**IN THE CIRCUIT COURT OF THE THIRD JUDICIAL CIRCUIT,
IN AND FOR COLUMBIA COUNTY, FLORIDA**

**CASE NO.: 18-000105-CA**

ADD HELIUM, LLC, a Delaware Limited Liability Corporation, and PETER SOTIS, individually,

Plaintiffs,

vs.

INTERNATIONAL ASSOCIATION OF NITROX DIVERS, INC., a Florida Corporation,

Defendant.
_____/

**DEFENDANT'S RESPONSE IN OPPOSITION TO PLAINTIFFS' *MOTION FOR RECONSIDERATION AND MOTION TO VACATE ORDER OF SUMMARY JUDGMENT***

COMES NOW Defendant, INTERNATIONAL ASSOCIATION OF NITROX DIVERS, INC., by and through the undersigned counsel, and files its response to *Plaintiffs' Motion for Reconsideration and Motion to Vacate Order of Summary Judgment* filed on July 17, 2019, and in opposition thereof says:

**Authority for Motions for Reconsideration**

1. "It is well established that a trial court may reconsider and modify interlocutory orders at any time until final judgment is entered." *Oliver v. Stone*, 940 So.2d 526, 529 (Fla. 2d DCA 2006).

2. Although there is no express provision in the Florida Rules of Civil Procedure for rehearing of orders, "a trial court has the inherent discretionary power to reconsider any order entered prior to rendition of the final judgment in the cause." *City of Hollywood v. Cordasco*, 575 So.2d 301, 302–303 (Fla. 4th DCA 1991), quoting 493 So.2d 91, 92. See also *Glary v.*

*Israel*, 53 So.3d 1095, 1099 n.9 (Fla. 1st DCA 2011); *AC Holdings 2006, Inc. v. McCarty*, 985 So.2d 1123 (Fla. 3d DCA 2008) (clarifying that interlocutory orders included dispositive orders, such as summary judgment orders).

3. The Florida Supreme Court has held that, "while a judge should hesitate to undo his own work and should hesitate still more to undo the work of another judge, he does have, until final judgment, the power to do so and may therefore vacate or modify the interlocutory rulings or orders of his predecessor in the case." *Tingle v. Dade County Board of County Commissioners*, 245 So.2d 76, 78 (Fla. 1971).

4. "However, the court is not required to exercise that authority, and its decisions whether to do so generally are not reviewable." *Hunter v. Dennies Contracting Co.*, 693 So.2d 615, 616 (Fla. 2d DCA 1997) *emphasis added.*

5. Plaintiffs cite *Holl v. Talcott* in support of their argument that their motion for reconsideration should be granted (page 5 of Plaintiffs' Memorandum). 191 So.2d 40 (Fla. 1966). In their Memorandum of Law, Plaintiffs improperly substitute "Motion for *Reconsideration*" in place of "Motion for *Rehearing*," as the *Holl* case is about a motion for rehearing, not a motion for reconsideration. As stated in their Memorandum page 4, motions for reconsideration and motions for rehearing are not the same. Motions for reconsideration are for non-final orders entered prior to entry of a final judgment, such as in this case. As stated in the prior paragraph, they are pursuant to the court's inherent authority to modify its own orders, they are only considered or heard at the discretion of the Court, and the court's decision to do so, or not do so, is generally not reviewable. Motions for rehearing, as in *Holl*, however, are different. Rule 1.530 Subdivision (a) states: "Jury and Non-jury Actions. A *new trial* may be granted to all or any of the parties and on all or a part of the issues. On a motion for a rehearing of matters

heard without a jury, including summary judgments, the court may open the judgment if one has been entered, take additional testimony, and enter a new judgment." Petitions for rehearing are generally analogous to motions for new trial and are available, among other things, for the correction of error apparent on the face of the record and for the purpose of introducing newly discovered evidence. *Braznell v. Braznell*, 140 Fla. 192, 195 (1939). Accordingly, Plaintiffs improperly cite *Holl* in support of their Motion. Additionally, Plaintiffs omitted the pertinent fact that the court specifically stated that its opinion regarding the motion for rehearing was "through the license of obiter dictum," which, of course, is not legal precedent. *Holl* 191 So.2d at 46.

6. Plaintiffs are simply attempting a second bite at the apple and are doing so at great expense to the Defendant. It is inherently unfair to Defendant to have to incur the expense of responding to Plaintiffs' Motion for Reconsideration, wherein Defendants have cited numerous cases it failed to cite in its initial Response, and also have to attend an entire second hearing on the same issue. Plaintiffs are essentially having a second hearing on Defendant's Motion for Summary Judgment.



**Summary of Argument**

7. Notably, in all of Plaintiffs' motions and responses, they never address the most important, unrebutted fact at issue in this case: **that the standards and procedures forming the basis of Plaintiffs' Complaint were not in effect at the time of Plaintiffs' suspension or placement on a non-teaching status.** Plaintiffs "affirmatively state" that Defendant relied on multiple versions of the standards (p. 12 of Plaintiffs' Memorandum), but they provided no evidence to support this allegation. Additionally, Plaintiffs never address the fact that they presented no summary judgment evidence at the hearing, nor designated any summary judgment

evidence that it was relying upon. Although the moving party bears the initial burden, and only when it meets its burden does the burden shift to the non-moving party, Plaintiffs fail to address how Defendant did not meet its burden.

8. Plaintiffs argue that the Court's protective order prevented them from full and fair discovery; however, they fail to note that they deposed Warren Mount, the CEO of IANTD, Luis Pedro, the COO of IANTD, and John Jones, prior to entry of the protective order wherein they asked and received answers on all of the issues contained in the protective order. They also fail to explain how those matters subject to the protective order would be relevant or how the order, entered in October of 2018, rendered summary judgment in July of 2019 premature. The entire grounds for the order, which the Court agreed with, was that the subjects of inquiry were irrelevant.

9. Plaintiffs argue that the deposition of Peter Sotis was taken the day before the summary judgment hearing; however, it is absurd to contend that Plaintiffs needed Defendant to take the deposition of their own client, or that they needed the deposition transcript of their own client, in order to defend summary judgment. Obviously, Mr. Sotis could have executed an affidavit, but did not do so. Plaintiffs argue that the depositions of Warren Mount, Luis Pedro and John Jones were taken the day before the summary judgment hearing; however, they fail to note that Plaintiffs previously deposed all three of them and the depositions taken the day before the hearing were limited only to Defendant's counterclaim. Plaintiffs also attempt to blame Defendant for the depositions occurring the day before the hearing, when it was Plaintiffs that insisted that the depositions occur on the same day, and it was Plaintiffs that set the depositions the day before the hearing.

10. Plaintiffs argue that there was an outstanding request to produce and interrogatories; however, the Court previously determined that Plaintiffs failed to act diligently in seeking discovery, that record was clear enough to disclose that further discovery was not needed to develop significant aspects of the case, and that the pending requests would not lead to evidence that would create a genuine issue of material fact.

**Depositions**

11. In paragraph 8 of Plaintiffs' Motion (paragraph 5 of Plaintiffs' Memorandum), Plaintiffs state that the Court granted Defendant's *Motion for Leave to Set Hearing for Defendant's Motion for Final Summary Judgment After Pretrial Conference*, but fail to also state that Plaintiffs did not object to Defendant's Motion.

12. In paragraphs 8 and 9 of Plaintiffs' Motion (paragraph 5 of Plaintiffs' Memorandum and Argument B p. 6 and C p. 8), Plaintiffs state that "substantial discovery" remained outstanding, that "[s]ignificant discovery in this case remained (and continues to remain) outstanding", and that the depositions of all of the parties were pending prior to Plaintiff's deadline to respond to Defendant's Motion.

13. In support, Plaintiffs state that Mr. Sotis's deposition was pending. As stated previously at the hearing on Defendant's motion for summary judgment, Plaintiffs did not need the deposition, nor the transcript of the deposition, of their own client to defend a summary judgment motion, as Mr. Sotis could have completed an affidavit.

14. Plaintiffs also list the "supplemental depositions of Defendant's principals" as rendering summary judgment premature and preventing Plaintiffs from presenting summary judgment evidnce. These depositions were specifically narrowed to only pertain to Defendant's counterclaim for injunctive relief, and not Mr. Sotis's claim. Furthermore, Plaintiffs failed to

present any evidence at the summary judgment hearing, failed to allege what occurred in the depositions of IANTD's "principals" that should have precluded summary judgment, and, if there was some need for these deposition transcripts, failed to move for a continuance of the summary judgment hearing.

[*Regarding the scheduling of depositions, stating that counsel for Defendant repeatedly refused to produce the witnesses (Mr. Mount, Mr. Pedro and Mr. Jones) at an earlier time is a complete falsehood. As evident in Exhibit C to Plaintiffs' motion, counsel for Defendant had been endeavoring to set Mr. Sotis's deposition for several weeks and indeed ultimately obtained attorney's fees as sanctions for his non-compliance. After repeated requests to set Mr. Sotis's deposition, rather than providing a date for his deposition, Plaintiffs made their first request to set the depositions of Mr. Mount, Mr. Pedro and Mr. Jones regarding Defendant's counterclaim, and further requested that they be set on the same day as Mr. Sotis, which clearly would make scheduling much more difficult. Counsel for Defendant requested that Mr. Sotis's deposition be set first and that, if the three other witnesses were available, they would be set as well. Plaintiffs previously deposed Mr. Mount, Mr. Pedro and Mr. Jones and these second depositions were <u>only regarding Defendant's counterclaim</u>.]*

**<u>Plaintiffs' Cases Cited Regarding Depositions</u>**

15. All cases cited by Plaintiffs on the issue of pending depositions (p. 8 of Plaintiffs' Memorandum) are distinguishable because 1) the depositions were not pending, they occurred the day before the summary judgment hearing; 2) one deposition was of Plaintiff, Peter Sotis, and his deposition and transcript was not required to defend summary judgment as he could have executed an affidavit; 3) the other three depositions were of witnesses previously deposed and leave was granted to take a second deposition only pertaining to Defendant's counterclaim; 4)

Plaintiffs failed to allege what was said in the depositions that rebutted Defendant's Motion for Summary Judgment either at the summary judgment hearing, or in their Motion for Reconsideration; 5) if there was a need for the deposition transcripts because there was something said that rebutted summary judgment, Plaintiffs failed to move to continue the summary judgment hearing.

**Discovery**

16. Regarding Plaintiffs' Third Request for Production and Second Interrogatories (Argument B p. 6), Defendant's responses were not due until after this Court entered Summary Judgment. Accordingly, as the only claim pending before the Court after the Court entered Summary Judgment was Defendant's counterclaim, Defendant responded to the discovery pursuant to Defendant's counterclaim. Additionally, Defendant's objections were not untimely. Although the Court granted Defendant's Motion to Compel, Defendant had properly objected to responding to Plaintiff's discovery because it was untimely and in violation of this Court's trial order. Pursuant to this Court's order granting the motion to compel, Defendant responded to the discovery and timely asserted its objections (prior to July 14, 2019). Furthermore, the only discovery that would be relevant to Plaintiff's declaratory action would be what the QA Board and IANTD relied upon in placing Plaintiffs on suspension/non-teaching status, and if they followed proper procedure in doing so. Defendant previously provided what it relied upon in making those decisions. Plaintiffs' entire cause of action, pursuant to what Plaintiffs pled in their Complaint, was based on procedures that did not exist, therefore it is difficult to ascertain how *anything* could be deemed relevant to Plaintiffs' claims. Finally, even though there were no due

process provisions in the standards cited in Plaintiffs' Complaint, it is apparent in the Summary Judgment Evidence designated by Defendant that Plaintiffs clearly received due process. Mr. Sotis was provided with all of the materials relied upon in issuing his suspension, he was in contact with IANTD during the process and his questions were answered, and he was afforded an opportunity to appeal the decision, which he did not avail himself of.

**Plaintiffs' Cases Cited Regarding Discovery**

17. Plaintiffs cite *Kemper v. First Nat'l Bank* in support of their argument; however, that case is distinguishable from the instant matter because the court found that the affidavits in support of the summary judgment motion left several issues unresolved. 277 So.2d 804 (Fla. 3rd DCA 1973).

18. Plaintiffs cite *Singer v. Star* in support of their argument; however, that case is distinguishable from the instant matter because previously scheduled depositions had not yet occurred and the facts upon which the court based its decision were not fully developed. 510 So.2d 637, 639 (Fla. 4th DCA 1987).

19. Plaintiffs cite *Salzberg v. Eisenberg* in support of their argument; however, that case consists of a one paragraph opinion absent of any additional facts. Additionally, as stated in this Court's Order granting summary judgment, there are other matters to consider such as the diligence of Plaintiffs in seeking discovery, whether or not the record is clear enough to disclose that further discovery is not needed to develop significant aspects of the case, and whether or not the pending requests would lead to evidence that would create a genuine issue of material fact. *Colby v. Ellis*, 562 So.2d 356 (Fla. 2nd DCA 1990); *Cong. Park Office II, LLC v. First-Citizens Bank & Trust Co.*, 105 So.3d 602 (Fla. 4th DCA 2013). In *Colby v. Ellis*, the court held that a

party does not have an unlimited right to discovery prior to a hearing on a motion for summary judgment and that there comes a time when discovery should end. *Ellis*, 562 So.2d at 357.

20. Plaintiffs cite *Spradley v. Stick* in support of their argument; however, that case is distinguishable from the instant matter because the only evidence presented in that case, which was a medical malpractice case, was an affidavit of a doctor that simply stated that he had reviewed the medical records and that the hospital was not negligent. 622 So.2d 610 (Fla. 1st DCA 1993) Additionally, the written questions that were pending in discovery were the plaintiff's written questions of the doctors at issue, and the questions were in substitution of the depositions of the doctors, as plaintiff was a state prisoner. *Id.*

21. Plaintiffs cite *A & B Pipe & Supply Co. v. Turnberry Towers Corp.* in support of their argument; however, that case is distinguishable from the instant matter because in *A & B,* the defendants filed a motion for summary judgment, the plaintiffs then noticed the defendants for deposition, defendants then moved for a protective order requesting additional time to prepare to be deposed, then the defendants failed to appear for their depositions. Plaintiffs moved for sanctions and to compel their depositions. The court never ruled on any of the motions but entered summary judgment in favor of defendants. 500 So.2d 261 (Fla. 3rd DCA 1986).

22. Plaintiffs cite *Derosa v. Shands Teaching Hospital & Clinics, Inc.* in support of their argument; however, that case is distinguishable from the instant matter because summary judgment was entered prior to the deposition of a doctor who had submitted an affidavit in support of summary judgment, and his deposition testimony could have revealed a genuine issue of material fact because the affidavits submitted by the moving party were insufficient. 468 So.2d 415, 417 (Fla. 1st DCA 1985).

23. Plaintiffs cite *Cullen v. Big Daddy's Lounges* in support of its argument; however, that case is distinguishable from the instant matter because, although the opinion is very short and contains very little facts, the court notes that it is premature to grant discovery when the defending party, "through no fault of its own" had not completed discovery. 364 So.2d 839 (Fla. 3rd DCA 1978). As stated in Defendant's Motion and in this Court's Order, here Plaintiffs had two years to conduct discovery.

**Protective Order**

24. In Paragraph 15(a) of Plaintiffs' Motion (8b of Plaintiffs' Memorandum and section A of Plaintiffs' Argument p. 5), Plaintiffs fail to explain how this Court's protective order rendered its summary judgment order premature. The cases cited by Plaintiffs do not support their argument. *Lenhal Realty, Inc. v. Transamerica Commercial Fin. Corp.* pertained to a default that prevented the appellant from raising its defenses against liability. The court vacated the default and reversed summary judgment so that the appellant could assert defenses. 615 So.2d 207 (Fla. 4th DCA 1993). In *Scherr v. Andrews*, the court, in a one paragraph opinion, stated that, where a protective order precluded the plaintiffs from deposing one of the defendants, and were therefore deprived of the opportunity to discover information tending to establish the liability of the co-defendant, the entry of summary judgment for the co-defendant was premature. 497 So.2d 970 (Fla. 3rd DCA 1986). Neither of those two cases apply to the facts of the instant case. Here, there is no default and Plaintiffs were not precluded from deposing anyone. Furthermore, there is nothing about the deponents' income, the current diving certifications of Brock Cahill, the source of documents and transcripts in the possession of Defendant (as set forth in Defendant's Summary Judgment Evidence, only Mr. Sotis's own statements were used in the determination to suspend him), and opinions regarding fault in the death of Robert Stewart, other

than the fault of the Plaintiffs, that would or could be relevant to the claims asserted in Plaintiffs' Complaint. Furthermore, once again, Plaintiffs neglected to submit any summary judgment evidence in support of this contention.

25. In the last paragraph of Plaintiffs' argument on the issue of this Court's protective order, Plaintiffs state that they were precluded from discovering summary judgment evidence with respect to Defendant's counterclaim. It is unclear how this argument has anything to do with the Court's order granting summary judgment in Mr. Sotis's claims. Additionally, as Defendant dismissed its counterclaim, this issue has been rendered moot.

26. Although it is not pertinent to this Court's entry of summary judgment, Plaintiffs continuously make the same assertion regarding the protective order in their motions and responses; however, they continuously fail to mention that Plaintiffs deposed Warren Mount (CEO of IANTD), Luis Pedro (COO of IANTD), and John Jones, prior to entry of the protective order. In those depositions, counsel for Plaintiffs inquired about all of the matters set forth in the protective order and all three deponents answered counsel's questions. It was the undue expense incurred by Plaintiffs in responding to these time-consuming, irrelevant inquiries that led to the motion for protective order.

**Allegations of Misrepresentation**

27. In paragraph 15(d) of Plaintiffs' Motion (8d of Plaintiffs' Memorandum and section D of Argument p. 9), counsel once again makes unfounded accusations against counsel for Defendant by asserting that the undersigned made "misrepresentations" to the Court and "misled" the Court regarding the QA Board involved in Mr. Sotis's subsequent expulsion. These constant, unsubstantiated allegations are completely inappropriate, unprofessional, and are violations of the rules of professional conduct. Although the undersigned does not recall the

exact verbiage utilized in argument at the hearing and Plaintiffs cite to no transcript, the point the undersigned was making to the Court was that Mr. Sotis's expulsion was based on a separate QA analysis and on grounds that were additional to those supporting the initial suspension. The undersigned was not intending to indicate that the QA Board consisted of different people as, in the opinion of the undersigned, it would make no difference if they were different or the same. The expulsion is not what was pled in Plaintiff's Complaint and was therefore not relevant to summary judgment. Additionally, Counsel for Plaintiffs was free to correct any perceived misstatement of fact at the hearing, wherein counsel for Defendant could make any necessary clarifications, rather than wait to make such unsubstantiated, inappropriate statements in a subsequent pleading.

**Section E of Plaintiffs' Argument p. 11**

28. In Section E of their Motion, Plaintiffs re-argue the same matters it has previously, repeatedly argued. They reference absolutely no summary judgment evidence to support any of their arguments. Defendant is not going to address all of these matters again in this response and requests that the Court review Defendant's Motion for Final Summary Judgment, the Court's notes taken at the hearing on Defendant's Motion, and the findings and case law cited in this Court's Order granting summary judgment. Plaintiffs do add two new references to their Motion not previously argued. They cite to *McCune v. Wilson*, which held that a member of a private organization is entitled to fair proceedings prior to being disciplined or expelled. 237 So.2d 169, 173 (Fla. 1970) and to §617.0607 Florida Statutes, which states that a member of a corporation may not be expelled or suspended without a fair and reasonable procedure. 1) The statute does not apply because Plaintiffs' were not members of a corporation; 2) the statute was not pled in Plaintiffs' Complaint; 3) the grounds set forth in *McCune* were not

pled in Plaintiffs' Complaint and if they had been, Defendants would show that Plaintiffs' did receive due process pursuant to a fair proceeding. That, however, was not what Plaintiffs chose to plead in their Complaint.

WHEREFORE, Defendant prays that this Honorable Court deny Plaintiffs' Motion.

**CERTIFICATE OF SERVICE**

**I HEREBY CERTIFY** that a true and correct copy of the foregoing has been furnished by ***Electronic Mail*** to: **Neil Bayer, Esquire**, Kennedys Americas LLP, *Attorneys for Plaintiffs,* 1395 Brickell Avenue, Suite 610, Miami, Florida 33131 [neil.bayer@kennedyslaw.com], on this 23rd day of July, 2019.

**ROBINSON, KENNON & KENDRON, P.A.**

**BY:** **/s/ Jennifer C. Biewend**

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