FOR PUBLICATION

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

ISLAND MARINE SPORTS, INC., AQUATIC MARINE CO., INC. d.b.a. AMIGO AQUATIC SPORTS, AUTOMARINE, INC., SEAHORSE, INC., and BSEA, INC., **Petitioners/Plaintiffs,** **v.** **DEPARTMENT OF PUBLIC LANDS, and TASI TOURS & TRANSPORTATION INC.,** **Respondents/Defendants.**	**CIVIL CASE NO. 12-0151** **ORDER REGARDING BOND FOR PRELIMINARY INJUNCTION**

I. INTRODUCTION

THIS MATTER came before the Court on August 22, 2012 for an evidentiary hearing. Petitioners Island Marine Sports, Inc., Aquatic Marine Co., Inc., d.b.a. Amigo Aquatic Sports, Automarine, Inc., Seahorse, Inc., and BSEA, Inc., ("Petitioners") move the Court to modify the bond amount required by the recent preliminary injunction order. Defendant Tasi Tours & Transportation Inc. ("Tasi Tours") and Defendant Department of Public Lands ("DPL") oppose modification of the bond amount. Based upon the record, filings and oral argument the Court now renders this written decision.

II. FACTUAL AND PROCEDURAL HISTORY

On June 25, 2012 Petitioners filed a Petition for Declaratory Judgment and Verified Complaint for Temporary Restraining Order and Preliminary Injunction seeking relief from statements by DPL

which they argue are improperly promulgated rulemaking by DPL. Petitioners, five marine sports businesses, seek to invalidate a "rule-making," by DPL which forbids them from picking up customers from Managaha Island and taking them on water sports activities. On June 28, 2012 Tasi Tours filed a Motion to Intervene which the Court granted on July 2, 2012. In support of their motion Tasi Tours submitted the Affidavit of Takashi Murakami the General Manager for Administration and Accounting of Tasi Tours. Murakami estimates certain lost profits based on "unauthorized operators," such as Petitioners.

On July 2, 2012, the Court held a hearing on the motion for injunctive relief. The testimony of David Igitol indicated that Tasi Tours would be injured if an injunction issues. At the hearing Petitioners briefly argued that a security bond should not be required. Tasi Tours argued orally and in their written opposition that a bond should be required under Rule 65(c). Appearing on behalf of DPL David Lochaby did not oppose injunctive relief and suggested that the bond requirement in Rule 65(c) is discretionary. The Court did not hear evidence that DPL would be injured by issuance of injunctive relief.

The Court heard evidence that the Petitioners' businesses were in jeopardy and they were suffering irreparable harm. *See Commonwealth v. Dept. of Public Land*, Civ. No. 12-0151 (NMI Super. Ct. July 19, 2012 at 8-11). One Petitioner testified that he had invested $600,000 in his business, and another testified that he had invested $1,000,000. *Id.* at 9,10. The Court also heard testimony that the Petitioners own equipment related to their marine sports businesses. *Id.* David Pangelinan testified that he has a small income from a rental property which enabled him to support his marine sports business during the slow season. *Id.* at 11. Petitioners offered evidence that they generally take a loss during the low season which they attempt to recoup during the high season from about June to August. Petitioners did not present evidence regarding their ability or inability to pay a bond in this case.

On July 19, 2012[1] the Court in a written decision granted a preliminary injunction and ordered a bond amount of $62,034.00 based on evidence of projected lost profit to Tasi Tours. *Id.* at 29 n.12.

On July 25, 2012 Petitioners filed their Motion to Modify Bond Requirement ("Motion"). Defendants Tasi Tours and DPL filed oppositions to the Motion. On August 2, 2012 a hearing was held on the Motion and the Court took the matter under advisement. On August 7, 2012, prior to any ruling on the Motion, Petitioners posted $1861.05 or 3% of the bond requirement and argued for the sufficiency of that amount. On August 8, 2012, the Court in a written order stayed decision on the Motion and invited the Petitioners to submit evidence of any financial hardship related to their ability to post a bond, or other proposal for meeting the bond requirement. In response, Petitioners reiterated their previously made legal arguments and submitted several sworn affidavits.

The Declaration of Ulysses Orpiano ("Orpiano"), the President of Petitioner Aquatic Marine Co., Inc. indicates that the company is unable to put up $12,406.80, or one fifth of the bond amount. (Pet'rs Submission RE: Financial Hardship Ex. A. 2:3.) Orpiano declares that his company sought a preliminary injunction in order to operate normally during the busy season, (*id.* 1:2), but because the preliminary injunction is not in effect the company has not realized anticipated income needed to keep the company solvent (*Id.* 2:3); he personally attempted to secure a bond from AON Insurance, Moylan's Insurance, Marianas Insurance and Trader's Insurance to no avail (*Id.* 2:5); and that the cash bond already posted represents what his company is able to afford (*Id.* 2:4).

The Declaration of Josephine Santos ("Santos"), the Vice President of Petitioner Automarine, Inc. indicates that Automarine is unable to post one fifth of the bond amount and has not realized anticipated summer income needed to remain solvent. (*Id.* Ex. C 1-2:3.) Santos declares that the posted bond amount represents what the Petitioners are able to afford (Pet'rs Submission RE: Financial

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[1] There have been multiple other filings in this case –only those relevant to the current issue are included in the procedural history.

Hardship Ex. B. 2:4); the limited funds available in Automarine's account are needed for monthly operating expenses including payroll, taxes, gas, insurance, maintenance, repairs and advertising; and all funds are being used to pay bills and creditors in order to keep the company solvent (*Id.* 2:7).

The Declaration of Maria Corazon Pangelinan ("Pangelinan"), the Vice President of Petitioner Island Marine Sports, Inc. is significantly similar. (*See id.* Ex. C 1-2.) It also indicates that the posted bond represents what the company can afford. (*Id.* 2:4.) Pangelinan declares that all the company funds are being used to keep the business operating; the company's income is not enough to meet their monthly obligations (*Id.* 2:8); they are often unable to pay bills on time, and buy the parts and engines necessary to keep the business functional; and the company is considering bankruptcy. (*Id.*)

The Declaration of Manuel Alvarez ("Alvarez") the Vice President of Petitioner Seahorse, Inc. also indicates that the company is unable to post even one fifth of the bond requirement and the amount already posted represents what the company can afford. (Pet'rs Submission RE: Financial Hardship Ex. D. 1:3-2:4). Alvarez declares that he personally contacted Century Insurance, PSG Insurance, and Equitable Insurance, none of whom were able to help (*Id.* 2:5); the limited funds Seahorse has are insufficient to cover their outstanding bills (*Id.* 2:7); the monthly bills include, among other things, $7000 in payroll, taxes, office lease payments insurance, maintenance, DPL payments, legal fees and repairs. (*Id.*) The company also has a monthly $3000 loan payment and their depreciated assets require regular and often expensive maintenance. (*Id.*)

The Declaration of William Owens ("Owens"), the President of Petitioner BSEA, Inc. indicates that BSEA is unable to post one fifth of the bond requirement in part because this year they spent more money during the slow season preparing for the busy season than any other previous year in anticipation of the arrival of Saipan Air whose executives forecast a serious increase in Japanese tourist arrivals. (*Id.* Ex E 2:4.) Owens notes that BSEA's cash flow has been seriously diminished because of its current inability to service Managaha tours and the failure of Saipan Air. (Pet'rs Submission RE: Financial

Hardship Ex. E. 2:4.) Owens declares that he personally contacted AON Insurance on both Guam and Saipan and Moylan's Insurance to see if they could help, but they were unable to do so (*Id.* 2:6); the amount already posted represents what BSEA is able to afford (*Id.* 2:5); the funds available to BSEA are both insufficient to cover the bond and are needed to pay operating expenses such as health insurance, vehicle and boat insurance, office rent, marina rent, part suppliers, equipment suppliers, utilities, advertizing, payroll, etc. (*Id.* 2:7-3:7.) Owens declares that "Currently, in our books, 97% of the value of our fixed assets have been depreciated using generally accepted accounting principles. Two imperative components to our services a Toyota Sienna van and our primary boat trailer are both in immediate need of extensive repair or replacement." (*Id.* 3:10.)

On August 19, 2012 Tasi Tours filed their response to Petitioners submission in which they argue that Petitioners showing of financial hardship was not responsive to the Court's request and in any case the Court did not err in requiring the bond and should not reconsider that decision.

On August 22, 2012 the Court held a hearing on the issue of financial hardship to Petitioners from the bond requirement, evidence was taken and arguments were heard.

III. DISCUSSION

Petitioners argue that (1) the Court erred in ordering a bond because Tasi Tours is not an enjoined party and DPL has not shown any harm; (2) the improper bond negates the Court's preliminary injunction order; and (3) the Court has discretion to change the bond to a nominal amount. Tasi Tours counters that (1) the Court should treat the motion as one for reconsideration and (2) no clear error exists because Tasi Tours is enjoined, it would be inequitable to not consider loss to Tasi Tours and the bond requirement protects DPL; (3) no manifest injustice results from the bond requirement because Petitioners are not public interest litigants and there is no statutory exception to the bond requirement. DPL argues that (1) the injunction harms them because Tasi Tours' rent is based on their gross receipts and they may face a lawsuit from Tasi Tours; (2) a bond is appropriate because this is not a public

interest case; and (3) because injunctions are equitable in nature a bond may be based on loss to an intervenor.

A. LAW OF THE CASE

Initially the Court addresses whether the law of the case doctrine requires it to treat the Motion as one for reconsideration.

"Under the [] law of the case doctrine, courts are generally required to follow legal decisions of the same or a higher court in the same case." *Wabol v. Villacrusis*, 4 NMI 314, 318 ¶ 10 (1995). "The policy underlying this doctrine is one of finality of court decisions." *Id.* (citations omitted). The doctrine generally applies "to issues either explicitly or implicitly decided by the previous court." *Id.* "While the doctrine is not a limit on a court's power, it is our practice to 'generally refuse to reopen what has been decided,'" *In re Estate of Roberto* 2010 MP 7 ¶ 18 (quoting *Cushnie v. Arriola*, 2000 MP 7 ¶ 14). Courts properly depart from the law of the case where there are unusual circumstances or where clear error would work a manifest injustice. *Id.*

In *Cushnie* the Commonwealth Supreme Court reasoned that "The [law of the case] doctrine is not an inflexible rule. There is no imperative duty to follow the earlier ruling -- only the desirability that suitors shall, so far as possible, have reliable guidance how to conduct their affairs." *Cushnie*, 2000 MP 7 ¶ 15 (citations omitted). The United States Supreme Court has also held that "[i]n the absence of statute the phrase, *law of the case*, as applied to the effect of previous orders on the later action of the court rendering them in the same case, merely expresses the practice of courts generally to refuse to reopen what has been decided, not a limit to their power." *Messenger v. Anderson*, 225 U.S. 436, 444 (1912) (emphasis added).

In *Cushnie* no new law or facts justified reconsideration. Instead, the Court found that unusual circumstances existed based in part on the fact that there had not been adequate briefing on the subject in the first instance. *Cushnie*, 2000 MP 7 ¶ 16.

Similarly, here, the parties very cursorily dealt with the bond issue at the preliminary injunction hearing. No evidence was presented regarding the inability of Petitioners to pay a bond. DPL did not advance any argument that it would be harmed by issuance of injunctive relief, and off-handedly suggested a bond is discretionary. Petitioners asserted without support that no bond was required. Tasi Tours was the only party who briefed the issue prior to the grant of injunctive relief. These are unusual circumstances justifying a departure from the law of the case.

The justifications for departing from the law of the case mirror the standard on a motion for reconsideration. *Compare Roberto*, 2010 MP 7 ¶ 18 *with Camacho v. J.C. Tenorio Enterprises, Inc*., 2 NMI 407, 414 (1992). Thus the Court treats the Motion as one for partial reconsideration of the bond amount.

B. MOTION FOR RECONSIDERATION

"[T]he standard for approving a motion for reconsideration is an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice." *J.C. Tenorio Enterprises, Inc*., 2 NMI at 414 (citations omitted). There has been no change in controlling law and none is argued, therefore the other bases for reconsideration will be addressed.

1. The Court Did Not Commit Clear Error

The issue is whether the Court committed error in setting the bond amount based on alleged harm to Tasi Tours. Petitioners argue that the Court erred in considering harm to Tasi Tours a "non-enjoined" party.

First the Court examines the text of Rule 65. Rule 65 is "binding only upon ***the parties to the action***, their officers, agents, servants, employees, and attorneys, and ***those persons in active concert or participation with them*** who receive actual notice of the order." NMI R. Civ. P. 65(d) (emphasis added). This language indicates that Tasi Tours, because they are a party, and to the extent that they are in active

concert or participation with DPL, are also enjoined by the order. For example if Tasi Tours were to try to enforce the regulations according to their view of their concession rights, they would be prohibited from doing so by the clear language in Rule 65(d). Moreover the 1993 Regulations grant enforcement authority to DPL; thus, the only way Tasi Tours can attempt to enforce the regulations is through DPL. The clear language of Rule 65(c) and the Court's order indicate that the scope of the Preliminary Injunction includes parties in active concert or participation.[2] As a result, Tasi Tours is indirectly restrained by the order, and consideration of harm to them is proper.

The text of Rule 65(c) also plainly states that the security requirement is intended "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." NMI R. Civ. P. 65(c). In other words the rule

> [P]rovide[s] a mechanism for reimbursing an enjoined party for harm it suffers as a result of an improvidently issued injunction . . . . The amount of the bond, then, ordinarily depends on the gravity of the potential harm to the enjoined party . . . as either the losses the unjustly enjoined or restrained party will suffer during the period he is prohibited from engaging in certain activities or the complainant's unjust enrichment caused by his adversary being improperly enjoined or restrained.

Hoechst Diafoil Co. v. Nan Ya Plastics Corp., 174 F.3d 411, 421 n. 3 (4th Cir. 1999) (citations omitted).

In light of this purpose it is appropriate for the Court to consider claimed loss to Tasi Tours whether as a measure of what they may suffer from DPL not enforcing the regulations according to their view, or as a measure of Petitioner's unjust enrichment if Defendants were improperly enjoined.

Petitioners cite *Natl Wildlife Fedn v. Nat'l Marine Fisheries Serv*., 2005 U.S. Dist. LEXIS 16656 (D. Or. 2005) for the proposition that this Court has no authority to order a bond based on harm to Tasi

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[2] Petitioners omit the part of the order indicating that those in active concert are also enjoined indirectly suggesting that the subsequent list of enjoined activity in the order beginning with "DPL is enjoined from . . . " – stands alone. It does not. *See Commonwealth v. Dept. of Public Land*, Civ. No. 12-0151 (NMI Super. Ct. July 19, 2012 at 28-29). This Court specifically defined "DPL" directly above the language quoted by Petitioners as "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." *Id.* (emphasis added).

Tours. Their reliance is misplaced. The court in *Wildlife* simply reasoned based on the language of Rule 65 that the bond requirement is only meant to cover parties who are enjoined. *Id*. citing Fed. R. Civ. P. 65(c). In that case, the entity claiming damage, a power provider, ***was not a party*** to the action and further, the intervening power customers were not enjoined. Here, by contrast, Tasi Tours is a party and is enjoined, as explained above. Furthermore, consideration of harm to Tasi Tours is consistent with the purpose of Rule 65(c).

Moreover, the facts of the *Wildlife* are significantly different than the instant case. In *Wildlife*, the defendants sought a 50 million dollar bond to be posted by plaintiff, a non-profit environmental group seeking a preliminary injunction to preserve certain species. Here, by contrast, although public interest factors such as the benefit of tourism are implicated, the petitioners are hardly a non-profit public interest entity. Accordingly, the Court properly considered potential harm to Tasi Tours.

2. New Evidence / Manifest Injustice

The Court next considers whether the bond issue should be reconsidered based on new evidence, or to prevent a manifest injustice. The Court did not intend to set a bond which was so high as to prohibit Petitioners from relief. Instead, the bond amount was based on evidence of harm to Tasi Tours and evidence that Petitioners had assets such as marine sports equipment and rental property. Counsel for Petitioners represented at the hearing that the Petitioners went to every insurer in Saipan to attempt to obtain a bond as required but were unable to do so. Based on this representation the Court allowed the Petitioners to introduce evidence of financial hardship related to posting the bond. The evidence demonstrates that the Petitioners suffer from serious cash flow problems and are attempting to use the scarce resources at their disposal to keep their businesses, rendering it extremely burdensome for them to post the bond. (Pet'rs Submission RE: Financial Hardship Ex. A-E.)

Petitioners cannot without extreme hardship post the whole bond amount at this time and as a result they continue to suffer irreparable injury, even though they have shown entitlement to a

preliminary injunction. *See Commonwealth v. Dept. of Public Land*, Civ. No. 12-0151 (NMI Super. Ct. July 19, 2012 at 15-27). Should Petitioners be forced to post a bond *instead* of keeping their respective businesses solvent, the Preliminary Injunction would have the ironic and unintended effect of putting the Petitioners out of business when it was intended to afford them relief from irreparable harm by preserving the status quo. Such a result would plainly be unjust. Consequently the Court reconsiders the bond issue based on the new evidence offered by Petitioners in order to prevent a manifest injustice.

C. THE COURT HAS DISCRETION TO MODIFY THE BOND AMOUNT

Finally the Court considers whether it has discretion to alter or eliminate the bond in this case. Petitioners argue that that bond negates the Court's intent in issuing a preliminary injunction and the Court can and should eliminate the bond requirement or modify it to a nominal sum.

The text of Rule 65 states

> No . . . 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.

NMI R. Civ. P. 65(c).

Based upon use of the word "shall" the bond requirement appears to be mandatory. However the amount—"in such sum as the court deems proper"—builds broad discretion into the rule.

The Commonwealth Supreme Court has not addressed whether a court has discretion to dispense with the security requirement or order a nominal bond. However, the Superior Court has found it appropriate to dispense with the bond requirement where "the burden on Defendants is minimal and the filing of security by Respondent would apparently be extremely onerous." *Office of the Atty. Gen. and Div. Immigration Services v. Yu Dong Mei*, Civ. No. 98-01077B (NMI Super. May 16, 2001) (Order Granting Motion to Stay Deportation and Request for Injunctive Relief ¶ 11). In dispensing with the

security requirement, the court relied on the Ninth Circuit citing *People ex. rel. Van De Kamp v. Tahoe Regional Planning Agency*, 766 F.2d 1319, 1325-1326 (9th Cir. 1985).

Other jurisdictions have also construed Rule 65(c) as investing the trial court with broad discretion in determining the amount of security bonds. *See, e.g.*, *Doctor's Associates, Inc. v. Stuart*, 85 F.3d 975, 985 (2d Cir. 1996) (affirming district court's decision not to require bond); *Moltan Co. v. Eagle-Picher Industries, Inc.*, 55 F.3d 1171, 1176 (6th Cir. 1995) (affirming decision not to require a bond in defamation case between competing manufacturers); *Stockslager v. Carroll Elec. Co-op. Corp.*, 528 F.2d 949, 951 (8th Cir. 1976) ("The amount of the bond rests within the sound discretion of the trial court and will not be disturbed on appeal in the absence of an abuse of that discretion.").

The Ninth Circuit has long held that "[t]he court has discretion to dispense with the security requirement, or to request mere nominal security, where requiring security would effectively deny access to judicial review." *Van De Kamp v. Tahoe*, 766 F.2d at 1325; *see also Friends of Earth, Inc. v. Brinegar*, 518 F.2d 322 (9th Cir. 1975) (granting order reducing bond where effect of a bond requirement would seriously impede access to appellate review by appellants, a private organization and citizens with limited resources). The non-enjoined party's ability to pay may also play a role in determining a proper bond amount. *Barahona-Gomez v. Reno*, 167 F.3d 1228, 1237 (9th Cir. 1999) (affirming nominal $1000 bond requirement where financial means of the class mitigated in favor of nominal bond); *Crowley v. Local No. 82, Furniture & Piano*, 679 F.2d 978 (1st Cir. 1982), rev'd on other grounds, 467 U.S. 526 (1984) (upholding denial of bond where Union members would have had financial difficulty posting it).

In this case, Petitioners have presented evidence of financial hardship to them if forced to pay a bond. An affiant for each respective Petitioner swore that the bond already posted on August 7, 2012 in the amount of $1861.05 or 3% of the bond requirement represented what they are able to pay and still keep their respective businesses solvent. The affidavits submitted demonstrate that the bond amount

places an extremely onerous burden on them. For example Petitioners have been unable to meet their basic operating requirements such as necessary repairs to equipment, monthly overhead such as payroll, rent, taxes and payments to creditors. Petitioner Island Marine Sports, Inc., has indicated that the financial difficulties are so severe that it may be forced to begin bankruptcy proceedings if the injunction does not issue. Based on the affidavits the Courts finds that each business is suffering from financial hardship rendering them unable to post the bond amount, consequently the requirement that Petitioners post the full bond amount as a pre-requisite to injunctive relief effectively denies them judicial review. *Van De Kamp v. Tahoe*, 766 F.2d at 1325.

However, the Court also notes that this is not a case where if the Court ultimately finds that Defendants were improperly restrained the burden would be minimal—the claimed losses by Tasi Tours represent a significant sum. Further, the Court finds that it did not err in considering potential harm to Tasi Tours, an enjoined party. Consequently the Court intends to fashion an equitable solution which both affords the Petitioners meaningful review and meets the aims of the bond requirement. Consistent with these concerns the Court orders the following method to satisfy the bond.

IV. ORDER

1. The bond amount posted on August 7, 2012, in the amount of $1861.05 or 3% of the bond requirement is considered a secured deposit sufficient for the Preliminary Injunction to issue.
2. The remaining portion of the bond requirement is considered unsecured. Each Petitioner is responsible for 1/5 of the unsecured bond amount in the event that Defendants are found to have been wrongfully enjoined.
3. The Preliminary Injunction shall become effective upon the filing of a signed acknowledgement by all five Petitioners of their responsibility for the unsecured amount.
4. The Preliminary Injunction is amended to the extent consistent with this order.

SO ORDERED this 22nd day of August, 2012.

/s/
Joseph N. Camacho, Associate Judge