NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	
	)	Appeal No. 95-0076
JONATHAN W. SMEE,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
ECHO BELLE, INC.,	)	August 1, 1996
Respondent	)	
	)	

STATEMENT OF THE CASE

Both respondent Echo Belle, Inc., and appellant Jonathan W. Smee applied for Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program in connection with halibut and sablefish caught on the F/V ECHO BELLE during 1987, 1988, and 1989. Echo Belle, Inc., claims the QS as owner of the F/V ECHO BELLE. Mr. Smee claims that he had an unwritten lease of the vessel during the relevant years.

The Restricted Access Management Division [Division], in an Initial Administrative Determination [IAD] issued on March 24, 1995, denied Mr. Smee's claim and issued the QS to Echo Belle, Inc. The IAD held that Mr. Smee had failed to establish that he leased the F/V ECHO BELLE from Echo Belle, Inc. The IAD noted that Echo Belle, Inc., directly paid and also reimbursed Mr. Smee for expenses related to the F/V ECHO BELLE, obtained insurance and paid a crewman injured during Mr. Smee's operation of the F/V ECHO BELLE. It held that Mr. Smee had failed to show that he, rather than the owner shouldered the financial burdens and risks of the fishing operation. It found Mr. Smee had not overcome the presumption[1] that he did not hold a lease on the F/V ECHO BELLE, and awarded the QS for the trips at issue to Echo Belle, Inc. Mr. Smee timely appealed.

On appeal, the parties presented additional evidence that had not been considered by the Division, including sworn statements of several witnesses. Appeals Officer Ronald Miller held an oral hearing pursuant to 50 C.F.R. § 679.43(g)(3)[2] . The following witnesses testified at the hearing for Mr. Smee:

[1]See the discussion of presumptions and burden of proof beginning on page 4, *infra*.

[2]Formerly 50 C.F.R. § 676.25(g)(3). All IFQ regulations were renumbered, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the regulation in question was unchanged by the renumbering.

Appellant Jonathan W. Smee; appellant's wife, Debbie Smee (who performed bookkeeping in connection with the venture); appellant's accountant, Dennis McManus; and appellant's cousin and fellow fisherman, Robert John Wurm. The following witnesses testified for Echo Belle, Inc.: its president, Richard Powell, and a hired expert, Charles E. Morgan, CPA. The appeal was originally assigned to Appeals Officer Ronald Miller and later was reassigned to Appeals Officer Rebekah Ross. Ms. Ross reviewed the audio tapes of the hearing and the documentary evidence submitted by the parties, and gave the parties the opportunity to file additional motions prior to issuing this Decision.

ISSUE

Whether Jonathan W. Smee leased the F/V ECHO BELLE during 1987, 1988 and 1989.

BACKGROUND

The original owners of respondent Echo Belle, Inc., were Richard Powell, Ted Otness, H. Y. Kim, and Fred Likens. At the time the corporation was formed, the Appellant was known in Kodiak as an experienced and successful fisherman. Mr. Smee was a part owner of two corporations that owned other fishing vessels, the F/V CONTENDER and the F/V TENACIOUS.

In early May, 1987, Mr. Powell learned that the F/V ECHO BELLE, an 83-foot vessel, would be auctioned at a marshal's sale. Prior to the sale, Mr. Powell contacted Mr. Smee to learn his opinion regarding the condition of the vessel. Mr. Smee noted that the vessel was in very poor condition, that it was filthy and that it needed considerable work and maintenance before it could be used for fishing.

Mr. Powell purchased the F/V ECHO BELLE at the auction on behalf of himself and the other owners, and they soon formed the corporation, Echo Belle, Inc. Mr. Powell contacted Mr. Smee shortly after the purchase. Mr. Smee testified at the hearing:

> He offered the position to me to take over the boat; to take over the boat; run it; outfit it; do whatever it takes to get it going and go longlining. Halibut fishing was the first thing that we could see that was upcoming. He needed a skipper that knew how to set the boat up, basically. I had my own concerns about what I was going to do. I was employed at the time. I was running my own boat. I had the CONTENDER. We were having a good year with the CONTENDER. I had a good crew. My first thoughts were, well, what am I going to do with my boat? Who am I going to get to run my boat?

Mr. Smee testified that Mr. Powell made the proposal of terms: "I'd give him 45% and I would keep 55%." Mr. Powell, on the other hand, testified that the proposal was made by Mr. Smee. In any

event, the parties agreed that, out of the 55%, Mr. Smee was to pay the crew, groceries, bait, and fuel. Mr. Powell would take care of the boat payments, gear, and insurance. Other expenses would be negotiable. After consultation with others, Mr. Smee agreed to the terms. He set to work to prepare the vessel in the three short weeks prior to the first halibut opening.

Mr. Smee hired crew and set them to work preparing the vessel and the halibut gear. The compensation to the crew was the crew share (5-6% per crew member) of the fishing proceeds, minus certain trip expenses. In addition, Mr. Smee hired other non-crew workers to help prepare the initial gear. Echo Belle, Inc., reimbursed Mr. Smee for the wages of those workers, but not the crew. Echo Belle, Inc., paid the costs of the gear and other expenses associated with preparing the vessel for fishing. When Mr. Smee incurred expenses associated with the gear and vessel preparation, he submitted those to Echo Belle, Inc., along with copies of invoices.

As discussed in more detail below, during the term of the relationship Echo Belle, Inc., paid for the following: purchase of the vessel; hull insurance, P&I (protection and indemnity) insurance, injuries to crew members (under the deductible of P&I insurance), vessel repairs, vessel maintenance, fishing gear (including labor costs to prepare initial gear), moorage, and vessel licenses.[3] Mr. Smee paid for the following: crew shares (including labor hired at a fixed rate to perform crew functions, such as fish cleaning), groceries, fuel (which includes filters and other fuel-associated sundries), bait, part of the electricity[4] while the vessel was in the harbor stall, gear transportation, and his entry cards.

By October 1987, Mr. Smee had discussed becoming an owner of Echo Belle, Inc. He made an initial deposit towards ownership in November, 1987, and became a 25% owner in January, 1988. He replaced Fred Liken as an owner.

Although there is no evidence of the parties' discussions on this point, it appears that the parties understood from the beginning that the 55/45 arrangement would apply only when the vessel was engaged in fishing — not when it was engaged in salmon tendering (the transportation of salmon from fishermen to a processor). For salmon tendering, Mr. Smee was paid a set daily fee when he captained

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[3]Mr. Smee testified in his original affidavit that he paid for all licenses. [Exhibit S-3, at 2-3] On cross examination, he admitted that the documents indicate that Echo Belle, Inc., paid for vessel licenses and that he paid for his entry permits. [*See also* Exhibit S-18 (reimbursement for 1987 license); Exhibit 4 (reimbursement for 1988 license); Exhibit 28 (payment for 1989 license)]

[4]Mr. Smee testified that he had the option of running the vessel while it was in harbor and consuming more fuel or arranging an electrical hookup. He chose the latter as being the more cost-effective. The record indicates that sometimes Mr. Smee paid this expense and sometimes it was paid by Echo Belle, Inc. [See Exhibits 3; 5; 10; 33-35]

the vessel. When another person captained the vessel, Mr. Smee received nothing (except for his share as an owner of Echo Belle, Inc.).

In its estimated projection submitted in connection with the original bank loan application, Mr. Powell, on behalf of the "Echo Belle Partners," estimated that the vessel would have 60 salmon tendering runs at a profit of $2,000 each, and that expenses for those operations would include "crew shares". [Exhibit 16, at A-3] In contrast, he estimated two halibut openings with the following expense: "55% to skipper for halibut fishing & he pays operating costs." *Id.* This appears to show Mr. Powell's understanding that the 55/45 split would not apply when the vessel was engaged in salmon tendering.

Mr. Smee apparently had the same understanding. In his original affidavit, Mr. Smee contended that the "same lease arrangement" applied to salmon tendering. [Exhibit S-3, at 5]. However, in a later affidavit he testified: "During the salmon tendering operations, I did not lease the boat from Echo Belle, Inc., but instead worked for a flat rate." [Exhibit S-20, at 4, paragraph 17] He testified at the hearing that his earlier contention that the lease applied to salmon tendering was erroneous.

The vessel apparently was not used for salmon tendering until 1988. [Exhibit 10] In May, 1989, Mr. Smee, on behalf of Echo Belle, Inc., entered into a written agreement, titled "Three-Year Charter Agreement" with North Pacific Processors, Inc. [Exhibit S-27] The charter agreement committed the F/V ECHO BELLE to tender salmon from July 5, 1989 through August 25, 1989 and for a like period in 1990 and 1991. However, in 1989 the processor released the vessel from its charter obligation to fish for halibut on condition that it deliver the catch to the processor.

During the years at issue, the following arrangements apparently applied even when the vessel was engaged in salmon tendering (*i.e.*, the times all parties agree there was no lease): All proceeds were paid into an account set up by Mr. Smee in the name of the vessel and his own name. Sometimes the checks from the processors were made out to the Echo Belle, sometimes to Jon Smee, and sometimes both were named. The Smees did the bookkeeping. Mr. Smee then paid to Echo Belle, Inc., the amounts due to the corporation from the operation. Mr. Smee paid to the crew amounts due to the crew and issued 1099 forms to the crew. Other relevant facts are discussed below in more detail in the context of discussion of the issues in this case.

DISCUSSION

Presumptions and burden of proof

Under 50 C.F.R. § 679.40(a)(2),[5] either a vessel owner or a lessee can be a qualified person and

[5]Formerly 50 C.F.R. § 676.20(a)(1).

eligible for an initial issuance of QS. The owner of a vessel will receive QS in connection with relevant landings of halibut and sablefish unless it is determined that there was a lease of the vessel. In O'Rourke v. Riddle,[6] and in subsequent cases, we explained that the Division administratively established a presumption in favor of vessel owners. We stated that this presumption is nowhere explicitly stated in the IFQ regulations, but that it arose from the requirement that data regarding a lease supplied by an applicant must be compared with data compiled by the NMFS Regional Director, and that the compiled data initially contained no information regarding vessel leases. The Office of Administrative Appeals views this presumption as a device applied by the Division merely for administrative convenience. It is not recognized or applied on appeal. We wish to make clear now that on appeal we accord no weight to this presumption and that the entire record in each appeal is reviewed *de novo.*

We also stated in O'Rourke, and in subsequent decisions, that in two-party cases in which the IAD denied one party and made an award to the other, the burden of proof on appeal (both the burden of production and persuasion) is on the party who seeks to change the status quo, i.e., the party whose claim was denied in the IAD. While that may be a good general rule in appeals from decisions rendered after full due process hearings, IADs are not such decisions. Because our appeals are *de novo*, the parties on appeal should begin on an equal footing. To the extent that an appellant has the burden of production, that burden is minimally met by filing an appeal that complies with requirements of the IFQ regulations. Each party to an appeal has the same burden of persuasion that the evidence supports the party's position. To the extent that our previous decisions conflict with the views expressed here, those decisions are overruled.

Analysis of whether Mr. Smee leased the F/V ECHO BELLE

The regulations do not define "lease," but discuss the evidence that will establish the existence of a lease:

> Conclusive evidence of a vessel lease will include a written vessel lease agreement or a notarized statement from the vessel owner and lease holder attesting to the existence of a vessel lease agreement at any time during the QS qualifying years. Conclusive evidence of a vessel lease must identify the leased vessel and indicate the name of the lease holder and the period of time during which the lease was in effect. *Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted.*

[6]Appeal No. 95-0018, May 18, 1995, at 9, *aff'd* May 23, 1995.

50 C.F.R. § 679.40(a)(3)(iii)[7] (Emphasis supplied).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Smee's appeal depends on there being sufficient "other evidence" of an oral lease to establish that he was the lessee of the F/V ECHO BELLE during the relevant periods.

In O'Rourke v. Riddle,[8] the Office of Administrative Appeals identified five factors that should be considered by an Appeals Officer in deciding whether a vessel lease existed, in the absence of conclusive evidence:

> (1) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;
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> (2) whether the claimed lessee directed fishing operations of the vessel;
>
> (3) whether the claimed lessee had the right to hire, fire, and pay the crew;
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> (4) whether the claimed lessee was responsible for the operating expenses of the vessel; and
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> (5) whether the claimed lessee treated the fishing operations in which the vessel was used as his/her own business for federal income tax and other purposes.

These were intentionally called *factors*, rather than *elements*, because they are meant to be used as analytical tools or guideposts to help the Appeals Officer decide whether there was a vessel lease. Because neither the IFQ regulations nor the regulatory history provided a definition of *vessel lease*, and because of the great variety of business arrangements between owners and operators of fishing vessels, we have found it necessary to apply a flexible case-by-case analysis in these types of appeals. In each case, we are trying to determine whether the party who claims to have held a vessel lease had sufficient control of the fishing operations and assumed sufficient entrepreneurial risk from the fishing operations to qualify as a lessee for purposes of the IFQ program.

In Kristovich v. Dell,[9] we added a sixth factor:

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[7]Formerly 50 C.F.R. § 676.20(a)(1)(iii).

[8]Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

[9]Appeal No. 95-0010, March 20, 1996, at 10, *aff'd* March 27, 1996.

(6) whether the claimed lease had a set or guaranteed term.

As we have previously stated, these are not exclusive factors. Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties.

Of particular interest in every case involving a claimed lease is how the parties characterized their business arrangement during negotiations and discussions, during fishing operations, and subsequently. As with purported written vessel leases and charters, the terminology used by the parties to describe their relationship and their unwritten agreement can be relevant evidence of whether they intended to form a lease.[10] In cases involving claimed oral leases, we have already been considering such evidence without formally calling it a *factor*. Now it is appropriate to call this a factor and add it to those previously identified in O'Rourke and Kristovich. Accordingly, Appeals Officers should also consider:

(7) how the parties characterized their business arrangement at the relevant times.

Although this is the seventh factor so identified, analytically it should be the first addressed. Accordingly, the numbering of the factors will differ from our prior decisions.

1. The Parties' Characterization of the Arrangement

The great weight of the evidence establishes that, during the relevant years, when the parties discussed their relationship with each other, they did not characterize it as a "charter" or "lease". Mr. Powell testified in an affidavit:

> The Corporation has never leased or chartered the Vessel to Mr. Smee or anyone else. I certainly did not consider the arrangement we set up for handling Vessel income to be a lease. We never told our bankers or anyone else that Mr. Smee had a lease. As a matter of fact, it was the opposite - we always spoke of him as a skipper, and after we decided to offer him a share of the Corporation in 1988, as a skipper who was a co-owner. I never understood the Corporation to be turning the Vessel over to him for a specific period of time, nor did I consider him to be assuming any of our control over the way the Vessel operated. I always understood that I could terminate his employment for any reason at any time, and that he could do the same.

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[10]In reviewing such evidence, however, Appeals Officers should keep in mind that individuals are often more careful and deliberate in their choice of words when creating formal written documents having legal significance that they may be in oral conversation and informal communications.

Exhibit 15, at 2. Mr. Powell testified again at the hearing that he did not ever describe the relationship as a lease to anyone and that Mr. Smee did not use the term "lease."

Mr. Smee did not testify that he ever called the arrangement a "lease" or "charter." However, he testified that he once had a discussion with Mr. Powell at Mr. Powell's home (presumably after he purchased the 25% share of the corporation). In that conversation, Mr. Smee characterized their relationship as a partnership. Mr. Powell corrected him and told him that he was a shareholder in the corporation, not a partner. Mr. Smee testified that Mr. Powell told him that what he had with the corporation was just like a lease. Thus, the parties did not negotiate their arrangement as a lease or characterize it as *being* a lease. At most, accepting Mr. Smee's testimony on this point, one of the parties once said it was *like* a lease.

Crew members apparently were not told that there was a lease of the vessel to Mr. Smee, although they acknowledged that he was making the determinations of where and when to fish and was navigating the vessel. Crew member Michael Stanelle testified in an affidavit that, upon questioning, Mr. Smee told him he was just the skipper. [Exhibit 24] He clarified in a later affidavit that he did not know whether there was a lease. [Exhibit S-57] Crew member Mark Smith testified that Mr. Smee told him he was "a part-owner, who operated the boat for a percentage of its income." [Exhibit 23]. Crew member William Matthews testified in an affidavit that Mr. Smee told him "he was one of four co-owners, and that he managed the vessel for the owners." [Exhibit 22] Crew member Forrest Hosier testified in an affidavit that Mr. Smee told him "he was a 25% partner in the vessel, and that he received a skipper's share for operating it." [Exhibit 21] Mr. Smee has testified that he did not discuss the particulars of his arrangement with his crew. I find[11] that the crew were not told that the arrangement was a lease. In addition, it does not appear that vendors were told of any lease or charter of the vessel to Mr. Smee. [Exhibit 17 (Petro Marine Services); Exhibit 18 (Alaska Pacific Seafoods); Exhibit 19 (Alaska Fresh Seafoods)] This is not surprising, in that Mr. Smee does not contend that he characterized the relationship as a lease during the times at issue.

Although the parties did not themselves characterize the arrangement as a "lease," the term "lease" was used in two contexts to describe the relationship. As discussed more fully below, the first was in financial statements prepared by an outside bookkeeper, and the second was in the context of applications for participation in the Capital Construction Fund (CCF) program prepared by the parties' accountants.

Echo Belle, Inc.'s outside bookkeeper, Sandra R. Sappington, prepared financial statements after Fred

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[11]Factual findings in this appeal were made by Appeals Officer Rebekah Ross, who considered the evidence presented by the parties, including documentary evidence and testimony presented at the oral hearing. Chief Appeals Officer Edward H. Hein concurs in the factual findings.

Liken (who initially performed this task) left the corporation. In the financial statements, Echo Belle, Inc.'s income for the trips at issue, as well as the income from salmon tendering, was characterized as "fishing income-lease." Those statements were circulated to the owners, and also occasionally to the corporation's accountants and banker. [Exhibits S-7— S-8] In 1990 the financial statements indicate zero income for the category "fishing income-lease." [Exhibit S-9] Starting in 1990, the statements list income from various fisheries, such as halibut, black cod, crab and tendering (salmon). *Id*.[12]

Ms. Sappington testified in an affidavit that she decided to use the term "fishing income-lease" without influence or direction from the corporate officers or owners, and that she can no longer remember why she used the label. [Exhibit 6] Mr. Powell testified at the hearing that he did not direct Ms. Sappington to use the term "lease". I have given no weight to the accountant's characterization of the income as "lease" income, in light of the absence of evidence that the accountant was told that the relationship was a lease. *Cf*. Kristovich, at 13, note 18. I find credible Mr. Powell's testimony that, during the relevant times he was not troubled by the characterization on the financial statements, as those statements were essentially internal documents and the characterization was not a matter of substance. [Exhibit 7] I also note that, in the general ledgers for the years at issue, the fishing income is separated into "fishing income-lease"; "halibut"; "crab"; "salmon tendering" and "other fishing income". [Exhibits 3; 5; 10] Those items were combined into the category "fishing income-lease" in the consolidated income statements.

On February 27, 1989, Echo Belle, Inc.'s directors passed a resolution allowing its accountant, Jon Krueger, to execute documents in connection with the Capital Construction Fund (CCF). [Exhibit 27] CCF is a program jointly administered by the Internal Revenue Service and NMFS under which owners and lessees of vessels may set aside tax-deferred funds to be used to purchase or upgrade fishing vessels. Mr. Krueger prepared a CCF application for Echo Belle, Inc., identifying Mr. Smee as a lessee of the vessel. [Exhibits 21; 26] He testified that he did so as he understood that Mr. Smee wanted to qualify his entire skipper share for CCF deposit, instead of just his 25% share of Echo Belle, Inc. [Exhibit 26] Mr. Krueger testified that the other owners of Echo Belle, Inc., did not direct him to identify Mr. Smee as a lessee on the application. *Id.* Mr. Kim signed the application on behalf of the corporation, but testified in an affidavit that he simply signed the forms prepared by Mr. Krueger, and was not aware that the forms identified Mr. Smee as a lessee of the Echo Belle, Inc. [Exhibit 27]

Mr. Smee also submitted a CCF application in December, 1989. [Exhibit S-22] Along with that application, prepared by Mr. Smee's accountant, Dennis McManus, Mr. Smee also submitted a "Memorandum of Fishing Vessel Lease and Certificate" signed by himself as both the lessor and as the

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[12]Mr. Smee contends that he continued to lease the vessel during the first few months of 1990. [Exhibit S-3, at 1] This appears to detract from his claim that the financial statements indicate when a lease existed.

lessee. Mr. Smee purported to sign the document as lessor in his capacity as Vice President of the corporation, although corporate documents establish that he was not a vice-president or other officer or director at that time. [Exhibit 27][13] Mr. Smee apparently did not seek to have Mr. Powell or any other officer of the corporation sign the document. Mr. McManus and Mr. Smee apparently made little attempt to have the CCF application conform to reality, as they used the wrong term for the alleged lease, the wrong compensation amount, and Mr. McManus testified that he simply made up a provision that the "lease" was terminable on 30 days notice by either party.

I find that neither the CCF application prepared by Mr. Krueger on behalf of Echo Belle, Inc., nor the CCF application prepared by Mr. McManus on behalf of Mr. Smee is worthy of any weight in determining whether the parties truly characterized their relationship as a lease. The accountants concur that hired skippers are regularly designated as lessees for the purposes of the CCF program, and that their standard practice was to submit forms designating skippers as lessees. Here, the parties simply put the CCF application process in the hands of their accountants, and apparently made no effort to determine that the forms conformed with the reality of their relationship.

It would be possible to draw a negative inference from Mr. Smee's application. If he truly felt he had a lease, why did he not obtain a certificate of lease from an authorized agent of the corporation instead of purporting to sign one on behalf of the corporation? However, I do not draw this negative inference, as the evidence suggests that the CCF process was wholly handled by the accountants. The parties simply allowed their accountants to characterize matters in a manner that would allow the maximum benefits from the CCF program.[14] I also draw no positive inference in favor of Echo Belle, Inc., from the availability of the CCF program. It has been suggested that the terms of the arrangement were negotiated simply to take advantage of the CCF program. There is no evidence that this was so. The CCF applications were submitted long after the parties negotiated the terms of their arrangement.[15]

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[13]Mr. McManus testified that he had made inquiry of another director (although he did not recall which one) to verify that Mr. Smee was a vice president. He testified that Mr. Krueger consented to his filing the CCF application.

[14]This, of course, raises the issue of accountants simply characterizing the relationship as a lease or not a lease for the advantage of their clients in the context of the IFQ program as well. Because neither the accountants, nor anyone else among the parties and witnesses, is an expert on what relationship qualifies as a "lease" for the purposes of the program, no weight is given to any witness's opinion on that issue.

[15]Likewise, I give no credit to the suggestion that the arrangement between Echo Belle, Inc., and Mr. Smee was based on his ownership interest in the corporation. The terms of the arrangement were negotiated prior to discussions of his becoming a shareholder, and apparently did not alter significantly after he became a shareholder.

The only other contemporaneous documents illuminating whether the parties characterized their arrangement as a "lease" are the parties' tax returns. Those returns are discussed more fully in Section 5, below.

Mr. Smee argues that his agreements with respect to other fishing vessels illuminate whether his arrangement with Echo Belle, Inc., would be characterized as a lease. Mr. Smee co-owned corporations that owned two other vessels, the F/V CONTENDER and the F/V TENACIOUS. Those corporations entered into written fishing agreements with individuals who operated those vessels. [Exhibit S-25] The first of these, between Tenacious Fisheries, Inc., and Brad Scudder, is dated June 14, 1990, and is not titled a "lease" or "charter." Instead, it is titled "Fishing Agreement." The second, between Contender Fisheries, Inc., and Roy Wolkoff, is dated December 4, 1991, and is titled "Boat Lease Agreement." The later Tenacious Fisheries, Inc., and Contender Fisheries, Inc., written agreements are also titled "Boat Lease Agreement." Because the written agreement closest to the relevant period was not titled "lease," and because Echo Belle, Inc., was not a party to the written agreements submitted by Mr. Smee, I find that the written agreements do not illuminate even Mr. Smee's characterization of his arrangement with Echo Belle, Inc., much less the parties' joint intent.

I find that the great weight of the evidence establishes that the parties did not, at the relevant times, characterize their arrangement as a "lease" or "charter" of the F/V ECHO BELLE. That finding, however, does not dispose of the issue. As noted in Kristovich, at 15:

> [T]he National Marine Fisheries Service recognizes that, notwithstanding the language used by the parties, their arrangements may be characterized as leases for the purposes of the IFQ regulations. If, in *substance*, the arrangement had the characteristics of a lease as opposed to an owner/hired skipper relationship, the Service will recognize the relationship as a lease for the purposes of the IFQ regulations.

The rest of this discussion will analyze each of the remaining factors in turn to determine whether the arrangement was, in substance, a lease for the purposes of the IFQ program. This discussion is based on Mr. Smee's current contention that the lease period did not include the times the vessel was used for salmon tendering.

2. Did Mr. Smee possess and command the vessel and control its navigation?

It is undisputed that, during the halibut and sablefish fisheries at issue, Mr. Smee possessed and commanded the vessel and controlled its navigation.

3. Did Mr. Smee direct fishing operations of the vessel?

It is undisputed that, during the halibut and sablefish fisheries at issue, Mr. Smee directed the fishing operations of the vessel.

4. Did Mr. Smee have the right to hire, fire, and pay the crew?

It is undisputed that Mr. Smee hired, fired and paid the crew. Most significantly, Mr. Smee determined the compensation of the crew members, and paid their shares out of his 55% share of the proceeds. When he had inexperienced crew, he paid each crew member a smaller percentage, keeping the rest for himself. When his crew was more experienced, he gave them larger percentages. Very inexperienced crew were often paid a flat fee with no opportunity to share in the profits. Apparently, Echo Belle, Inc., placed no limitation on Mr. Smee's decision-making as to crew hiring and compensation, except that he could not hire more crew members than would be covered by the P&I insurance.

In sum, Mr. Smee amply satisfies the foregoing three factors. As discussed in Kristovich, at 9, due to the nature of the longlining fisheries, those factors are usually satisfied in either the owner/hired skipper or the lessor/lessee arrangement. However, when one of those factors is not satisfied, this casts considerable doubt on whether the relationship can be characterized as a lease.[16] In this case, there is nothing about the degree of control and autonomy in the operation of the vessel that would be inconsistent with either an owner/hired skipper or a lessor/lessee relationship.

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[16]Mr. Smee testified that his autonomy with respect to the F/V ECHO BELLE was much greater than with respect to the F/V MARCY J, another vessel that he skippered. The owner of the F/V MARCY J directed where the vessel was to sell fish, issued paychecks to the crew, including Mr. Smee, and handled the accounting. Mr. Morgan testified that the owner of the F/V MARCY J kept an unusually high degree of control over its operations. Mr. Smee also testified that owners of different vessels he has been involved with have varying amounts of control. I find that, as a general matter, owners might exert varying degrees of control over skippers with respect to navigation, crew hiring and wages, where to sell the catch, how frequently to contact the owner, and nearly every other aspect of the fishing operation. These depend on a number of variables, including the degree of trust the owner has in the skipper and arrangements the owner might have made with specific processors or vendors. Thus, I do not find Mr. Smee's relationship with a different owner to be relevant to determining whether his relationship with Echo Belle, Inc., was a lease.

5. Was Mr. Smee responsible for the operating expenses of the vessel?

In Kristovich, at 9, we stated that when addressing the question of whether the claimed lessee was responsible for the operating expenses of the vessel, the Appeals Officer should focus on expenses for the *vessel* that are above and beyond the typical operating expenses of a given fishing *trip* borne by all. We wish to make clear that Kristovich should not be interpreted as disregarding trip expenses entirely. "Operating expenses of the vessel" are those expenses that are attributable to the fishing operations in question. These would include trip expenses, as well as other expenses necessitated by the fishing operations.

A party's investment in the fishing enterprise is certainly a significant factor in determining whether the party was the type of person the North Pacific Fishery Management Council [Council] believed would qualify as a lessee. Recently, the Ninth Circuit Court of Appeals upheld the IFQ program in the face of a challenge that it was inequitable in denying QS to those who were actively engaged in the fishery, but who were neither owners nor lessees of vessels. Alliance Against IFQs v. Brown[17]. The Ninth Circuit noted:

> The Council thought that equity to people who had invested in boats, and the greater ease of ascertaining how much fish boats, as opposed to individual fishermen, had taken, favored allocating quota shares according to owner and lessees of boats[.]

Id., at 349. The Ninth Circuit further noted:

> The Secretary thought that the problem of overfishing resulted more from investment in boats than occupational choices of fishermen, so the administrative remedy should be measured by ownership and leasing of boats[.]

Id. The Ninth Circuit noted that the Council grouped owners and lessees as being those participants in the industry who had "a capital investment in the vessel and gear that continues as a cost after crew and vessel shares are paid from a fishing trip." *Id.* (quoting 58 Fed. Reg. 59, 375, at 59,386 (Nov. 9, 1993).

The Council apparently concluded that vessel lessees, like vessel owners, take some financial risk and have some control over the level of capitalization of the fisheries. That, the Council indicated, is what distinguishes vessel owners and lessees as a group from hired skippers and other crew members. Yet, the Council did not require that a person must have made a certain level of investment to be considered a lessee under the IFQ program. When there is a written lease, for example, a lessee need not show

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[17]84 F.3d 343 (9th Cir. 1996).

any capital investment. Only a valid, executed lease document identifying the leased vessel, the lease holder and the period of time during which the lease was in effect must be produced.[18]

As with other factors, a flexible approach is needed when considering responsibility for operational expenses. Because of the great variety in commercial fishing business arrangements, and in the way expenses and risks of fishing operations are allocated between the parties, no single expense or category of expenses is likely to determine whether the parties had a lease agreement or not. Whether or not they represent a capital investment in the vessel, operating expenses should be considered only to the extent that they shed light on the question of whether a vessel lease existed. The question is not which party invested more money in the fishing operations; rather, it is whether the payments, responsibilities, risks, and method of operation -- as evidenced by the handling of expenses -- were more consistent with a lease than some other arrangement, and whether they, therefore, tend to show that there was a lease.

a. Trip Expenses

Mr. Smee was responsible for paying the following expenses: fuel for the fishing trips[19], groceries, and bait. These types of expenses, representing items that are consumed during the course of a trip, are often called the "trip expenses" or "crew expenses". Mr. Smee shared these expenses with crew members, who theoretically would have remained responsible to Mr. Smee in the event that proceeds were insufficient to cover the expenses.

Mr. Smee testified that he was responsible for paying 100% of the trip expenses out of the 55% share, and that the crew members were responsible only for a percentage of those expenses corresponding to their percentage shares. Thus, for example, if each crew member received 5% of the gross proceeds and Mr. Smee received 30%, then each crew member would pay only 5% of the trip expenses (instead of 5/55) and Mr. Smee would pay the remainder. For example, the settlement sheet for August 23, 1987 shows Mr. Smee paying 75% of the fuel and bait expenses. [Exhibit S-12] The exception was groceries, which were shared equally by the crew and Mr. Smee. *Id.* In addition, the settlement sheets indicate that the crew and Mr. Smee shared equally in the cost of hiring fixed-rate labor.

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[18]50 C.F.R. § 679.40(a)(3)(iii) (formerly 50 C.F.R. § 676.20(a)(1)(iii)).

[19]Mr. Smee did not pay for fuel associated with taking the vessel for maintenance, even if the maintenance was during the term of the alleged lease. Echo Belle, Inc., also paid the grocery bills during the term of the alleged lease when the vessel was in Seward being repaired.

The arrangement to which Mr. Smee testified is different from the Set Line Agreement, acknowledged by some to be the general industry standard for allocation of various fishing expenses and shares. [*See* Exhibit 14][20] Under the Set Line Agreement, after the deduction for the gross stock expenses (such as moorage fees and licenses), the owner receives a boat share. Then each crew member is responsible proportionately for the trip expenses. Generally, this is achieved by simply deducting the trip expenses from the adjusted gross, and dividing the net proceeds according to each crew member's share. The trip expenses paid in this manner consist of grub, fuel, ice, salt, bait, and condemned fishing gear. [Exhibit 14]

The settlement sheets do not fully support Mr. Smee's testimony regarding the division of expenses. In the first settlement sheet in which expenses were posted Mr. Smee and each member of the crew paid trip expenses in proportion to their percentage shares (except for groceries and fixed-rate labor, which were shared equally). After that, there are a few settlement sheets, such as the August 23, 1987 settlement, in which Mr. Smee bore about 75% of the fuel and bait expenses out of the 30-31% share he received. Often the Smees did not indicate on the settlement sheets the percentages received by or paid by Mr. Smee, but it may be inferred that this allocation of expenses continued. However, apparently at the same time that the Smees started using a computerized bookkeeping system, the payment of expenses reverted to a closer resemblance to the Set Line Agreement formula. In the September 10, 1988 settlement agreement, the crew each start receiving their proportionate share of the net proceeds after deduction of the bait, ice, and fuel. The groceries and fixed-rate labor were still shared equally. [Exhibit 12]

There is no testimony in the record about why the allocation of trip expenses between Mr. Smee and his crew were done differently for a period of time. It is not clear whether the Smees intended to always have the crew pay their proportionate share of trip expenses, and that the other settlement sheets are mistakes, or whether the Smees always intended for Mr. Smee to pay a greater share of the trip expenses. Debbie Smee testified at the hearing that fuel and bait were taken off the top, and the groceries were shared equally, leading to a possible inference that the few months in which this did not happen may have been the result of an error.

There was a "hole trip" in November, 1987, for which Mr. Smee incurred expenses not covered by the

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[20]The version of the Set Line Agreement submitted as evidence in this matter is the agreement negotiated in 1991 between the Deep Sea Fishermen's Union of the Pacific and the Fishing Vessel Owners' Association, and its terms did not bind the parties to this action. A certified public accountant familiar with the fishing industry, Charles E. Morgan, testified that the Set Line Agreement formula reflects general industry practice for allocation of boat shares and expenses. [See Exhibit 16, at 3] *See also* Kristovich, at 13-15. However, Mr. Smee testified that he was unfamiliar with the Set Line Agreement. [Ex S-20] His cousin, Robert John Wurm, was also unfamiliar with the agreement.

fishing revenues. The settlement statement for that gray cod trip indicates gross fish pay of $7,000, and fuel, grocery, and bait expenses of $3,901.34. [Exhibit S-41] The 45% paid to Echo Belle, Inc., was $3,150, and the 55% remaining to Mr. Smee was $3,850. Had Mr. Smee deducted the trip expenses, the net proceeds would have been $ -51.34, and he and his crew would each, in theory, have been liable for their percentage shares. In this example, each of the crew members who received a 6% crew share would have paid 6/55 of the loss, and Mr. Smee, who received a 37% share would have paid 37/55 of the loss. However, as discussed above, during the months in question, the crew were paying only a percentage of the expenses corresponding to their shares, in other words 6/100 rather than 6/55. Thus, Mr. Smee ended up paying the crew a small amount and taking a larger loss himself.

It is doubtful, of course, that Mr. Smee would have actually charged any crew member $5.60 in connection with the trip at issue, even if he had been using the Set Line Agreement accounting. Even if the loss had been significantly greater, I believe Mr. Smee would likely have borne the loss, and hoped that the subsequent trip would make up for it. I find that, under the terms of their arrangement, Echo Belle, Inc., would not have been obligated to reimburse Mr. Smee for the trip expenses in the event there was a hole trip.

In theory, Mr. Smee could have been liable for the trip expenses of each trip had the trips yielded no profits. The settlement sheets in the record reveal trip expenses for bait, fuel and groceries most frequently in the $5,000 to $10,000 range. Mr. Smee's risk for each trip could have been in this range and, theoretically, could have multiplied had Mr. Smee fished again and again, each time with no success. However, Mr. Smee testified at the hearing that, at least with respect to halibut openings, he and the crew were almost guaranteed a good trip.

I find that Mr. Smee was responsible for and bore the risk of the trip expenses, such as fuel, bait, and groceries.

b. Labor

Mr. Smee hired crew, and their wages were paid out of his 55% share of the proceeds. As with the trip expenses, the crew shares would be paid regardless of whether this lay/share arrangement were deemed a lease or an owner/hired skipper arrangement. [*Cf*. Exhibit S-60] In addition, Mr. Smee and the crew shared equally in the cost of hiring some occasional fixed-rate labor, such as for cleaning fish. Because Mr. Smee and the crew hired such labor to perform crew duties, the payment of such wages does not seem to represent a shift in responsibilities *vis a vis* Mr. Smee and Echo Belle, Inc. When labor was hired to perform duties beyond that of the fishing crew, Echo Belle, Inc., paid for it.

c. Other Expenses Borne by Mr. Smee

There were some expenses borne by Mr. Smee for which he did not seek reimbursement either from Echo Belle, Inc., or the crew. For example, the record does not indicate Mr. Smee was reimbursed for the cost of his entry permits, which captains must have in order to deliver fish to processors. The record does not indicate Mr. Smee was reimbursed when he paid for electricity during moorage. [Exhibit S-65 (totaling $581.79)] Mr. Smee testified at the hearing that he charged Echo Belle, Inc., for its pro rata share of the insurance on his truck, but not for its gasoline. The record does not show the exact figure of these sundry expenses. However, I cannot infer from this record that there was any significant nonreimbursed expense incurred by Mr. Smee. I find the parties did not agree that Mr. Smee would pay for a category of expense that would make the relationship inconsistent with either a lessor/lessee or an owner/hired skipper relationship.

d. Operating expenses borne by Echo Belle, Inc.

Echo Belle, Inc., generally paid the expenses of the venture other than the trip expenses. Echo Belle, Inc., submitted two notebooks of invoices evidencing such expenses, as well as its financial statements and complete tax records for the years at issue. Some of those expenses involve services to Echo Belle, Inc., as a corporation (such as attorney and accounting fees), and accordingly are not relevant. Other expenses relate to ownership and maintenance of the vessel itself, such as mortgage payments, hull insurance and general vessel repairs, which would normally be borne by any owner regardless of whether there was a lease of the vessel.

The evidence establishes that Echo Belle, Inc., paid P&I insurance covering the trips at issue. The premiums on that insurance apparently ranged between $25,535 and $30,889 per year.[21] [Exhibits 1 and 29] In addition, Echo Belle, Inc., paid for an injury to a crew member that was under the deductible of the insurance, in the amount of $6,235. [Exhibit 9]

Echo Belle, Inc., paid for moorage of the vessel during the term of the alleged lease between the fishing trips, and at least some of the electricity costs while the vessel was moored. [Exhibits 3; 5; 10; 11; 33-35]

Echo Belle, Inc.'s largest expense during the relevant time periods, not counting the cost of the vessel and its maintenance and repairs, was the cost of the gear and equipment used for fishing halibut, sablefish, gray cod and crab. Echo Belle, Inc.'s general ledgers, tax returns, and invoices evidence its

[21]Because the insurance covered periods the vessel was tendering salmon, not all of this expense is attributable to the times that Mr. Smee contends there was a lease.

payments of tens of thousands of dollars each year to equip the vessel to fish in those fisheries. [Exhibits 3; 5; 10; 33-35; S-24] Many gear items were initially purchased by Mr. Smee, who was then reimbursed by Echo Belle, Inc. Mr. Smee also purchased gear on accounts that Echo Belle, Inc., then paid directly.

Nearly as significant as the amounts paid by Echo Belle, Inc., for gearing the vessel is the fact that Echo Belle, Inc., paid for gear in an ongoing fashion during the term of the alleged lease. Apparently, Jon Smee could regularly make purchases for the various fisheries he chose to pursue, and Echo Belle, Inc., regularly paid for the gear and equipment needed in those fisheries. Other purchases may have been arranged directly by Mr. Powell. [*E.g.*, Exhibit 33 invoice for $29,807.51 in longline gear sold to "Echo Bell c/o Dick Powell"] The gear expenses paid by Echo Belle, Inc., throughout the term of the alleged lease included both large refitting of the vessel to engage in new fisheries and, literally, nuts and bolts.

In other words, this arrangement was not one in which the vessel owner hands over a fully equipped vessel with the expectation that it will be returned in a like condition. Rather, it was an arrangement under which the vessel owner remained involved in gearing up the vessel. This applied not only to the initial stages, when the F/V ECHO BELLE was not yet a viable fishing vessel, but throughout the term of the arrangement.

e. The parties' risks in payment (or non-payment) of expenses

The Kristovich decision drew a distinction between the parties' responsibilities for expenses under the terms of their arrangement, and which party actually "*paid* the expenses prior to being reimbursed from the fishing proceeds." Kristovich, at 17. In Kristovich, the alleged lessee purchased gear and paid other expenses from an account set up by the owner in the owner's name. The alleged lessee did not pay the expenses for which he was responsible until payments were made by the fish processors. In part because his initial outlay of personal funds was minimal, he was not credited with paying the vessel's operating expenses.

In contrast to the alleged lessee in Kristovich, Mr. Smee made certain vessel purchases using his own bank account, and later with an account under the names: "Jonathan W. Smee or Debbie E. Smee F/V ECHO BELLE Payroll". [Exhibits S-16—17] Mr. Smee purchased gear and other items for which the parties agreed Echo Belle, Inc., would reimburse him.

On the other hand, Mr. Smee made many of the vessel purchases, including for trip expenses, using accounts that he or Echo Belle, Inc., set up in the name of the vessel. The parties apparently took no steps to assure that the vessel would not be taken as security in the event those debts were not paid.

Although the Smees testified that the naming of the vendor accounts was done for the purpose of segregating the expenses for the F/V ECHO BELLE, the effect was to give the vessel as security for purchases made for the vessel's endeavors. *See*, Gulf Trading & Transp. Co. v. Vessel Hoegh Shield, 658 F.2d 363, 368 (5th Cir. 1981), *cert. denied*, 457 U.S. 1119 (1982).

There is no evidence the vendors were told they could not look to the vessel to secure purchases made by Mr. Smee. *Cf*. Ferromet Resources, Inc. v. Chemoil, Corp., 5 F.3d 902, 903 (5th Cir. 1993) (supplier's lien is defeated when supplier has actual knowledge that the person ordering supplies had no authority to bind the vessel). Under these circumstances, Echo Belle, Inc., could have ended up paying for expenses that were to be borne by Mr. Smee, or lose the vessel to the suppliers. *See*, Equilease Corp. v. M/V Sampson, 793 F.2d 598, 605 (5th Cir.) *cert. denied*, 479 U.S. 984 (1986) (a party claiming that there was no maritime lien against the vessel for supplies furnished for its ventures bears the burden of establishing that the supplier relied solely on the personal credit of the owner or charterer). In at least one instance, the vendor's account from which Mr. Smee purchased bait on credit listed the names of the owners of Echo Belle, Inc., in addition to the name of the vessel. [Tab C to Affidavit of Jonathan W. Smee submitted in connection with his application for quota share, attaching account detail of Alaska Fresh Seafoods] Mr. Smee apparently did not reimburse that account until he received the proceeds of the trip. [*See* Exhibits S-12; S-15 — S-16].

In sum, the evidence establishes that both Echo Belle, Inc., and Mr. Smee made certain purchases using their own names and own property as security and that they also placed their names and/or credit on the line for certain purchases that were ultimately the responsibility of the other. I find that, as a practical matter, Echo Belle, Inc., bore little risk that Mr. Smee would not pay for the trip expenses that were his responsibility, and Mr. Smee bore little risk that he would not be reimbursed for any gear, maintenance and repair expenses that he incurred on Echo Belle, Inc.'s behalf. In other words, the substance of the parties' agreement with respect to payment of expenses reflected the parties' actual risks.

I find that both parties bore responsibility for the operational expenses of the F/V ECHO BELLE during the periods at issue. Although Mr. Smee was responsible for payment of trip expenses, his overall responsibility for expenses does not clearly place him in a category other than that of a hired skipper. Echo Belle, Inc.'s payment of capital expenses, the P&I insurance, and the unanticipated cost of a crew member's injury, are consistent with its claim that the relationship was not a lease.

6. Did Mr. Smee treat the fishing operations in which the vessel was used as his own business for federal income tax and other purposes?

The fundamental inquiry in this case is whether the operation of the F/V ECHO BELLE during the

periods at issue was, in essence, Echo Belle, Inc.'s operation, in which it hired Mr. Smee as its trusted agent, or whether it was, in essence, Mr. Smee's operation, for which he leased the vessel and gear from Echo Belle, Inc.

a. Accounting and bookkeeping

For each of the trips at issue, Mr. Smee received 100% of the fishing proceeds from the processors. The Smees handled the bookkeeping. Mr. Smee then paid 45% of the proceeds to Echo Belle, Inc., paid the crew their shares, paid the trip expenses, and kept the remainder. This system gave Mr. Smee considerable autonomy. For example, his profits could increase if he negotiated lower wages for the crew. He was not limited to a fixed captain's share. Echo Belle, Inc., apparently had no concern over how much was paid in crew shares and trip expenses, so long as it received its 45%.

After he was absent from the vessel for medical reasons in 1990, Mr. Smee came back and ran the vessel under an arrangement that both parties agree was an owner/hired skipper arrangement in late 1990 for at least one trip. [Exhibit S-60] In contrast to the periods at issue, the settlement sheets for that trip show Mr. Smee receiving a skipper share of 18% of the net proceeds. Echo Belle, Inc., apparently received 100% of the proceeds from the processor and handled the bookkeeping for that trip.

The testimony was unanimous in this case that it is highly unusual for 100% of the proceeds to be paid to a hired skipper, who then pays the trip expenses and crew and remits the remainder to the vessel owner. In fact, although he testified that the relationship was, in substance, no different from a hired skipper arrangement, Echo Belle, Inc.'s expert witness, Mr. Morgan, knew of no hired skipper situation in which the hired skipper received 100% of the proceeds. The only example in this record of a "hired skipper" receiving 100% of the proceeds was Mr. Smee's own receipt of those proceeds when he acted as the hired skipper of the F/V ECHO BELLE for salmon tendering.

I find that the accounting and bookkeeping responsibilities of the parties to be *more* consistent with a lessor/lessee relationship than an owner/hired skipper relationship. Although these responsibilities did not substantively alter the payments and risks of the parties, they reflect that Mr. Smee had considerable autonomy and responsibility with respect to the management of the F/V ECHO BELLE. However, we have found that such responsibilities do not necessarily indicate a lessor/lessee relationship. *See* Kristovich.

b. Taxes

Mr. Smee testified that he claimed the entire fishing income as his income for the purposes of his income tax returns, and deducted as expenses the 55% paid to Echo Belle, Inc., the shares paid to crew members, and the trip expenses. Mr. Smee's entire tax records for the years in question are not of record. The records he submitted show that the payments to Echo Belle, Inc., were designated as "Rent on business property" in the 1987 and 1988 returns, and as "Rent or lease; machinery and equipment" on the 1989 return. However, Mr. Smee likely included other items in those categories, as the amounts claimed by Mr. Smee exceed the payments to Echo Belle, Inc., during the years in question. Because Mr. Smee paid the crew, he issued 1099 forms to the crew. On those forms he used his own (business) employer identification number [EIN], not the EIN of Echo Belle, Inc.

Echo Belle, Inc.'s tax statements reflect as income only its 45% share received for the trips at issue, and apparently also its net income from the salmon tendering trips. Echo Belle, Inc.'s tax statements do not reflect the trip expenses paid out of the 55% share. However, they reflect the other operating expenses paid by Echo Belle, Inc. Echo Belle, Inc.'s tax statements do not indicate any lease income from the F/V ECHO BELLE. Mr. Morgan testified that a change in the tax laws would have required Echo Belle, Inc., to categorize its income as rental income had there been a lease. This would have affected the deductibility of certain losses (had there been any such losses).

Here, as in Kristovich, Mr. Smee treated the operations as his own for the purposes of his tax returns and the issuance of 1099 forms to the crew. I find that the tax documents are consistent with Mr. Smee's claim of a lease. However, as noted in Kristovich, at 11, the final regulations did not make income tax documents dispositive on the issue of the existence of a vessel lease.

c. Banking

Mr. Smee treated his operations with respect to the F/V ECHO BELLE as his own business in the context of banking. He set up separate bank accounts for the F/V ECHO BELLE under his name and the name of the F/V ECHO BELLE. Debby Smee testified that this allowed them to receive payments from the fishing processors made to the "F/V ECHO BELLE." Echo Belle, Inc., permitted this, and did not require deposit of the revenues received from the processors into the corporate account.

On the other hand, Echo Belle, Inc., submitted documents to its bank characterizing Mr. Smee as the skipper, not the lessor, of the vessel.

d. Liability

Echo Belle, Inc., purchased both hull and P&I insurance for the F/V ECHO BELLE. It was liable for

injuries under its deductible and over the policy limits. Mr. Smee did not purchase insurance, and apparently had no concerns for liability with respect to his operation of the vessel. The insurance documents do not indicate the existence of a lease. One such document indicates that the vessel was operated by Echo Belle, Inc., and that Mr. Smee was the "skipper/part owner". [Exhibit 29]

Echo Belle, Inc.'s liability is reflected not only by the fact that it obtained P&I insurance, but by the fact that it paid a crewman's claim under the deductible of its policy during the term of the alleged lease. Echo Belle, Inc.'s payment of that claim indicates that the parties understood Echo Belle, Inc., to be the party ultimately responsible for risks of the operation other than the risk that proceeds would not cover trip expenses for a given trip.

Mr. Smee contends that he was liable for illegal actions committed on the F/V ECHO BELLE during the term of the alleged lease, and accordingly had greater exposure than a hired skipper. He argues that, because he was held criminally responsible for illegal equipment (allegedly) used on a different vessel owned by the same owners as the F/V ECHO BELLE and operated under the same arrangement, and that because the owners did not reimburse him for the fine he paid in that regard, this indicates he would have similarly been liable for violations on the F/V ECHO BELLE.

I find this line of argument wholly irrelevant to determining the parties' relative risks. If there were no unlawful acts committed under Mr. Smee's direction, he would have no risk of such liability. Moreover, it would be reasonable for an owner not to take on liability for serious unlawful acts committed under a skipper's direction without the owner's knowledge, particularly when the skipper, not the owner, is charged by the authorities in question. I find it equally irrelevant that Echo Belle, Inc., chose to pay a minor fine incurred by a different skipper for a different type of violation.

I find Echo Belle, Inc.'s liability risk under the terms of their arrangement to be significantly greater than that of Mr. Smee. The parties held out Echo Belle, Inc., as the entity liable for mishaps that may have occurred (and did occur) during the periods at issue.

e. Vessel refurbishment

Mr. Smee and the crew spent many days and weeks of their personal labor in the repair and refurbishing of the F/V ECHO BELLE, including construction of gear, particularly immediately before and after the vessel's first halibut run. Echo Belle, Inc., paid the costs, including the labor costs of workers hired off the dock to work on the initial gear. Mr. Smee made numerous purchases for the vessel that were later reimbursed. Mr. Morgan testified without contradiction that it is common for hired skippers and crew to spend time working on vessels and gear when the vessel is not fishing. Typically, the hope is to do these in winter layovers, not during fishing seasons.

I find that, although the amount of labor and effort expended on the vessel may have far exceeded the norm, this was attributable to the poor condition of the vessel and the fact that it was not equipped for fishing. Mr. Smee and the crew worked on the vessel as hard as they did in the hopes of their efforts being paid off in the subsequent fishing runs. As it turned out, their first run was successful beyond their wildest dreams.

During the outfitting and repair periods, Mr. Smee acted, in essence, as an agent of the corporation. He was authorized to make purchases for the vessel and was then reimbursed. When the vessel was laid up in Seward for repairs after its initial voyage, Mr. Smee acted as the project manager for the repairs. He had control over the layout of the boat. During the years at issue, the vessel was geared to fish halibut, sablefish, and crab. It would seem unusual for a vessel owner to give a lessee carte blanche discretion to gear up a vessel for various fisheries if the owner is footing the bills. It would not seem unusual, however, for a vessel owner to give such authority to a trusted agent or project manager.

The division of responsibilities with respect to the refurbishing of the vessel highlights the fact that the essential contribution of Mr. Smee to the venture was his labor.[22] This contribution should not be minimized. Had Mr. Smee not brought to the venture his experience and his days and nights of toil, what return could have been expected from a vessel in a terrible condition with a green crew? Unfortunately, the IFQ program does not take into account these labors in the initial allocation of QS. Instead, the program provides initial allocations of QS only to owners or lessees. The regulations initially allocate QS only to owners and lessees because, in the Council's view, they are the entities that have made *capital* contributions to the industry. The Council chose not to allocate QS to others who contributed their labors and even risked their lives, but who did not own or lease a vessel during the appropriate years. *See* Alliance, 84 F.3d at 344, 348-49; Kristovich, at 5-6, and authorities cited therein. Hence, our decisions have focused on whether an alleged lessee has acted as an "entrepreneur." O'Rourke, at 17.

7. Did the claimed lease have a set or guaranteed term?

Case law authority has characterized lay/share fishing arrangements as either bareboat charters or owner/hired skipper relationships. The pivotal issue is whether the vessel owner has completely and exclusively relinquished possession, command, and navigation of the vessel. *See* Guzman v. Pichirilo, 369 U.S. 698, 699 (1962). While a lease, for the purposes of the IFQ program, need not rise to the level of a bareboat charter, cases distinguishing bareboat charters, or demises, from other arrangements

[22]The fact that Mr. Smee was obligated to provide his labor to the enterprise is further fortified by his and his wife's admissions that he could not, under the terms of the arrangement, have permitted another individual to captain the vessel.

are helpful in determining the existence of a lease. Kristovich, at 10.

Because of its factual similarities to the instant case, the analysis of Bishop v. United States, 476 F.2d 977 (5th Cir. 1973), *cert. denied* 414 U.S. 911 (1973), is helpful, although that case involved alleged "bareboat charters," not IFQ leases. In that case, as here, there were many factors that could make the lay/share arrangements at issue appear similar to vessel leases. However, as here, the agreements had no guaranteed or set duration. The Fifth Circuit found that the agreements were not bareboat charters.

The Fifth Circuit in Bishop adopted the findings of fact made by the District Court, 334 F. Supp. 415 (S.D. Texas 1971), including: The captains selected crew, operated the boats, conducted fishing operations and supervised deck hands. 334 F. Supp. at 421. The owners received 60%, and the captains and crew divided the remaining 40% of the proceeds. *Id*., at 422. The captains separately agreed with the crew how much they were to be paid. *Id.* The captains purchased food, fuel and ice, which were paid for out of the crew's share. *Id.,* at 416. The captains had no guaranteed compensation, as their compensation was based on a percentage of the catch. *Id*., at 423. "The unpaid expenses were considered a personal obligation of the captain." *Id.* The captains "owned" and were "in possession of the catch" put aboard the boat. *Id*., at 422. The captains decided when to depart, when to return, where to fish, how to fish, and "all other matters concerning the operation, maintenance, and fishing of the boat . . . " *Id*., at 422. Although the catch was to be delivered to a certain purchaser when in that area, the price was uniform, and the unloading was always done to obtain the highest price. *Id*. The captains were responsible for maintenance of the vessels in port, either using existing crew or hiring other labor. *Id*. Contact with the owners was infrequent. *Id.*

> In the captains' discretion, settlements between the [owners] and captains were made at the fish house in the particular port whereby the captains and crews received their agreed share and the balance was forwarded to the [owners] . . . . On other occasions the captains would cause the entire amount from the sale of the catch to be sent to the [owners] by the fish house who purchased the shrimp, and settlement would be deferred until the captain chose to make it.

Id., at 424. The arrangements were oral, and had no specified duration. *Id*., at 421.

The District Court in Bishop found that the arrangements described above qualified as demise charters, and that the owners accordingly were not the employers of the crew. 334 F. Supp. at 420. The Fifth Circuit reversed, finding that the arrangements were not demise charters. The Fifth Circuit put considerable weight on the fact that the arrangements could have terminated at any time. 476 F.2d at 979; *see also* Deal v. A. P. Bell Fish Co., 675 F.2d 438 (1982) .

A finding that an agreement does not have a guaranteed term may not always be fatal to finding that

there was a demise charter. Mr. Smee has cited two authorities, United States v. Shea, 152 U.S. 178 (1894) and Carolina Seafoods, Inc. v. United States, 581 F.2d 1098 (4th Cir. 1978), in which the courts found "demises" or "bareboat charters" could exist even if the arrangement were terminable at the will of the lessor. In Shea, the vessel owner was to provide vessels to the government "whenever called upon, during a specified year" as needed to replace other vessels. In Carolina Seafoods, the parties uniformly characterized as a "lease" an arrangement under which an oyster "bateau" was provided to an oysterman who delivered oysters to the oyster house. The dissent in Carolina Seafoods would have followed Bishop and found that there was no bareboat charter of the bateaux.

Taking into account all these authorities relating to bareboat charters, it is appropriate to find that, while the absence of a guaranteed term will not always be fatal to a claim of an oral lease for the purposes of the IFQ program, the question of whether the arrangement has a set term of duration is very helpful in resolving whether a lay/share arrangement is a lease.

There was no set or guaranteed term for the arrangement between Echo Belle, Inc., and Mr. Smee. Either party could have terminated the arrangement at will.[23] Mr. Smee testified in his original affidavit that the alleged lease began at the time of the purchase of the F/V ECHO BELLE and extended through the end of 1989, and also that he leased the vessel during the first few months of 1990 to fish for tanner crab. [Exhibit S-3, at 1] However, he later testified that the term of the arrangement did not encompass the times that the vessel was chartered to tender salmon.[24] He testified at the hearing that under his arrangement with Echo Belle, Inc., he "stepped back and let the boat do its tender thing." Usually another individual was captain of the vessel when it was used to tender salmon.

Mr. Smee testified that he "anticipated" fishing an entire season, but made no commitment to do so. In fact, he terminated the arrangement unilaterally shortly into the 1990 season, due to medical issues.

In contrast to his arrangement with Echo Belle, Inc., Mr. Smee's written "lease" and "charter" arrangements with others each had set terms. [Exhibits S-25 (various written agreements titled "Boat Lease Agreement" that designate time periods either by specifying dates, by specifying the fishing

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[23]Presumably, Echo Belle, Inc., could not interrupt a given fishing run after Mr. Smee had invested in the trip expenses and commenced the run. Any owner's actions in depriving a captain and crew of their investment of labor and trip expenses would seem to be inconsistent with fair play in a lay/share arrangement, regardless of whether the parties had specifically negotiated this point.

[24]Mr. Smee was the individual who negotiated the salmon tendering charter. However, he expressly did this as one of the owners of the Echo Belle, Inc., and not within the scope of his alleged lease. The charter had the effect of interfering with possessory interests Mr. Smee would have as a lessor.

season for the fishery covered by the lease, or in one case by specifying "month-to-month."); *see also* S-27 ("Three-Year Charter Agreement" for salmon tendering)].

Summary of evidence

The basic provisions of the lay/share arrangement under which Mr. Smee operated the F/V ECHO BELLE had some characteristics more typical of an owner/lessee relationship and some characteristics more typical of an owner/hired skipper relationship. The following facts are of particular interest: (1) Mr. Smee received a set 55%, and could maximize his profits by reducing the shares received by the crew; (2) Mr. Smee and his wife handled the bookkeeping and crew payments, and (3) the funds were channeled through Mr. Smee's bank account and payments to the crew were reported under his EIN. All of these features are atypical of an owner/hired skipper relationship, and they support Mr. Smee's characterization. On the other hand, (1) Mr. Smee bore no greater share of entrepreneurial risk than the typical hired skipper responsible only for trip expenses; (2) Echo Belle, Inc., continued to provide gear throughout the relevant periods; (3) Echo Belle was liable for injuries occurring during the term of the alleged lease and purchased P&I insurance; and, most significantly, (4) the arrangement had no set term. All of these features are atypical of a lease, and they support Echo Belle, Inc.'s characterization of the relationship.

After a careful review of all the evidence, I find that the preponderance of the evidence supports Echo Belle, Inc.'s characterization of the relationship as not being a lease.

FINDING OF FACT

I find, by a preponderance of the evidence, that the Appellant did not hold a lease of the F/V ECHO BELLE during 1987, 1988, or 1989.

CONCLUSION OF LAW

The qualifying pounds of halibut and sablefish landed from the F/V ECHO BELLE during the period May 28, 1987, through December 31, 1989, should be awarded to the Respondent.

DISPOSITION

The RAM Division's Initial Administrative Determination awarding the qualifying pounds at issue to Echo Belle, Inc., is hereby AFFIRMED. This decision takes effect on September 3, 1996, unless by

that date the Regional Director orders review of the decision. Any party, including the Division, may submit a Motion for Reconsideration, but it must be received at this office not later than 10 days after the date of this decision, August 12, 1996.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1996 fishing season, we recommend that the Regional Director expedite review of this decision and, if there is no substantial disagreement with it, promptly affirm the decision and thereby give it an immediate effective date.

Rebekah R. Ross
Appeals Officer

Edward H. Hein
Chief Appeals Officer