NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0105
	)	
BENJAMIN L. HARPER,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
TED H. WEST,	)	
Respondent	)	July 17, 1997
_____	)	

STATEMENT OF THE CASE

This is an appeal from the April 12, 1995 Initial Administrative Decision [IAD] of the Restricted Access Management [RAM] Division of the National Marine Fisheries Service, Alaska Region [NMFS]. The IAD resolved the conflicting claims of Dr. Benjamin L. Harper, as successor-in-interest to the now-dissolved Buttercod Fisheries, Inc. [BFI], and Ted H. West to Quota Shares [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program contained in 50 CFR § 679.[1]

At issue was whether Mr. West leased the F/V ALASKA STAR from BFI during the period January 5, 1987 to February 20, 1988.[2] The IAD determined that Mr. West had held a lease of the vessel and, therefore, assigned to him 57,100 qualifying pounds of halibut and 1,196,825 qualifying pounds of sablefish, which had been landed from the vessel during the period in question.[3]

In accordance with 50 CFR § 679.43(d) [formerly § 676.25(d)], Dr. Harper timely filed this appeal on June 9, 1995, seeking an oral hearing and reversal of the IAD. The acting Chief Appeals Officer,

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[1]Formerly 50 C.F.R. Part 676, which was renumbered as Part 679, effective July 1, 1996. *See*, 61 Fed. Reg. 31,270 (1996). The wording of the renumbered regulations cited in this decision was unchanged by the renumbering.

[2]The IAD specified the claimed lease period as January 15, 1987, through February 5, 1988. Mr. West's Request for Application (Form D) shows the claimed lease dates as January 5, 1987 through February 22, 1988, which he noted as the date the vessel sank. In the appeal, however, the date of the vessel's sinking was given as February 20, 1988. [West I, at 16].

[3]A review of the Official NMFS IFQ Record shows that all 57,100 pounds of halibut were landed in 1987, and no halibut was landed from the vessel during any of the qualifying years (1988-1990). Neither party claims to have owned or leased any other vessels during the qualifying years. Therefore, neither party can be a qualified person for halibut QS. [*See*, 50 C.F.R. § 679.40(a)(2).] Thus, this appeal involves only the sablefish qualifying pounds at issue in the IAD.

Robin Tuttle, then joined Mr. West as Respondent and assigned the appeal to this Appeals Officer (AO) for further proceedings. Dr. Harper and Mr. West are both represented by counsel.

AO Procedural Order No. 1 granted a written hearing to resolve the lease issues *de novo*, with each side presenting simultaneous opening, opposition, and (at both parties' election) reply cases.[4] Each case consisted of the party's affidavits, exhibits sponsored by the affidavits, integrating memorandum with points of law, and argument appropriate to the filing stage. The evidentiary record and memoranda are extensive.[5]

ISSUES

The ultimate issue on appeal is whether Mr. West held a lease of the F/V ALASKA STAR during the time in question and with respect to the landings in dispute. The subsidiary issues are: whether the parties' written "Operating Agreement" constitutes conclusive evidence of a vessel lease for IFQ program purposes and, if not, whether the Operating Agreement and other evidence establish that Mr. West held a vessel lease for IFQ program purposes.

SUMMARY

Dr. Harper, successor-in-interest to BFI (owner of the F/V ALASKA STAR) appealed the Division's determination that Mr. West had held a lease of the vessel and the Division's allocation of qualifying pounds to Mr. West. The Appeals Officer concluded that the written Operating Agreement between the parties did not constitute conclusive evidence of a vessel lease, and that Mr. West did not hold a

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[4]The Order also reserved future oral hearing as a possibility in the event the written materials revealed a material factual issue whose resolution might benefit from oral hearing presentation. Further hearing is not required for disposition.

[5]In this Decision, each party's case will bear its appropriate prefix, e.g., H Opening at 2 or W Reply at 10 will, respectively, signal Dr. Harper's opening case memorandum, page 2, or Mr. West's reply case memorandum, page 10. Several witnesses submitted more than one affidavit and in such cases, a suffix number will distinguish between them, e.g., Harper II or West III, will, respectively, signal Dr. Harper's second affidavit (submitted with his opposition case) or Mr. West's third affidavit (submitted with his reply case). Unless otherwise indicated, affidavit number references, e.g., West II at 3, are to the particular affidavit's page number and not paragraph number. Mr. West's documentary evidence was conventionally presented as lettered or numbered exhibits to his filings' affidavits. Dr. Harper's documentary evidence for his filings' affidavits was separately numbered HR 0001 - HR 3370 in his opening case (tabbed by subject matter dividers, with a separate opening case Appendix A providing the tabs' subjects, a narrative description of each document, statement of its putative relevancy, and opening memorandum page reference) and HR 3432 - HR 3853 in his opposition case. Documentary references in this Decision will use the parties' exhibit numbering, as described.

lease of the vessel during the period of time in question. The Appeals Officer vacated the IAD and ordered the Division to reallocate the qualifying pounds of sablefish to Dr. Harper.

BACKGROUND

From the material submitted, the following are the background facts:

A. Parties and initial contacts

Mr. West:
In 1976, following a two-year exposure to the Prince William Sound shrimping and salmon fisheries, Mr. West decided to pursue a fisheries career beginning with work for a fishing concern in Virginia. In 1977 he was promoted to Plant Manager and in 1978 to General Manager, at which time he returned to set up an Alaskan operation for the concern. This included, in Kodiak, the construction and establishment of a processing plant with refrigeration for salmon and bottomfish. Between 1980 and 1982 Mr. West worked with various processors, including several floating processors. From 1983 until 1986 Mr. West was employed by Alaska Fisheries Co. to "develop and manage" a floating processor, the Alaskan I, as well as to diversify its operation to include bottomfish. Under his management, all this was accomplished, including expansion into sablefish and halibut. Mr. West continued with Alaska Fisheries until 1986. [West I, at 1-2.]

Dr. Harper:
Dr. Harper is a physician in Orange, California, who has "operated numerous ventures, including closely held and publicly traded corporations." [Harper I, at 5.] Dr. Harper used the services of Timothy R. Busch (Busch) of Irvine, California, to advise and represent him with respect to these business ventures. [Harper I, at 3.]

Initial contacts:
Mr. West first met Dr. Harper in 1986 while visiting Southern California with his wife. Dr. Harper was a friend of Mrs. West's family, as well as her former physician. [West I, at 3; Harper I, at 2.] Dr. Harper was subsequently a house guest of the Wests in Anchorage, Alaska during October 1986. [Harper I, at 3.] During this visit, Dr. Harper asked Mr. West at one point, "What would you do if you had your own fisheries operation?" [West I, at 4.] Mr. West responded that he would purchase a particular used vessel he knew of, the F/V ALASKA STAR, to work the sablefish fishery. [*Id.*]

Mr. West "around 1986" had become aware of the potential of an American catcher-processor vessel, none of which were then in operation. There had been at one time 22 such Japanese vessels working the fishery, but they were being phased out as foreign fishing was eliminated in Alaska waters. Mr. West was further aware of the opportunity to purchase a 150-foot vessel, the F/V ALASKA STAR, which had been confiscated by U.S. Customs for fishing in closed waters. Until 1975, the vessel had

been operated as a longliner catcher-processor, but had since been re-fitted as a salmon and herring processor. It was Mr. West's plan to acquire this vessel and have it re-fitted and restored to its original function. [*Id.*, at 2-3.]

Dr. Harper, according to Mr. West, "was enthusiastic about my ideas...[and] expressed confidence in me and my experience and knowledge of the fishery." [*Id.*, at 4.] Dr. Harper asked what the cost would be of such a venture, to which Mr. West responded at least $1 million. Dr. Harper stated he had such funds available and, if the project looked feasible "he [Dr. Harper] would advance the funds to support my efforts." [*Id.*]

B. Preliminary documents

Mr. West and Dr. Harper proceeded quickly after their early-October visit to become an operational enterprise for 1987. There are five documents referenced by the parties from the pre-operational or preliminary phase:

- Letter from Mr. West to Dr. Harper, October 15, 1986 [West I, Exhibit E]
- Letter from Mr. West to Dr. Harper, November 4, 1986 [West I, Exhibit F]
- Mr. West's hand-written notes, undated [West II, Exhibit 2]
- Memorandum from Mr. Busch to Dr. Harper, November 19, 1986 [HR 0768-0773]
- Letter from Mr. Busch to Dr. Harper, December 4, 1986 [HR 3284-3288]

Letters from Mr. West

Mr. West transmitted two letters to Dr. Harper during the preliminary stage: one dated October 15, 1986 and the other November 4, 1986. [West I, at 5, respectively, Exhibits E and F.] The October 15 letter includes several references to an inspection report of the F/V ALASKA STAR by "my Engineer," a person from the Alaskan I (the floating processor Mr. West was hired to manage during the 1983-1986 period), and further states:

> Dr. Harper, should you feel that you or your bank or financial institution would be interested in loaning me or taking part, in some negotiated way, in a fisheries venture using the value of the vessel as collateral, I would dedicate myself to the success of the business involving the asset of the F/V "Alaska Star."

The November 4 letter references a conversation the preceding week with Dr. Harper that seems clearly to have been an encouragement for Mr. West to intensify efforts at confirming projected costs and revenues, i.e., feasibility, and securing institutional financial participation in the project. Mr. West writes that with the help of "my engineer" and "my production manager" he will complete pro forma projections of the "project's potential." With respect to financing, Mr. West reported that if the Commercial Fishing & Agriculture Bank (CFAB) liked "the program" it might provide debt and equity

participation (the latter depending on guarantor strength), so long as 51 percent of the stock was owned by an Alaska resident which "could be accomplished thru a secondary arrangement between you and me." [*Id.*, at 1-2.]

In the letter Mr. West stated that he had also enclosed that year's annual report to the owner of the Alaskan I (including an operations summary for the preceding year (1986-1987), projections for next year, and the maintenance and capital analysis for the next year) as examples of the detailed annual reports he was making for that vessel and would make for the F/V ALASKA STAR's pro forma analysis. Mr. West further stated that after his pro forma analysis is complete, he should begin work on a number of matters including "[w]ork on a structure for a corporation," embracing tax issues, pension program, and complete insurance analyses for the corporation. [*Id.*, at 2.] Mr. West concludes this letter with the statement that he "will be anxious to hear your [Dr. Harper's] comments and direction" with respect to "this report." [*Id.*, at 3.]

Mr. West's notes

Mr. West in his opposition filing also produced a third document from the preliminary stage [West II, Exhibit 2], described as follows:

> Attached hereto as Exhibit "2" are two pages of my handwritten notes prepared during the course of my discussions with Dr. Harper. On the first page, on the left side, I listed estimates of my expenses as the "Operator Entity", which would receive "55% ". On the right side I wrote "45% ÿ of Stock goes to Vessell [sic] Lease". On the second page, I also referred to "lease Fm 45% of Gross Return—" [West II, at 3.]

The above notes are undated, rough, and not entirely legible. [West Opposition, at 17, confirms "poor copy".] They are scratch-pad calculations of particular costs that might be charged against the 55 percent [on page 1 under the heading Operator Entity"] and 45 percent [on page 2] revenue shares to produce a possible net income for each revenue share. There is no suggestion the notes were transmitted to Dr. Harper or Mr. Busch. The notes including particularly use of the words "lease" are accepted as Mr. West's authentic recordings of his contemporaneous thoughts made at some point during the preliminary stage.

Mr. Busch's memorandum

Dr. Harper states that "[a]fter making an initial determination to start a fishing company, I then contacted Mr. Busch, who has been my financial advisor, and asked him to apprise me on how best to structure this proposed business venture." [Harper I, at 3.] Mr. Busch then sent two documents to Dr. Harper: a six-page memorandum dated November 19, 1986 [HR 0768-0773] and a six-page letter dated December 4, 1986. [HR 3284-3288] Mr. West indicated he was familiar with these documents. [West I, at 11; West II, at 4.] In fact, he submitted copies of them as exhibits. [West I, Exhibit J; West II, Exhibit 3.]

The stated purpose of the memorandum "is to discuss the capital structure and compensation benefits, which would be created for Alaskan Star Corporation, an Alaska corporation, which owns and operates the commercial fishing boat 'Star.'" [*Id.*, at 1.] In section A, "Capital Structure," Mr. Busch recommended that the "company" be incorporated in Alaska; that stock be owned by the Harper Living Trust for both estate planning and liability purposes; and that it qualify for S Corporation status under Federal tax laws. ("The S Corporation would both own and operate the fishing boat.") [*Id.*, at 1-3.]

Section B, "Compensation and Future Participation," provides the following introduction, in part: "You have advised me Ted West, the Captain who will be operating the ship, and in turn business, will be an integral part to the operating company. You have requested I deliver to you recommendations for compensation, bonus participation, and equity ownership in the operating company, at some time in the future....I recommend a tripartite compensation and benefit program as follows." [*Id.*, at 3.]

Under the heading "Base Salary," Mr. Busch recommended that the parties set a "base salary" for Mr. West appropriate to a start-up business and which "will take care of West's day-to-day living needs." He stated that the base salary should "provide some flexibility and room for expanding his [Mr. West's] compensation through profit participation as a bonus and/or stock participation." Mr. Busch recommended that the compensation be set "at around 75% of the base salary he may receive in an operation whereby he may not participate in profits or stock ownership." [*Id.*]

Under "Profit Sharing," Mr. Busch recommended that: "A bonus system should be developed based on a budget of income and expenses, developed by Mr. West and approved by you, under which he will participate in the bottom line profit.... to the extent of some preagreed amount," after payment of "budgeted expenses and debt service, as well as...a fair return on your money...[recognizing] this must be limited because of the need for continued reinvestment of capital in an expanding business." [*Id.*, at 4.]

Under the heading "Stock Ownership," Mr. Busch recommended development of a four-year program under which Mr. West, from the end of the second year to end of the fourth year, could acquire up to 15 percent of the operating business (5 percent at a pre-determined amount and 10 percent at fair market value). [*Id.*, at 4-5.]

Mr. Busch's letter

In the December 4 letter Mr. Busch discussed preparation of an Operating Agreement:

> I have had a conversation with Steve Drugge, C.P.A. in Seattle, Washington regarding standard operating agreements. He was forwarding to me two samples of standard operating agreements he has. He made the following comments:

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3. He has never heard of an administration component participating in a percentage of the catch. They are normally just paid a salary and fixed fee. [*Id.*, at 5.][6]

Mr. Busch concludes:

I spoke to Ted West since I started this dictation and he said he would be open to any proposals. I informed him we had no problem going with industry standard on the crew and he informed me that in this case the crew was actually going to be the same for fishing and processing and they were going to basically switch turns which may alleviate one of our issues. I told him that we would love to involve him in a percentage but we didn't know exactly what percentage that would be and we definitely wanted a minimum return on our investment. He said he would be open to anything and would be ready, willing and able to review any proposals. [*Id.*, at 5-6.]

Mr. Busch's associate Terry Carlton notes, in a December 15, 1986 file memorandum [HR 3290-3291], that "I spoke to Steve Drugge regarding the operating agreements that he was to send for our review. Mr. Drugge has informed me that he had forgotten about this request and will place such in the mail today." I consider the two-page memorandum to be a business record.

Mr. Carlton also wrote that Dr. Harper asked the firm to contact Mr. West "with the proposal that the operating agreement be structured subject to the following terms:

(1) The agreement may be terminated and/or renewed on an annual basis.

(2) Ted West will receive 50% of the gross revenues for the operation with the other 50% going to Dr. Harper.

(3) West will be responsible for all expenses except major repairs.

(4) West will be responsible for such things as Workman's Compensation and the groceries for the crew, etc. [HR 3290]

Mr. Carlton continued:

I was able to speak to Ted West today to discuss some of the terms of the operating

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[6] Mr. Drugge, whose firm was knowledgeable in maritime matters and became BFI's accountant, was selected by Mr. West subject to Dr. Harper's approval. [West II, at 5.]

agreement which will exist between himself and Dr. Harper. Mr. West went into a complicated explanation of "industry standards" and said basically such is not in existence as there are only four or five operations similar to the one he is about to embark on. Mr. West has informed me that he is very open to negotiations with Dr. Harper on this matter.

Mr. West has promised that he will be sending to our office some breakdowns regarding what some of the other fishing vessels operate under. Basically it will be some type of budget which allocates approximately 8% of the gross revenues to the Captain and Engineer, 10% of the gross revenues to administration and the remaining 82% to be divided 64% to the crew and 36% to the vessel itself." [HR 3290-3291]

C. Organizational events and documents

Buttercod Fisheries incorporation and vessel purchase:
The parties incorporated BFI as an Alaska corporation on December 17, 1986, "[t]o engage in the business of commercial fishing or any other lawful purpose for which a corporation may be organized according to the laws of the State of Alaska." The registered agent was Mr. West; the sole incorporator was Mr. Busch; and the sole director was Dr. Harper. [HR 3193-3198]

Dr. Harper, as trustee for his family trust, purchased the F/V ALASKA STAR on December 24, 1986, pursuant to a Unanimous Consent Resolution by himself as director. [HR 3235] Dr. Harper paid $295,000 to purchase the vessel, and another $34,000 for repairs. Title to the vessel was vested in BFI. [HR 0736, 0745] In conjunction with the vessel purchase, Mr. West, as BFI's President, executed a preferred vessel mortgage and a secured promissory note to Dr. Harper in the amount of $350,000. [HR 0719-0727] Three months later, in March 1987, Mr. West (as BFI President) signed a second mortgage and promissory note to Dr. Harper in the amount of $500,000. [*See generally,* HR 0717-0753]

Initial corporate elections, actions and by-laws:
The first Directors and Shareholders meetings were held in Irvine, California, on January 5, 1987, and was attended by Dr. Harper, Mr. West, and Mr. Busch. Mr. West was elected President and Dr. Harper was elected Secretary and Treasurer. Initial equity capitalization was $10,000, the corporation office was established in Anchorage, S Corporation tax status was elected, a corporate bank account was established with Mr. West or Dr. Harper as authorized signatories, and corporate By-laws were adopted. [HR 3222-3229]

By-Law Article IV , Officers, Section 3, Removal, provides, in part:

> Any Officer or agent elected or appointed by the Board of Directors may be removed

> by the Board of Directors whenever in its judgment the best interests of the corporation would be served thereby . . .. [HR 3208]

Section 6, President, provides, in part:

> The President shall be the principal executive officer of the corporation and, subject to the control of the Board of Directors, shall in general supervise and control all of the business and affairs of the corporation. He shall have authority . . . to appoint such agents and employees of the corporation as he shall deem necessary . . .. He shall have authority to sign, execute and acknowledge . . . documents or instruments necessary or proper to be executed in the course of the corporation's regular business . . .. In general, he shall perform all duties incident to the office of President and such other duties as may be prescribed by the Board of Directors from time to time. [HR 3208-3209]

By-law Article VII, Indemnification, provides, in part:

> The corporation shall indemnify any...officer...against reasonable expenses, including attorney's fees, actually and necessarily incurred by him in connection with the defense of any civil, criminal or administrative action . . . within the course of his duties or employment, . . . except in relation to matters as to which he shall be adjudged . . . liable for negligence or misconduct in the performance of his duties. [HR 3214]

The Board at this January 5, 1987 meeting [HR 3230] then authorized a salary to Mr. West:

> WHEREAS, through the experience acquired by each of its officers in the business function of this corporation and through outside education and experience in the business world, this Board of Directors agrees that its corporate officers are deserving the following salaries to be paid to them in the upcoming year:
>
> President TED WEST $42,000.00

Also at this meeting the Board passed a resolution authorizing BFI to "make available to President TED WEST, a line of credit not to exceed $300,000.00, to be advanced to President TED WEST, as the cash flow of the corporation allows, to be repaid by President TED WEST, with interest at the rate of 12% per annum, and due December 31, 1987." It was further resolved, "that President TED WEST shall execute the Promissory Note Line of Credit attached hereto to evidence the above line of credit." [HR 3229]

The actual Promissory Note Line of Credit (Promissory Note) referred to in the minutes of the January

5, 1987 board meeting recites a December 23, 1986 execution date and provides for the interest rate and maturity date specified in the minutes. [HR 3236-37] The Promissory Note refers to BFI as Owner and Mr. West as Operator, and provides in ¶ 3 that this Promissory Note "is intended to be satisfied from receipts maintained in a 'Trust Account', under Section 3.3 of a certain Operating Agreement of even date herewith, by and between OWNER and OPERATOR." The Promissory Note states further in ¶ 4 that, "The parties acknowledge the title to such proceeds and accounts receivable generated by the commercial fishing operation is vested in the OWNER and shall be used on behalf of the OPERATOR in the OPERATOR'S share as calculated under Section 5.0 of said Operating Agreement, shall be utilized to pay the principal and any accrued and unpaid interest on this Promissory Note."

But while ¶ 3 states the Promissory Note is to be satisfied from "Trust Account" receipts, ¶ 5 states: "The OPERATOR shall be personally liable for the repayment of any principal and accrued and unpaid interest, to the extent the OPERATOR'S allocable share under Section 5.0 is not adequate to amortize the principal and accrued and unpaid interest." The Promissory Note then provides that "[a]ll loans or advances . . . should be charged to a 'Loan Account', in OPERATOR'S name, on the OWNER'S books," with debits and credits to be made for advances and repayments as they might occur. Interest was to accrue monthly. A "statement of account" by Owner "shall" be rendered from time to time to operator and be deemed binding on Operator unless objected to within ten days. [HR 3236-3237]

Operating Agreement:

The Operating Agreement [West I, Exhibit G] referred to in the Promissory Note was recited as executed on the "even date" of December 23, 1986, but bears the January 5, 1987 effective date of the Board and Shareholder meetings, although this was not reflected in any separate resolution. The Operating Agreement's relevant features are summarized as follows:

> (1) Terminology. BFI is referred to as "Owner" and Mr. West as "Operator." Mr. West is also referred to occasionally as "General Manager," with one section describing Operator's activities entitled "Management Services" and certain movements of monies to Mr. West and "his principals" referred to as "base salary" or "base fees."
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> (2) Possession. Mr. West "will take possession of the Star and operate [it] as a commercial fishing vessel."
>
> (3) Payment of Expenses. Mr. West is to "pay operating and administrative expenses" of the vessel.
>
> (4) Reporting. Mr. West is to provide BFI with various periodic financial reports and obtain prior BFI approval for certain expenses and levels of expenses.

(5) Working Capital. BFI is to provide working capital for the enterprise including payment of the base fees or salary.

(6) Promissory Note. Mr. West is to execute a $300,000 promissory note line of credit to BFI for working capital advances.

(7) Division of Gross Revenues and Net Profits. BFI and Mr. West are to share gross revenues 45 percent and 55 percent, respectively. Mr. West is entitled to the net profit between his 55 percent and operating expenses of the fishing season. BFI is entitled to the net profit between its 45 percent share and vessel ownership expenses. Any West deficit is carried forward to future years.

(8) Term. The Agreement sets a one-year term, but specifies that OWNER may terminate OPERATOR without cause on 30 days' notice.

(9) Future Relations. The parties will consider after the first year a "Joint Venture or merger of their operations" that through "selling shares in the OWNER" or otherwise "would vest equity interest to the OPERATOR in the operating vessel."

D. Operation

Initial working relationship of the parties. BFI had what both parties agree was a strong first year of operation, with the enterprise employing approximately 50 people as crew or office staff during the year. [Harper I, at 12.] Mr. West truly distinguished himself as more than a merely competent operations manager. He proved enterprising, resourceful and extremely adept in providing a high-quality product to a demanding Japanese clientele.[7] In all respects Mr. West's initial vision of the potential for an American catcher-processor operation appears to have been vindicated.

It also seems clear that Dr. Harper and Mr. Busch lost any apprehensions they may have had about allowing Mr. West wide-ranging discretion in conducting the enterprise. A $5,000 joint signature requirement was quickly lifted and the Trust Account was never established, with the business using a conventional corporate business account instead. [Busch, at 11-12. *See also,* HR 3292-3296, letter from Mr. Busch to Mr. West complimenting the latter: "I continue to be impressed with your detail in managing both the accounting and operational aspects of Buttercod fisheries."]

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[7] The sample correspondence file provided in West I, at 14, Exhibit S, is a fascinating glimpse of the fisheries business conducted at a sophisticated level. In the process Mr. West even achieved recognition as a model of the Alaskan fishing entrepreneur to the extent of being featured for his activities in the Japanese marketplace in a video prepared by the University of Alaska Center for International Business. [West I, at 9-10, Exhibit I.]

Mr. West flew to Japan for various negotiations and market explorations; hired and fired personnel, including the captain; and directed complete operations and marketing efforts -- all on his own initiative. There does not appear to have been any instance in which Dr. Harper or Mr. Busch sought to preclude any activity by West.[8]

Funding and control of expenses. Dr. Harper did not provide working capital directly. Rather, a line of credit for BFI was established at Key Bank (originally Alaska Pacific Bank) for $200,000 initially. The line of credit was personally guaranteed by Dr. Harper, who submitted his financial statements and was also required to purchase and keep on deposit a $100,000 Certificate of Deposit. Both the CD and a $200,000 vessel mortgage from BFI (junior to BFI's mortgages to Dr. Harper) were pledged as security for the line of credit. The line of credit was extended several times, with Dr. Harper signing a new guarantee on each occasion (Dr. Harper's personal guarantee is, finally, for $400,000, although the line of credit appears not to have exceeded $325,000). [Harper I, at 11; HR 3244-3255.] There is some evidence that Mr. West was a personal guarantor on the original and enlarged line of credit from Key Bank, but there is no guarantee document signed by Mr. West in the record. [West I, at 13; West Exhibits P and Q.]

As to documenting Dr. Harper's control of expenses and reimbursements, Mr. Busch states:

> 32. Ted West was never required to pay any of his own funds to operate the vessel or run the business…. Since it was not always logistically possible to issue a purchase order before paying for goods purchased from a vender, West would often pay for items himself and seek reimbursement (making the purchase order out to Ted West, and not the vendors themselves). This is also a recommended tax practice as it provides a paper trail to keep the I.R.S. from asserting that such reimbursements are disguised salary payments. [Busch, at 13-14.]

Mr. West as BFI employee vs. lessee. Mr. West was treated as an employee in tax returns by BFI for all payments made to him in 1987 and 1988 (prior to his resignation). [*See,* HR 1207-1223, and HR 3806-3834 for BFI's Federal income tax returns reflecting the entire "commercial fishing"

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[8] Dr. Harper states: "During the 1987 operating season, we were in weekly communication regarding the operation of the company, each of us participating in the decisions which needed to be made....[and] Mr. West regularly reported to me the corporation's financial condition and operations." [Harper I, at 11.] Ms. Claudia Russell, BFI's bookkeeper, indicates she meticulously allocated expenses into Owner (vessel) and Operator (general) accounts, provided monthly reports to Dr. Harper's accountant, and occasionally answered questions and received assistance from the accountant (dealing with tax forms and general accounting practices), but received no directions from Dr. Harper. [Russell I, at ¶¶ 2, 7-8.]

operation as BFI's.][9] Mr. West's Federal income tax returns do not claim income or expenses of a lease operation and reflect only salary, wages, etc. income for himself and his wife (a BFI employee). [HR 3178-3192]

All correspondence by Mr. West appears to have been signed as BFI President using corporate letterhead. There does not appear to have been any instance of BFI's business dealings in which Mr. West held himself out as other than BFI's agent in some respect.

Mr. West signed and filed the November 16, 1987 Renewal Application for the F/V ALASKA STAR's NMFS Federal Fisheries Permit, but did not indicate himself or any other entity as a lessee of the vessel in the space provided for that entry (BFI was indicated as owner). Item 1 of the Application's instructions provided: "This permit covers all fishermen who operate or lease the vessel; the names of theses [sic] operators/lessee must be supplied." [HR 1365-1368][10]

BFI purchased "key man" insurance on Mr. West, with Mr. West in the application listing his "Occupation" as "President-General Manager" and "Principal Duties" as "Administrative-Executive." Mr. West signed the application as "President-General Manager" for BFI. [HR 0999-1003]

Revenues and losses. Under Mr. West's stewardship the enterprise in 1987 recorded approximately $1.83 million in gross revenues against 'Operator'-related operating expenses of approximately $1.55 million for "net operating income" of approximately $286,000, according to BFI's bookkeeper. [Russell II, at 4-5, Exhibit 11.] Vessel-related capital charges, such as depreciation and mortgage interest, and other 'Owner'-related expenses, such as vessel repairs, maintenance and upgrades, totaled approximately $445,000. This resulted in total expenses for the operation of approximately $2 million and a net loss before taxes of approximately $159,000, according to Ms. Russell. [*Id.*] BFI's 1987 Federal income tax return shows a $121,320 loss before taxes [HR 1207], which is reasonably consistent with Ms. Russell's figure for net loss, given various year-end accounting adjustments that would have occurred in Mr. Drugge's preparation of the return. Under both Ms. Russell's bookkeeping data and the tax return, these losses actually embodied a nearly $400,000 positive operational cash flow.[11]

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[9]*See generally,* Dr. Harper's opening case Appendix A for documentary materials evidencing BFI responsibility for federal and state tax and employment security matters relating to the fishing operation. [Appendix A, at 17-23, items 20-22, 26, and 28-48.]

[10]*See generally,* Dr. Harper's opening case Appendix A for documentary material evidencing various business licenses and permits, as well as an annual report and bond in BFI's name or the names of various individuals, but reimbursed by BFI. [Appendix A, at 16-19, items 15, 16, 19, 23-25 and 27.)

[11]Included in either Ms. Russell's pre-tax loss of approximately $159,000 or the tax return's net loss of approximately $121,000 was $408,000 in extraordinary repairs and maintenance, according to a

The vessel ceased fishing in October, 1987, at which time it was placed in dry-dock for repairs and maintenance as well as improvements for the next year's fishing:

> The fishing venture had generated substantial surplus revenue which was applied toward further refitting of the vessel, including substantial upgrades of safety features. I personally supervised this refit, just as I had supervised the previous refit. On January 14, 1988, marine surveyor Captain Wolstenhome appraised the vessel's value after the improvements at $2.5 million, an increase of $1.4 million over the initial valuation…. [West I, at 15; West Exhibit T.]

Mr. Busch states:

> 45. At the end of 1987, there was approximately $400,000 in net pre-tax profits remaining. Dr. Harper and I spoke about the money and what to do with it, and it was agreed that it was necessary to reinvest all of the proceeds generated during the first year into the vessel to upgrade it and expand the business. West also concurred that we should reinvest these proceeds into the vessel to generate an even large [sic] net profit for future years. [Busch, at 19.]

Mr. West's compensation. Under the profit-sharing arrangement, Mr. West's 55 percent of the $1.83 million in gross revenues (approximately $1.01 million) would have been inadequate to cover the $1.54 million in operating expenses under the Operating Agreement. In fact, Mr. West would have been in a deficit position of approximately $530,000 entering 1988 under the carry-forward facet of the profit-sharing arrangement.[12]

According to Dr. Harper:

> 44. Mr. West asked for and, after deliberation, I elected to pay him a bonus based

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later communication from Mr. Busch to Dr. Harper. [HR 0683] The 1987 tax return's loss also included a $92,000 depreciation allowance, while Ms. Russell's loss included approximately $73,000 in vessel depreciation expense and $42,000 in vessel interest expense (presumably to Dr. Harper). Thus, the positive cash flow for 1987 from normal operations and before depreciation and capital charges to Dr. Harper would have been approximately $384,00 under the tax return and $389,000 under Ms. Russell's figures.

[12]The 1987 tax return against the same $1.83 million in gross receipts records a "cost of goods sold" expense of $1.34 million alone that, together with compensation, wages, and rents of approximately $100,000 and a 50 percent share of the approximately $300,000 in "other expense" deductions from the return, reflects a similar $500,000 shortfall to Mr. West under the profit-sharing mechanism.

> upon my perception that he was working at making the business a success. I determined, after discussing the matter with Mr. Busch, that a 10% pre-tax bonus would be appropriate.
>
> 45. For the same reasons, I elected to increase his compensation the following year. I thought an employee who performs satisfactorily should be financially recognized. I still do. [Harper I, at 12.][13]

It is clear that the referenced discussions relating to new salary and bonus took place, as Mr. West was paid the $4,500 monthly salary beginning in January. [HR 3090] Both the salary (including commitment to annual review) and a $26,500 bonus were authorized at BFI's second annual Director's and Shareholders' meetings. [HR 3256-3272]

The second director's and shareholders' meetings. The February 8, 1988 annual Director's and Shareholders' meetings were preceded by Mr. West's year- end report for 1987 and the agenda for the February 8 Director's meeting. The report and agenda were accompanied by Mr. West's transmittal letter dated only "January 1988," which concludes:

> In regard to the operating agreement, if you are happy with how things have been operating and desire to continue in a similar manner, I have attempted to rewrite the

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[13]Mr. Busch states: "35… Ted West never received any payment under the Operating Agreement. Instead he received a bonus of $26,500…. The purpose of the bonus was to reward Ted West for his work in 1987, even though the Operating Agreement would have given him nothing (or very little).

37…[E]nforcement of the 1987 Operating Agreement would likely leave Mr. West in the "hole" to Dr. Harper. Since this was the first year of operations, and the Operating Agreement was merely a 'test' agreement to work with, it was, in effect, put aside (both retrospectively for 1987 and for the future 1988 and beyond)." [Busch, at 14-16.]

46….My recollection is that Ted West actually asked for a bonus of $30,000. We came up with a compromise figure between what Dr. Harper wanted and what Ted West requested. It was roughly ten percent (10%) of the pretax profits before the money was invested into the vessel….Essentially, we were conforming his 1987 income to a base salary plus ten percent (10%) of the pretax profits of the corporation.

47. Ted West requested an increase in salary to $49,500 (i.e., $4,500 per month [for] 9 months, and $3,000 for 3 months, instead of $4,5000 [sic] for 4 months and $3,000 for 6 months) because he had some living expenses which he needed to pay. Furthermore, this increase better reflected the fact that business was "active" for 9 months a year, instead of only 4 months a year. Mr. West was then to be paid a bonus of ten percent (10%) of the pre-tax profit at the end of each year pursuant to the 1988 Employment Agreement. [Busch, at 19-20.]

> operating agreement to reflect actual operation. I have also interjected my own hopes for salary level adjustment and stock acquisition since we initially discussed that after one year of operation we would re-evaluate everyones [sic] position and the option of operator participation in stock ownership. . . . My main interest is in the successful continuation of our program. It has been a pleasure to work with you, Dr. Harper, and I look forward to the continuing relationship. [West II, Exhibit 14; and HR 0023-0025] (emphasis supplied).[14]

The Stock Option Transfer Proposal [West II, Exhibit 15] was based on a January 25, 1988 memorandum from Mr. Drugge to Mr. West entitled "Thoughts on Stock Transfer from Dr. Harper to Current Management of Buttercod Fisheries, Inc. [*Id.*, Exhibit 13], and presented at the February 8 meeting. Mr. Drugge's memorandum and the actual proposal were identical in most respects, including as to the transfer's beneficial justification that it would provide "current management" with "reward and compensation" for the vessel's increase in value and BFI's operating good will, reason to remain with BFI and "strong incentive" to maximize BFI's profitability.

Among other matters discussed at the February 8 meeting was evaluation of BFI's hull and machinery insurance and P&I insurance. Mr. West recommended that insurance be raised to cover the vessel's new $2.5 million value, which was a $1.4 million increase over the earlier valuation. Because 20 percent of the initial $1.1 million had been self-insured by BFI (after the carrier for that portion was placed under a regulatory "cease and desist" order), the coverage totaled only $880,000 -- leaving a $1.6 million exposure. [West I, at 16-17; West II, at 23.]

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[14]Mr. West explained the "attempted rewrite" of the Operating Agreement: "The reference I made in the undated memorandum to may having 'attempted' to rewrite the operating agreement to reflect actual operation was a reference to my desire that the Operating Agreement more completely catalogue the functions I had been performing as Operator, including development of product markets, etc., and that it also reflect the contributions I was making on behalf of the vessel owner, which had substantially increased the value of the vessel. However, I did not prepare any such proposed revision prior to the February 8 meeting or the February 20 sinking of the vessel." [West II, at 20-21.] As earlier noted, Mr. Busch had also prepared a draft Exclusive Employment Agreement for 1988 [HR 3276-3280], which: (1) defined Mr. West as BFI's "President" and Chief Operating Officer; (2) had a one-year term, but is terminable on 30 days' notice; (3) specified Mr. West's duties as managing the vessel, etc.; (4) provided for the salary (with annual review) and 10 percent pre-tax bonus previously discussed for Mr. West; (5) expressly characterized the Agreement as an "Employer/Employee relationship;" (6) contained no promissory note from Mr. West; and (7) contained an integration or merger clause, which superseded and nullified all prior agreements and constituted the parties' entire understanding. Mr. West made no contemporaneous response to the Busch draft, and he denies ever having seen it. He states that it would have been acceptable, and that he would have rejected it if it had been presented to him." [West II, at 21-22.]

There is no evidence in the record of any explicit discussion of the West Promissory Note at the February 8 meeting. The parties in this proceeding dispute whether the Note was ever activated or waived, or even considered a central concern.[15] For purposes of this appeal, I presume that the Note was activated and not waived.

No action was taken at the February 8 meeting on the stock and insurance matters. [West II, at 21 and 23.] Anthony Kastens, a Seattle business consultant whom Mr. West had prepare 1988 and 1989 projected profit and loss estimates for the meeting and who was in attendance, indicated that Dr. Harper and Mr. Busch, in response to the stock option proposal, "stated that they would have to think about the business arrangements under which the 'Alaska Star' would continue its fishing operations. This meeting occurred in the context of a very promising first year of operations, under which Mr. West and Dr. Harper appeared optimistic about future operations, and expected to continue their business association." Kastens at 2. As to insurance, Mr. West "advised that the vessel value had substantially increased, and urged that Buttercod Fisheries, Inc. increase its insurance coverage in an amount sufficient to protect this new value. "Neither Dr. Harper nor Mr. Busch regarded Mr. West's suggestion as important, and, by their statements, gave what to me were clear indications that they did not intend to follow Mr. West's advice. I was surprised by this response, and I felt it was unwise for the owner not to increase its insurance." [*Id.*, at 3.]

Sinking of the vessel and subsequent actions. On February 20, 1988, the F/V ALASKA STAR sank at sea. Mr. West states:

> 29. Just as I returned from negotiating product sales in Japan, I was notified that, on

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[15]Mr. Busch disputed whether the Note was intended to create a personal liability in Mr. West. He said that it was intended to do no more than record certain expenses against Mr. West's 55-percent portion of revenues for profit sharing, and that it was never, in fact or law, more than "fictitious." The promissory note was never actually funded, activated, recorded, reconciled, or waived. Mr. Busch stated that the note had no relationship to the Key Bank line of credit later set up. Mr. Busch additionally states he never advised Dr. Harper to foreclose on the Note, even in light of later events (when Dr. Harper paid off Mr. West's personal guarantees for 'Operator'-related expenses). "In fact, I had even forgotten this Note existed until Mr. West made an issue out of it in his Motion to Deny Appeal." *See*, Busch, at 3-5, 14, and 17. The ease with which Mr. Busch's draft Exclusive Employment Agreement for 1988 would have nullified the Promissory Note from the 1987 Operating Agreement and not carried such a Note forward confirms Dr. Harper's and Mr. Busch's view that the Note was not intended by them to hold Mr. West personally liable, but instead was linked to the Operating Agreement's profit sharing mechanism, which they believed would be replaced in the future. Nonetheless, a personal liability appears to have been created by the Note and its amount could arguably be viewed as co-extensive at any one time with outstanding Key Bank advances to BFI. However, actual adjudication of the Note's validity would be beyond this proceeding and, ultimately, hypothetical in view of later events.

> February 20, 1988, during an Aleutian storm, the "Alaska Star" had run aground on an unchartered rock and sunk while seeking shelter in Nikolski Bay, at the west end of Umnak Island, 120 miles west of Dutch Harbor. Fortunately the entire crew was saved. [West I, at 16.]

Mr. West further stated that the insurance proceeds were insufficient to make salvage feasible. Together, all three payments insurance payments totaled $880,000 -- the amount of insurance on the vessel covered by the underwriter. The loss of the F/V ALASKA STAR resulted in an uninsured loss to the Owner, BFI, of $1,620,000, which was a direct result of the Owner's decision to underinsure the vessel." [West I, at 17; West Exhibits Z, AA, BB.]

It seems clear, however, that the full $880,000 in insurance proceeds were used to pay BFI creditors and wind-up expenses. ("When the vessel sunk on February 20, there were insufficient insurance proceeds to pay all the outstanding creditors of BFI.") [West II, at 23.] In terms of cash actually placed in the venture by Dr. Harper, the amount lost can be viewed at least as the $850,000 reflected in his First and Second Mortgages. (Mr. West, in a March 9, 1988 communication to Dr. Harper, places the then-current principal and interest owed to Dr. Harper by BFI at $1,102,702.) [HR 0031, Notes/Assumptions 7.] To this $850,000 should probably also be added the approximately $400,000 in 1987 cash surplus that was foregone in favor of upgrading the vessel, for a total cash loss to Dr. Harper of $1.2 million or greater. However, as Dr. Harper in fact owned a $2.5 million asset at the time of the vessel's sinking, the total loss to him can plausibly be viewed as the full $2.5 million (consisting of the $1,620,000 of uninsured equity and $880,000 of insurance proceeds applied to creditors' claims and wind-up expenses).

On March 28, 1988, Mr. West wrote to Mr. Busch:

> I understand Dr. Harpers [sic] position and realize that it will be too expensive a proposition for him to remain in the Fish business. My team of professionals has dissipated to other jobs and I have notified all other personnel of the inevitable. All are understanding and have begun seeking employment elsewhere. [HR 0027]

The letter continued:

> When Dr. Harper pays off the Key Bank Line of Credit and loans of $225,000.00, $25,000.00 represents a loan on the Suburban and the office furniture combined worth the value of my bonus, I would accept these items as payment in full of my bonus. All other leases and the assets I would liquidate on behalf of Dr. Harper and Buttercod Fisheries, Inc. and forward the proceeds to Mr. Woeppel or the designated agent Dr. Harper assigns to the clean up tasks. [HR 0028]

On April 5, 1988, Mr. West submitted his resignation as President of BFI, as well as the resignations of James H. Russell as Operations Manager and Charles M. Shull, III as Chief Engineer. The resignation letters are dated April 4. [HR 0694-0697]

In September 1988, BFI gave Mr. West the Suburban, worth $18,000, and office furniture and equipment. The following year a dispute arose between the parties over responsibility for payment of taxes on these items. In a letter to Dr. Harper, dated April 13, 1989, Mr. West took the position that he was a corporate employee and the property was an in-kind bonus. He wrote: "There has been a mistake on the declaration of my bonus to IRS" which increased his personal tax liability by more than $4,000. Mr. West cited an IRS regulation that he said "clearly states the employer's responsibility to withhold taxes from bonuses." He mentioned that BFI principals and stockholders could be held personally liable and be subject to civil and criminal penalties for failing to comply with the reporting and filing requirements. He stated that the "mistake. . . . needs to be corrected or I need to be given the funds to pay the IRS this excess liability by April 15th." [HR 3283]

Dr. Harper refused to pay Mr. West or to amend BFI's tax reporting. He stated that Mr. West was no longer an employee when the property was transferred to him because he had resigned five months earlier. Therefore, Dr. Harper believed, BFI had acted properly in issuing a Form 1099 in lieu of a W-2. [Bush file memorandum, April 21, 1989, HR 3281]

With respect to winding-up BFI's affairs, Mr. Busch states in his affidavit:

> 59. On February 20, 1998, [sic] the F/V ALASKAN [sic] STAR sank while engaged in fishing operations near Dutch Harbor, Alaska. Dr. Harper and I discussed the situation and it was determined fairly quickly by Dr. Harper that he did not want to pursue this highly-risky venture any longer. We contacted several maritime professionals who are experts in this area and they recommended a James Woeppel in Seattle. I monitored the situations [sic] for a short period of time (late February to mid March 1988), and after it became clear that there were going to be a number of specific items unique to the fishing business that I was not qualified to handle, I encourage [sic] Dr. Harper to hire Mr. Woeppel to handle the situation (trying to collect insurance proceeds while juggling creditors at the same time) to avoid further liability or a stain to Dr. Harper's credit.
>
> 60. Mr. Woeppel, West and Dr. Harper were extensively involved in preparing the request for insurance proceeds (of which Woeppel was much more qualified than myself to handle).
>
> 61. At the time of the vessel's loss, Buttercod owed almost $1.5 million in outstanding short-term and long-term liabilities. More than half of this amount was owed to Dr.

Harper personally as loans by Shareholder to the Corporation. [Busch, at 24-25.]

Attorney Woeppel's affidavit. Mr. Woeppel's affidavit states he is an attorney whose firm specializes in fisheries, maritime and admiralty matters and was retained to work on the various insurance and regulatory matters arising out of the F/V ALASKA STAR's sinking. Dr. Harper instructed him to work closely with Mr. West, "who was president and general manager of the corporation" [¶¶ 3-5].

Woeppel recites he had "innumerable phone conversations, in-person conversations or written communications" with Mr. West [¶ 32], "numerous conversations" with Dr. Harper [¶ 35], and "many conversations" with Mr. Drugge (¶ 25). Woeppel also was familiar with documents filed with federal and state agencies resulting from the sinking [¶ 7]; insurance policies and the salvage effort [¶¶ 6 and 8]; Washington and Alaska Labor Department correspondence [¶ 29]; BFI personnel records [¶ 31] and virtually all billing records for BFI from late 1987 through 1989 [¶ 27]. Woeppel also had extensive contacts with various BFI creditors, especially those involving personal guarantees of Mr. West, including Key Bank [¶¶ 13, 14 and 20].

Woeppel states (in the preceding referenced paragraphs and elsewhere in his affidavit) that at no time in conversations with Dr. Harper, Mr. West or Mr. Drugge, or in any of the correspondence and documents reviewed, was there any indication or suggestion that a vessel lease was involved or that any person or entity other than BFI operated the vessel, was the employer or was responsible for BFI operating expenses. All documents and checks were signed by Mr. West in his representative capacity.

Woeppel recalls that "Mr. West made a number of claims for various expenses he had incurred on behalf of the corporation. As an example, I specifically remember reimbursement claims he made with regard to various phone charges for calls he made on Buttercod's behalf on his personal phone, office cleaning charges upon vacating the Anchorage office, and other similar miscellaneous charges. To my knowledge, all expenses that Mr. West incurred on behalf of Buttercod were reimbursed fully." (¶ 12; *See also,* ¶ 27). Woeppel states particularly:

> 13. While I was settling up the company's affairs, Mr. West advised me he had signed several personal guarantees on behalf of the corporation, and that these had been done with Mr. Harper's approval with the assurance that Buttercod would indemnify him for any expenses he incurred as a result of these personal guarantees. I specifically recall a personal guarantee to Carr Gottstein for the office lease, one to American Express for a corporate credit card and one to Contel for the office phone equipment. Mr. West made a series of pleas that I recommend to Mr. Harper that Buttercod and/or Mr. Harper pay off these creditors.

Woeppel then recounts that he thoroughly reviewed each such creditor's claims, concluded they were "legitimate obligations of Buttercod," and recommended that Dr. Harper authorize payment: "After I received authorization, I reached a settlement with all creditors holding a personal guarantee from Ted West relieving him of his personal liability. I paid some of these creditors and Mr. Harper paid others." (¶ 14).

Further:

> 15. I do not recall any situation in which Mr. West had to pay any of Buttercod's expenses due to personal guarantees or any other circumstances. In those situations in which Mr. West "fronted" the money for miscellaneous expenses for the corporation, he sought and received reimbursement on each and every occasion.
>
> 16. In my discussions with Mr. West regarding these personal guarantees, as well as other matters, Mr. West forcefully asserted that he was an employee or former employee of Buttercod, and therefore, he should have no responsibilities for any expenses that arose out of Buttercod's activities, either before or after the sinking.

With respect to Key Bank in particular, Woeppel states:

> 20. . . . Key Bank at all times indicated they were looking to recover from either the corporation or Mr. Harper. . . . At no time did they indicate they were seeking recourse against Mr. West.
>
> 21. During the same time frame, Mr. West contacted me with regard to the Key Bank note. At that time, he again emphasized that he considered himself to have been an employee of Buttercod and therefore should not have any personal liability for this note.
>
> 22. . . . Mr. Harper . . . authorized me to make arrangements to pay off the Key Bank note in full from the insurance proceeds.

Woeppel offered the following in his final paragraphs:

> 32. At no time...did he [Mr. West] ever state explicitly or implicitly that he either leased the vessel or was responsible for the operating expenses of the vessel.
>
> 35. . . . He [Dr. Harper] never once stated nor suggested in any way that anyone other than the corporation was responsible for the vessel's operating expenses, and in fact took great pains to stress to me that Mr. West was not to pay for any of the company's expenses, even in several situations in which it was not completely clear that the

expense was solely for the benefit of Buttercod.

37. . . . Mr. Harper took full responsibility for items in which Mr. West had a contingent liability such as the personal guarantees previously discussed.

The remaining debts. As earlier observed, insurance proceeds were insufficient to pay all BFI creditors. Mr. West stated that Dr. Harper, at a time when continuation of the operation was still under consideration, "assured me that it was his intention to see that all creditors were repaid in full." Mr. West, in turn, so assured all creditors. Once salvage proved infeasible, Dr. Harper "decided to dissolve BFI, and to disregard the commitment he had made to me that all creditors would be paid. At that point, because there were limited proceeds, both Dr. Harper and myself wanted to prioritize payments to those debts upon which we had personal guarantees. This was certainly my intention, because I would be financially ruined if creditors pursued me personally because insurance proceeds were not directed towards guaranteed debts." [West II, at 23-24.]

However, the remaining debts "…though not legally in my name were associated with my name." Their legacy "so affected" Mr. West's reputation in the Alaska fishing industry that he was unable to secure financing "to start a new venture, and I ultimately took bankruptcy." [West II, at 24.] According to Mr. West:

> [N]umerous other American ventures were already putting together catcher/processing operations, copying that of the "Alaska Star". Financial institutions ultimately decided not to advance short term financing to us [Mr. West and Mr. Robert Vickery, organized as Key Fisheries Management Group], because of the new competition in catcher/processing, and because they learned that many creditors of BFI had not been paid. Bank officers clearly regarded BFI's non-payment of operating expenses as my personal failing, so my efforts to begin a new venture floundered. [West III, at 7.]

The West Bankruptcy Petition was filed August 22, 1991 [HR 3432-3475], and lists BFI and Dr. Harper as creditors with "disputed" claims. [HR 3447-3448] Mr. West testifies here that the listing of BFI/Harper claims was intended to liquidate the Promissory Note. They were described as disputed because Mr. West believed he might have an "offset" claim for "breach of contract and defamation" growing out of Dr. Harper's failure to continue operations after assuring Mr. West that he would. [West III, at 8-9.] The Petition's list of creditors does not appear to reflect any who might have been creditors for any operating expenses of BFI.

E. Contentions of the parties:

Mr. West advances a two-fold contention in support for his claim to award of initial QS. First, he argues that the 1987 Operating Agreement is a written vessel lease agreement constituting conclusive

evidence of the existence of a lease within the contemplation of 50 CFR § 679.40(a) [formerly §676.20(a)(1)(iii)]. Alternatively, Mr. West argues that even if the Operating Agreement does not constitute conclusive evidence of a vessel lease, the agreement and other evidence of the parties' conduct and overall relationship establish that he was the responsible force behind BFI's fishing operations, and thus entitled to recognition as a lessee.

Dr. Harper takes the position that the Operating Agreement does not contain the required elements to conclusively establish a written vessel lease agreement, and that the events and documents presented in the record establish that had an employment relationship, rather than a lease arrangement, within the contemplation of the IFQ program.

PRESUMPTIONS AND BURDEN OF PROOF

There are no presumptions in favor of either party on appeal from a RAM Division IAD by virtue of either the Division's administrative presumption against leases or the party having prevailed in the IAD. An "appeal" is a *de novo* proceeding. 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. Smee v. Echo Belle, Inc.[16]

DISCUSSION

A. Is the Operating Agreement conclusive evidence of a vessel lease?

In Treinen v. Scudder,[17] we stated:

> Under the IFQ program, as implemented by the Division, an applicant for an initial issuance of QS may receive credit only for legal landings of Pacific halibut or sablefish that were made from a vessel owned or leased by the applicant at the time of the landings. [*See*, 50 C.F.R. § 676.20.] Under § 676.20(a)(1)(iii), a written vessel lease is conclusive evidence of the existence of a vessel lease between the parties. To be conclusive evidence, a written lease must identify the leased vessel, the name of the

[16] Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, at 4-5, *aff'd*, August 20, 1996, *aff'd*, Smee v. N.M.F.S, C96-1512WD (W.D. Wash., June 9, 1997).

[17] Appeal No. 95-0104, October 11, 1995, *aff'd*, October 18, 1995.

> lease holder, and the period of time during which the lease was in effect. Where, as in this case, an applicant has submitted a written document said to be a vessel lease, the appropriate inquiry on appeal is whether that document on its face actually constitutes a vessel lease for purposes of the IFQ program.
>
> The inquiry begins with an examination of the provisions in the document itself, rather than with other evidence concerning the intent or actual conduct of the parties. In the absence of evidence challenging the validity of the agreement, a document that contains provisions consistent with a vessel lease is conclusive evidence of the existence of a vessel lease between the parties, and the inquiry on that question need go no further. However, evidence that the agreement was invalid (void) *ab initio*, such as evidence of fraud, duress, coercion, or incapacity, is always relevant and should be considered. [Footnote omitted] If the Appeals Officer determines that a valid vessel lease existed, then the next question is to determine when the lease was in effect. In examining that question, the Appeals Officer will presume that the lease was in effect for the term stated in the lease, unless contrary evidence is presented.
>
> The IFQ regulations do not define "vessel lease," nor do they prescribe the minimum requirements for, or essential elements of, a vessel lease. Recognizing that commercial fishermen and vessel owners enter into a considerable variety of business arrangements relating to fishing operations, this office has chosen not to establish a single, narrow definition of a vessel lease. Rather, we have identified a number of factors that should be considered in deciding whether a vessel lease existed. [At 3-4]
>
> * * * *
>
> [I]t has become clear that some of the factors, which are appropriate to consider in an oral lease situation, might not be relevant in a written lease situation. For example, while it might be useful when reviewing a claimed oral lease to consider how the parties treated the fishing operations for tax purposes, one would not expect a written lease to address this question. Thus, a flexible approach is needed. [At 5]

In dealing with the conclusive evidence premise, the focus is almost exclusively on ascertaining the parties' actual intent from the document presented and, if found to be a mutual intent to enter into a lease, then giving effect to it. In essence, the conclusive evidence premise is a declaration that if the parties mutually desired to consider their relationship as a lease, then the Council would accept it as such on the basis that, in most if not all instances, it would also identify the significant economic player in the particular enterprise for IFQ program purposes. Consequently, the analysis of a proffered written vessel lease agreement is a search for provisions consistent only with a lease arrangement and provisions consistent only with a non-lease arrangement, such as a hired skipper relationship.

I will now examine the various provisions of the Operating Agreement to determine whether it constitutes conclusive evidence of the existence of a vessel lease between the parties.

Terminology

The title of the document and the terminology used in the document, while not determinative, can be relevant evidence of whether the parties intended the document to constitute a vessel lease. Treinen v. Scudder, at 5; Ocean Crest v. McKee,[18] at 6; and Dittrick v. Weikal,[19] at 5.

In this case, the document is entitled "Operating Agreement." BFI is referred to as "Owner" of a "commercial fishing vessel known as the Alaska Star." Mr. West is referred to as "Operator," and further described as "an experienced General Manager" having the "capability of managing a fishing boat comparable to the Star." Mr. West is also characterized as "General Manager" for receipt of "base salary" and "base fees." Section 2 of the agreement is entitled "Management Services."

The document in this case lacks the terminology clearly indicative of a lease found in Treinen and Ocean Crest. In both of those cases the documents in question were entitled "Bareboat Charter" and the parties were called "owner" and "charterer." The documents contained provisions specifying the payment of "rent" or "charter hire" by the charterer. The terminology used by Dr. Harper and Mr. West is more like the terminology in Dittrick. The document in that case was a two-page hand-written agreement entitled "Vessel Charter Agreement." The parties, as here, were referred to as "owner" and "operator." The Dittrick document, as in this case, provided for the allocation of gross revenues between owner and operator, but in both cases there was not mention of "rent" or a "lease fee." The document in Dittrick, however, provided that the operator would "operate the vessel for owner." We said such language was inconclusive. Although use of the word "charter" was consistent with a vessel lease, the phrase operate "for the owner" could suggest something other than a lease. Therefore, we gave little weight to the terminology in Dittrick.

In this case, there is no terminology in the document that clearly indicates the existence of a lease. Rather, the terminology used indicates that the document was intended as something other than a lease arrangement. The use of the title "Operating Agreement" in a document between an owner of an income-producing asset and an operator described as an experienced general manager with respect to assets of that kind suggests an agreement under which the asset is to be managed by the Operator for the Owner. The further references to Mr. West as the General Manager who is to receive a base salary or base fee, together with a section called "Management Services," indicate an agreement between an owner and an independent contractor, if not employee, for management services at a base

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[18]Ocean Crest v. McKee, Appeal No. 95-0101, October 13, 1995, *aff'd*, October 19, 1995.

[19]Dittrick v. Weikal, Appeal No. 95-109, October 20, 1995, *aff'd*, October 24, 1995. [Decision on Reconsideration, February 27, 1996, *aff'd*, March 4, 1996, to correct factual error as stipulated by the parties.]

fee or salary.

Possession
Recital C provides:

> The OWNER and OPERATOR are desirous of entering into an Operating Agreement, subject to the terms and conditions contained herein, under which the OPERATOR will take possession of the Star and operated as a commercial fishing vessel, and pay operating and administrative expenses, and share the profits pursuant to the Agreement.

Mr. West relies heavily on this 'possession-vesting' provision to establish the document as a written vessel lease agreement.

In Ocean Crest, at 6, it was held probative in favor of a lease that the "charterer/captain would have exclusive possession, control and commend [sic] of the vessel." By contrast, it was observed in Treinen, at 6, that "[t]he document in question in this appeal does not explicitly provide that the charterer would have exclusive possession, control and command of the vessel for the duration of the charter or, conversely, that the owner would retain no control, possession or command." This absence of express "exclusivity" in the possession-vesting language, coupled with the absence of any preclusion against Owner taking possession, resulted in the possession-vesting language in Treinen having no probative force in establishing the document as a lease.

The focus on exclusivity in Treinen and Ocean Crest is a natural outgrowth of the nature of a lease as granting an exclusive tenure of possession to the lessee, as against the lessor, during the lease term (except for stated cause). If such exclusivity cannot reasonably be derived from the possession-vesting language, that language cannot support the existence of a lease. Standing alone, the language becomes as much consistent with any number of non-lease arrangements under which an owner permits another to take possession of its property.

Here, although Mr. West's materials occasionally insert the word "exclusive" in describing the possession authorized under the document,[20] the word does not, in fact, appear in the possession-vesting recital or elsewhere in the Agreement. There is also no provision in the Agreement that expressly purports to preclude owner from taking possession at anytime. To the contrary, the Agreement provides that the owner may terminate the operator upon 30 days' written notice without cause. [Agreement, at 8, Sec. 7.0] Accordingly, the possession-vesting Recital has no probative force in establishing the Operating Agreement as a lease. Indeed, it is ambiguous whether the phrase "will take possession [etc.]" is intended to confer a right or prescribe a duty on Operator.

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[20]For example, Mr. West states that "under the operating agreement 'Operator', myself, was vested with the exclusive possession and control of the vessel and its fishing operations…" [West I at 5.]

Moreover, the possession-vesting language appeared only in a recital preceding the actual contract terms and conditions implementing its intent. The document in Management Services Section 2.1 provides that "Operator shall assume all responsibility for the administration of the Star," including retention of crew, conduct of fishing operations, sale of product, collection of revenue, payment of operating expenses, reporting "of the same" to Owner, and allocation of profits and losses of the business.

This substantive provision seems most reasonably understood from the document as the specific implementation of the possession-vesting Recital. In any event, the language under which Operator is to run the vessel and business is introduced as a mandate on Mr. West to "assume all responsibility for administration" of the vessel and business. The language is more indicative of imposition of a duty on the Operator than conferral of a right, as would be the case in a lease. Additionally, the actual duty imposed is to "administer," not "take possession, command or control." The concept of authorizing another to "administer" an owner's business property is itself suggestive of an arrangement other than a lease.

Finally, the Management Services provision contains further subparagraphs specifying in detail what is to be embraced in the duty to administer, and such specification is more consistent with a relationship other than a lease.[21] One would not normally expect to encounter in a lease a detailed specification of how a lessee is to run a leased business, and particularly not the specification of on-going financial reporting to Owner and requirements of securing prior Owner approval of expenditures. Mr. West, in essence, concedes the anomalous presence of such financial reporting requirements in a lease when he argues the provisions reflect a financing arrangement within the Agreement connected to the Promissory Note. (Whether the Promissory Note indicates a lease and its connection to reporting requirements will be considered shortly.)

Therefore the "possession-vesting" provision has no probative force in construing the document. Conversely the specification of a detailed duty to administer, coupled with extensive reporting requirements and expenditure restrictions, suggests a relationship other than a lease. Such specifications and reporting suggest more the retention of an employee or independent contractor to provide independent services for a business subject to a considerable degree of on-going control from its owner.

Working capital, fee payments, and title to revenues

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[21]These include not only the activities specified in § 2.1, including the duty "to report the same," but also the even further-detailed financial reporting to Owner specified in §§ 2.3-2.4 of quarterly updates on a capital expenditures budget and monthly lists of accounts payable, together with a restriction of prior advance approval from Owner before expenditures or payments are made by Operator. Section 2.5 also requires specific advance approval in writing of expenditures in excess of $5,000 by the Operator.

The Management Services provision in § 2.2 also states that the Owner shall provide the working capital "necessary to operate and administer the business of the Star in its commercial fishing expeditions." One would not expect to encounter in a lease document a provision under which the Owner assumes the responsibility of providing all working capital necessary for the business. That would be a lessee responsibility of the first order. Accordingly, the specification of Owner responsibility for provision of necessary working capital to conduct the business is strongly probative that the document in question was not mutually intended as a lease.

The document also provides that "base salaries" or "base fees" in specified amounts are to be paid to the Operator/General Manager and "principals of the Operator" listed as "Captain, Engineer, and Production Manager." [§§ 3.1-3.3 and 4.1.] However, the lessee of a business operation will normally make provision for his or her own employees' or consultants' salaries or fees. The lessee also would normally determine what, if any, personal draw or salary is feasible to take in light of reasonable entrepreneurial projections of costs and revenues. Accordingly, one would not expect to encounter a lease document specifying salaries for any personnel involved in the lessee's operation, let alone for the lessee and those denominated "principals" of the lessee.

These provisions are strongly probative that the document is something other than a lease, perhaps a management services agreement with an independent contractor or even an employee for base fees or base salaries.

The document further provides: "The OPERATOR shall maintain all receipts and revenues in a Trust Account held in the name of the OWNER." Sec. 3.3.[22] The maintenance of all revenues from the business in a Trust Account in the Owner's name is again surprising in a lease document, as one would expect a lessee to have all revenues from the business in the lessee's name for disbursement as the lessee deems required for operation of the business, including a lease payment obligation to the Owner. Accordingly, the presence of a mandated commercial business account in the name of the Owner for the business's revenues, not to mention a Trust Account as here, is probative of a relationship other than a lease; rather, it appears the parties contemplated that the Operator would act as an agent of the Owner in some respect.

Term of agreement

Section 8 of the document contains the following text:

> It is the desire of the parties for this Operating Agreement to be a one (1) year term arrangement, under which the parties shall become familiar with each other and the operation of the commercial fishing business and the vessel, Star, with the intent of

[22]Section 3.3 contains further references to other reporting duties under §§ 5.0 and 6.0, and the residual right of the Owner to require reports in "other detail reasonably requested" by the Owner.

developing a Joint Venture or merger of their operations.

The parties agree within one (1) year to discuss the possibility of selling shares in the OWNER or alternatively developing a Joint Venture Agreement which would vest equity interest to the OPERATOR in the operating vessel.

Several points are immediately apparent from this provision. First, the language "their operations" suggests a present separateness of some sort between the Operator's "operation" and the Owner's "operation." But such suggested separateness, while consistent with a lease arrangement, could just as likely signal a joint venture, an independent contractor relationship, or an employer/employee relationship. Second, the Agreement, by express mutual declaration, is not to be considered a joint venture agreement. Accordingly, my inquiry into the nature of the present document is confined to ascertaining if it is a lease or something other than a lease, excluding a joint venture possibility. Third, one would expect a lease to contain a period fixing its duration with certainty and to specify that the lessee, at the end of the lease period, will return the vessel or other leased property in as good a condition as when received, less ordinary wear and tear.

Here, by contrast, the one-year term is expressly mentioned as a familiarization period, before the end of which the parties are to discuss moving to a joint venture, in order to vest equity in the vessel in the Operator, or to sell shares in BFI to the Operator, which would necessarily include acquisition of equity in the vessel owned by BFI. There is no return by Operator of the vessel referenced in any manner, and no expectancy that the arrangement is to end. The one-year period is considered only a beginning, a learning or even a probationary period. Before the end of the familiarization period, the parties are to have commenced serious consideration of a more mutually suitable arrangement, particularly for the benefit of the Operator, who will not have any equitable interest during the first year.

This reading of the one-year term does not suggest a lease term. It is more indicative of an experimental or temporary employment relationship (particularly with the joint venture option excluded), with some form of equity participation for the employee if the experience proves satisfactory by whatever personal standards Owner and Operator will use to assess the one year. The view that this one-year term is not a lease period is bolstered by the Sec. 7.0, which provides:

The term of this Agreement shall be for a period of one (1) year from and after the date of this Operating Agreement. However, the OWNER may terminate the OPERATOR upon thirty (30) days' written notice without cause.

This arrangement does not give the Operator a substantial tenure in the possession of the vessel or other property. With no cause required for termination, and only thirty days' notice needed, the Owner may effectively take possession at will, which is inconsistent with the normal definition of a lease. [*See*,

Kristovich v. Dell.][23]

This provision is probative evidence that the document embodies something other than a lease arrangement. It validates our understanding of the one-year term as an experimental period with a great deal of uncertainty as to Owner's affinity for the industry, reliability of the Operator, and the "fit" between Owner and Operator.

Promissory note
The Promissory Note provision in Sec. 3.2 of the Agreement states:

> The Owner shall advance up to…($300,000.00) to the Operator to fund the payment of operating expenses which shall include the base salaries outlined herein. Interest shall accrue at the rate of …(12%) per annum on all advances made by the Owner to the Operator. The Operator shall execute a Line of Credit Promissory Note in the amount of …($300,000.00) to document these advances. All principal advances and interest accrued thereon shall be repaid to the Owner, prior to any profit sharing under Section 5.0 herein.

One would not expect to find in either an employment contract or a lease a requirement that a lessee, employee, or even an independent contractor execute a promissory note to the owner. The appearance of such a provision in a lease could support a conclusion that the owner was lending working capital to the lessee. But such a provision could equally support a conclusion that the employer/owner desired to ensure that the employee or independent contractor would not be casual, or worse, in handling the enterprise's working capital.

The presence of detailed financial reporting requirements in the Agreement may also indicate that the Promissory Note was intended as a true debt instrument, as Mr. West has argued. On the other hand, the reporting requirements could just as easily represent an imposition by an owner on an independent management/administrative services contractor or general manager employee. Therefore the Promissory Note provision itself is not probative in determining whether the Operating Agreement was a lease.[24]

Profit sharing
Section 5.0, Profit Sharing, provides:

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

[24]Arguably, the Promissory Note could be considered part of the agreement, but the note does not support the view that the agreement was a vessel lease, nor does the note change our view that the Promissory Note provision is not probative in determining whether the Operating Agreement was a lease.

> The parties agree to allocate gross revenues for purposes of defining profit sharing forty-five percent (45%) in favor of the OWNER, and fifty-five percent (55%) in favor of the OPERATOR.
>
> 5.1. The OWNER shall be responsible to pay comprehensive insurance for the boat, wharfage expenditures while the vessel is not in production, value added improvements, repair parts, depreciation on vessel and improvements, and interest and principal charges for the vessel which shall include the capital expenditures for the vessel, and the capital expenditures to "outfit" the vessel.
>
> 5.2. The OPERATOR shall be responsible to pay all operating expenses from their allocable share, which shall include but not be limited to commissary, fish bait, fuel, packing material, processing supplies, P&I insurance, fishing gear, wharfage fees while in operation, general repairs and maintenance, interest charges for operating debt outlined in Section 4.3, administrative expenses including telephone, mail, office supplies, legal and professional, general insurance, and depreciation on equipment.
>
> 5.3. The OWNER and the OPERATOR shall retain their share of surplus cash flow after assessment of their expenses. The same shall be disbursed from the Trust Account and distributed to the respective parties. All principal and interest due Owner for advances under Section 3.2 shall be repaid prior to distribution from the Trust Account.

The operating expenses charged to Operator under section 5.2 are the types of expenses that often are incurred by a lessee in leasing a vessel for a fishing enterprise. The lessee's profit, if any, would come from his 55 percent of gross revenues less the specified operating expenses. The expenses charged to Owner under section 5.1 are the residual expenses and capital charges of boat ownership that often are absorbed by a lessor and netted against his percent of gross revenues.

On the other hand, operating expenses are the costs that would be subject to the greatest control by a general manager employee or management services independent contractor. A bonus or profit-sharing arrangement with such an employee or contractor would, therefore, be very logically predicated on precisely such a division of expenses as appears here. Regardless of whether this is an employee or contractor agreement or a vessel lease, the parties' motivation in reaching a mutually acceptable negotiated gross revenue division would be the same.

For these reasons, I find nothing in the division of expenses and revenues contained in the profit-sharing provision that is probative in establishing the agreement as a lease rather than another type of arrangement between Owner and Operator. To the contrary, certain aspects of the profit sharing provision suggest that the Agreement is not a lease.

I interpret section 5.3 to mean that (1) operating expenses, as defined in sec. 5.2, must come from the 55 percent of gross revenues allocated to Mr. West; and (2) the expenses assigned to Owner and Operator, as well as the principal and interest for the $300,000 advance, must be paid before Mr. West can share in any profits.[25] Section 5.3, together with sec. 5.2, do not mean that Mr. West assumed a personal obligation to third parties for the operating expenses of the vessel. Rather, they merely set out the circumstances under which Mr. West will receive additional compensation in the form of profit sharing. I would expect the Operating Agreement to more clearly place on Mr. West a personal obligation for the operating expenses if the parties had intended the document to constitute a vessel lease. The lack of such language tends to show that the Agreement is not a vessel lease.

In addition, although the 45 percent of gross revenues credited here to Owner under section 5.0's introductory language arguably could be viewed as a vessel lease fee, I do not adopt that view. There is no mention of a rental or lease fee in the profit-sharing provision or, for that matter, anywhere in the Operating Agreement. The Agreement is a formal document covering all aspects of the parties' arrangement with respect to the operation of the vessel and the handling of its expenses and profits. One would therefore expect to find a rental or lease fee denominated as such, if that is what the parties intended. I believe the better reading of the profit-sharing provision is that it is nothing more than it appears to be on its face. The lack of some provision requiring Mr. West to pay a lease fee tends to show that the Operating Agreement was not intended to be construed as a vessel lease.

Summary

In summary, the foregoing analysis of the Operating Agreement nowhere supports its construction as a written vessel lease agreement within the contemplation of the conclusive evidence premise of the IFQ program. A reasonable reading of the document reveals a number of provisions lacking probative value in characterizing the document as either a lease or other arrangement or, at best, generating an occasional weak implication that might support a lease construction.

On the other hand, there are a number of provisions that allow me to reasonably construe the document as a general manager employment contract or a management services contract with an independent contractor, containing a fixed-base compensation amount, plus a profit-sharing override. Although our earlier decisions spoke of establishing a document's character by a "preponderance" of relevant considerations, the analysis here rises to the level of "strongly" establishing both that the Operating Agreement is not properly to be understood as a lease document, and that its proper characterization is as a contract for employment of a general manager or retention of a management services independent contractor.

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[25]This point is stated more directly in sec. 3.2, covering the $300,000 advance to Operator for funding operating expenses: "All principal advances and interest accrued thereon shall be repaid to the OWNER, prior to any profit sharing under Section 5.0 herein."

B. Does other evidence establish the existence of a vessel lease?

Federal regulation 50 C.F.R. § 679.40(a)(3)(iii) states that in the absence of conclusive evidence of the existence of a lease, "Other evidence, which may not be conclusive, but may tend to support a vessel lease, may also be submitted." Because I have determined that the Operating Agreement does not constitute *conclusive evidence* of a lease, I will seek to determine from a review of all the evidence in the record whether the parties, nonetheless, entered into a valid vessel lease agreement.[26] In making that determination, I will use the analysis we have previously employed in cases in which there was no written lease agreement. That approach entails a consideration of various factors developed in a series of decisions, including most prominently, Seater v. Seater & Seater Partnership,[27] O'Rourke v. Riddle,[28] Kristovich v. Dell,[29] and Smee v. Echo Belle, Inc.[30]

These factors are:

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

(2) whether and to what extent the claimed lessee had possession and command of the vessel and control of navigation of the vessel;

(3) whether the claimed lessee directed fishing operations of the vessel;

(4) whether the claimed lessee had the right to hire, fire, and pay the crew;

(5) whether the claimed lessee was responsible for the operating expenses of the vessel;

(6) whether the claimed lessee treated the fishing operations in which the vessel was used as

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[26]In Treinen v. Scudder, Appeal No. 95-0104, October 11, 1995, *aff'd,* October 18, 1995, we noted: If the Appeals Officer finds that a written document does not constitute conclusive evidence of a vessel lease, but does constitute a valid agreement between the parties, the document may still be considered as relevant evidence of the relationship between the parties, along with other evidence of the parties' actual conduct and intent. [*Id.*, at 4, n. 4.]

[27]Appeal No. 94-0010, June 6, 1995, at 10, *aff'd,* June 9, 1995.

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

[29]Appeal No. 95-0020, March 20, 1996, at 10, *aff'd,* March 27, 1996.

[30]Appeal No. 95-0076, August 1, 1996, at 7-8, *aff'd,* August 20, 1996, *aff'd,* Smee v. N.M.F.S., C96-1512WD (W.D. Wash., June 9, 1997).

his/her own business for federal income tax and other purposes; and

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

In Smee we also stated:

> 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. [*Id.* at 6.]

As we stated in Kristovich [at 9], when the owner is not aboard the vessel, some of the factors will generally apply equally to either a lessor/lessee arrangement or to an owner/hired skipper arrangement. For example, because of the distances travelled in longlining ventures and the need for the captain to control the vessel and crew, factors 2 - 4 will usually be satisfied by either type of arrangement. But where one of those factors is *not* satisfied, that would cast considerable doubt on whether the relationship could be characterized as an unwritten vessel lease. In this appeal what we said in Kristovich is particularly true about factors 2 - 4 because Dr. Harper admitted he was unsophisticated in commercial fishing, he was located remotely from the fishing activities, he actively pursued another profession, and he contemplated a relatively passive involvement with the fishing enterprise. Thus, Dr. Harper *expected* Mr. West to have possession and command of the vessel, to control its navigation, to direct the fishing operations of the vessel, and to hire, fire, and pay the crew. Even if Mr. West did all these things, that does not tend to prove he did so as a lessee. Therefore the analysis under the other evidence premise must emphasize the remaining factors.

I will now apply the factors to the evidence in the record.

1. The parties' characterization of their business arrangement

Not particularly probative in deriving mutual intent are present assertions of current beliefs as to what legal characterizations should be placed on past events, e.g., whether a lease was present or not, whether personal liability for operating expenses was present or not, unless, of course, the parties are in agreement on or stipulate to a particular point. Nor are present assertions of unshared past beliefs as to the characterization of such past events particularly probative in establishing their nature. These are all

mere opinions, whether past or present. As stated in Kristovich at 13 (n.18):

> I have given no weight and in some cases have stricken from the record, opinions and assertions of various witnesses as to whether the business arrangement is properly characterized as a "lease" for the purposes of the IFQ regulations.[31]

The record is replete with present testimonial assertions of present or past beliefs as to the character of the parties' relationship during the period under examination. Such assertions by Dr. Harper, Mr. Busch and Mr. West are, therefore, not particularly probative on the ultimate issues and, moreover, cancel each other, for all practical purposes. Included in this minimal probative value testimony is also Mr. West's contemporaneous use of the word "lease" in his personal notes of a conversation with Dr. Harper during the preliminary negotiation stage between the parties as to the terms of their future relationship, if any. Whether this was an initially hoped-for relationship not adopted in its final evolution, or even Mr. West's opinion of the relationship that was, at the time of recording, fixed in material details, this claimed past recollection recorded is in the last analysis only a wish or opinion. There is no contemporaneous documentary proof of communication of the "lease" hope or belief to either Dr. Harper or Mr. Busch. There is not even a present testimonial assertion by Mr. West that he somehow communicated the note's use of the term "lease."

There is also no testimony that Mr. West, at any time during the relevant period, ever used the terms "lease," "charter," "hire," or "rent," etc., in any communications to Dr. Harper or Mr. Busch. The testimony of Woeppel (knowledgeable in maritime matters and working intensively with Mr. West, Dr. Harper, and Mr. Drugge), that no terminology suggestive of a lease ever surfaced, is particularly probative. For these reasons, the testimony in this proceeding does not provide evidence of contemporaneous communications between the parties using lease terminology that could support the existence of a lease.

The absence of such communications in a relationship whose substantive aspects are otherwise consistent with a hired skipper relationship would suggest a non-lease relationship. Moreover, while the mere absence of communications using lease terminology between the parties is itself suggestive of a

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[31]The note goes on to state: "I have given no weight to the inconsistent testimony of the parties' accountant regarding whether a lease existed, in that the accountant has denied ever being informed by the parties whether the relationship was a lease." In this proceeding, a dispute has arisen concerning the propriety of utilizing documents prepared by Robert Congdon, an attorney, that reflect in passing and without substantive analysis whether the parties had a lease relationship or not. Underlying the dispute is whether Mr. Congdon prepared those documents as BFI's or Mr. West's attorney and whether their surfacing constituted an inadvertent breach of the attorney-client privilege. However, as Mr. Congdon's opinion is not probative in this proceeding, the parties dispute is mooted and his subject documents in HR 0001 - 0009 are stricken from the record as immaterial.

non-lease arrangement under Kristovich, the presence of contemporaneous oral or written communications providing positive indication that a relationship other than a lease was mutually intended becomes highly suggestive that no lease existed.

Here, there are the November 19, December 4, and December 15, 1986 documents by Mr. Busch and Mr. Carlton all reflecting that a single corporation was to be created for an integrated enterprise acquiring the vessel and conducting its fishing activities, with Mr. West to be employed by the corporation for a base salary and profit-sharing arrangement appropriate under industry standards for a general manager or administrator of a catcher/processor operation. Stock acquisition by Mr. West would be reserved for consideration after the first year of operations. Mr. West's own previous October 15 and November 4 communications, as well as the contents of his conversations as reflected in the Busch/Carlton documents, all reflect one consistent theme: Mr. West would be amenable to whatever business structure Dr. Harper and Mr. Busch preferred. Thus, while Mr. West seems actually to have initially proposed the integrated corporate enterprise structure, he acceded to Dr. Harper's desire (on Mr. Busch's advice) to defer stock acquisition and instead accept a present employee arrangement for the corporation with a suitable base salary and profit-sharing formula.

Thus, the preliminary communications between the parties are clear in objectively evidencing a mutual intent to create an integrated corporate enterprise employing Mr. West as "General Manager" consistent with his work history and at a salary level and profit-sharing arrangement appropriate for such services. This mutual intent, in turn, becomes highly suggestive that the formal relations actually entered into, as well as operations conducted thereunder, were to be understood as an employment, not a lease arrangement.

Furthermore, there is the actual corporate structure and organizational activities. Here, the incorporation papers made clear that BFI was created to engage in commercial fishing as well as vessel ownership. BFI was therefore legally constituted by the parties for an integrated enterprise pursuant to their expressed mutual contemplation.

Of greater significance are the By-laws, resolutions and minutes (corporate events) resulting from the first organizational Board and Shareholder meetings on January 5, 1987. The effective date of the Operating Agreement is also January 5, 1987, the same date as the meetings. Both the corporate events and Operating Agreement deal with the Promissory Note. It is, therefore, difficult to ignore the corporate events, not only for their independent significance, but also in further construing the Operating Agreement.

The election of Mr. West as President, with plenary authority and corresponding duty to transact business on behalf of the corporation, is functionally tantamount to at least the powers and duties specified in the Operating Agreement for the Operator/General Manager. Mr. West as President was also authorized on an annual basis the same salary as appears in the Operating Agreement's base salary

or fee for Mr. West as Operator/General Manager. Mr. West is also subject to removal as Officer at any time. He is also entitled to reimbursement for any actions in the course of his duties.

Mr. West was charged with and compensated for the duties of being a corporate agent in the conduct of the corporation's entire range of activities with no independent prerogatives or responsibility on his part in dealing with third persons in the scope of those duties and capable of removal at any time by the corporation. In addition to independently reflecting a corporate agent status for Mr. West with respect to all BFI activities, the simultaneity of the corporate events and parallel Presidential incidents and Operator/General Manager incidents further supports the conclusion that the Operating Agreement reflected a mutual intent to recognize an employment relationship and not a lease.

In the conduct of actual corporate activities, the hearing evidence, when dealing with materials other than contemplated as RAM Division evidentiary materials, reflects the consistent pattern of Mr. West acting only as a BFI agent at all times, even to the point of affirmatively asserting employee status in the "key man" insurance application and effectively denying lease status when such indication was called for under NMFS forms. Even as to the bonus situation, Mr. West was adamant in communications to BFI that he had at all times been a corporate employee in conducting BFI affairs. Also, there is Woeppel's testimony that all discussions and conversations during wind-up referred to Mr. West as a BFI employee only.

Other aspects of the parties' actual conduct will be treated in connection with specific substantive factors and discussed shortly. At this point it is sufficient to conclude that the testimony and conduct of the parties can be considered nothing less than highly suggestive of an employment relationship.

2. Possession and command of the vessel and control of navigation

The parties acknowledge that Mr. West was responsible for the vessel and its navigation. Although Mr. West was not the captain of the vessel, he hired and fired the captains and gave them directions concerning use of the vessel. Thus, Mr. West was at least indirectly in possession and command of the vessel, and in control of navigation, through those working under him. To be a lessee, one need not personally captain the vessel, unless the agreement so provides. Nor is it necessary to even set foot on the vessel to be eligible to receive an initial issuance of quota shares. Mr. West's possession and command of the vessel and control of its navigation would normally tend to support the existence of a lease. In this case, however, such evidence is equivocal because Mr. West was an employee of BFI and might simply have been carrying out his assigned duties. There is nothing about the evidence here that distinguishes Mr. West as a lessee. Therefore, I give no weight to this factor.

3. Direction of the fishing operations of the vessel

As we stated in Smee, one of the key determinations we make in lease cases is whether the claimed

lessee had sufficient control of the fishing operations to qualify as a lessee. I have already stated in this Appeal that Mr. West "directed complete operations and marketing efforts" on his own initiative. *Supra*, at 10. It is clear that Mr. West had wide-ranging discretion in conducting the enterprise, and that his experience, skills, and effort were critical to the success of the enterprise. Thus, for all practical purposes, Mr. West was directing the fishing operations of the vessel.

As with the previous factor, however, the evidence here does not help us resolve the issue of whether Mr. West held a vessel lease. It does not distinguish Mr. West as a lessee; his actions could just as easily be those of an employee or contractor. Therefore, I give no weight to this factor.

4. The right to hire, fire, and pay the crew

The evidence in the record is that Mr. West hired and fired the crew of the vessel, including five captains. Again, it is not clear whether he performed these functions as a lessee running his own business or as an employee operating on behalf of the corporation. If Mr. West had not had the authority to hire, fire, and pay the crew, that fact would suggest there was no lease. But the presence of this authority in him does not tend to prove or disprove the existence of a vessel lease. Therefore, I give no weight to this factor.

5. Responsibility for operating expenses

In Smee, we stated:

> "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. [At 12]
>
> * * * *
>
> 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. [At 13-

14]

There is no documentation from any sources suggesting that Mr. West was personally liable to creditors for the fishing enterprise's operating expenses. The testimony and documentation as to the parties' conduct of the business was that Mr. West either paid for operating expenses as BFI's agent (i.e., on corporate checks signed as President), or he was promptly reimbursed by BFI for any operating expenses he may have paid personally. This payment or reimbursement pattern was also followed in connection with any necessary permits or licenses for the fishing operation. Moreover, as to operating expense items for which Mr. West provided a personal and, on occasion, even sole guarantee to the particular creditor, BFI after the vessel's sinking paid those items off so as to relieve Mr. West of any personal liability to the creditor with Mr. West also requesting and contending that such reimbursement was his right.

Kristovich observed on its facts:

> A more fruitful inquiry in determining which of the parties acted as an entrepreneur in the enterprise is who paid the expenses prior to being reimbursed from the fishing proceeds. Even if that person fully expected and was entitled to reimbursement, that person surely bore the risk of the venture in the event no fish were caught, the boat sank, and the other parties to the venture became insolvent. [*Id.*, at 17.]

Here, and far more clearly than in Kristovich, the evidence points to only one party being responsible for payment of operating expenses prior to receiving fishing proceeds. That party was BFI, which even assumed payment of obligations on which Mr. West was a personal and sole guarantor and, moreover, did so factually without any expectation of reimbursement. Under these circumstances, the conduct of the parties establishes, for purposes of the IFQ program, that BFI and not Mr. West was responsible for the fishing enterprise's operating expenses.

There is no merit to Mr. West's arguments that the Promissory Note and/or profit-sharing mechanism of the Operating Agreement made him liable for operating expenses. The mere existence of these provisions in examining the Operating Agreement under the conclusive evidence premise were seen as, at best to Mr. West, non-probative in establishing a lease relationship. In the context of the regulation's other evidence premise, which focuses on parties' actual conduct, the provisions support a non-lease arrangement.

As to the Promissory Note, Kristovich made clear that even if BFI had a right to reimbursement from Mr. West through holding his Promissory Note for operating expenses paid by BFI, the fact of BFI having actually paid those expenses and then assuming the risk of Mr. West's insolvency is sufficient to constitute BFI and not Mr. West as the responsible party for payment of operating expenses within the contemplation of the IFQ program. This effectively also disposes of any contention that the Promissory

Note could constitute evidence of Mr. West's "investment" to establish that he and not BFI "shouldered the financial burdens and risk of the fishing enterprise."

Whatever dollars would be captured in the Promissory Note's line of credit from BFI, BFI would have already paid them and then possessed only the Note and its collection risks against Mr. West. Thus, there would always be a dollar-for-dollar nominal equivalency between the "investment" represented by BFI's actual payment and the "investment" represented by Mr. West's Promissory Note, with the BFI investment not merely equivalent to and offsetting Mr. West's in nominal amount, but also constituting, for IFQ program purposes, a greater "shouldering" of the financial burden embraced in those amounts.

As to the profit-sharing mechanism, it is true that any operating expense would diminish Mr. West's potential to benefit from the mechanism. However, that consequence is inherent in the nature of any crew share, in which the amount available for sharing is a function of revenues and expenses of the fishing enterprise. The same consequence, moreover, is common to employee profit-sharing plans. Such plans do not render the employee liable for the enterprise's operating expenses, which is a critical element for establishing a lease arrangement.

Indeed, in this instance, Mr. West was entitled to and received his base salary regardless of profitability, which even an ordinary crew member for shares would not enjoy. Thus, Mr. West did not even have the ordinary risk in profit sharing experienced by a typical crew member for shares. Moreover, the fact that Mr. West was awarded a bonus based on BFI's overall profitability for the year provides strongly suggestive evidence from the parties' own conduct that the profit-sharing mechanism was never viewed as a lease relationship during the period under consideration.

For all the above-stated reasons, I find that Mr. West was not responsible for the operating expenses of the vessel.

6. Treatment of fishing operations for tax and other purposes

This factor concerns how the parties treated the enterprise for federal income tax and other purposes, and whether that treatment is consistent with the existence of a vessel lease. On this matter, there is no question but that BFI at all times treated all income and operating expenses as its own for tax purposes. This included treatment of Mr. West and "his principals" as BFI salaried employees, prior to their resignations. Other personnel were treated for tax purposes as either BFI salaried personnel or BFI independent contractors.

Conversely, Mr. West's federal income tax returns do not reflect that he was treating the operations of the F/V ALASKA STAR as his a lease. He did not claim income or expenses of a lease operation; rather, his tax return shows only salary, wages, etc., for himself and his wife. With respect to vessel operations, Mr. West did not hold himself out to others as a lessee. He signed documents,

correspondence, and checks as president of BFI. Mr. West testified that he allowed BFI to treat his claimed lease operation as BFI's own for tax, labor department, credit, and marketing purposes (effectively all business purposes) as a "convenience" to his operation and presumably BFI's overall profitability. However, such assertions have no more probative value in establishing a lease than a present assertion of an unshared past opinion of the relationship as constituting a lease.

I find that the parties' tax treatment of the enterprise is evidence that no vessel lease existed.

7. Set or guaranteed term

This factor relates to the presence or absence of a durational term reflective of a lease arrangement. The parties' actual conduct from the end of the 1987 fishing season to launching the 1988 season was clearly uncharacteristic of a lease relationship.

Without any subsequent year's written agreement having been negotiated, BFI subjected the F/V ALASKA STAR to extensive re-fitting; a raise was granted in Mr. West's base salary; proposals for adding stock acquisition or total net profit bonus plans to their relationship were evolved; Mr. West flew to Japan for negotiations; and the vessel was crewed and put to sea to commence fishing in the new season. In all respects, the one-year term was not anticipated as the end of a relationship, but merely as a stipulated milestone for considering enhancements to a continuing relationship. Moreover, these enhancements to a continuing relationship, such as acquisition, profit sharing, and a salary raise, are the more naturally expected enhancements to an underlying employment rather than a lease agreement.

The evidence in the record does not show that Mr. West was granted exclusive, uninterrupted possession of the vessel during the period of the claimed lease. Although Mr. West, in fact, had the vessel under his control for the one-year period, the Operating Agreement specified that the Owner had the right to terminate without cause upon 30 days' written notice. Such a provision is inconsistent with the existence of a vessel lease. The lack a guaranteed or set term of exclusive possession tends to show that a vessel lease did not exist.

Summary of evidence

The parties did not characterize their relationship with each other as a lease. Mr. West was not responsible for the operating expenses of the vessel, except as an agent of the corporation. Mr. West did not treat the vessel's operation as a lease on his federal income tax returns or for other purposes. BFI's federal tax returns reflect that the corporation treated the vessel operations as its own business and treated Mr. West and others as employees or contractors. Mr. West did not have a guaranteed or set term for the exclusive possession and use of the vessel. Although Mr. West did have possession and command of the vessel, controlled its navigation, directed the fishing operations, and had the right

to hire and fire crew, the evidence does not establish that in any of these respects he acted as a lessee and not as a corporate employee or contractor.

Thus, the evidence of the parties' relationship, including the Operating Agreement, strongly indicate that no lease arrangement was present between BFI and Mr. West. The evidence indicates that Mr. West was most likely an employee or an independent contractor providing management services to the corporation. This conclusion is entirely consistent with the Council's ultimate intent to award initial QS allocations to the party that shouldered the financial burdens and risks of the fishing venture. By every standard, it was BFI and not Mr. West that provided the funds for the fishing venture and sustained the financial losses attendant to its failure, and this is true whether one looks only at operating capital loss or total investment and enterprise value loss.

In his December 4, 1986 letter to Dr. Harper, Mr. Busch wrote:

> As your financial advisor and attorney, I am still perplexed as to the enormous risk and limited knowledge you have with respect to this particular transaction.
>
> Your limited experience with Ted, nonactive role in the operation of the business, extensive geographic difference in the operation of the business from your personal residence, limited capital invested by Ted West, and general risk nature of this business, lends to its natural problems in the operation and ultimate success of the business.
>
> Although I will attempt as your counsel and through accounting expertise locally, to supervise the administration of the business, there is no way we will be able to protect you because of the volatility and flexibility of the operating business and sole control vested in Ted West.[32]

These words, of course, proved prophetic. But more to the point, Mr. Busch's statement accurately identifies BFI as the entrepreneurial risk-taker to which the Council intended to award initial IFQ allocations, notwithstanding Mr. West's substantial contributions to the enterprise.

For the foregoing reasons, I conclude that the evidence presented on this appeal warrants reversal of the Division's determination that a vessel lease existed between the parties.

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[32]Mr. West has argued there is regulatory significance to the word "sole" at the conclusion of the quote. However, there can be no significance in connection with the conclusive evidence theory as the word is not part of the written vessel lease agreement, however expansively defined. Far more significantly, it is clear in context that Mr. Busch's caution to Dr. Harper in use of the word "sole" was precisely anticipatory of the factual realities identified by Kristovich with respect to the first three substantive criteria i.e., the hired skipper will factually have sole control of the fishing operation.

FINDINGS OF FACT

1. The terminology and substantive provisions of the Operating Agreement are more consistent with some other type of agreement, most probably an employment agreement or independent contractor management services agreement, than with a vessel lease.

2. The parties did not characterize their relationship as a vessel lease.

3. Mr. West was not responsible for the operating expenses of the vessel.

4. Mr. West did not treat the fishing operations as a vessel lease for federal income tax purposes, but Dr. Harper's corporation, BFI, did treat the vessel operations as its own business, and treated Mr. West and others as employees or contractors.

5. Mr. West possessed and commanded the vessel and controlled its navigation, but his possession was not exclusive or guaranteed for a set term.

6. Mr. West directed the fishing operations of the vessel and exercised the right to hire, fire, and pay the crew, but not necessarily as a lessee of the vessel.

CONCLUSIONS OF LAW

1. The Operating Agreement between the parties does not constitute conclusive evidence of a written vessel lease agreement for purposes of the IFQ program as contemplated in 50 CFR § 679.40(a)(3)(iii) [formerly § 676.20 (a)(1)(iii)].

2. The other evidence does not establish that Mr. West held a vessel lease for IFQ program purposes.

3. Mr. West did not hold a lease of the F/V ALASKA STAR during the period January 5, 1987, to February 20, 1988, within the contemplation of 50 CFR § 679.40(a)(3)(iii) [formerly § 676.20 (a)(1)(iii)].

DISPOSITION AND ORDER

The IAD that was the subject of this Appeal is VACATED. The Division is ORDERED to amend the NMFS Official IFQ Record to reflect that Ted H. West did not hold a vessel lease of the F/V ALASKA STAR during the period January 5, 1987, through February 20, 1988. The Division is further ORDERED to reallocate to Benjamin L. Harper the qualifying pounds of sablefish that were landed from the vessel during the period of the claimed lease, and to issue to Dr. Harper the resulting QS and IFQ for 1997. This Decision takes effect on August 18, 1997, unless by that date the Regional

Administrator 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 4:30 p.m. Alaska Time, on the tenth day after the date of this Decision, July 28, 1997. A Motion for Reconsideration must be in writing, must allege one or more specific, material matters of fact or law that were overlooked or misunderstood by the Appeals Officer, and must be accompanied by a written statement or points and authorities in support of the motion. A timely Motion for Reconsideration will result in a stay of the effective date of the Decision pending a ruling on the motion or the issuance of a Decision on Reconsideration.

Louis Agi
Appeals Officer

I concur in the factual findings, legal analysis, and conclusions of law of this decision. I have reviewed this decision and the accompanying administrative record to verify the substantive accuracy of the decision and to ensure compliance with applicable laws, regulations, and agency policies, and consistency with other appeals decisions of this office.

Edward H. Hein
Chief Appeals Officer