable interest in defending itself from any claim or apportionment of liability arising out of Stewart's use of the product in relation to his death. *See South Fla. Water Mgmt. Dist*., 922 F.2d at 710. Moreover, the evidence obtained from the rebreather in July 2017, which was shared with the ESTATE and purportedly HORIZON and SOTIS, clearly shows that the rebreather functioned properly and HORIZON is significantly responsible for causing Stewart's death. REVO is in the best position to evaluate this evidence and explain it to the Court in a non-jury hearing.

3. The disposition of this action without REVO's participation would impede or impair REVO's ability to protect its interest

If HORIZON ultimately prevails in this action without REVO's participation, HORIZON will have at least apportioned some degree of liability to REVO for the death of Stewart. (D.E. 18 at 6, ¶ 4; D.E. 19 at 6, ¶ 5.) If REVO cannot participate in this action, it runs of the risk of an adverse holding that would directly harm REVO's interest in defending itself in the underlying wrongful death action. Courts have allowed offensive collateral estoppel even when a party to a pending action was not a party to a prior action but was in privity with a prior party to the federal action. See *Parklane Hosiery, Inc., v. Shore*, 439 U.S. (1979). Thus, if there is a finding of liability against REVO in the federal limitation action and a state court action is later instituted against REVO, Plaintiff could offensively assert collateral estoppel, precluding REVO from defending itself as to liability.

4. The existing parties inadequately represent REVO's interests There are no parties in this action that are adequately representing REVO's interests in this matter. Indeed, the depositions attached as exhibits hereto demonstrate that the existing parties have *no* interest in representing REVO. The ESTATE could have delivered a *coup de grace* when it questioned HORIZON's witnesses about why HORIZON failed to rescue an incoherent Stewart on the surface for nearly three minutes, or the illicit recovery of Stewart and his rebreather, but it failed to do so. HORIZON certainly does not want to talk about its conduct, choosing instead to deflect blame onto REVO and SOTIS.

The Eleventh Circuit has explained that it is "'presumed that a proposed intervenor's interest is adequately represented when an existing party pursues the same ultimate objective as the party seeking intervention.'" *United States v. Georgia*, 19 F.3d 1388, 1394 (11th Cir. 1994)

(quoting *Falls Chase*, 983 F.2d at 215). *See also United States v. City of Miami*, 278 F.3d 1174, 1178 (11th Cir. 2002) (holding that a party seeking to intervene pursuant to Rule 24(a) "must overcome a presumption--that it is adequately represented--that arises 'when applicants for intervention seek to achieve the same objectives as an existing party in the case'" (quoting *Meek v. Metropolitan Dade County*, 985 F.2d 1471, 1477 (11th Cir. 1993). However, the proposed intervenor's burden to show that their interests may be inadequately represented is minimal. *Chiles,* 865 F.2d at 1214.

There are no parties in the litigation that have the same objectives as REVO, to defend REVO from any claim or apportionment of liability arising out of Stewart's use of the product in relation to his death. The other parties in this action are either adverse to REVO's interest (HORIZON and the ESTATE) or neutral to REVO's interest (SOTIS). (D.E. 1, 12, 12-1, 14, 141, 18, 19.) Accordingly, all of the factors weigh in favor of granting REVO's proposed intervention under Rule 24(a)(2).

C. Alternatively, REVO May Intervene Permissively under Rule 24(b)

In the alternative, REVO may intervene with the Court's permission under Rule 24(b), as the proposed intervention is timely, REVO's defenses share common questions of law and fact and no prejudice or delay would result. *See Walker*, 747 F.2d at 1365. Please see REVO's discussion above regarding the elements of timeliness of the proposed intervention and lack of prejudice or delay. *See supra*. Section III(B)(1).

1. REVO's defenses share common questions of law and fact

The common question of law or fact requirement of Rule 24(b)(1)(B) is easily met by REVO in this case. Indeed, REVO's defenses share common questions of law and fact with this action. HORIZON is attempting to apportion liability to REVO in their affirmative defenses and REVO is seeking to protect its interest and denies any such liability. (D.E. 18 at 6, ¶ 4; D.E. 19

at 6, ¶ 5.) REVO denies that it contributed in whole or in part to the ESTATE's losses of damages in the underlying wrongful death action. *See* Ex. J. All of REVO's defenses directly challenge HORIZON's allegations that REVO is liable whole or in part for the losses or damages suffered by the ESTATE, which clearly demonstrates that common questions of law and fact exist.

2. REVO's intervention will not unduly delay or prejudice the adjudication of the original parties' rights

As stated, REVO's intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Discovery in this matter is not yet complete and few depositions have been taken. In REVO is permitted to intervene, its participation in the case will be limited to rebutting allegations that Stewart's rebreather was responsible for causing his death. That the rebreather functioned properly has already been proven by the computer data downloaded from Stewart's rebreather in July 2017 and an inspection of Stewart's rebreather conducted by the U.S. Navy Experimental Dive Unit in April 2017. REVO has little interest in deposing PETER SOTIS, CLAUDIA SOTIS or representatives the ESTATE, but it is keenly interested in deposing the individuals responsible for recovering Stewart's rebreather, including Jenni and Levendorf (who arguably have waived any privilege associated with their role in the recovery of Stewart's body and rebreather). Any question by REVO of witnesses already deposed (Dawson, Knapp, Cahill) will be limited to issues related to their qualifications and the recovery of the rebreather.

Accordingly, if the Court finds that intervention is not proper under Rule 24(a), REVO should be permitted to intervene in this action pursuant to Rule 24(b).

IV. CONCLUSION

For all the reasons stated herein and in REVO's accompanying motion, the Court should enter an Order granting REVO's motion to intervene in this action.

Dated: July 24, 2018

By *s/ Christopher F. Lanza*

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system, on this the 24th day of July, 2018, and that the foregoing document is being served this day on all counsel of record on the service list below, via the transmission of Notices of Electronic Filing generated by CM/ECF.

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