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FOR PUBLICATION

**IN THE SUPERIOR COURT
FOR THE
COMMONWEALTH OF THE NORTHERN MARIANA ISLANDS**

**HIDEKI MORITA, as Personal Representative of)
the ESTATE OF MEGUMI MORITA, deceased,)
HIDEKI MORITA, individually, MICHIKO)
MORITA, TAKAATSU MORITA and NAOKI)
MORITA,)**

Plaintiffs,

vs.

**SCUBA WORLD, INC., d/b/a PASTIME SAIPAN,)
H.I.S. CO. LTD, H.I.S. SAIPAN, INC., AIR)
WORLD CO., LTD, RIE SUZIKU, REIJI TODA,)
TEPPIE KOIKE, TOMOYUKI UMEMURA,)
MAYUMI FUKUDA, deceased, through her)
personal representative, PADI WORLDWIDE)
CORPORATION, PADI AMERICAS, K.K. PADI)
JAPAN, KIMIKO TAKEYA, KAZUHIRO TODA)
and YOSHIO OTSU,)**

Defendants.

CIVIL ACTION NO. 07-0248

**ORDER DENYING DEFENDANT
PADI AMERICA'S
MOTION FOR SUMMARY JUDGMENT**

I. Introduction

THIS MATTER came before the Court for a hearing on June 24, 2009 at 10:30 a.m. in Courtroom 220A on the motion of Defendant PADI Americas ("PADI") for summary judgment on all claims alleged against it by Plaintiff Hideki Morita, as personal representative of the estate of Megumi

1 Morita. Defendant appeared by and through legal counsel David G. Banes, Esq. Plaintiff appeared and
2 was represented by attorney William M. Fitzgerald, Esq., in opposition to the motion. Prior to hearing
3 oral argument on the matter, the Court entertained Plaintiff's motion to strike portions of Defendant's
4 arguments contained in its Reply to Plaintiffs' Opposition to Motion for Summary Judgment, filed by
5 Defendant on May 14, 2009. Plaintiff filed his written motion to strike on June 18th and Defendant filed
6 a written opposition to the motion on June 22, 2009. For reasons more fully explained *post*, the Court
7 denied Plaintiff's preliminary motion to strike Defendant's arguments. The Court further granted
8 Defendant's request to submit a supplemental written response after the hearing to narrowly address two
9 citations to legal authority which were raised initially by Plaintiff at oral argument.

10 At the conclusion of counsel's oral argument on Defendant's motion for summary judgment, the
11 Court took the matter under advisement and set a status conference for July 7, 2009, to issue its ruling.
12 Following its review of the written and oral arguments of counsel and the affidavits and exhibits
13 admitted in support of, and in opposition to the Defendant's motion, and upon consideration of the
14 applicable law, the Court issued its ruling from the bench on July 7th denying Defendant's motion for
15 summary judgment for the reasons stated on the record and more fully set forth in the following written
16 decision.

17 **II. Factual and Procedural Background**

18 This action arises from the death of 26-year old Megumi Morita ("Morita") on July 16, 2005,
19 which occurred during her participation in an instructional scuba diving course conducted at the Grotto
20 diving site on Saipan. The course was conducted by Defendant Scuba World, Inc., doing business as
21 Pastime Saipan ("Pastime"), a Saipan dive shop. Defendant PADI Americas ("PADI") is a national
22 recreational diving membership organization that provides certification to divers according to the divers'
23 completion of educational courses developed and administered by PADI and provided through its
24 certified members. Pastime offered PADI-authorized diving instruction and Morita's participation in the

1 course was for the purpose of obtaining certification as a PADI “Advanced Open Water” diver. Prior to
2 her arrival in Saipan, Morita had completed four dives in Japan and had obtained a basic PADI “Open
3 Water” certificate issued under the auspices of PADI Japan.

4 Plaintiff Hideki Morita, as personal representative of Morita’s estate, alleges a wrongful death
5 claim for negligence against PADI that is divided into two counts: “Count III” of Plaintiff’s Complaint
6 alleges that Defendant is liable for the negligence of Pastime and its instructors on the basis that Pastime
7 acted as Defendant’s agent in promoting and conducting the diving course; while “Count IV” asserts a
8 direct claim against PADI for negligently allowing Pastime to deviate from PADI-authorized safety
9 standards. Additionally, Plaintiff pleads a second cause of action against PADI for violation of the
10 CNMI Consumer Protection Act (4 CMC §§ 5101-5123). This claim is based on the allegation that
11 PADI falsely represented to the public that its authorized course providers adhered to its published
12 safety standards.

13 On April 6, 2009, Defendant filed its Motion for Summary Judgment together with a separate
14 statement of undisputed facts, supporting declaration and exhibits. Defendant’s motion is based
15 principally upon the undisputed fact that, just prior to her fatal dive, Morita had signed a form document
16 printed in Japanese and captioned (as translated) “Waiver and Release of Liability” (the “Release”).
17 Defendant contends that the terms of the Release bar Plaintiff from any recovery in this action as a
18 matter of law because the Release is an enforceable waiver of all prospective claims against PADI and
19 because the Release also constitutes Morita’s express assumption of all risks related to the dive,
20 including the risk of wrongful death due to PADI’s negligence. Defendant asserts as an additional basis
21 for summary judgment that the application of the tort doctrine of “primary assumption of the risk” to the
22 undisputed facts of this case establishes as a matter of law that Defendant owed no duty to protect
23 Plaintiff’s decedent from the dangers of scuba diving, including the risk of death caused by the
24 carelessness of other participants.

1 Defendant submits two English translations of the Release; one translated for use by Defendant's
2 legal counsel and the second version translated by Plaintiff. (Decl. of Counsel David G. Banes, April 3,
3 2009, Ex. "B" and "C"). There are no material differences between these translations. Defendant's
4 version is translated as follows:

5 **Waiver and Release of Liability**

6 Please read carefully before signing this document.

7 I, _____, have been thoroughly informed and educated on the risks of
8 skin diving/ scuba diving, and hereby fully acknowledge the same. I further acknowledge that
9 diving with compressed air involves certain injuries that may occur which require treatment in a
10 recompression chamber.

11 In addition, I understand that open water diving training which are necessary for
12 certification or for other training which correspond to such training may be conducted at a site
13 that is remote by distance from a recompression chamber, however, I still agree to be enrolled in
14 the diving training and recreational diving. In spite of the possible injuries or damages arising out
15 of my participation in the said course and understand the possible absence of a recompression
16 chamber in proximity to the dive site, I still desire that the course be conducted and I assume full
17 responsibility for any injuries or damages arising out of my participation.

18 I hereby acknowledge that SCUBA WORLD INC. PASTIME SAIPAN, PADI JAPAN,
19 and PADI USA, to which instructors and guides for this course in Saipan belong, shall not be
20 held liable for any results even where resulting in injuries, death, or other damages to myself, my
21 family, heirs, or devisees relating to this diving course. In consideration of being allowed to
22 enroll in this course, I hereby agree to personally assume all injuries or other damages that may
23 befall me while I am enrolled as a student or customer of this course, whether foreseen or
24 unforeseen. I further save and hold harmless the individuals, parties stated above, and this diving
course from any claims by me, my family, heirs, devisees, and other concerning parties.

I further state that I am of legal age when executing this release or have acquired the
written consent of my parents or guardian. I further understand that the terms herein are
contractual and not mere recital, and that I have signed this document of my own free act.

It is the intention of myself by this instrument to exempt and release SCUBA WORLD
INC. PASTIME SAIPAN, PADI JAPAN, and PADI USA, to which instructors and guides for
this course in Saipan belongs, from all damages including personal injuries, property damages,
and wrongful death due to any negligent act.

I have read this release thoroughly and fully understand its contents.

_____ (Signature)	_____ 2005.7.16	_____	_____
Participant's Name	Date	Parents or Guardian's Name (if applicable)	Date

(Id., Exhibit "B").

1 On April 24, 2009, Plaintiff filed its Opposition to PADI America’s Motion for Summary
2 Judgment with supporting documents, arguing: (1) that the Release is unenforceable on the basis of the
3 Commonwealth’s public policy as expressed by the CNMI’s Safe Diving Act of 1990 (3 CMC §§ 5601-
4 5611); (2) the Release fails to preclude Plaintiff’s claims because it does not expressly and
5 unequivocally exempt PADI from liability for its own negligence or directly state that Morita assumes
6 the risk of PADI’s negligence or wrongdoing; and (3) that the doctrine of “primary assumption of the
7 risk” is inapplicable to these circumstances.

8 On May 14, 2009, Defendant filed a twenty-three page Reply to Plaintiff’s Opposition, in which
9 Defendant offered a rebuttal to each of Plaintiff’s legal arguments. In its Reply, Defendant further
10 argued that Plaintiff had failed in his opposition to present evidence to rebut the claim made by
11 Defendant in its moving papers that Plaintiff possessed no evidence on the victim’s exact cause of death,
12 hence on the necessary element of causation, and that Plaintiff also failed to present evidence to show
13 recklessness or other behavior by Defendant or Pastime that may have increased the victim’s risks
14 beyond the scope of the “primary assumption of the risk” doctrine. At the same time, Defendant PADI
15 concedes that “there is no dispute that the Safe Diving Act was violated by the dive shop (Defendant
16 Pastime) that Morita used and the instructors that accompanied her,” (Def’s Reply to Pl.’s Opp., at 7)

17 On June 18, 2009, Plaintiff filed a motion to strike Defendant’s arguments on procedural
18 grounds. Defendant filed an opposition to the motion on June 22, 2009.

19 **III. Analysis**

20 **A. Plaintiff’s Motion to Strike Defendant’s Arguments.**

21 Plaintiff objects that Defendant PADI based its motion for summary judgment primarily on the
22 legal effect of the Release signed by Morita and raised purely legal arguments in support of its motion,
23 but that Defendant included an argument in its written reply to the effect that it was entitled to summary
24 judgment on the basis of Plaintiff’s inability to produce evidence on the necessary element of causation

1 or to show that the doctrine of primary assumption of the risk may not apply. (Def.'s Reply to Pl.'s
2 Opp., at 17-19; Pl.'s Mot. To Strike, at 1). Plaintiff argues that these portions of Defendant's reply
3 memorandum unfairly derogate from the procedure prescribed by Rule 56 of the Commonwealth Rules
4 of Civil Procedure and must be stricken. (*Id.*, at 12).

5 Defendant responds that it was made evident in its moving papers that primary assumption of the
6 risk, while being a question of the existence of a legal duty, also rests on certain preliminary factual
7 determinations that must be made by a court applying the doctrine. (Pl.'s Mem. in Supp. of Mot., at 23,
8 citing *Knight v. Jewett*, 834 P.2d 696, 703-704 (Cal. 1992)). Defendant included a separate statement of
9 undisputed facts with its motion, supported by a declaration of counsel David G. Banes, Esq., and
10 documentary exhibits, including deposition testimony of Morita's diving companion, a police incident
11 report, and Morita's death certificate indicating that no autopsy was performed and that "drowning" was
12 the cause of death. (Pl.'s Ex. "D"- "G"). In its opening memorandum, however, Defendant argues on
13 the basis of persuasive legal authority in favor of adopting the doctrine of primary assumption of the risk
14 without reference to these proposed undisputed facts or to their supporting evidence. (Pl.'s Mem., at 22-
15 26).

16 Reviewing the materials submitted by the moving and opposing parties to this motion, the Court
17 agrees with Plaintiff that Defendant has not met its initial burden of showing that Plaintiff has no
18 evidence from which he could prove the essential element of causation, or that this Court must adopt the
19 doctrine of primary assumption of the risk and apply it to dismiss Plaintiff's claims unless Plaintiff can
20 refute its factual predicates or produce evidence of an exception. Com. R. Civ. P. 56(c); *Furuoka v.*
21 *Dai-Ichi Hotel*, 2002 MP 5, ¶ 22. Defendant's argument in reply concerning Plaintiff's lack of evidence
22 exceeds the basis of its initial motion. Generally, however, this Court will not strike the argument of a
23 party unless the argument is presented in a manner that would require the Court to strike it from a
24 pleading under Rule 12(f) of the Commonwealth Rules of Civil Procedure. The Court will disregard

1 arguments on irrelevant matters or made inappropriate under the civil rules, but is reluctant to strike an
2 argument unless it causes prejudice to the complaining party that is not remediable through
3 counterargument. Plaintiff has not been prejudiced by arguments stated in the Defendant's reply. For
4 this reason, Plaintiff's motion to strike is DENIED.

5
6 **B. PADI's Enforcement of the Release to Bar Plaintiff's Wrongful Death Action Would Violate the Public Policy of the Commonwealth as Established by the CNMI Safe Diving Act.**

7 **1. The effect of public policy on the validity of the Release in general.**

8 The Release drafted by PADI and signed by Morita in this matter contains provisions by which
9 Morita purportedly waives her right to bring any claims against released parties, including any claim for
10 wrongful death, and by which she also agrees to assume certain risks of harm related to the dive.¹ On
11 this motion, the considerations of public policy raised by the parties in argument for and against the
12 enforcement of the Release are equally applicable to both types of exculpatory provisions. Whether it
13 operates as an express assumption of risk or as a waiver of the right to sue, an exculpatory prerelease of
14 liability is construed according to the law of contracts. RESTATEMENT (SECOND) OF CONTRACTS § 195(2)
15 (1981); RESTATEMENT (THIRD) OF TORTS: APPORTIONMENT OF LIABILITY § 2 (2000). In a majority of

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17 ¹ The CNMI's wrongful death statute creates a cause of action vesting in the decedent's personal representative for the
18 recovery, on behalf of the decedent's surviving family members, of the survivors' pecuniary damages suffered on account of
19 the decedent's death when the death is caused by the negligence or wrongful act of the defendant. 7 CMC §§ 2101-2103;
20 *Indalecio v. Yarofalir, et al.*, 2006 MP 18 ¶ 18. Section 2101(a) of Title 7 provides in part:

19 (a) When the death of a person is caused by wrongful act, neglect or default *such as would have*
20 *entitled the party injured to maintain an action and recover damages* in respect thereof if death had
21 not ensued, the person or corporation which would have been liable if death had not ensued... is
22 liable to an action for damages notwithstanding the death of the person injured...

23 7 CMC § 2101(a)(emphasis added).

21 By definition, the deceased victim cannot possess a cause of action for his own wrongful death and therefore has no power to
22 waive a wrongful death claim. The majority of courts, however, have interpreted the equivalent of the emphasized statutory
23 language to permit the wrongful death defendant to raise any defense to liability that could have been asserted against the
24 victim personally, including the victim's agreement to prerelease the defendant from liability for harm. *See, Warren v. Cohen*, 363 So.2d 129, 131, n.1 (Fla.App. 1978) (citing majority and minority views); 22A AM. JUR. 2D *Death* § 185 (1988); *Cf., Gershon v. Regency Diving Center, Inc.*, 845 A.2d 720, 725-727 (N.J.Super. Ct. App. Div. 2004) (minority position).

1 jurisdictions, such releases are generally enforceable, subject to ordinary contract defenses. *Id.*; REST. 2D
2 OF TORTS § 496B. An agreement exempting one party from tort liability, however, is strictly construed
3 against the party claiming protection for reasons of public policy and the avoidance of unconscionable
4 contracts. TORTS 3D § 2, cmt. d.; *Ito v. Macro Energy, Inc.* 4 N.M.I. 46, 55 (1993). To be enforceable,
5 the release must (1) be sufficiently clear and definite in its terms to shield the protected party from the
6 particular liability at issue; and (2) not contradict public policy, particularly a policy that protects
7 members of a class to which plaintiff belongs from the respective class of defendants in regard to the
8 type of activity that caused the harm. *Id.*; REST. 2D OF CONTRACTS § 195(2)(c).

9 Defendant asserts that the enforcement of the exculpatory terms of the Release is consistent with
10 the public policy of the Commonwealth and cites numerous court decisions from other jurisdictions
11 holding that an exculpatory prerelease of liability executed in connection with scuba diving instruction
12 or other recreational sporting activities does not offend public policy. *E.g., Madison v. Superior Court*,
13 203 Cal.App.3d 589, 596-597 (Cal.App. 1988); *Hewitt v. Miller*, 521 P.2d 244, 248 (Wash.App. 1974).
14 These courts have determined that a voluntary sporting activity such as scuba diving does not affect the
15 public interest and that the parties involved are therefore free to contractually limit their liabilities. *See*,
16 *Madison*, at 599; *Hewitt*, at 248.

17 The *Madison* case, in particular, arose from facts very similar to those presented in the present
18 action. *Madison* involved a wrongful death action against the sponsor of a scuba diving course for the
19 death of plaintiff's decedent during the dive. Prior to the dive, the victim had signed a standard form
20 agreement prepared by an international diving organization in which he promised to release the provider
21 from all liability in connection with the dive. *Madison*, at 593. The trial court denied the defendant's
22 motion for summary judgment, finding disputed issues with respect to the effective scope of the release,
23 whether the victim had been adequately informed of the nature of the waiver, and whether the actual
24 cause of the accident fell outside of the risks assumed by victim under the release. *Id.* at 594-595. The

1 California Court of Appeal issued a writ of mandate directing the trial court to vacate the ruling and
2 enter summary judgment in favor of the defendant, holding in part that the express terms of the release
3 agreement were effective as a matter of law and that the enforcement of the release to bar plaintiff's
4 wrongful death action was not contrary to public policy. *Id.* at 599, 602.

5 The appellate court in *Madison* based its public policy determination on the factors developed in
6 the landmark case of *Tunkl v. Regents of the University of California*, 383 P.2d 441 (Cal. 1963), now
7 incorporated into Restatement (Third) of Torts § 2, cmt. e, and applied by many courts to this issue.
8 These factors focus on the defendant's social role in providing an "important public service" in relation
9 to the plaintiff's relative lack of bargaining power and were originally used by the California Supreme
10 Court to invalidate a release for medical negligence signed by a hospital patient. *Tunkl*, at 445-447. The
11 factors pointing to the unenforceability of such a release are that:

12 (1) The contract concerns a business of a type generally thought suitable for public
13 regulation.

14 (2) The party seeking exculpation is engaged in performing a service of great importance to
15 the public, which is often a matter of practical necessity for some members of the public.

16 (3) The party holds himself out as willing to perform this service for any member of the
17 public who seeks it, or at least for any member coming within certain established standards.

18 (4) As a result of the essential nature of the service, in the economic setting of the
19 transaction, the party invoking exculpation possesses a decisive advantage of bargaining
20 strength against any member of the public who seeks his services.

21 (5) In exercising a superior bargaining power the party confronts the public with a
22 standardized adhesion contract of exculpation, and makes no provision whereby a purchaser
23 may pay additional reasonable fees and obtain protection against negligence.

24 (6) As a result of the transaction, the person or property of the purchaser is placed under the
control of the seller, subject to the risk of carelessness by the seller or his agents.

Tunkl, 383 P.2d at 445-446.

23 When this test is applied to releases executed in connection with scuba diving or other
24 recreational sports activities, it is usually determined that the transactions fall outside the ambit of the

1 *Tunkl* factors, with most courts holding that such releases may not be avoided on public policy grounds.
2 The reason is that, pursuant to the second and fourth factors, scuba diving instruction fails to qualify as a
3 service “of great importance to the public” and that any superior bargaining strength possessed by the
4 released party does not flow from the “essential nature of the service” provided. *Madison*, at 599; *Boyce*
5 *v. West*, 862 P.2d 592, 596 (Wash.App. 1993). A few courts, while recognizing this aspect of voluntary
6 recreational sports, have nevertheless concluded that such releases were unenforceable on grounds of
7 public policy. *See, Dalury v. S-K-I, Ltd.*, 670 A.2d 795, 799 (Vt. 1995) (fact that plaintiff’s participation
8 in sporting activity was not “a matter of practical necessity” and that defendant did not provide an
9 “essential service” to the public was a single factor; release held contrary to public policy when the
10 remaining factors were present); *Hanks v. Powder Ridge Restaurant Corp.*, 885 A.2d 734, 746 (Conn.
11 2005) (accord); *See, also, Berlangieri v. Running Elk Corp.*, 76 P.3d 1098, 1110 (N.M. 2003) (“It would
12 be possible that only one of these factors would be applicable, but that factor would be significant
13 enough to make the release unenforceable.”). Defendant correctly maintains, however, that the majority
14 of courts that have considered the question through application of state law or the Restatements have
15 concluded that an exculpatory prerelease of liability executed in connection with scuba diving or other
16 recreational sports does not offend the public policy of their respective jurisdictions.

17 **2. The impact of the CNMI Safe Diving Act on the validity of the Release.**

18 A different analysis is appropriate when a statute is proffered as the basis for a public policy
19 precluding enforcement of the release. A contract purporting to release a party from liability for the
20 breach of a duty imposed by statute is unenforceable. REST. 2D OF CONTRACTS § 195, cmt. a. “[W]hen a
21 statute imposes a standard of conduct, a clause in an agreement purporting to exempt a party from tort
22 liability to a member of the protected class for the failure to conform to that statutory standard is
23 unenforceable.” *Murphy v. North American River Runners*, 412 S.E.2d 504, 509 (W.Va. 1991); 22A
24 AM. JUR. 2D *Negligence* § 56 (1989), *citing, Hunter v. American Rentals*, 371 P.2d 131, 133-134 (Kan.

1 1962) (release waiving “any and all claims” by customer against trailer rental company was void and
2 unenforceable in personal injury suit alleging defendant had installed a trailer hitch that failed to meet
3 safety standards prescribed by vehicle code); *Cf., Wolfgang v. Mid-American Motorsports*, 898 F.Supp.
4 783, 787 (D.Kan. 1995) (violations of Occupational Safety and Health Act by automobile racetrack
5 owner did not preclude enforcement of exculpatory release by driver because purpose of the statute was
6 to protect employees and state legislature chose not to regulate auto racing). When a declaration of
7 public policy has already been made by the Legislature, the strength and scope of that policy is a matter
8 of statutory interpretation and the Court must then weigh the extent to which the terms of a private
9 agreement would contravene the policy expressed by the statute. REST. 2D OF CONTRACTS § 178, cmt.
10 b., § 179, cmt. b.; *See, Bank of Saipan v. Superior Court (Attorneys’ Liab. Assurance Soc’y, Inc.)*, 2001
11 MP 5, ¶¶ 20-23; *Diamond Hotel v. Matsunaga*, 4 N.M.I. 213, 224-225 (1995) (Atalig, J., concurring).

12 Plaintiff contends that the CNMI’s Safe Diving Act of 1990, 3 CMC §§ 5601-5611 (1991) (PL
13 7-47) is a statute that establishes safety standards to be followed by the providers of recreational diving
14 services in the Commonwealth and that the enforcement of the Release in this action would contravene
15 the public policy expressed by the statute. Plaintiff distinguishes the persuasive judicial opinions cited
16 by Defendant in support of its motion on the basis that none involved a statute regulating the activity of
17 scuba diving or other relevant sport. Plaintiff cites *Murphy, supra*, where the Supreme Court of West
18 Virginia found that a pre-accident release signed by a whitewater rafter was unenforceable in respect to
19 plaintiff’s negligence claim on grounds of public policy due to a public safety statute regulating
20 commercial whitewater rafting companies. 412 S.E.2d at 512. Plaintiff argues that the Safe Diving Act
21 provides a comparable and compelling ground for refusing to enforce the Release.

22 The purpose of the CNMI Safe Diving Act is “to require dive instructors and tour leaders to be
23 certified and to obtain substantial liability insurance in order to ensure that only skilled divers who
24 adhere to the strict standards of safe diving established by national and international diving

1 *organizations will be permitted to provide, for profit, recreational dive services to residents and tourists*
2 *in the Commonwealth.”* 3 CMC § 5602. The Act was introduced upon the following findings:

3 Findings. The legislature recognizes that a prime attraction for visitors to the
4 Commonwealth is its beautiful waters. Recreational scuba diving occupies an important
5 role in the tourism industry. It is important that the Northern Mariana Islands continue to
6 be known and trusted for safe diving. The legislature finds that the business of tour diving
7 and diving instruction is comprehensively regulated by the dive industry through various
8 national and international organizations. Instructors certified by these organizations are
9 required to follow the safety standards of their organization in order to issue student
10 certifications and to obtain insurance coverage. Dive tour leaders certified by these
11 organizations are required to follow these standards in order to obtain insurance coverage
12 for their dive activities.

13 PL 7-47, Section 2, effective Dec. 17, 1991.

14 The Act imposes a standard of care on commercial diving tour operators and instructors,
15 identified as “the strict standards of safe diving established by national and international diving
16 organizations.” § 5602. Additionally, the Act specifically requires (1) liability coverage for every
17 “instructor” or “tour leader” sufficient to insure the business and the employee in the minimum amount
18 of \$500,000 per incident; (2) that a business may only employ tour leaders or instructors who are
19 appropriately certified and must provide proof of their current certification; (3) that every diving tour be
20 supervised by a tour leader; and (4) it further prohibits instructors and tour leaders from providing
21 services to a customer who is not covered by the provider’s insurance policy. §§ 5606-5609.

22 The CNMI Safe Diving Act is an apparently uncommon example of legislation touching the field
23 of commercial recreational sports which, at the same time, is plainly and unambiguously nothing more
24 than a public safety statute. All of the Act’s provisions, including the mandatory liability coverage, are
directly aimed at promoting safe commercial diving practices in the CNMI, with the enhanced purpose
of securing the Commonwealth’s reputation as a safe diving destination. PL 7-47, § 2. In contrast, the
Court’s review of state statutes referenced in the opinions of various courts on this issue indicates that
most of these jurisdictions have chosen to codify the common law on assumption of risk, or else to

1 provide detailed risk-allocations between recreational service providers and their patrons, invariably
2 accompanied by the legislative declaration that it is in the public interest of the state to protect the
3 recreational *industry* from unnecessary litigation and/or unwarranted liability.² *See, Murphy*, at 511
4 (interpreting the West Virginia Whitewater Responsibility Act, W. VA. CODE, 20-3B-1 to 20-3B-5
5 (1987)).

6 In *Murphy*, the plaintiff was a paying passenger on a whitewater rafting tour when she fell inside
7 her raft and seriously injured her knee and ankle. The plaintiff claimed that the accident was due to the
8 negligence of the defendant’s guide, who was attempting at the time to dislodge another raft that had
9 become stuck between some rocks by bumping it with the raft in which she was riding. *Murphy*, at 508.
10 The trial court dismissed plaintiff’s suit on the basis of a comprehensive release and waiver of claims
11 she had signed prior to her rafting trip. *Id.* Reversing this decision, the West Virginia Supreme Court
12 held, *inter alia*, that the release was unenforceable against plaintiff’s claim on grounds of public policy
13 due to the state’s Whitewater Responsibility Act. The court noted that the foremost provisions of the
14 Act immunized commercial whitewater tour operators from tort liability for the “inherent risks of this
15

16 ² See, for example, *Berlangieri v. Running Elk Corp.*, *supra*, 76 P.3d at 1110 (construing N.M.S.A. 1978, §§ 42-13-1, *et seq.*,
17 *Equine Liability Act*); and *Reardon v. Windswept Farm, LLC*, 905 A.2d 1156, 1162 (Conn. 2006) (Conn. Gen. Stats. § 52-
557p – horseback rider assumes inherent risks).

18 Another example is Colorado’s “Ski Safety Act of 1979,” which is expressed as a public safety statute but was reportedly
19 enacted at the behest of ski resort owners. *Graven v. Vail Assocs.*, 909 P.2d 514, 517 (Colo. 1995) (en banc). The Colorado
state legislature explained that the purpose of the act was:

20 to clarify the law in relation to skiing injuries and the dangers and risks inherent in that sport, to establish as a
21 matter of law that certain dangers and risks are inherent in that sport, and to provide that, as a matter of public
policy, no person engaged in that sport shall recover from a ski operator for injuries resulting from those
inherent dangers and risks.

Ski Safety Act of 1979, COLO. REV. STAT. ANN. 2, 33-44-103 (amended 1990).

22 Nevertheless, because Colorado’s Ski Safety Act was interpreted to comprehensively allocate responsibilities for skiing
23 accidents, immunizing resort owners from liability for harm resulting from the “inherent dangers” of skiing, but leaving the
24 door open to claims based upon the owners’ negligence, the Act has served as a basis for *denying* enforcement of exculpatory
releases of liability for the owners’ ordinary negligence. *Phillips v. Monarch Recreation Corp.*, 668 P.2d 982, 987
(Colo.App. 1983).

1 recreational activity,” but that a further provision also established that guides must "conform to the
2 standard of care expected of members of their profession." *Id.* at 511-512 (W. VA. CODE, 20-3B-3(b)).
3 Although the same standard of care at common law might be waived by contract, its status as a
4 legislative enactment for the benefit of the public meant that the standard could not be avoided by
5 private agreement. *Id.* at 512.

6 The Safe Diving Act does not allocate liabilities; all of its obligations are placed on the providers
7 of commercial recreational diving tours and instructors, and all of its protections are for members of the
8 public who pay for these services or for the public at large. The Act promotes safe diving practices in
9 part by mandating that providers maintain liability insurance and by also prohibiting providers from
10 accepting any diving customer who, under the terms of a specific liability policy, would cause a lack of
11 coverage for potential claims by that individual. 3 CMC § 5609. To the extent that the Release purports
12 to absolve the released parties from their statutory obligations, including the standard of care imposed on
13 dive instructors and tour leaders under 3 CMC § 5602, it is unenforceable on grounds of public policy.
14 REST. 2D OF CONTRACTS § 195. Further, the provisions of the Safe Diving Act presume that diving
15 customers will have recourse to civil judgments and that this will motivate providers through their
16 insurers to adhere to safe diving practices. 3 CMC § 5602; PL 7-47, § 3. The Act specifically defines
17 “liability insurance” as a valid insurance policy insuring against legal liability for death, injury, or
18 disability of any human being. 3 CMC § 5603(b). Enforcement of the Release in this matter to bar
19 Plaintiff’s wrongful death action would be contrary to the purpose of the statute and would impair its
20 effectiveness. REST. 2D OF CONTRACTS § 179.

21 In reply to Plaintiff’s opposition to its motion for summary judgment, Defendant PADI concedes
22 that “there is no dispute that the Safe Diving Act was violated by the dive shop (Defendant Pastime) that
23 Morita used and the instructors that accompanied her,” but argues that the Act does not render the
24 Release unenforceable by PADI. (Def.’s Reply to Pl.’s Opp., at 7). Defendant contends that the Safe

1 Diving Act is irrelevant to its attempt to enforce the release because the statute only imposes obligations
2 on CNMI commercial diving businesses and does not purport to regulate national diving organizations
3 such as PADI. Defendant asserts that the public policy established by the Safe Diving Act is one in
4 favor of protecting recreational divers from the unsafe practices of local commercial diving “businesses”
5 employing “instructors” and “tour leaders.” §§ 5606-5607. Defendant contends that it could not violate
6 the Act because it is not one of these entities, concluding on this basis that there can be no public policy
7 against Defendant enforcing the Release. (Def.’s Reply, at 8).

8 The issue before the Court, however, is not whether Defendant PADI, or any other party,
9 violated the statute or violated public policy. The issue presented is whether or not the judicial
10 enforcement of the exculpatory terms of the Release by dismissing Plaintiff’s wrongful death claim
11 against PADI would be contrary to the public policy established by the Safe Diving Act.³ The Act is not
12 only relevant but indispensable to this determination, independently of Defendant’s capacity to violate its
13 express provisions. *Bank of Saipan*, ¶ 20; *Diamond Hotel*, at 224 (citing REST. 2D OF CONTRACTS § 8, §
14 178, cmt. b., § 179, cmt. b.).

15 Plaintiff’s complaint alleges a relationship between Defendant PADI and Pastime that would
16 support a finding of vicarious liability on the part of PADI for the actions of Pastime. (Complaint, 15-
17 16). Plaintiff further alleges that PADI had a duty to monitor its members to insure compliance with its
18 standards, that it failed to monitor Pastime and its instructors and that this was the proximate cause of
19 Morita’s death. (*Id.*, at 16-19). Defendant introduced the Release, which lists PADI seriatim within a

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21 ³ See, *Berlangieri, supra*, 76 P.3d 1098:

22 [Plaintiff] argues that the Act imposes affirmative duties upon equine business operators to protect their
23 patrons from harm under subsections one through five. [Defendant] argues that this statute imposes no duty
24 upon it. "However, it is also a general proposition that every person has a duty to exercise ordinary care for
the safety of others, when that person does choose to act." *Davis v. Bd. of County Comm'rs*, [987 P.2d 1172
(N.M. 1999)]. The relevant inquiry for this Court is not whether the Act imposes duties, but whether it
generally expresses a policy that the duty of ordinary care may not be disclaimed in this context.
Id., at 1110 (other citations omitted).

1 block of other released parties, including Pastime, as a complete defense to Plaintiff's claims. It is not
2 disputed that PADI drafted the Release and distributed it for use by Pastime. The consideration recited
3 for Morita's promise to assume the described risks and waive her prospective claims was "being allowed
4 to enroll in this course," that is, to participate in a PADI-authorized instructional dive conducted by Pastime and
5 intended to lead to an advanced PADI certification. Because PADI is a national diving certification
6 organization, it asserts the right to enforce the exculpatory terms of the Release even though the same
7 terms would be unenforceable on grounds of public policy if Pastime sought to enforce the Release.

8 The allegations of Plaintiff's complaint and the undisputed facts presented on this motion,
9 including the express terms and language of the Release, considered in light of the safe diving policy of
10 the Commonwealth as declared by the CNMI Safe Diving Act, do not reveal a basis upon which the
11 Court can find a valid separable agreement between Morita and PADI or that enforcement of the Release
12 in favor of Defendant would have a measurably less deleterious effect on the public interest than would
13 its enforcement by Co-Defendant Pastime or one of the other released parties. *See, Diamond Hotel*, at
14 220. Defendant PADI's motion for partial summary judgment on this basis is DENIED.

15 **C. Public Policy Determines the Further Points and Arguments Raised on the Motion.**

16 **1. The sufficiency of the terms of the Release.**

17 Plaintiff argues that the language of the Release does not meet the standard of clarity required for
18 the enforcement of an exculpatory release, as set by *Ito v. Macro Energy*, 4 N.M.I. 46 (1993). Because
19 the Court determines that the Release is unenforceable on grounds of public policy even if its terms are
20 sufficiently clear, an examination of the contents of the Release under the applicable standard is not
21 required.

22 **2. Primary Assumption of the Risk.**

23 Defendant moved for summary judgment on the additional ground that Plaintiff's wrongful death
24 action is precluded by the legal doctrine of primary assumption of the risk. (Pl.'s Mem., at 22-26). This

1 is a basis for summary judgment which does not rely on the enforceability of the Release. “Primary
2 assumption of the risk” is a so-called “no duty” or “limited duty” rule which, in its original and basic
3 form, simply holds that those persons who are engaged in a sporting activity that carries an inherent risk
4 of injury do not owe a duty to protect other participants from those risks. *Knight v. Jewett*, 834 P.2d 696
5 (Cal. 1992). The doctrine represents a judicially-developed policy decision that the ordinary principles
6 of tort law should not apply to individuals engaged in some kinds of sporting activity. The effect of the
7 doctrine is to remove from the jury all consideration of a participant’s subjective knowledge of
8 particular risk or other fact-specific considerations relevant to a traditional assumption of the risk
9 analysis and to subsume these into an analysis of duty based upon the court’s legal characterization of
10 the nature of the activity and the relationship of the participants to that activity. *Id.*, 706.

11 The doctrine of “primary assumption of the risk” has not previously been considered by
12 Commonwealth courts in any published decision. The CNMI has no comparable “no-duty” rules. The
13 doctrine does not appear in Restatement (Second) of Torts, because *Knight* was decided in 1992. The
14 Third Restatement, so far, acknowledges that some jurisdictions have “no-duty” rules, but does not yet
15 express a rule on the subject. REST. 3D OF TORTS § 2, cmt. j. Whatever the merits of the doctrine in
16 principle, it is clear that the Court may not adopt it as a rule of decision in this matter. A judicial
17 declaration, based solely upon the nature of the sport of scuba diving, that no duty was owed between
18 the parties participating in the scuba diving incident in this matter would flatly contradict the public
19 policy specifically established by the Legislature through the Safe Diving Act.

20 **3. A Prospective Release of Liability for Unlawful Business Practices is Unenforceable.**

21 The considerations supporting the unenforceability of the Release with respect to Plaintiff’s
22 wrongful death claims demonstrate as well that the Release may not be enforced to dismiss Plaintiff’s
23 cause of action against Defendant for violation of the CNMI Consumer Protection Act (4 CMC §§ 5101-
24 5123). Section 5112(a) of the CPA provides a private civil cause of action to any person aggrieved by

1 certain unfair or deceptive business practices that are described as “unlawful” under 4 CMC § 5105.
2 There is no reference to the CPA in the language of the Release, but Defendant asserts that Morita’s
3 purported waiver of “any claim” as it appears in that document is sufficient to waive Plaintiff’s right to
4 bring suit against Defendant pursuant to 4 CMC § 5112(a) for unfair and deceptive business practices.
5 Even if the Release contained an express term to this effect, however, the term would be unenforceable
6 against the consumer protected by the Act. REST. 2D OF CONTRACTS § 195, cmt. a.

7 Even where the particular statute does not include an express prohibition on such agreements,
8 courts have consistently held that a business may not shield itself from statutory liability for its unlawful
9 business practices through the device of securing from the consumer a standardized exculpatory
10 contract. *See, Wells v. Allstate Ins. Co.*, 2006 U.S. Dist. LEXIS 4694 (D.D.C. Jan. 24, 2006) (release of
11 “any and all liability” does not release liability under consumer protection statute), *citing, additionally*,
12 REST. 2D CONTRACTS § 196 (a “term unreasonably exempting a party from the legal consequences of a
13 misrepresentation is unenforceable on grounds of public policy.”); *Hoffman v. Blum*, 2008 U.S. Dist.
14 LEXIS 7643 (N.D. Cal. Jan. 31, 2008) (public policy permits the voluntary release of mature claims
15 under consumer protection statute, but prohibits a prospective release by which releasee would avoid its
16 statutory obligations). To the extent that the Release executed by Morita may be construed as a
17 prospective waiver of any claims against Defendant based upon the CNMI Consumer Protection Act, the
18 Release is unenforceable on the basis of the public policy established by that Act.

19 **IV. Conclusion**

20 For the reasons stated above, the “Waiver and Release of Liability” signed by Plaintiff’s
21 decedent July 16, 2005 (Pl.’s Ex. A) is unenforceable by Defendant PADI as a contractual limitation of
22 liability or as a prospective waiver of Plaintiff’s claims on the ground of Commonwealth public policy
23 established by the CNMI Safe Diving Act. The Release therefore fails to present a complete defense to
24 the causes of action alleged in Plaintiff’s complaint and Defendant has not otherwise shown that it is

