

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

\_\_\_\_\_ /

**REPLY BRIEF IN SUPPORT OF**  
**MOTION TO QUASH SUBPOENA *DUCES TECUM***

Non-party, HEAD USA, INC. (“HEAD”), by and through its undersigned counsel,  
hereby files its Reply Brief in Support of its Motion to Quash the Subpoena *Duces Tecum* dated  
June 5, 2018 and served upon the Mares Diving Division of HEAD USA, Inc. by Petitioner  
HORIZON DIVE ADVENTURES, INC. (“HORIZON”) on June 7, 2018 (D.E. 63). In support  
thereof, HEAD states as follows:

**I. INTRODUCTION AND FACTUAL BACKGROUND**

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. *See* Subpoena (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 BVBA (“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, Respondent/Claimant Sandra Stewart, as personal representative of the Estate of Robert Stewart (“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.) Further HEAD moved for the imposition of sanctions including the reimbursement of the fees and costs incurred in objecting to the subpoena and preparing and filing the motion due to the conduct of HORIZON’s counsel in serving the subpoena on HEAD and continuing to demand the production of documents identified therein. (*Id.*)

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. Similarly, why can't HORIZON, a “Party-In-Interest” to the U.S. Coast Guard investigation, obtain records from the U.S. Coast Guard, and how is a non-party supposed to obtain these records if HORIZON cannot? HORIZON's response is completely devoid of any detail concerning how HORIZON – the party issuing the subpoena with the duty not to burden the recipient – tried to obtain the records it seeks consistent with its obligations under Fed. R. Civ. P. 26 and 45.

HORIZON's seems to indicate that HORIZON is interested in “the retrieval of data from Stewart's dive equipment in or around February of 2017.” (D.E. 73 at ¶¶ 7 and 10.) HEAD is unaware of any effort to retrieve data from Mr. Stewart's dive equipment in February 2017 – other than efforts allegedly made by HORIZON and its counsel when they recovered Mr. Stewart's body on February 3, 2017. (D.E. 63 at ¶ 25.) HEAD was not present when HORIZON's owner and its counsel recovered Mr. Stewart's body from a depth of 219 feet and,

according to their own public admission, performed “some forensics” before turning the body and Mr. Stewart’s equipment over to the U.S. Coast Guard.

HORIZON could be confusing its own conduct (potentially in violation of FLA. STAT. § 406.12 (2016)) with another meeting in July 2017 at the office of the ESTATE’s counsel where the U.S. Coast Guard downloaded the data stored on Mr. Stewart’s dive equipment. HEAD was not present at this meeting, although a representative of REVO traveled from Belgium to consult and observe. However, in consultation with the ESTATE’s counsel, HEAD has been informed that a copy of the data retrieved on that day was provided to HORIZON during discovery in this case and, if it was not, a copy can be easily obtained simply by inspecting the dive equipment at the office of the ESTATE’s counsel and downloading another copy of the original data, which is still stored in the hardware of the dive equipment’s controllers.

Rather than avail itself of legitimate discovery in this case, which HORIZON could do in a day with the cooperation of the ESTATE, HORIZON argues that the proper avenue is to subpoena Head USA, Inc. and make it obtain documents on HORIZON’s behalf from REVO because Head USA, Inc., rEvo BVBA and Mares are wholly owned subsidiaries of Head UK Ltd. that “do not maintain their individual corporate form.” Even if this were true, why not simply serve a subpoena on REVO? Importantly, HEAD is not in possession of any records regarding any testing of Mr. Stewart’s diving equipment (or the equipment of any of the other divers with Mr. Stewart) conducted by the U.S. Coast Guard and/or the U.S. Navy or by anyone else. HEAD has no records or data from any such retrieval, inspection or investigation by these other entities.

Despite HORIZON’s arguments to the contrary, the subpoena served on HEAD should be quashed because, among other things: (1) it is not contested that HORIZON has served the

wrong party as REVO, not HEAD, is the manufacturer of the closed-circuit rebreather used by Robert Stewart on January 31, 2017; (2) HEAD is not in possession, custody or control of the documents sought by HORIZON; (3) the documents HORIZON is seeking are in the possession of others, both parties and non-parties, including STEWART, U.S. Coast Guard, the U.S. Navy, REVO and HORIZON itself; (4) HEAD has no knowledge of, nor any documents related to, an inspection of Mr. Stewart's equipment in February 2017, and HEAD never attended any inspection of Mr. Stewart's dive equipment; and (5) HORIZON is seeking privileged communications and documents related to an investigation of the Stewart incident which may have been carried out by REVO and, if so, are protected from discovery and disclosure by Fed. R. Civ. P. 26(b)(1) and (3), and any request for these documents is more properly directed to REVO instead of HEAD.

## II. LEGAL ARGUMENT

### A. Standard

Under Rule 45 of the Federal Rules of Civil Procedure, "[e]very subpoena must . . . command each person to whom it is directed to do the following at a specified time and place . . . produce designated documents . . . in that person's possession, custody, or control . . ." Fed. R. Civ. P. 45(a)(1)(A)(iii). Rule 45(d)(2)(b) permits objections to a subpoena *duces tecum* and Rule 45(d)(3) permits a motion to quash. Fed. R. Civ. P. 45. Rule 45(d) states in pertinent part:

#### (d) PROTECTING A PERSON SUBJECT TO A SUBPOENA; ENFORCEMENT.

(1) *Avoiding Undue Burden or Expense; Sanctions.* A party or attorney responsible for issuing and serving a subpoena must take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena. The court for the district where compliance is required must enforce this duty and impose an appropriate sanction—which may include lost earnings and reasonable attorney's fees—on a party or attorney who fails to comply.

...

(3) *Quashing or Modifying a Subpoena.*

(A) *When Required.* On timely motion, the court for the district where compliance is required must quash or modify a subpoena that:

- (i) fails to allow a reasonable time to comply;
- (ii) requires a person to comply beyond the geographical limits specified in Rule 45(c);
- (iii) requires disclosure of privileged or other protected matter, if no exception or waiver applies; or
- (iv) subjects a person to undue burden.

. . .

(C) *Specifying Conditions as an Alternative.* In the circumstances described in Rule 45(d)(3)(B), the court may, instead of quashing or modifying a subpoena, order appearance or production under specified conditions if the serving party:

- (i) shows a substantial need for the testimony or material that cannot be otherwise met without undue hardship; and
- (ii) ensures that the subpoenaed person will be reasonably compensated.

Fed. R. Civ. P. 45(d).

“[T]he scope of subpoenas for production of documents pursuant to Rule 45 is the same as the scope of discovery under Rule 26(b) and Rule 34.” *Commissariat a L’Energie Atomique v. Samsung Elec. Co.*, No. 8:06-mc-44-T-30TBM, 2006 U.S. Dist. LEXIS 39217, at \* 2 (M.D. Fla. June 14, 2006)). Rule 26(b) provides in relevant part:

*Scope in General.* Unless otherwise limited by court order, the scope of discovery is as follows: Parties may obtain discovery regarding any nonprivileged matter that is relevant to any party’s claim or defense—including the existence, description, nature, custody, condition, and location of any documents or other tangible things and the identity and location of persons who know of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence.

Fed. R. Civ. P. 26(b).

While Rule 26 prohibits discovery of privileged material, Rule 26(b)(3) goes further to specify this protection:

(3) *Trial Preparation: Materials.*

(A) Documents and Tangible Things. Ordinarily, a party may not discover documents and tangible things that are prepared in anticipation of litigation or for trial by or for another party or its representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent). But, subject to Rule 26(b)(4), those materials may be discovered if:

(i) they are otherwise discoverable under Rule 26(b)(1); and

(ii) the party shows that it has substantial need for the materials to prepare its case and cannot, without undue hardship, obtain their substantial equivalent by other means.

(B) Protection Against Disclosure. If the court orders discovery of those materials, it must protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of a party's attorney or other representative concerning the litigation.

In this case, two things are clear: (1) HORIZON wants HEAD to obtain documents that are not within its "possession, custody, or control" because HORIZON is unwilling to retrieve these documents from their sources; and (2) HORIZON wants HEAD to obtain, reveal and catalog any privileged documents that REVO may have regarding whatever investigation REVO may have done as a result of the Stewart incident, even though these documents are not within HEAD's possession, custody, or control and Rules 26 and 45 forbid discovery into these matters.

In support of these requests, HORIZON offers a list of corporate affiliates and a business card. It makes no effort to address its own shortcomings in discovery, the conduct of its counsel in retrieving the same information that HORIZON seeks from HEAD, nor the obvious issue that the discovery sought by HORIZON does not relate to HORIZON's negligence or conditions of unseaworthiness that were a cause of Mr. Stewart's death, which are the only narrow issues to be decided in this limitation of liability action. *See, e.g., Suzuki of Orange Park, Inc. v. Shubert*, 86 F.3d 1060 (11<sup>th</sup> Cir. 1996); *Beiswenger Enterprises Corp. v. Carletta*, 86 F.3d 1032 (11<sup>th</sup> Cir. 1996); *Farrell Lines, Inc. v. Jones*, 530 F.2d 7 (5<sup>th</sup> Cir. 1976). HORIZON has not filed a

complaint or claim against REVO, in accordance with Fed. R. Civ. P. 3 and 5; it is simply trying to sue an empty chair and obtain evidence from a non-party to support its illusory claim.

HORIZON's response to HEAD's motion to quash is woefully inadequate to demonstrate that its subpoena was not issued in bad faith, to harass and to burden HEAD, and to make an end run around the appropriate discovery and litigation process. Accordingly, the Court should grant HEAD's motion to quash the subpoena *duces tecum* issued by HORIZON for all the reason stated herein.

Alternatively, if the Court finds that HEAD and REVO are sufficiently related to show that HEAD has possession, custody and control over some of the discoverable documents at issue (which the affidavit of Stephen Lamphear categorically shows is not the case), the Court can modify the subpoena to require only that the data downloaded by the U.S. Coast Guard in July 2017 be produced to HORIZON, if HORIZON can affirmatively demonstrate that it has not and cannot obtain this data from the ESTATE or by examining the equipment. If the Court enters such an order, HEAD will do what HORIZON seems unwilling to do and simply ask REVO to voluntarily produce this information.

Finally, HEAD moves for the imposition of sanctions, including reimbursement of the fees and costs incurred in objecting to the subpoena and preparing and filing this motion, due to the conduct of HORIZON's counsel in serving the subpoena on HEAD and continuing to demand the production of the documents identified therein. Rule 45 provides that a court may enforce the issuing party's obligation to take reasonable steps to avoid imposing undue burden or expense on a person subject to the subpoena "by imposing upon the party or attorney in breach of this duty an appropriate sanction, which may include, but is not limited to, lost earnings and a reasonable attorney's fee." Fed. R. Civ. P. 45(c)(1). HORIZON has failed to fulfill its



obligation to minimize the burden and expense incurred by HEAD, despite repeated efforts by HEAD's counsel to persuade HORIZON to withdraw its subpoena.

### **III. CONCLUSION**

WHEREFORE, HEAD hereby moves for entry of an Order quashing HORIZON's subpoena and imposing sanctions.

Dated: July 9, 2018

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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 9<sup>th</sup>, 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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