

NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION  
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0046
	)	
IGNATY BASARGIN,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
LAZAR EROFEEFF,	)	
Respondent	)	April 14, 1997
_____	)	

STATEMENT OF THE CASE

Appellant Ignaty Basargin and Respondent Lazar Erofeeff applied for halibut Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] Program. Mr. Basargin's claim for QS was based, in part, on his ownership of the F/V FLYING SAUCER for the period 1986 - 1991. Mr. Erofeeff's claim for QS was based on an alleged oral lease of the vessel during the period 1988 - 1990. The Restricted Access Management Division [Division] denied both applicants' claims in an Initial Administrative Determination [IAD] issued March 16, 1995, in which it stated that it could not determine which party had the more convincing evidence.

An oral hearing was held before Appeals Officer James C. Hornaday in Homer, Alaska, on December 22, 1995. Mr. Basargin and his representative, Paul Fleenor, appeared in person. Mr. Erofeeff and his attorney, Audrey Faulkner, appeared by telephone from Anchorage. Mr. Basargin declined to testify because of his limited English-speaking ability. Mr. Fleenor testified on Mr. Basargin's behalf, giving a brief overview of Mr. Basargin's claims. Mr. Erofeeff claimed that he was unprepared to testify. Ms. Faulkner stated that she was making a "limited appearance" on behalf of Mr. Erofeeff, and that she had been contacted to represent him only the day before the hearing. She stated that she had not received or reviewed the files relating to the appeal, but had requested them from this Office. At the time of the hearing, this Office, as well as most of the rest of the federal government, was closed due to a "government shutdown" from December 16, 1995, until January 5, 1996, and was unable to provide the requested files before the hearing.

At the hearing, Ms. Faulkner made a motion to continue the hearing. Appeals Officer Hornaday denied the motion on the grounds that Mr. Erofeeff had been given adequate time to obtain counsel and prepare for the hearing. Appeals Officer Hornaday granted Ms. Faulkner's request for an extension of time to review the files and supplement the record until February 23, 1996. Additional documents were received from both sides and made part of the record. The record has been reviewed in its

entirety by Appeals Officers Hornaday, Randall J. Moen, and Edward H. Hein.

## ISSUE

Whether Mr. Erofeeff leased the F/V FLYING SAUCER from Mr. Basargin for the period January 1, 1988, through December 30, 1990.

## BACKGROUND

Mr. Basargin owned the F/V FLYING SAUCER between January 20, 1986, and December 31, 1990. Mr. Erofeeff claimed in his Application for QS that he held an oral lease of the vessel from Mr. Basargin from January 1, 1988, through December 30, 1990. Mr. Basargin claims that he did not lease the vessel to Mr. Erofeeff or to anyone else during the QS qualifying period and base years, 1984-1990.

Mr. Basargin claims that during the conflict period he:

- (1) hired Mr. Erofeeff as the F/V FLYING SAUCER's skipper;
- (2) told Mr. Erofeeff where and when to fish, and to market the fish;
- (3) kept the vessel's income and expense records;
- (4) calculated the vessel's crew, boat, and skipper shares after each halibut opener;
- (5) treated the vessel's income and expenses as part of his fishing business;
- (6) paid for the vessel's operating expenses, repairs, and maintenance;
- (7) paid Mr. Erofeeff on a share basis; and
- (8) fished his vessels (including the F/V FLYING SAUCER) together, side-by-side, and that he directed the vessels' fishing activities.<sup>1</sup>

Mr. Basargin states:<sup>2</sup>

I did not lease my vessel or have any other business arrangement with Lazar Erofeeff other than that of an employed skipper to operate the F/V FLYING SAUCER, ADF&G #53214, while I was operating one of my other vessel [sic] as we fished together. As an employed skipper Lazar Erofeeff was paid on a share basis. He did not pay for any of the expenses to operate the vessel and had no other responsibility for the vessel beyond that of a hired skipper.

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<sup>1</sup>The record shows that during the three years in question, Mr. Basargin owned the F/V FLYING SAUCER, the F/V STAR TREK, and the F/V SEA GLIDER (1990 only).

<sup>2</sup>See Mr. Basargin's affidavit of November 17, 1994.

Mr. Basargin claims that he had the same employed skipper relationship with the operators of the other vessels<sup>3</sup> that he owned during 1984-1990.

Mr. Basargin states:<sup>4</sup>

I have been fishing for over twenty years and at no time have I ever leased one of my vessels to a hired skipper. The skippers were hired on a share basis to operate the vessel. We would fish together side by side, laying the gear at the grounds I decided to fish; delivering to the cannery I decided to deliver to; laying up for bad weather or repairs when I decided it was the best time to do so. I am the one who is solely responsible for the vessel and crew safety. I am the one who did all the paperwork for my boats crew and skippers. I am the one who kept the records straight.

Mr. Erofeeff had an account with Icicle Seafoods, Inc., to pay for the F/V FLYING SAUCER'S expenses. Mr. Basargin claims that it was the cannery's policy to put the account in the name of the card holder, and he submitted a notarized statement to that effect from Ms. Rachel Adams of the Icicle Seafoods plant in Homer, Alaska. Mr. Basargin claims that he and Mr. Erofeeff asked the cannery to pay Mr. Basargin the net proceeds owed from the vessel's catch, and that Mr. Basargin would in turn pay Mr. Erofeeff all crew shares, based on the final settlements calculated by Mr. Basargin. Mr. Erofeeff would then pay the crew from the proceeds received from Mr. Basargin. Mr. Basargin claims that any proceeds the cannery paid to Mr. Erofeeff were deposited in Mr. Basargin's account for disbursement, following final settlement.

Mr. Erofeeff claims that, in January 1988, he and Mr. Basargin orally agreed to a lease of the F/V

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<sup>3</sup>Mr. Basargin claims that he owned four vessels during 1984-1990, the F/V BARIN, F/V STAR TREK, F/V SEA GLIDER, and the F/V FLYING SAUCER, from which halibut landings were made. The vessels' operators during the conflict period were as follows:

Year	Vessel	Operator
1990	Flying Saucer	Lazar Erofeeff
	Sea Glider	Ignaty Basargin
	Star Trek	Afonasi Ayhan
1989, 1988	Flying Saucer	Lazar Erofeeff
	Star Trek	Ignaty Basargin

<sup>4</sup>See Mr Basargin's affidavit of May 8, 1995.

FLYING SAUCER for three years, from January 1, 1988, through December 30, 1990.<sup>5</sup> Mr. Erofeeff claims<sup>6</sup> that during the fishing seasons of 1988-1990 he:

- (1) paid the crew out of his share of the net proceeds;
- (2) treated the vessel's operation as a family business, hiring family members, claiming the income and expenses from the vessel on his 1988, 1989, and 1990 federal income tax returns, and doing general maintenance and repairs on the vessel;
- (3) was the CFEC<sup>7</sup> cardholder and the operator of the vessel;
- (4) split the expenses with Mr. Basargin, including the fuel, food, bait, ice, and gear;
- (5) split the vessel's net income, 50/50, with Mr. Basargin;
- (6) made all decisions regarding the vessel's operations; and
- (7) hired, fired, and paid the crew.

Mr. Erofeeff writes:<sup>8</sup>

In January 1988, I made a lease agreement with Ignaty Basargin, owner of the F/V Flying Saucer, ADFG #53214. Ignaty would furnish the boat and gear, I would run the boat, furnish the crew, and make all the necessary repairs, plus replace 50% of all lost gear. All expenses, including fuel, bait, groceries, and ice, were to be split 50/50. Income was also to be split 50/50.

Mr. Erofeeff claims that Mr. Basargin characterized his [Mr. Basargin's] share of the vessel's proceeds as "boat rent;" and that Mr. Basargin was never present on, nor exercised control over, the vessel.

## DISCUSSION

Under 50 C.F.R. § 679.40(a)(2),<sup>9</sup> a person who leased a vessel that made legal landings of halibut or

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<sup>5</sup>In his Request for Application for QS, Mr. Erofeeff claimed that the lease was in effect for the period May 31, 1988, through October 1, 1990. In his affidavit, dated January 13, 1996, Mr. Erofeeff stated the lease period as "approximately February 1988 through September 1990."

<sup>6</sup>See Mr. Erofeeff's affidavit of January 13, 1996.

<sup>7</sup>The Commercial Fisheries Entry Commission for the State of Alaska.

<sup>8</sup>See Mr. Erofeeff's letter to the Division, dated June 16, 1994.

<sup>9</sup>Formerly 50 C.F.R. § 676.20(a)(1). Effective July 1, 1996, 50 C.F.R. Part 676 was removed and the regulations thereunder were renumbered. However, there have not been any changes material to the issues in this appeal.

sablefish, harvested with fixed gear, from any IFQ regulatory area in any QS qualifying year, is a "qualified person." Such a vessel lessee will receive QS that would otherwise go to the owner of the vessel.

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

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

50 C.F.R. § 679.40(a)(3)(iii)<sup>10</sup> (Emphasis added).

Here, there is no conclusive evidence of a lease, either in the form of a written lease agreement or a notarized statement. Mr. Erofeeff contends that he has presented sufficient "other evidence" of an oral lease to establish that he held a lease of the F/V FLYING SAUCER during the relevant period.

In Smee,<sup>11</sup> we readdressed the factors an Appeals Officer should consider in making a case-by-case determination of whether a business relationship will be recognized as a lease when there is no written lease document. In Smee, we considered the factors developed in O'Rourke v. Riddle<sup>12</sup> and Kristovich v. Dell,<sup>13</sup> and expressly added a factor: "how the parties characterized their business arrangement at the relevant times." That factor was renumbered as the first factor to consider. We will accordingly consider the following nonexclusive factors<sup>14</sup> in order to determine whether the unwritten arrangement between the parties was a lease:

- (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;

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<sup>10</sup>Formerly 50 C.F.R. § 676.20(a)(1)(iii).

<sup>11</sup>Appeal No. 95-0076, August 1, 1996, at 5-7, *aff'd*, August 20, 1996.

<sup>12</sup>Appeal No. 95-0018, May 18, 1995, *aff'd* May 23, 1995.

<sup>13</sup>Appeal No. 95-0020, March 20, 1996, at 10, *aff'd* March 27, 1996.

<sup>14</sup>"[T]hese are not exclusive factors. Appeals Officers have discretion to consider other factors that, in their judgment, help in determining whether a lease existed between the parties." Smee, at 7.

- (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 his/her own business for federal income tax and other purposes; and
- (7) whether the claimed lease had a set or guaranteed term.

### **1. The parties' characterization of the arrangement**

The record contains no evidence of the circumstances under which the parties reached an agreement concerning the arrangement under which they would operate. The only possibly relevant evidence we have concerning how the parties characterized their arrangement are:

(1) four trip summaries or settlement sheets prepared by Mr. Basargin for the 1990 halibut openings, which Mr. Basargin has labeled "Exhibit B" [four pages]; and (2) the parties' income tax treatment of income and expenses from fishing operations, which will be discussed later, under the sixth factor.

As originally prepared, two of these settlement documents [for the third and fourth halibut openings in 1990] characterized income from the fishing operations of the F/V FLYING SAUCER as "Boat Rent Ignaty B." Mr. Basargin admits that he altered these documents before submitting them with his appeal, and that he changed the wording to read "Boat Share Flying Saucer." He states that he also inserted the same phrase on the sheet relating to the second halibut opening in 1990, even though the document originally did not characterize this income at all. On page 2 of his affidavit of February 23, 1996, Mr. Basargin explained that these changes to the documents were made to "reflect my understanding of the agreement." He points out that he also used the phrase "boat rent" in connection with income from his other vessels during this same period of time, even though he did not have lease arrangements with the operators of those vessels. He acknowledges that it was improper to alter the documents, but asserts that "boat rent" was merely a "poor choice of words on my part, and not an indication that I thought I was receiving rent payments from the vessels' captains." [Affidavit, at 3-4.]

Although Mr. Basargin states that "I do not have a full command of the English language, and I did not fully comprehend the impact of the use of the phrase 'Boat Rent' as used on this worksheet," he does understand the significance of that term now, and he appears to have understood it when he altered the documents. Nonetheless, the use of the phrase "boat rent" and the alteration of documents need not be viewed as an admission that he had, or believed he had, a lease arrangement with Mr. Erofeeff. It is equally possible that Mr. Basargin was careless with his use of terms when he originally made out the documents, and that his subsequent alteration was an ill-conceived attempt to make sure the documents

did not create the wrong impression during the appeal. In light of these possibilities, we decline to give any weight to the terms used on the settlement sheets.

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

Mr. Erofeeff claims that he operated the vessel as a family enterprise, and made all the decisions regarding the vessel's operation;<sup>15</sup> and that Mr. Basargin was never present on the vessel. Mr. Basargin does not deny that Mr. Erofeeff captained the vessel, or operated it as a family business, nor does he claim that he was physically on the vessel. Thus, it appears that Mr. Erofeeff was in control and command of the vessel while at sea. As discussed under the third factor, however, Mr. Erofeeff did not specifically address or deny Mr. Basargin's assertions that he decided when and where the vessel would be fished.

The evidence indicates that Mr. Erofeeff had possession of the vessel during the halibut openings in question. Whether he also had possession of the vessel between openings and during the winter off-seasons is not clear. Affidavits of Mr. Erofeeff's sons, Alexander Erofeeff [January 24, 1996, at 2], and Filip Erofeeff [January 23, 1996, at 2], indicate that the vessel was laid up for the winter months at Northern Enterprises, and that the Erofeeff family painted and maintained the vessel each year. Receipts for vessel parts and repairs submitted by both parties are dated between late April and September, with the exception of one invoice dated December 9, 1988, submitted by Mr. Basargin. Other receipts submitted by Mr. Basargin show that he paid annual vessel moorage fees to the City of Homer. Mr. Basargin states that Mr. Erofeeff did not have possession of the vessel when it was not fishing. ["Written Summary of Respective Position", September 22, 1995, at 2]. Mr. Erofeeff states that "Ignaty [Basargin] was never present on the F/V Flying Saucer *while we were fishing* [emphasis supplied]." [Affidavit, January 23, 1996]. Mr. Erofeeff does not state whether Mr. Basargin went on the vessel or had possession of it at other times during the period of the alleged lease.

On balance, the evidence in the record does not establish by a preponderance that Mr. Erofeeff had sole possession and control of the vessel for the entire three-year period of the claimed lease. In

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<sup>15</sup>See Mr. Erofeeff's affidavit of January 13, 1996, where he writes: "Between 1988 and 1990, I was the operator of the F/V FLYING SAUCER. ... I was not merely a skipper on the FLYING SAUCER. ... I made all decisions regarding the operation of the F/V FLYING SAUCER during the fishing season. ... There is absolutely no question that my family and I operated the F/V FLYING SAUCER during the relevant periods of time. We operated this boat as a family enterprise, and it was because of our effort that legal landings were made. ... I was the captain of the F/V FLYING SAUCER between 1988 and 1990. I decided whether I would fish a halibut opener. I operated the boat. ..."

addition, Mr. Basargin's absence from the vessel, and Mr. Erofeeff's operation of the vessel, are as consistent with a hired skipper or other arrangement as they are with a lease arrangement. Thus, the evidence relating to this factor does not help substantially to determine whether the relationship between the parties was a lease or not.

### **3. Direction of the fishing operations**

In his appeal, Mr. Basargin is quite specific and detailed in describing the ways in which he claims to have controlled the overall fishing operations of all his vessels, including the F/V FLYING SAUCER, during the years in question. He states that although he was not present on the F/V FLYING SAUCER, he was commanding another of his vessels at the same time, and that all his vessels fished together. Mr. Basargin states that during all the openings, he would decide where all the vessels would fish and would lead the way to the fishing grounds. He states that the vessels returned from the fishing grounds together. He states that he selected the canneries to which his vessels would sell, and that he made the arrangements with those canneries. He also took care of the accounting and paperwork associated with the fishing operations. [Appeal pleading, at 1; "Written Summary of Respective Position," September 22, 1995, at 1].

In support of his claim, Mr. Basargin submitted affidavits of three persons who were crew members on the F/V FLYING SAUCER at various times during the years 1988 - 1990. In identical statements, three crew members asserted:

To my knowledge there was no lease in effect between the owner and the skipper. The owner was the one to direct where we fished, who we delivered the fish to, and if the conditions were safe for fishing. [Affidavits of Nikita Kaya, November 26, 1994, Prokopy "Corey" Zarkoff, January 6, 1995, and Afonasi Ayhan, December 29, 1994].

In response, Mr. Erofeeff states only that "I made all decisions regarding the operation of the F/V Flying Saucer during the fishing season." and "I decided whether I would fish a halibut opener." [Affidavit, January 23, 1996, at 4 and 6]. Mr. Erofeeff also argues that all but one of the affidavits submitted by Mr. Basargin are irrelevant to this appeal because the affiants did not work on the F/V FLYING SAUCER during the years in question. He states that Nikita Kaya was the only affiant who worked on the vessel during that period, and that was only for one week in 1989. Mr. Erofeeff also submitted an affidavit by Prokopy Zarkoff, which he says supports a finding that a lease existed between the parties. But this affidavit was never signed, dated, or notarized and, therefore, we give it no weight.

This "Battle of the Affidavits" did not produce a clear victor, but other evidence already on record with the Division tips the balance in favor of Mr. Basargin. The evidence of landings made from Mr. Basargin's three vessels during the years in question independently supports his claim that the vessels were fished together and that he selected the buyers.

The record shows that all nine halibut landings made from the F/V FLYING SAUCER in 1988 and 1989 were on the same dates and in the same regulatory areas as those made from another of Mr. Basargin's vessels, the F/V STAR TREK . The sales during this two-year period were made to four different processors, but in eight of the nine openings, both vessels sold to the same processor. In 1990, all three of Mr. Basargin's vessels fished the same four openings. On three occasions, all three boats sold to the same processor; on the other occasion, the F/V FLYING SAUCER and the F/V SEA GLIDER sold to the same processor.<sup>16</sup>

Taken as a whole, this evidence is consistent with Mr. Basargin's claim that his boats fished together, and that he selected the buyers and made prior arrangements with them. We believe it is more than mere coincidence that, in every case during the three years in question, all the halibut landings from Mr. Basargin's vessels were made on the same dates and in the same regulatory areas, and almost always to the same processors. This evidence suggests to us that Mr. Basargin was in control of the combined fishing operations of his three vessels. At the very least, the landings evidence tends to show that the parties operated the vessels in a coordinated fashion. Although it is conceivable that this evidence might be interpreted in a way more consistent with Mr. Erofeeff's version of events, he has not provided

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<sup>16</sup>Record of halibut landings, showing vessel, date, buyer, and regulatory area:

<u>Star Trek</u>	<u>Flying Saucer</u>	<u>Sea Glider</u>
05-25-88 Whitney Foods, Anchorage [3A]	Icicle, Homer [3A]	
06-22-88 Whitney Foods, Anchorage [3A]	Whitney Foods, Anchorage [3A]	
08-06-88 Peter Pan, King Cove [4A]	Peter Pan, King Cove [4A]	
09-09-88 Whitney Foods, Anchorage [3A]	Whitney Foods, Anchorage [3A]	
10-04-88 Icicle, Homer [3A]	Icicle, Homer [3A]	
05-17-89 Icicle, Arctic Star [3A]	Icicle, Arctic Star [3A]	
08-15-89 Royal Aleutian, Dutch H. [4B]	Royal Aleutian, Dutch H.[4B]	
09-09-89 Icicle, Seward [3A]	Icicle, Bering Star [3A]	
10-12-89 Icicle, Homer [3A]	Icicle, Homer [3A]	
05-02-90	Icicle, Homer [3A]	
05-03-90 Icicle, Homer [3A]		Icicle, Homer [3A]
06-07-90 Icicle, Homer [3A]	John Cabot, Seldovia [3A]	John Cabot, Seldovia [3A]
08-15-90 Peter Pan, King Cove [4A]	Peter Pan, King Cove [4A]	Peter Pan, King Cove [4A]
08-31-90 Keener Packing, Kenai [3A]	Keener Packing, Kenai [3A]	KeenerPacking,Kenai[3A]
09-01-90	Keener Packing, Kenai [3A]	

sufficient facts to enable us to do so. The greater specificity of Mr. Basargin's claims regarding the fishing operations, and the corresponding lack of specificity of Mr. Erofeeff's response, strengthen our view that more weight should be given to Mr. Basargin's explanation of events. Therefore, we find it more probable than not that Mr. Basargin directed the fishing operations of all his vessels, including the F/V FLYING SAUCER, during the years in question.

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

Mr. Basargin states that he prepared the final settlements and paperwork for the fishing operations, and that he was "responsible for everything, except for driving the vessel to the fishing grounds and working the gear."<sup>17</sup> The affidavits of three crew members of the F/V FLYING SAUCER state that they had been hired by Mr. Basargin during the period of Mr. Erofeeff's use of the vessel. Mr. Basargin also submitted the affidavits<sup>18</sup> of skippers and crew from other vessels that he owned during the QS qualifying period and base years, all of whom affirmed that they were hired by Mr. Basargin. Mr. Erofeeff asserts that two of the crew members [Mr. Kaya and Mr. Zarkoff] were not hired by Mr. Basargin. Mr. Erofeeff contends that he hired Mr. Kaya at the request of Mr. Basargin, and that it was for only one week during the 1989 salmon season. Mr. Erofeeff states that he hired Mr. Zarkoff for the 1990 halibut season, and after two openers "let him go." Mr. Basargin never responded to these contentions.

Mr. Erofeeff claims that the operation was a family business, and that he hired and paid additional crew to help his family fish. He submitted the affidavit of his father, Narazii Erofeeff (one halibut opener in 1990), and his son, Filip Erofeeff (1988-1990),<sup>19</sup> as proof of family who served as the vessel's crew. He also submitted the 1988 federal tax 1099 forms for Alex Erofeeff, Afonasy [sic] Ayhan, Phillip Erofeeff, and Pavel Erofeeff, as further proof that he hired and paid family and other persons to crew the vessel.

The documents show, and Mr. Erofeeff does not deny, that Mr. Basargin kept the records, and did the accounting for crew and captain settlements, and paid Mr. Erofeeff his captain's share, and separately

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<sup>17</sup>Testimony of Mr. Paul Fleenor, on behalf of Mr. Basargin.

<sup>18</sup>See the affidavits of skippers Afonasi and Alex Kalugin, and crew members Demetry Erofeeff, Steve Ayhan, and Andrey Cheremnov, who served the F/V STAR TREK and the F/V BARIN in 1986 or 1990.

<sup>19</sup>Filip Erofeeff stated that he was not paid because it was a family operation.

paid Mr. Erofeeff for the crew's share.<sup>20</sup> The documents are silent as to who determined crew share percentages. All that is known is that Mr. Basargin kept the records, did the accounting, paid Mr. Erofeeff his net share, and paid Mr. Erofeeff the crew's share.

We find that, on balance, the evidence shows that Mr. Erofeeff was the person who hired, fired, and paid the vessel's crew. The 1099's for 1988, and the affidavits of Nazarii and Filip Erofeeff, show that it was a family operation, headed by Mr. Erofeeff. Mr. Erofeeff's contention that he hired and/or fired at least two of the three non-family crew was never specifically rebutted by Mr. Basargin, and all three were directly paid out of a lump sum by Mr. Erofeeff. While Mr. Basargin did the paperwork and settlements, the checks were made out to Mr. Erofeeff, not the crew, adding further credibility to Mr. Erofeeff's control over the crew. Mr. Basargin never specifically alleged in his affidavits that he hired, fired, and paid the crew. Mr. Erofeeff, on the other hand, did. We add that the experiences of the crew aboard Mr. Basargin's other vessels are, even if true, irrelevant as to the employment practices aboard the F/V FLYING SAUCER, given the vessel's uniqueness as a family operation. Thus, we find that Mr. Erofeeff was responsible for hiring, firing, and paying the crew of the F/V FLYING SAUCER.

## **5. Responsibility for the operating expenses of the vessel**

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. "Operating expenses of the vessel" are those expenses that are attributable to, and necessitated by, the fishing operations in question. Smee, at 12-14.

Mr. Erofeeff states that "Ignaty Basargin was responsible for one-half of all expenses, including food, fuel, bait, and lost gear, while I was responsible for one-half of these same expenses, plus paying the crew." [Affidavit, January 23, 1996, at 1-2] Mr. Basargin states that he was solely responsible for expenses. He stated that, among other things, he purchased the necessary papers for licenses and

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<sup>20</sup>See the copies of checks made out to Mr. Erofeeff by Mr. Basargin for the purpose of paying Mr. Erofeeff, Corey Zarkoff (9/5/90), Efrem Reutov (9/5/90), Nikita Kaya (1989), Afonasi Ayhan (1989), or Nazary Erofeeff (9/5/90). There are no checks in the record for 1988.

permits, and paid to replace gear when it was lost from the vessels. He states that gear loss expenses were deducted from the crew on a share basis, with the vessel's share being the greatest. Mr. Basargin also paid for insurance and moorage, and initially provided the gear.

A review of all the receipts, account statements, and cancelled checks submitted by the parties reveals that most of the expenses for the vessel during the years in question were charged on an account with Icicle Seafoods. The account was in the name of Mr. Erofeeff, with the vessel noted as the F/V FLYING SAUCER. Many of the receipts were imprinted with Mr. Erofeeff's salmon drift net permit card, and they show the F/V FLYING SAUCER as the vessel. Mr. Basargin argues that even though the Icicle Seafoods account was in Mr. Erofeeff's name, that does not mean that Mr. Erofeeff would have been responsible for payment of the account. Mr. Basargin states that Icicle Seafoods has had a long-standing relationship with him and that Icicle's practice is to put accounts in the name of the permit holder. In support of this claim, he submitted an affidavit from Rachel Adams of Icicle Seafoods in Homer, who agrees that this is the company's policy. [Affidavit, August 29, 1995] It appears from the record that all accounts with Icicle for the F/V FLYING SAUCER were paid from gross fishing proceeds.

It would be speculative to try to determine whether Mr. Erofeeff or Mr. Basargin, or both of them, or the vessel itself, would have been ultimately liable for these expenses if fishing proceeds had not been sufficient to cover them. But we need not speculate. Mr. Erofeeff has stated that he and Mr. Basargin were equally responsible for the expenses of the fishing operations. Thus, Mr. Erofeeff acknowledges that if fishing proceeds had not covered expenses, he and Mr. Basargin would each have been responsible for half. If we accept Mr. Erofeeff's statement, then we cannot find that he was primarily responsible for the operating expenses of the vessel. At best, he was no more responsible than Mr. Basargin.

One other fact is worth considering as part of this factor: Mr. Basargin's 50-percent share [whether termed "share" or "rent"] was not "off the top." Expenses were paid first, then income from the fishing operations were calculated and distributed. This fact, combined with Mr. Basargin's responsibility for at least one-half of the expenses, tends to show that the parties had something other than a lessor-lessee relationship.

## **6. Treatment of the fishing operations for tax and other purposes**

Mr. Erofeeff claimed business income and expenses on Schedule C of his 1989 and 1990 federal income tax returns.<sup>21</sup> Mr. Erofeeff also filed 1099's in 1988 for several employees. Although he

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<sup>21</sup>He did not submit a copy of his federal income tax return for 1988.

claimed deductions relating to payments for the "lease" of property, (undoubtedly, the F/V FLYING SAUCER), he claimed no deductions for insurance, repairs, maintenance, food, bait, or fuel on his 1990 federal return, or on his 1989 return, except for fuel. We could find no evidence in Mr. Erofeeff's tax returns that he paid Mr. Basargin for his bookkeeping, and time spent for final settlements.

Mr. Basargin claimed business income and expenses for fuel, food, bait, insurance, repairs, maintenance, and supplies on Schedule C of his 1988-1990 federal income tax returns. Deductions for gear were also taken on his 1988 return. He did not claim wage deductions on any of his returns. Although not discernable on the face of the returns, Mr. Basargin claims that the income and deductions were related to all three of his fishing vessels. Given the amounts of income claimed on his returns, we find his claim credible.

On balance, we find that Mr. Erofeeff's tax return is not entirely consistent with the existence of a vessel lease. While he claims deductions for lease or rental payments, he does not claim deductions for costs (insurance, meals, bait, fuel, repairs, maintenance, gear, bookkeeping, and final settlements, etc.) that would normally be incurred from a fishing business operation. On the other hand, we find that Mr. Basargin's tax returns are consistent with his claim that the vessel's operation was part of his combined fishing enterprise. He claimed the combined income and expenses from all his vessels on the same tax return each year for 1988-1990. Consequently, the tax returns suggest that the fishing operations were more Mr. Basargin's than Mr. Erofeeff's.

## **7. Whether the claimed lease had a set or guaranteed term**

Mr. Erofeeff claims that in January of 1988 he made an oral agreement with Mr. Basargin to lease the F/V FLYING SAUCER for three years, beginning January 1, 1988, through December 30, 1990.<sup>22</sup> In his Application for QS and in his RFA, he claimed different lease periods.<sup>23</sup> Mr. Basargin denies that there was ever a lease, and contends that he had a hired skipper arrangement with Mr. Erofeeff. Mr. Basargin did not specify the dates of his arrangement with Mr. Erofeeff, nor did he take issue with the dates provided by Mr. Erofeeff. The parties do not disagree that Mr. Erofeeff operated the F/V FLYING SAUCER during each of the halibut openings in which the vessel participated in 1988, 1989, and 1990.

As stated earlier in this Decision, it is not clear that Mr. Erofeeff had exclusive possession of the vessel for the entire three-year period. Mr. Basargin specifically states that Mr. Erofeeff's possession was not

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<sup>22</sup>See Mr. Erofeeff's affidavit of June 16, 1994.

<sup>23</sup>In the Application he lists the dates of the lease as May 31, 1988, through October 1, 1990. In the RFA, he lists February 1988, through September 1990.

exclusive. He states that he had the right to fire Mr. Erofeeff and to retake possession of the vessel at any time. [Affidavit, February 23, 1996] But Mr. Basargin did not produce any evidence showing that he had possession or use of the vessel during the years in question. If Mr. Erofeeff did have sole possession of the vessel for the three-year period, that would be consistent with his lease claim, but it does not tell us whether the parties had agreed that his possession and use of the vessel was for a fixed or guaranteed term.

There is no reliable evidence in the record indicating whether the claimed lease was for a guaranteed period or for dates certain, or whether the relationship could have been terminated at will by either party. All that can be ascertained from the documents is that Mr. Erofeeff possessed and fished the vessel for the fishing seasons of 1988-1990. Consequently, we find that the evidence does not show one way or the other if there was a set or guaranteed term for the use of the vessel, and that this factor, therefore, is of no value in determining the existence of a lease.

### **Summary of the Evidence**

Considering all the evidence in the record, we do not believe that it is sufficient to establish the existence of a vessel lease between the parties. Our primary considerations in reaching this result are that (1) Mr. Basargin directed the overall fishing operations, and the F/V FLYING SAUCER was operated as part of the owner's multiple-vessel enterprise; (2) the parties' federal income tax returns are more consistent with the view that the parties did not have a lessor-lessee relationship; and (3) Mr. Basargin was at least as responsible for the expenses, and therefore the risk, of the fishing operations as Mr. Erofeeff was. Factors 1, 2, 4, and 7 are inconclusive and do not help us to determine in this case whether a vessel lease existed.

### **FINDINGS OF FACT**

1. Mr. Erofeeff was the sole operator of the F/V FLYING SAUCER during the fishing operations in question.
2. Mr. Erofeeff was responsible for hiring, firing and paying the crew of the F/V FLYING SAUCER.
3. The F/V FLYING SAUCER fished together with Mr. Basargin's other vessels and was under the overall direction of Mr. Basargin.
4. Mr. Basargin was at least equally responsible as Mr. Erofeeff for the expenses of the fishing operations of the F/V FLYING SAUCER.
5. The parties' income tax treatment of the fishing operations is more consistent with a hired skipper or

other arrangement than with the existence of a vessel lease.

#### CONCLUSION OF LAW

Mr. Erofeeff did not hold a lease of the F/V FLYING SAUCER during the period of time in question in this appeal.

#### DISPOSITION AND ORDER

The IAD that was the subject of this appeal is SUPERSEDED by this Decision. The Division is ORDERED to allocate to the Appellant Ignaty Basargin the qualifying pounds from halibut landings made from the F/V FLYING SAUCER from January 1, 1988, through December 30, 1990, and to issue to Mr. Basargin the resulting QS and 1997 IFQ. This Decision takes effect on May 14, 1997, unless by that time the Regional Administrator orders review of the Decision.

Because the 1997 fishing season has already begun, we recommend that the Regional Administrator expedite review of this Decision in order to minimize the loss of fishing time for the prevailing party in this appeal.

Any party, including the Division, may submit a Motion for Reconsideration, but it must be received by this Office not later than 4:30 p.m., Alaska Time, on the tenth day after the date of this Decision, April 24, 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 Officers, 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 Decision on Reconsideration.

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Edward H. Hein  
Chief Appeals Officer

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Randall J. Moen  
Appeals Officer