By Order of the Court, *Judge Joseph N. Camacho*

**FOR PUBLICATION**

**E-FILED**
**CNMI SUPERIOR COURT**
E-filed: Jul 19 2012 4:15PM
Clerk Review: N/A
Filing ID: 45426050
Case Number: 12-0151-CV
N/A

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

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| **ISLAND MARINE SPORTS, INC., AQUATIC MARINE CO., INC. d.b.a. AMIGO AQUATIC SPORTS, AUTOMARINE, INC., SEAHORSE, INC., and BSEA, INC.,**<br><br>**Petitioners/Plaintiffs,**<br><br>**v.**<br><br>**DEPARTMENT OF PUBLIC LANDS, and TASI TOURS & TRANSPORTATION INC.,**<br><br>**Respondent/Defendant.** | **CIVIL CASE NO. 12-0151**<br><br>**OPINION & ORDER GRANTING PRELIMINARY INJUNCTION** |

## I. INTRODUCTION

**THIS MATTER** came before the Court on July 2, 2012 at 1:30 p.m., on a motion for injunctive relief. Island Marine Sports, Inc., Aquatic Marine Co., Inc., d.b.a. Amigo Aquatic Sports, Automarine, Inc., Seahorse, Inc., and BSEA, Inc., ("Petitioners") are five marine sports operators seeking to invalidate a "rule-making," by the Department of Public Lands ("DPL") which forbids them from picking up customers from Managaha Island and taking them on water sports activities such as banana boat rides and parasailing. They seek to enjoin DPL from enforcing this rule, until the case can be decided on its merits. Based on a thorough review of the record, motions and relevant law, the Court now enters this written decision.

## II. FACTUAL AND PROCEDURAL HISTORY

The history of this case concerns a regulation promulgated by DPL regarding the commercial use of Managaha Island and a contract between DPL and Defendant Tasi Tours & Transportation, Inc.

1 (“Tasi Tours”) regarding the same. The parties differ in their interpretation of both. Significantly, the
2 scope of Tasi Tours’ rights under the contract and the regulation are contested. Petitioners believe that
3 the regulation and contract do not prevent their companies from picking up customers on Managaha
4 Island for water sports activities such as banana boat rides and parasailing as part of their pre-purchased
5 package tours. In contrast, Tasi Tours believes that their contract and the regulations grant them the
6 exclusive right to conduct any “tour” that leaves from Managaha Island, which includes marine sports
7 activities such as banana boat rides and parasailing. DPL has not offered an interpretation during the
8 course of litigation thus far but has advanced more than one view historically, as will be more
9 elaborately explained by examination of the record.

10 **A. 1993 REGULATION**

11 In May of 1993 the Marianas Public Land Corporation promulgated regulations regarding the
12 commercial use of Managaha Island (“1993 Regulations”), which became effective September 15, 1993.
13 *See* NMIAC § 145-30-001, *et seq*. The 1993 Regulations provide that, “[a]ll commercial activity
14 including conveniences such as food, beverages, recreational equipment and the like shall only be
15 provided by one concessionaire and three Subconcessionaires.” NMIAC § 145-30-101(a). Pursuant to
16 the 1993 Regulations, “[t]he exclusive right to operate all commercial concessions does not include the
17 exclusive right to provide transportation to and from the island[.]” NMIAC § 145-30-101(c). The
18 regulations also provides that “[t]here shall not be an extra charge for multiple landings of a tourist if
19 occurring in a single day.” NMIAC § 145-30-210(d).

20 The 1993 Regulations define “commercial activity,” as, “[a]ny activity conducted on island for
21 profit (or resulting in profit) by an enterprise or person required to have a business license to conduct the
22 activity.” NMIAC § 145-30-015(a). Whereas, “Commercial Concession” is defined as:

23 > Any facility which prepares, delivers, sells or provides food or beverages
> on the Island; any facility which rents or sells water sports equipment,
24 > recreational equipment, or beach equipment and related supplies; any

> operation which conducts tours on the Island or from the Island; and, any merchant which sells goods or services of any nature on the island.

NMIAC § 145-30-015(b). "Tour" is not defined under the 1993 Regulation. *See* NMIAC § 145-30-015.

**B. EXCLUSIVE CONCESSION CONTRACT**

In 1989, prior to the promulgation of the 1993 Regulations, Tasi Tours obtained an exclusive concession contract with the Marianas Public Land Corporation ("MPLC"), the predecessor to DPL, through a competitive bid. The contract was extended by MPLC and its successors, and in 2001 Tasi Tours again won a competitive bid for the concession. The 2001 Agreement between Tasi Tours and DPL ("Agreement") regarding the commercial use of Managaha describes the concession as "a license to operate and maintain a special exclusive recreational concession on Mañagaha Island." (Def.'s Ex. A, 2). The Concession area is designated by a map and incorporated into the Agreement. (*Id.*)

Significantly the Agreement provides, "Concessionaire shall have the exclusive right to operate all commercial concessions on Mañagaha Island during the term of this Agreement." (*Id.*) Pursuant to the Agreement:

> The term "commercial concessions" includes the right to prepare, deliver, sell and provide food or beverages on the Island for all persons who desire to purchase the same; the rental or sale of water sports equipment, recreational equipment, or beach equipment and related supplies; the conduct of tours on the Island and from the Island; the sale of goods on the Island; and, the provision of entertainment for profit on the Island.

(*Id.* at 3.)

The Agreement requires the Concessionaire to obtain the prior written consent of the Board in order to conduct activities other than certain proscribed ones including the operation of "[u]nderwater activities, such as SCUBA diving, SNUBA diving, snorkeling, and sea walker-type tours," and "surface water activities, such as parasailing, banana boat rides, pedal bikes, power boat lagoon cruises, windsurfing, canoe rentals and tours, and kayak rentals and tours." (*Id.*)

There is no evidence in the record indicating that the scope of the exclusive concession in the Agreement, or the 1993 Regulations—as it pertains to marine sport operators other than the concessionaire, picking up tourists from Managaha for water sports activities—has ever been litigated.

**C. OCTOBER LETTER – SIGNED BY DPL SECRETARY OSCAR M. BABAUTA**

On October 4, 2011—eighteen years after the 1993 Regulation became effective—DPL wrote a letter ("October Letter") to Mr. Frank Murakami, the General Manager of Tasi Tours. (Pl.'s Ex. 2.) The letter states that the Agreement "in no way prohibits other concessionaries from selling services off-island and then picking up tourists from Managaha and then returning them to Managaha after the activity is completed." (*Id.*) The letter then cites the 1993 Regulation for the proposition that tourists can only be charged one landing fee in a given day. The October Letter concludes that:

> In accordance with the above Agreement and Rules, tourists are free to book activities with concessionaries who operate off Managaha Island. Those operators may pick the tourists up from Managaha, and then after the activity is completed, return them to Managaha. Such tourists cannot be charged any additional or duplicative fees for re-entering Managaha Island.

(*Id.*)

The letter is signed by Oscar M. Babauta, Secretary of DPL. (*Id.*) No evidence suggests that DPL ever issued any internal or external guidance or opinion regarding the 1993 Regulation or the scope of the Agreement prior to the October Letter.

**D. DECEMBER LETTER – SIGNED BY DPL SECRETARY OSCAR M. BABAUTA**

On December 13, 2011, DPL sent a letter ("December Letter") to "all beach concessionaires and marine sports operators." (Compl. Ex. A; Pl.'s Ex. 1.) The December Letter states:

> The Department of Public Lands is issuing this Memo to clear up any confusion regarding the extent of the exclusive concession right on Mañagaha Island. Specifically, the issue is whether another company can pick up tourists on Mañagaha Island and take the tourists for a water sports tour (e.g. parasailing, banana boating, speed boat riding, snorkeling, scuba diving). In brief, the answer is "no."

> The Agreement for Special Recreational Concession (Mañagaha Island) states:
>
> > Concessionaire shall have the exclusive right to operate all commercial concessions on Mañagaha Island during the term of this Agreement. The term "commercial concessions" includes the right to . . . the conduct of tours on the Island and from the Island . . .
>
> § 3A, B.
>
> Only the Concessionaire can conduct tours *on* Mañagaha Island or *from* Mañagaha Island. When tourists are picked up on Mañagaha Island to go on a marine sports tour, whether it is parasailing, banana boating, or the like, they are taking a tour "from the Island." If the tour is sold by a company other than the Concessionaire, the Concessionaire's exclusive right to operate all commercial concessions on Mañagaha Island has been violated. It should be noted that this is regardless of whether the tourist is returned to Mañagaha or taken back to Saipan after the water sports tour.
>
> The Department of Public Lands expects, and requires, all persons to abide by this rule. The Rules and Regulations Regarding the Commercial Use of Mañagaha Island (September 15, 1993) provide that all commercial activity on Mañagaha Island shall be provided by one concessionaire only. § 5A. They further provide that if any person violates the regulations, Public Lands may take enforcement action, which could include the loss of the license to land passengers on Mañagaha. § 5C. It may also result in a refusal by DPL to renew the annual license for a vendor's beach concession.
>
> We have sent this memo to all beach concessionaires and marine sports operators so that everyone will have a clear understanding of this rule. We appreciate your cooperation.

(*Id.*) The December Letter is signed by Oscar M. Babauta, Secretary of DPL. (*Id.*)

No evidence indicates that DPL ever issued any public statements regarding the interpretation or the scope of the Agreement between 1993 and December 13, 2011. It is also unclear from the record whether Tasi Tours and DPL held the same view as to the interpretation of the 1993 Regulation and the Agreement during that period of time.

**E. MAY LETTER – SIGNED BY ACTING DPL SECRETARY PEDRO ITIBUS**

On March 2, 2012 counsel for Petitioners sent a letter petitioning DPL for amendment or repeal of the rule announced on December 13, 2011, advancing several arguments. (Compl. Ex. B; Pl.'s Ex. 4.) The letter alleges that, "Tasi Tours sent a letter to DPL on November 11, 2011 making rather vague threats of litigation." (*Id.* at 3.)

On May 7, 2012 DPL wrote a letter ("May Letter") "announc[ing] the repeal of the rule first promulgated in its December 13, 2011 letter to various marine sports operators regarding their operations relative to Mañagaha Island." (Compl. Ex C; Pl. Ex. 5.) The May Letter goes on to interpret Tasi Tours exclusive rights pursuant to the Agreement as prohibiting marine sports operators from soliciting services on Managaha Island, but not from selling services which are procured off Managaha Island, which may include packages "whereby the operator transports a given group of tourists to Mañagaha, picks those same tourists up of (*sic*) a banana boat ride in the lagoon, returns those same tourists to Mañagaha for a period of time, and finally picks those same tourists up to transport them back to Saipan." (*Id.* at 1.) The May Letter concludes that "[t]he arrangements described herein are consistent with both the text of the Concession Agreement and past practice." (*Id.* at 2.) The letter is signed by Acting Secretary Pedro Itibus.

**F. JUNE LETTER – SIGNED BY ACTING DPL SECRETARY PEDRO ITIBUS**

On June 14, 2012, yet another letter ("June Letter") was sent to the marine sports operators regarding this issue, along with a Press Release, interpreting the Agreement in substantially the same manner as the December Letter—only there is no mention of the 1993 Regulation. The June Letter in pertinent part reads:

> I have reconsidered the conclusion of the May letter that was sent to you regarding the conduct of tours from Mañagaha Island. . . .
>
> Upon further investigation of the history and language of the Agreement, Public Lands has determined that it is *not the place of the sale of the tour*

> that controls, but the *place where the tour takes place* that controls. Any tour conducted on Mañagaha Island or from Mañagaha Island comes within the terms of the Agreement. This means that **customers may not be picked up from Mañagaha Island for a water sports tour by any company other than the exclusive concessionaire or its subcontractor**. For example, companies offering banana boat rides and parasail rides cannot pick up customers for these tours at either the Island's pier or beaches.

(Compl. Ex D) (emphasis in original).

The Press Release consists of a five-page document which: (1) recounts the history and purpose of the Agreement; (2) renounces the interpretation in the May Letter; and (3) interprets the language "conduct of tours on the Island and from the Island" in the definition of commercial concessions under the Agreement as prohibiting marine sports operators other than the concessionaire from picking up customers on the island and suggests that the parties intended for the exclusive concession to cover surface water activities such as parasailing and banana boat riding because they are listed in the same section that grants exclusivity. (*Id.* at 3,4.) Significantly the Press Release reads:

> In conclusion, the contract shows Public Lands must restrict the conduct of tours from Mañagaha Island, including parasailing and banana boat tours, to the company which holds the contract rights to the exclusive concession and its subcontractors. Other marine sports operators may not pick up customers from Mañagaha Island and then take them on water sports tours. Any statement or suggestion by Public Lands to the contrary is hereby rescinded. It makes no difference whether these tours were pre-sold or not. It makes no difference whether the tour is one-way from Mañagaha Island or a round trip. Any tour from Mañagaha Island must be conducted by or sanctioned by the exclusive concessionaire.

(*Id.* at 4) (emphasis in original).

The June Letter and Press Release are signed by Acting Secretary Pedro Itibus.

**G. THE PETITION**

On June 25, 2012 Petitioners filed a Petition for Declaratory Judgment and Verified Complaint for Temporary Restraining Order and Preliminary Injunction. On June 28, 2012 Tasi Tours filed a Motion to Intervene as a defendant, Notice of Motion, and Memorandum of Points and Authorities in

Support of Motion to Intervene. (collectively "Motion to Intervene"). The same day, Petitioners filed an Amended Petition For Declaratory Judgment and Amended Verified Complaint For Temporary Restraining Order and Preliminary Injunction with Exhibits, and a Proposed Amended Temporary Restraining Order. On July 2, 2012 the Court held a hearing on the Motion to Intervene, and the Court granted the motion.

**H. PRELIMINARY INJUNCTION HEARING**

On July 2, 2012, the Court held a hearing on the motion for injunctive relief. At the outset, the Court permitted Tasi Tours to file its Memorandum of Points and Authorities in Opposition to Plaintiffs' Request for Temporary Restraining Order, an Affidavit of David L. Igitol, and a Declaration of Rexford C. Kosack in support of its opposition. Attached to the Declaration, among other documents, is a true and correct copy of the Agreement with DPL. (Def.'s Ex. A.)

First, the Court heard testimony from William Owens, the President of BSEA, Inc., one of the Petitioners. He testified that his company has been offering package marine sports tours, including a trip to Managaha Island since 1993 and that 99% of his business has been based on such tours for about 18 years. The company offers marine sports such as parasailing, banana boating, boat snorkeling, fishing, and wake-boarding. Mr. Owens testified that all of his marketing is based on Managaha Island and that he has taken hundreds of thousands of customers to and from the island over the years. He testified that the designated place for parasailing is the Tanapag Lagoon near Managaha. He also testified that prior to December of 2011, he was never told by anyone at DPL that he could not take his customers on marine sports activities once they landed on Managaha but had been allowed to do so until recently. Mr. Owens also testified that between December of 2011 and June of 2012, some of his customers had been stopped by DPL and not allowed back on Managaha after doing a water sports activity. He also testified that his understanding of the December Letter was that it announced a new rule and that his business

1 was previously allowed to pick up customers from Managaha to take them on marine sports activities as
2 part of the package tours which he has been offering for 18 years.
3 Mr. Owens testified that before June of 2012 he would typically have 40-50 tours a day, but now
4 that he must comply with the new rule, he cannot take his customers on marine sports tours once they
5 land on Managaha. As a result, he testified that he is only able to serve about 20 customers a day. He
6 testified that July through August is consistently the busy season in his business and that the money he
7 makes during the high season is used to "float" the business for the rest of the year. Mr. Owens testified
8 that if the current "rule" (as explained in the December Letter) were to be enforced, he would be forced
9 to lay off his employees and ultimately go out of business. He testified that the value of his business is
10 based on the infrastructure and that there is also value in the company's name. He also testified that he
11 had invested $600,000 in his business. He also testified that if he is forced to liquidate, it would be
12 difficult to sell his equipment if the current rule were in place because no one would want to buy it. Mr.
13 Owens testified that it would not be economical to use the six-person boat(s) he already has to transport
14 people to and from Managaha without offering water sports tours; that a bigger boat would be needed to
15 offer a viable transportation-only service.
16 Next, the Court heard testimony from Manuel Jose Alvarez, the CEO of Seahorse Inc, one of the
17 Petitioners. He testified that he brought parasailing to Saipan 26 years ago. Significantly, Mr. Alvarez
18 testified that his business operates a beach concession out of the Fiesta Hotel; 100% of his packages,
19 which are his main product, involve Managaha; once or twice a month a customer asks to do something
20 not involving Managaha; his tours typically include a banana boat ride on the way to Managaha, then the
21 customers are picked up for a parasail in the lagoon, dropped back off on Managaha, and later taken
22 back to Saipan; his business model is based on Managaha; it is included in all of the advertising; and
23 most of the company's business comes from websites in Japan, Korea and China. He also testified that
24 his understanding of the December Letter was that it announced a new rule and that his business was

previously allowed to pick up customers from Managaha to take them on marine sports activities as part of his package tours.

Mr. Alvarez testified that if the rule forbidding him to pick up his customer's from Managaha to take them on a marine sport activities is enforced his business is "probably gonna' die a slow death." He explained that he was not forced to close from December through June because that is not the peak season. He testified that out of 40-50 tours a day he is only able to accommodate about 40% given DPL's restriction. Mr. Alvarez testified that the peak season is June through August. He testified that he has no other source of income and is 58 years old. He has about one million dollars worth of equipment, which would be difficult to liquidate, in part because if DPL's current restriction remains in place no one will want to get into the marine sports business.

On July 3, 2011 the Court heard testimony from David Igitol, Tasi Tours' General Manager for Corporate Planning. He has worked at Tasi Tours since 1994 (Def.'s Aff. 2.) Mr. Igitol's sworn affidavit indicates that over the years he has called DPL approximately 5-6 times a year to report various concession violations. (*Id.*) He testified that violations have included soliciting customers on Managaha and picking up customers from Managaha. He also testified regarding several instances where DPL enforced Tasi Tours exclusive concession to sell food on Managaha. Mr. Igitol also testified that in 2000 there was a meeting with DPL to discuss violations of the Agreement by small boat operators offering parasail and banana boat tours from Managaha but that after the meeting, most of the marine sports activity continued. Mr. Igitol also testified that in 2010 Tasi Tours complained about Marine Sports, Inc. taking a large number of people on parasail and banana boat rides. Mr. Igitol described DPL's enforcement on this issue as "laid back." He testified that he did not know if DPL Rangers told small boat operators that they could not engage in that activity. Mr. Igitol agreed that to his recollection the first time DPL issued any directive on this issue was probably December 13, 2011. Mr. Igitol indicated that he disagreed with the interpretation in the October Letter that opined that marine sports

operators other than the concessionaire were allowed to pick up customers on Managaha and take them on water sports activities, so long as the package was purchased on Saipan and the boat operators did not solicit business on Managaha.

Finally, the Court heard testimony from David Pangelinan, the President and Owner of Island Marine Sports, one of the Petitioners. He has been in Saipan for 50 years. His company has been incorporated for 14 or 15 years and consists of two shareholders, himself and his wife. Significantly, Mr. Pangelinan testified that he has been in the marine sports business for over 30 years, first at Hafadai Hotel, then Diamond Hotel, and currently at World Resort; 80% of his business consists of package tours which include a trip to Managaha; packages are typically booked through an agent on Saipan; and his brochure, advertizing Managaha, is displayed at the hotel. He also testified that December of 2011 was the first time he became aware of an interpretation of the 1993 Regulation, which would restrict his business from doing what they had been doing for 30 years. Prior to December of 2011 his company was able to successfully execute 40-50 tours per day, but since then he testified that he would be lucky to be able to fulfill 4 or 5 bookings. He supported his business during the slow season from December of 2011 through June of 2012 from a small income he has from a rental property. He testified that continued enforcement of the current interpretation of the rule will force him to shut down. He is 73 years old and does not think he could find another job.

After the testimony the Court heard extensive oral argument from both Petitioners and Defendant Tasi Tours. Counsel for DPL did not explicitly take any position on the issuance of injunctive relief. However, counsel argued that the December Letter was not a rule. Counsel for DPL also argued that language in the 1993 Regulation and the Agreement is ambiguous; in particular counsel suggested that the meaning of the word "tour," could not be readily equated with taking a tourist on a water sports activity. Following argument, the Court took the matter under advisement.

## III. INJUNCTIVE RELIEF

Petitioners have sought a temporary restraining order ("TRO") and preliminary injunction. A TRO is an emergency remedy, designed to restrain the defendant for a brief period pending a hearing on an application for preliminary injunction. *See* NMI R. Civ. P. 65(b). Where issuance of a temporary restraining order is considered after notice and an adversarial hearing (or extends beyond the 10-day limitation in Rule 65), it may be treated as a preliminary injunction—thus the Court here treats the Complaint as one for a preliminary injunction. *See* NMI. R. Civ. P. 65; *Sampson v. Murray*, 415 U.S. 61, 88 (1974).

"[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, by a clear showing, carries the burden of persuasion." *Mazurek v. Armstrong*, 520 U.S. 968, 972 (1997). The purpose of a preliminary injunction is to preserve the status quo pending a final determination on the merits. *Pacific Am. Title Ins. & Escrow (CNMI), Inc. v. Anderson*, 6 NMI 15 ¶ 8 (1999). The status quo is the last uncontested status prior to the pending controversy. *Id.* In deciding whether to grant a preliminary injunction, Commonwealth courts consider (1) whether the plaintiff has a strong likelihood of success on the merits; (2) the level of the threat of irreparable harm to the plaintiff if the relief is not granted; (3) the balance between of harms to the parties and (4) the public interest. *Villanueva v. Tinian Shipping & Transp., Inc.*, 2005 MP 12 ¶ 20.

Alternatively, a court may issue a preliminary injunction if the moving party demonstrates either a combination of probable success on the merits and the possibility[1] of irreparable harm or the existence

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[1] The United States Supreme Court has held that the "possibility" standard is too lenient, writing:

> The lower courts held that when a plaintiff demonstrates a strong likelihood of success on the merits, a preliminary injunction may be entered based only on a "possibility" of irreparable harm. The "possibility" standard is too lenient. This Court's frequently reiterated standard requires plaintiffs seeking preliminary relief to demonstrate that irreparable injury is *likely* in the absence of an injunction.

*Winter v. NRDC, Inc.*, 555 U.S. 7, 8 (2008) (emphasis in original).

of serious questions going to the merits and a balance of hardships sharply tipping in its favor. *Pacific Am.*, 6 NMI 15 ¶ 9.

**A. STATUS QUO**

Initially the Court must determine whether the Petitioners seek a traditional prohibitory injunction to preserve the "status quo" or whether instead they seek a mandatory injunction,[2] requiring action by the non-movant.

Here, Petitioners seek a preliminary injunction prohibiting DPL from enforcement of the rule announced in the December Letter. According to Petitioners, a return to the "status quo" means a return to the status sometime prior to the December Letter. Defendant Tasi Tours counters that this would not constitute a return to the status quo; instead Petitioners seek a mandatory injunction requiring a higher showing.

The status quo is not the circumstances existing at the moment before the lawsuit or motion for injunction but the "last uncontested status preceding the pending controversy," *Id.* ¶ 8.

Here, the Court heard testimony from Petitioners that they were neither notified by DPL that they were prohibited from picking up their customers from Managaha for water sports activities, nor prevented from engaging in such activity by DPL or anyone else until sometime in 2011 or 2012. Petitioners testified that they understood that Tasi Tours held an exclusive concession, but they had not understood that concession as preventing them from picking up their customers from Managaha to take them on water sports activities as part of a package tour which begins on Saipan and is sold on Saipan.

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[2] "Because a mandatory preliminary injunction alters rather than preserves the status quo, it normally should be granted only in those circumstances when the exigencies of the situation demand such relief." *Braintree Labs., Inc. v. Citigroup Global Mkts. Inc*., 622 F.3d 36, 40-41 (1st Cir. 2010) (internal citations and quotation marks omitted). The "exigencies should still be measured according to the same four-factor test, as the focus always must be on prevention of injury by a proper order, not merely on preservation of the status quo." *Id.* (internal citations and quotation marks omitted).

The Court also heard testimony from Mr. Igitol that Tasi Tours reported violations of the concession agreement to DPL about 5 to 6 times a year. Many of the complaints Mr. Igitol specifically recounted related to the exclusive concession for providing food on Managaha Island. The Court also heard testimony that in the year 2000 Tasi Tours complained about boats taking people from Managaha on water sports activities, but that after the complaints, DPL was lax in its enforcement and the small boats continued to pick up customers from Managaha. Starting in 2010, Tasi Tours complained about Island Marine Sports, Inc. taking customers on water sports activities from Managaha (Def.'s Aff. 4), but DPL apparently did not enforce the rule according to Tasi Tours understanding thereafter. The October Letter indicates that DPL's understanding, at least at that time, permitted marine sports operators to pick up customers from Managaha as part of their package tours so long as they did not solicit those customers on Managaha.

Based on the evidence, the Court finds that the controversy herein arose sometime around the October Letter, therefore the status quo existed prior to that time. The status quo is not precisely clear–although DPL apparently did not strictly enforce the restriction in accordance with Tasi Tours' view prior to December of 2011. Whether DPL simply failed to enforce the rule, or held a different interpretation of it than Tasi Tours is subject to dispute. The Court makes no judgment as to whether the lack of enforcement was in fact the result of DPL interpreting the rule differently, or something else. At this stage of the proceeding the Court need not reach the issue of the appropriate interpretation of the 1993 Regulation, or make a finding as to DPL's view of the 1993 Regulation prior to the dispute.

For the purposes of this preliminary injunction determination, the Court has sufficient evidence to conclude that (1) the last uncontested status existed prior to the current dispute which arose around October of 2011; and (2) the status prior to the dispute was a general lack of enforcement of the rule announced in the December Letter. Therefore the complaint is one for a traditional prohibitory injunction.

**B. LIKELIHOOD OF SUCCESS ON THE MERITS**

Petitioners seek judicial review of agency action under the Administrative Procedure Act ("Commonwealth APA"), codified at 1 CMC §§ 9101-9115, and declaratory judgment invaliding rulemaking by DPL. Petitioners argue that (1) The December Letter constituted agency rulemaking; (2) the rule was given effect without appropriate administrative procedures; and (3) as a result, this Court should find the rule invalid. In the alternative, Petitioners argue that (1) the portion of DPL's contract with Tasi Tours at issue violates public policy as an illegal restraint on trade; (2) the interpretation advanced in the letter was waived by the longstanding practice of allowing the other tour operators to pick people up from Managaha for banana boat rides etc. and then return them to Managaha; and (3) DPL's action violates due process and equal protection.

Defendant Tasi Tours counters that the contents of the letter are neither new nor materially different from the properly promulgated rule; hence the letter is not a rule, and any case, such a reading would unnecessarily "hamstring" governmental agencies.

**1. Administrative Rule-Making**

In determining likelihood of success on the merits, courts looks to the substantive law at issue. *Roho, Inc. v. Marquis,* 902 F.2d 356, 358 (5th Cir. 1990). At a minimum, Petitioners must show that their likelihood of success is more than negligible.[3] To prevail on their administrative claim, Petitioners must show that the December Letter constitutes rule-making, and DPL failed to comply with appropriate administrative procedures.

[3] Courts differ as to the exact burden of persuasion on the movant. Some jurisdictions require that the movant demonstrate a "more than negligible" chance of success. *See, e.g.*, *Barbecue Marx, Inc. v. 551 Ogden, Inc*., 235 F.3d 1041, 1046 (7th Cir. 2000) (reversing where movant did not have a more than negligible change of prevailing on the merits); *see also Compact Van Equipment Company, Inc. v. Leggett & Platt, Inc.*, 566 F.2d 952, 954 (5th Cir. 1978) (holding that to prevail on a preliminary injunction, the movant's likelihood of success must be more than negligible). Other jurisdictions require a greater showing. *See, e.g.*, *Abdul Wali v. Coughlin*, 754 F.2d 1015, 1025 (2nd Cir. 1985) (stating that the movant needs to show that the probability of prevailing is better than fifty percent).

DPL has the authority to make rules and regulations pursuant to 1 CMC §§ 2801-2808. Government agencies such as DPL "exercise limited discretion through a predefined process. Such agencies have no inherent rights, and may only exercise that authority vested in them by constitution or statute." *N. Marianas College v. Civil Serv. Comm'n*, 2006 MP 4 ¶ 8.

To be valid, rules[4] and regulations must substantially comply with the notice and comment provisions provided in 1 CMC § 9104. 1 CMC § 9104(c).

Pursuant to 1 CMC § 9101(m),

> Rule means ***each agency statement of general applicability that*** implements, ***interprets***, or prescribes ***law or policy***, or describes the organization, procedure, or practice requirements of any agency. The term includes the amendment or repeal of a prior rule, but does not include:
>
> (1) Statements concerning only the internal management of an agency, including, but not limited to, the conduct of its employees, the distribution and performance of its business, and the custody, use, and preservation of its records, papers and property and not affecting private rights to procedures available to the public; provided, that this exclusion does not authorize withholding information from the public or limiting the availability of such manuals or records to the public; or
> (2) Declaratory rulings issued pursuant to 1 CMC 9107; or
> (3) Intra-agency memoranda; or
> (4) Opinions of the Attorney General.

1 CMC § 9101(m) (emphasis added).

Whether an interpretive letter from an agency, such as the one here, is a rule under the Commonwealth APA is an issue of first impression. The Commonwealth Supreme Court has consistently held that statutes are interpreted according to their plain meaning. *Marianas Eye Inst. v. Moses*, 2011 MP 1 ¶ 11("We give statutory language its plain meaning.); G*ovendo v. Micronesian Garment Manufacturing, Inc*., 2 NMI 270, 284 (1991) ("A basic principle of construction is that language must be given its plain meaning."). In *J.G. Sablan Rock Quarry, Inc. v.*

[4] The section is entitled "Procedure for Adoption of Regulations" but applies equally to rules because "regulation" is defined as "a rule which prescribes or has the force of law." 1 CMC § 9101(k).

*Dep't of Pub. Lands*, the Court looking to the plain text of the Commonwealth APA wrote "[plaintiff] could not argue in good faith that the Amended Permit is not a permit." 2012 MP 2 ¶ 31.

The general definition of "rule" illustrated by the language "each agency statement" followed by a list of specific exceptions indicates that the definition is to be applied comprehensively. In other words, any agency statement that conforms to the first part of the definition and does not fall into an exception in the second part is a "rule" within the meaning of the statute.[5]

The Court first considers whether the December Letter was an agency statement. The letter was written by the Secretary of DPL, enunciates the viewpoint of the agency, and describes itself as a Memo "intended to clear up any confusion regarding the extent of the exclusive concession rights on Mañagaha Island." (Compl. Ex. A). Thus, the December Letter is clearly a statement by the agency.

Next, the Court considers whether the December Letter is generally applicable. The letter indicates that it was sent to "***all beach concessionaires and marine sports operators*** so that ***everyone*** will have a clear understanding of this rule," demonstrating that it was intended to be generally applicable to marine sports operators. (Compl. Ex. A.) (emphasis added). Further, the December Letter notes that DPL expects compliance with the 1993 Regulation, writing that if "***any person*** violates the regulations," certain consequences will ensue. (*Id.*) In other words, the 1993 Regulation (as interpreted

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[5] Such a comprehensive reading of the statute comports with its history. Many provisions of the Commonwealth APA were modeled after the Model State Administrative Procedure Act of 1961 ("MSAPA"). 1 CMC § 9101 Law Revision Comm'n cmt. The Federal APA excepts interpretive and guidance rules from the requirement of notice and comment. The drafters' comments to the MSAP, by contrast, explicitly state that the 1961 MSAPA rejects the federal exception for guidance documents. *See* Michael Asimow, Administrative Law Discussion Forum: guidance Documents in the States: Toward a Safe Harbor, 54 ADMIN. L. REV. 631, 633 (2001) (citing MODEL STATE ADMIN. PROCEDURE ACT § 3 cmt. (1961), 15 U.L.A 214)). The MSAPA drafter's comment provides:

> It should be noted that the Revised Model Act goes beyond the Federal Act by requiring notice prior to the promulgation of "interpretative rules, general statements of policies, [and] rules of agency organization, procedure, or practice." This accords with the Hoover Commission Task Force recommendations and seems wholly desirable although it may involve a certain amount of administrative inconvenience in application in certain agencies.

MODEL STATE ADMIN. PROCEDURE ACT § 3 cmt. (1961), 15 U.L.A 214.

in the letter) is applicable and enforceable to any violators—thus it is plainly a statement of general applicability.

Finally, the Court considers whether the letter "implements, interprets, or prescribes law or policy. . . " 1 CMC 9101(m). The December Letter provides,

> Specifically, the issue is whether another company can pick up tourists on Mañagaha Island and take the tourists for a water sports tour (e.g. parasailing, banana boating, speed boat riding, snorkeling, scuba diving). In brief, the answer is "no."

(Compl. Ex. A.)

Next, the letter proceeds to quote the Agreement, explaining that the language "from the Island," means that:

> If the tour is sold by a company other than the Concessionaire, the Concessionaire's exclusive right to operate all commercial concessions on Mañagaha Island has been violated. It should be noted that this is regardless of whether the tourist is returned to Mañagaha or taken back to Saipan after the water sports tour.

(Compl. Ex. A.)

Then the December Letter cites language from the 1993 Regulations providing "that all commercial activity on Mañagaha Island shall be provided by one concessionaire only" (Compl. Ex. A) for the proposition that the activity at issue—"whether another company can pick up tourists on Mañagaha Island and take the Tourists for a water sports tour"—is a violation of the 1993 Regulations. Lastly, the letter indicates that DPL expects compliance with (this interpretation) of the 1993 Regulations, and cites the enforcement provisions of the regulations.

The language in the letter makes clear that it is effectively interpreting the 1993 Regulation. Thus the December Letter falls squarely within the definition of "rule." 1 CMC § 9101(m). Moreover, it makes no difference whether the December Letter reflected a change in policy or a new policy. There is no language in the Commonwealth APA indicating any intention on the part of the legislature to limit

1 the applicability of the definition of "rule" to new interpretations or material changes to previously
2 enacted rules and regulations. Moreover, the October Letter written to Tasi Tours shortly before the
3 December Letter, which advocated a different interpretation of the 1993 Regulation, exemplifies the
4 interpretive effect of the December Letter. The May Letter, written after the December Letter, also
5 advocates a different interpretation of the same regulation. Plainly, the December Letter—a letter of
6 general applicability, written by DPL, interpreting the 1993 Regulation is a rule pursuant to the statute.
7 Any other construction would be contrary to the plain language of the statute. 1 CMC § 9101(m).

8 Thus, under the plain meaning of rule as proscribed by the Commonwealth APA, the December
9 Letter is a rule requiring certain procedures unless it falls under an exception.

10 In this case, the letter is neither a statement about internal management of the agency,[6] nor a
11 declaratory ruling issued pursuant to 1 CMC § 9107.[7] It is not an intra-agency memoranda because it
12 was provided to all marine sports operators. Finally, it is not an opinion of the Attorney General
13 because it was signed by the Secretary of the Department of Public Lands. Thus, the letter does not fall
14 into any recognized exception[8] to procedural requirements.

15 As a result, the Petitioners have demonstrated a likelihood of success in showing that the
16 December Letter was rule-making under the Commonwealth APA.

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[6] "The "internal management" exception in the 1961 Act was drawn from a similar provision in the 1946 Act. It was probably derived from the provision in the federal APA that rules relating 'solely to the internal management of an agency' need not be published. According to the Attorney General's Report on the federal APA, this exception concerns little more than an agency's personnel rules." Asimow, *supra* note 5, at 634 n. 7.

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[7] 1 CMC § 9107 reads, "[a]ny person may petition an agency for declaratory rulings as to the applicability of any statutory provision or of any rule or order of the agency. Rulings disposing of petitions shall be issued promptly and shall have the same status as final agency decisions or orders in contested cases."

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[8] It should be noted that approximately 17 states have enacted statutory exceptions to the requirements of formal notice and comment for agency guidance, advisory opinions, or interpretive rules. Asimow, *supra* note 5, at 642. The CNMI has not adopted any such exception, but does have a procedure for emergency rule-making. 1 CMC § 9104(b). Many other states have interpreted their administrative code as including a "guidance documents" exception. Asimow, *supra* note 5, at 638. Still other states, like the CNMI, have no guidance document and require pre-adoption procedures. *Id.* at 644. In the absence of any statute, case law, or evidence of a legislative intent for such an exception, this Court is not inclined to fashion an exception.

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**2. Administrative Procedural Requirements**

Petitioners argue that the rule-making of December 13, 2011 was not taken in observance of any procedural requirements as set forth in 1 CMC § 9102-9105 of the Commonwealth APA, and as a result, it is invalid.

This Court's judicial review of agency action is proscribed by statute and may be limited thereby. *N. Marianas College*, 2006 MP 4 ¶ 6-8. The Commonwealth APA requires a reviewing court to "hold unlawful and set aside agency, action, findings, and conclusions found to be" made "without observance of procedure required by law." 1 CMC § 9112(f)(2)(iv). "Agency action includes the whole or a part of an agency rule . . . or the equivalent or denial thereof . . ." 1 CMC § 9101(c).

As previously noted, the December Letter is a rule and therefore agency action within the meaning of the Commonwealth APA. 1 CMC § 9101(c).

"Prior to adoption, amendment or repeal of any regulation,[9] the agency shall: (1) Give at least 30 days notice of its intended action by publication [and] (2) Afford all interested persons reasonable opportunity to submit data, views, or arguments, in writing [and] (3) Obtain approval from the Attorney General." 1 §§ CMC 9104(a)(1)-(3). Alternatively, an agency may adopt emergency rules, with either less or no prior notice pursuant to 1 § CMC 9104(b). Rules adopted without following such procedures are invalid. 1 CMC § 9104(c).

Here, no evidence has been offered that DPL published the rule in the Commonwealth Register, otherwise afforded interested persons 30-days notice and comment prior to the December Letter, or provided prior notice of any kind. There is also no indication in the record that DPL followed the procedures for an emergency rule-making. As a result, DPL's action was taken without substantial compliance with lawful procedures and it is likely to be declared invalid. 1 CMC § 9104(c).

[9] This provision applies equally to rules. *See* note 4.

Consequently, the Petitioners have made a strong showing of likelihood of success on the merits of their administrative rule-making claim.

The Petitioners have made a sufficient showing of likelihood of success on the merits of their claim that the December Letter was rule-making taken without observance of procedural requirements; thus the Court need not reach their alternative arguments. *See* 1 CMC § 9112(f)(2)(iv) ("***To the extent necessary to decision*** and when presented, the reviewing court shall decide all relevant questions of law ….[and] shall [h]old unlawful and set aside agency action, findings, and conclusions found to be [taken] [w]ithout observance of procedure required by law;"); *see also e.g., N.J. Retail Merchs. Ass'n v. Sidamon-Eristoff*, 669 F.3d 374, 389 (3d Cir. 2012) ("Because we affirm the District Court's grant of preliminary injunction based on [contract] claim, we need not reach the [constitutional] claim[s]."); *Lovely H. v. Eggleston*, 235 F.R.D. 248, 261 (S.D.N.Y. 2006) (finding that where plaintiffs demonstrated a substantial likelihood of success on the merits of their ADA claim, the court need not reach their other arguments at the preliminary injunction stage of the proceedings).

**C. IRREPARABLE HARM**

Next, the Court considers the threat of irreparable harm to Petitioners. Petitioners argue that access to Managaha is critical to the survival of their businesses, and they will be forced to shut down or drastically scale back operations if enforcement of the new rule continues.

Generally speaking, irreparable harm is something which an action at law for money damages cannot fix. *eBay Inc. v. MercExchange, L.L.C.,* 547 U.S. 388, 391, 393-94, (2006). "However, an injury is not fully compensable by money damages if the nature of the plaintiff's loss would make the damages difficult to calculate." *Basicomputer Corp. v. Scott*, 973 F.2d 507, 511 (6th Cir. 1992). The threat of loss must be more than mere speculation. *Grand River Enter. Six Nations, Ltd. v. Pryor,* 481 F.3d 60, 66 (2d Cir. 2007) ("To satisfy [] irreparable harm [the] injury [must be] neither remote nor

speculative, but actual and imminent, and one that cannot be remedied if a court waits until the end of trial to resolve the harm.") (internal quotation marks omitted).

Lost profits alone do not ordinarily constitute irreparable harm because they are readily compensable. However, a loss of customer goodwill is generally considered irreparable because it is difficult to calculate. *See, e.g.*, *Stuhlbarg Int'l Sales Co., Inc. v. John D. Brush & Co., Inc.*, 240 F.3d 832, 841 (9th Cir. 2001) ("Evidence of threatened loss of prospective customers or goodwill certainly supports a finding of the possibility of irreparable harm."); *see also Celsis in Vitro, Inc. v. CellzDirect, Inc.*, 664 F.3d 922, 930 (Fed. Cir. 2012) ("Price erosion, loss of goodwill, damage to reputation, and loss of business opportunities are all valid grounds for finding irreparable harm."). A loss of market share or permanent loss of customers to a competitor supports a finding of irreparable harm. *See, e.g.*, *Novartis Consumer Health, Inc. v. Johnson & Johnson-Merck Consumer Pharms. Co.*, 290 F.3d 578, 595-596 (3d Cir. 2002) (finding sufficient evidence to support irreparable harm where evidence demonstrated a decrease in market share relative to competition). The threat of going out of business supports a finding of irreparable harm. *Gateway E. Ry. v. Terminal R.R. Ass'n*, 35 F.3d 1134, 1139-1140 (7th Cir. 1994) (affirming trial court's finding of irreparable harm where without injunctive relief claimant would be forced to go out of business in approximately 6 months or lose customers to its competitor resulting in injury to goodwill).

Here, the Court heard testimony from three Petitioners that they have been in the water sports business for many years, and have built their respective businesses largely around package tours to and from Managaha, and water sports activities around the island of Managaha. Mr. Owens testified that 99% of his business includes a visit to Managaha; Mr. Alvarez testified that 100% of his package tours, which are his main product, include Managaha; and Mr. Pangelinan testified that 80% of his business consists of package tours which include a visit to Managaha. Thus, each business has built up customer goodwill based on their longstanding involvement in the marine sports business. The Petitioners also

testified that their advertizing efforts have focused on Managaha. The testimony demonstrates that the goodwill and reputations built by these businesses are directly tied to serving tourists wishing to visit Managaha. Petitioners have built their respective businesses through the promotion of Managaha as a major tourist attraction.

Each of these witnesses also testified that enforcement of the 1993 Regulations, as interpreted by the December Letter, threatens to harm the businesses they have built. The testimony indicates that the summer is the high season for water sports tours; roughly June through August. All three testifying Petitioners indicated that during the rest of the year they typically lose money, which they make up for during the high season. Mr. Owens testified that due to enforcement of the new rule his company is unable to pick up his customers for a water sports activity once he drops them off at Managaha, and as a result he is only able to complete 20 tours compared with the 40-50 per day which he was previously able to complete. Mr Owens testified that at that rate he will need to layoff employees immediately and eventually shut down. He testified that it would be financially impractical to change his business model to just transport tourists to and from Managaha because his boat(s) only carry six people. Mr. Alvarez testified that he is only able to fulfill 40% of his former bookings, because of the enforcement of the current interpretation of the regulations and at that rate his company will "die a slow death." Finally, Mr. Pangelinan testified that he is only able to complete about 10% of his previous bookings given the current interpretation of the 1993 Regulations, and his business will also be forced to shut down with continued enforcement.

Based on the testimony, each business has already been unable to fulfill bookings, harming their relationship with customers—that harm is likely permanent. Reasonable customers would not be inclined to book again with a company who could not deliver nor would they be likely to recommend such a company to others. Further, given that some of the Petitioners receive bookings online through

websites in Japan, China and Korea, they may be the subject of negative recommendations online—such damage is extremely difficult to calculate.

The Petitioners testified that they would be forced to shut down their businesses if DPL is allowed to enforce the current interpretation of the 1993 Regulations. Where a business runs the risk of being forced to shut down, the damage is irreparable. *Gateway*, 35 F.3d at 1139-1140 (affirming trial court's finding of irreparable harm where without injunctive relief claimant would be forced to go out of business in approximately 6 months). Here, it is not clear from the testimony how soon each business may be forced to shut down. However, given that it is the high season, such a loss is not merely speculative: Petitioners have shown that their cash flow will be reduced by between 50% and 90%; each testified that they will be forced to shut down if the 1993 Regulations are enforced pursuant to the December Letter; and the record demonstrates that they are all relatively small operations unlikely to be able to withstand a loss of such magnitude. Petitioners could certainly attempt to change their business model to offer services that do not directly implicate the restriction. However, because Petitioners have focused their advertising, infrastructure, staff, and equipment on a certain business model that includes the restricted activity, even if such changes were implemented immediately, the changes would not likely result in cash flow soon enough to benefit from the high season and keep Petitioners in business. This is particularly true in light of the testimony that their equipment would be difficult to sell.

Given this testimony it is clear that without injunctive relief—during the course of this litigation, which could easily last throughout the majority of the high season—each of these companies will continue to lose valuable goodwill that they have built up over the course of many years because they will be unable to fulfill their normal bookings. Further, enforcement of the December Letter will create a substantial handicap to these businesses during the high season, which is critical to the continued sustenance of their respective businesses. Thus, absent an injunction these businesses may permanently lose their market share to Tasi Tours during the course of this litigation. *Rogers Group, Inc. v. City of*

*Fayetteville*, 629 F.3d 784, 789-790 (8th Cir. 2010) (affirming trial court's finding of irreparable harm where ability to accommodate customer demands was critical to commercial viability and any customers lost would be unlikely to return). Loss of market share during the season may well result in an inability to maintain their businesses. Consequently, Petitioners have shown a likelihood of irreparable harm.

**D. BALANCE OF HARDSHIPS**

The Court next considers the balance of hardships; that is will Defendants suffer more injury if a preliminary injunction issues than Petitioners will face absent injunctive relief. "In each case, courts must balance the competing claims of injury and must consider the effect on each party of the granting or withholding of the requested relief." *Winter v. NRDC, Inc*., 555 U.S. 7, 24 (2008) (citations and internal quotation marks omitted).

The preliminary injunction sought proposes to enjoin DPL from enforcement of the new interpretation of the rule, pending litigation on the merits. Tasi Tours has argued that if an injunction issues harm to DPL and themselves will outweigh harm to Petitioners absent injunctive relief. Specifically, they argue that DPL will be harmed by an injunction because (1) it will not be able to provide exclusive rights pursuant to its contract with Tasi Tours and will be subject to an action for breach; (2) the value of the concession will be reduced; and (3) it may face lawsuits from persons of NMI descent for breach of fiduciary duty. Tasi Tours also argue that they will (1) lose profit from parasailing tours and from banana boat tours if a preliminary injunction issues; (2) may face a lawsuit from their subcontractor; and (3) will be "exposed to the likelihood that SCUBA and skin diving operators will next try to pick up tourists on Managaha." (Def.'s Mem. P. & A. Opp'n. 14.)

First, the Court will consider possible harm to DPL if a preliminary injunction issues. Tasi Tours' argument that DPL will be harmed because Tasi Tours may sue them for breach of contract is unpersuasive. The record demonstrates that the exclusive right Tasi Tours claims has not been enforced in the manner in which they advocate over the years; thus any causal relationship between a preliminary

1 injunction in this case and damage to Tasi Tours contract rights is tenuous at best. Next, Tasi claims
2 that DPL will be harmed because they may face a breach of fiduciary duty lawsuit from persons of NMI
3 descent. Any possible harm to persons of NMI descent would also likely be the result of DPL's lack of
4 enforcement/former interpretation of the 1993 Regulation rather than from a preliminary injunction in a
5 case which began nearly twenty years after the 1993 Regulation became effective. Finally, the value of
6 the concession is also unlikely be reduced as a result of the issuance of injunctive relief. A reduction in
7 value of the exclusive concession, if any, would be primarily the result of DPL's long-standing lack of
8 enforcement/former interpretation of the 1993 Regulation, not a preliminary injunction of a short
9 duration pending resolution on the merits. Further, any lost value to the concession attributed to the
10 preliminary injunction is compensable. Moreover, all the types of harms claimed are generally reparable
11 with monetary damages.

12 Next, the Court will consider Tasi Tours' claimed injuries. Although the issuance of an
13 injunction will not directly enjoin them, because DPL is responsible for enforcing Tasi Tours' rights
14 under the Agreement, an injunction will indirectly affect them. As to lost profits, Tasi Tours estimates a
15 loss of $870 per day loss from parasailing and $607 per day loss for banana boat tours. Over the course
16 of litigation this will add up to a significant amount of money. Nonetheless, loss of profit is by
17 definition monetary and therefore reparable at law. *eBay Inc.,* 547 U.S. at 391. Further, any lawsuit by
18 Tasi Tour's subcontractor for damages in lost profits would also be reparable—Tasi Tours has already
19 offered an estimate of their subconcessionaires' lost profit from parasailing. Finally, to the extent that
20 they are subject to other tour operators offering activities such as SCUBA "from Managaha" as a result
21 of an injunction, the Court can find no reason why money damages would not also repair that loss in the
22 event that Tasi Tours ultimately prevails. Tasi Tours has already demonstrated an ability to estimate
23 damages based on their claimed rights, and the Court has no reason to doubt they can do so with regard
24 to activities such as SCUBA diving.

Petitioners have shown irreparable harm to their goodwill, compared with Defendants, who have only demonstrated a risk of monetary loss, which although potentially severe, cannot compare with irreparable injury. Thus the balance of harm tips in Petitioners' favor.

**E. PUBLIC INTEREST**

The Court must carefully consider the public interest. Tasi Tours has suggested that an injunction will have the effect of harming the interests of persons of NMI descent.[10] Certainly the Agreement creates a large amount of revenue which DPL is bound to use for the public good. However, a preliminary injunction will do nothing to permanently affect the Agreement or adjudicate rights therein. A preliminary injunction will not prevent DPL from receiving rental payments for the concession. A preliminary injunction will not reduce the benefits that the public inures from the landing fee, which is used for the proper maintenance of the island. A preliminary injunction will not prevent Tasi Tours from continuing to perform their duties under the Agreement, to maintain the Island, preserving it as a beautiful public resource and major tourist destination.

In this case, if a preliminary injunction issues, there will be more competition in the marine sports activities market. If, on the other hand, a preliminary injunction does not issue and the December Letter rule is enforced, it is not clear how the customer, often a tourist from a different country, will become aware of the restriction or be appropriately routed to book through Tasi Tours or their subconcessionaire. The Petitioners have infrastructure in place that has been serving tourists for many years. The testimony demonstrated that due to enforcement efforts by DPL at least some tourists were prevented from returning to Managaha Island after their water sport activity with one of the Petitioners'

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[10] The Court understands this argument as follows: Because DPL holds the land in its fiduciary capacity for the benefit of NMI people, lost profit to Tasi Tours equals lost revenue for the people of the CNMI. Tasi Tours is perhaps relying on one provision in the agreement which provides that the "Concessionaire shall pay the Board the greater of the annual allocable rent or three percent (3%) of its annual gross receipts each year derived from the Agreement." (Def.'s Ex. A 6.). However, there is no evidence in the record that the 3% would be greater this year, than the annual base rent if no injunction issues. As far as the Court is aware, the base rent may far exceed 3% gross revenue for this year, irrespective of the enforcement of the December Letter.

companies. Tourists should not be penalized for the inconsistencies created by the various letters from DPL. Tourism is extremely important to the CNMI economy. A preliminary injunction will return the parties to the status quo, which in the short run, will prevent such confusion and harm to tourism.

## IV. CONCLUSION

For the aforementioned reasons, the preliminary injunction is **GRANTED**.

## V. PRELIMINARY INJUNCTION

For the reasons set forth in this Opinion, the Court orders the following:

1. DPL, their officers, agents, servants, employees, and attorneys, and those persons in active concert or participation with them who receive actual notice of this order, ("DPL"), are hereby enjoined from enforcing the interpretation of the 1993 Regulations in the December and June Letters to the following extent:
    a. DPL is hereby enjoined from restricting or in any way preventing licensed and duly-permitted marine sports operators, who are not soliciting customers on Managaha Island from dropping off and picking up their customers (who have pre-purchased package tours including activities such as banana boat rides and parasailing) on Managaha Island.
    b. DPL is hereby enjoined from revoking any licensed and duly-permitted marine sports operator's license to land passengers on Managaha as a penalty for picking up or dropping off their customers in conformity with this preliminary injunction.
    c. DPL is hereby enjoined from refusing to renew any licensed and duly-permitted marine sports operator's annual license for a beach concession as a penalty for picking up or dropping off their customers in conformity with this preliminary injunction.
2. This preliminary injunction is issued based on the reasons set forth more elaborately in this Opinion. The Petitioners have demonstrated (1) a very strong showing of the likelihood of success on the merits of their Commonwealth APA claim and (2) a likelihood of irreparable

harm absent injunctive relief based on loss of goodwill. The Court finds that the balance of hardships tips in Petitioners' favor and a preliminary injunction will be in the public interest.

3. Petitioners shall post a bond pursuant to NMI R. Civ. P. 65(c)[11] in the amount of $62,034.00.[12]
4. This preliminary injunction shall take effect upon remittance of the full bond to the Cashier of the Superior Court.
5. Should this case proceed longer than six weeks, the Court in its discretion may require an additional bond.

**IT IS SO ORDERED** this 19th day of July, 2012.

/s/
Joseph N. Camacho, Associate Judge

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[11] NMI R. Civ. P. 65(c) provides that:

> No restraining order or preliminary injunction shall issue except upon the giving of security by the applicant, in such sum as the court deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined or restrained. No such security shall be required of the Commonwealth or of any officer or agency therof.

[12] The Court deems this amount just. Defendant Tasi Tours has shown a possible lost profit of $1477.00 per day if an injunction issues. Tasi Tours represented that this case would take four to six weeks. Based on these representations, the bond figure is based on the projected lost profit multiplied by 42 days or six weeks.