NATIONAL MARINE FISHERIES SERVICE, ALASKA REGION
OFFICE OF ADMINISTRATIVE APPEALS

In re Applications of	)	Appeal No. 95-0088
	)	
JAY R. THOMASSEN,	)	
Appellant	)	
	)	DECISION
and	)	
	)	
MECHANICS SERVICE, INC.,	)	
Respondent	)	July 29, 1998
_____	)	

SUMMARY OF DECISION

The Appeals Officer found overwhelming evidence that the Appellant did not hold a lease of the F/V MISS CONCEPTION from the Respondent during the period in question, and AFFIRMED the Initial Administrative Determination that rejected Appellant's lease claim. The Respondent qualifies as the party who should receive the initial Quota Shares resulting from legal landings of sablefish and halibut made from the F/V MISS CONCEPTION during the period March 18, 1990 to June 20, 1990.

STATEMENT OF THE CASE

Jay Thomassen filed this timely appeal from an Initial Administrative Decision [IAD] issued on April 12, 1995, by Restricted Access Management [RAM] of the National Marine Fisheries Service, Alaska Region [NMFS]. The IAD resolved the conflicting claims of Thomassen and Mechanics Service, Inc. [MSI] to Quota Share [QS] under the Pacific halibut and sablefish Individual Fishing Quota [IFQ] program contained in 50 C.F.R. Part 679 [formerly Part 676].[1]

At issue is whether Thomassen leased the F/V MISS CONCEPTION from its owner, MSI, from March 18, 1990 to June 20, 1990. At stake is the IFQ credit for 121,409 qualifying pounds of halibut landings and 169,918 qualifying pounds of sablefish landings made from the vessel during the period. The IAD rejected Thomassen's lease claim and assigned the qualifying pounds to MSI. RAM observed that, although Thomassen "bore considerable responsibility for the fishing operation" and MSI "submitted no evidence to indicate . . . [it] shouldered the financial burdens and risks of the fishing operation," the parties' written Agreement was "essentially an employment (hired skipper) agreement." [IAD, at 4]

[1]The IFQ regulations were renumbered, effective July 1, 1996.

Appeals Officer Louis Agi granted a written hearing. The parties submitted numerous memoranda, declarations, affidavits, and supporting documents.[2] [*See*, "Pleadings Index"] Both parties were represented by counsel.

ISSUES

1. What were the terms of the arrangement between the parties for the use of the F/V MISS CONCEPTION?

2. Was the written Agreement between the parties invalid because of duress or coercion?

3. Did the arrangement between the parties constitute a vessel lease?

BACKGROUND

The parties do not dispute that Jay Thomassen operated the F/V MISS CONCEPTION from March 18 to June 20, 1990. The question is whether he operated the vessel as a lessee or in some other capacity. Thomassen asserts that he operated under an oral lease that was subsequently reduced to writing, with certain modifications. MSI's principals, Larry and Marilyn Pritchard, assert that there was no oral lease agreement, and that the parties' written Agreement is not a lease.

The written Agreement is not dated, and the parties give different accounts of when it was signed. Thomassen says that he and Larry Pritchard signed the Agreement on or about April 23, 1990 [Thomassen Appeal, ¶11], but that by then an oral lease agreement had already been in effect for five weeks. [Thomassen Appeal, ¶8] Larry Pritchard says he remembers that the written Agreement was signed before the parties' first fishing settlement, which was April 6, 1990. [L. Pritchard Declaration I, at 3] Marilyn Pritchard remembers more specifically that the Agreement was signed in late January, before Thomassen left Seattle to go crabbing in early February 1990. [M. Pritchard Declaration I, at 2] The parties do not dispute that the Agreement pertained to the 1990 fishing season.

Marilyn Pritchard states that the Agreement is in her handwriting. She states that she used notes that her husband wrote from discussions he had with Thomassen. [M. Pritchard Declaration I, at 2] Larry Pritchard states that these discussions took place in late 1989 and early 1990, and that the notes no longer exist. [L. Pritchard Declaration II, at ¶6] Marilyn Pritchard states that she was confident that she could draft the Agreement without the assistance of an attorney because of her experience as a contracts specialist with the Municipality of Seattle. [M. Pritchard Declaration I, at 1]

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[2]Witnesses' declarations or statements will be referred to by the witness's name and relevant page or paragraph number. Where a witness has submitted two declarations, they will be distinguished by a Roman numeral suffix, e.g., J. Thomassen Declaration I, or L. Pritchard Declaration II.

The written Agreement is four and one-half pages long and contains an introductory paragraph, followed by 24 numbered paragraphs and the signatures of Larry Pritchard, as president of MSI, and Jay Thomassen. The introductory paragraph recites that the parties to the Agreement are MSI and Jay Thomassen "hereinafter known as Skipper and/or Crewmember." This paragraph also identifies the F/V MISS CONCEPTION as the "vessel."

The Agreement provides that:

- it is a private contract between Skipper and Owner; [¶1]
- MSI will retain 35% of gross stock from all income, bonuses, adjustments, and fish sales from the operation of the vessel; [¶2]
- MSI and crew will pay for any gear loss "off gross"; [¶3]
- no charges will be made to the vessel or against any gross stock of fish without prior approval [of the Owner], except for fuel, lubricants, and bait; [¶6]
- the crew will rig new gear and overhaul old gear "to be ready for the next opening or year before final settlements are made"; [¶7]
- any tools or equipment lost or damaged due to negligence [by the Skipper or crew] will be deducted from the net stock; [¶8]
- a [federal tax form] 1099 will be prepared and sent to each crew member [presumably by MSI]; "It is understood that MSI will not be responsible for any federal taxes, social security taxes or unemployment tax" for crew members and that crew members will pay their own taxes; [¶9]
- [a provision that crewmembers would pay their own P&I insurance was deleted]; [¶10]
- the Skipper agrees to indemnify MSI and its officers for any fines or penalties imposed as a result of violations of fishing laws or regulations [by the Skipper or crew]; [¶11]
- the Skipper will provide necessary permits for fishing and selling product; [¶12]
- the Skipper will give Larry Pritchard 24-hour advance notice of the time and location of any unloading of fish from the vessel; [¶13]
- [cannery] checks will be signed [by the Skipper] and turned over to MSI or deposited

in a designated [account] within 24 hours after delivery; crew settlements will be made every two weeks; MSI will disburse all funds; [¶14]

- the crew is to pay for all vessel repairs unless Larry Pritchard is given written notice "of specific problems before a problem occurs"; a repair fund of 10% of gross stock "will be set aside"; [¶15]

- the crew is to pay for fuel, oil, lubricants, filters, and supplies "from home port to home port"; [¶16]

- "every other load of fish will be sold on my [Larry Pritchard's] fish ticket if owner aboard the vessel"; "if uneven amounts of trip occur load will be split"; [¶18]

- all provisions of the Agreement shall be construed according to the laws of the state of Washington; [¶22]

Jay Thomassen concedes that his claimed lease relationship with MSI was never clearly documented. [Written Hearing Memorandum, at 1] He asserts that the written Agreement was preceded by an oral lease agreement that contained other terms and conditions not reflected in the written Agreement. Thomassen argues that, because the written Agreement does not contain an integration clause, the written Agreement was not intended to supplant the oral agreement or to comprise the entirety of the agreement between the parties. Rather, he argues, the written Agreement, at most, supplements the terms of the oral lease agreement. Thomassen argues that "consideration of all verbal and written terms and conditions will show that a lease existed." [Thomassen Appeal, ¶8]

Thomassen states that the terms of the oral agreement were:

- MSI would receive a 30% share;

- Thomassen "intended" to take a 5% share before crew shares were calculated from the net proceeds;

- gear loss was to be paid "off the top" of vessel gross before shares were determined;

- Thomassen was to have "total control of the vessel";

- the vessel was to be redelivered to Seattle by "about" June 27, 1990.
[Written Hearing Memorandum, at 4; J. Thomassen Declaration I, ¶4]

Thomassen states that he signed the written Agreement reluctantly and under coercion. He says this

occurred in Seward, Alaska, on or about April 23, 1990, at the time of the vessel's third delivery of the season. At that time, he says, Larry Pritchard insisted that the catch be sold under his own permit. Thomassen says he refused to allow this because it would have been illegal since Pritchard had not been aboard the vessel when the fish was harvested. He states that Larry Pritchard got angry at his refusal to cooperate and threatened to take the boat back, but that Pritchard ultimately withdrew his demand after the crew agreed to leave with Thomassen if Pritchard retook possession of the vessel. Thomassen says Pritchard agreed to let him continue to fish with the vessel, provided he signed the Agreement. Thomassen states that he signed only "to avoid a dispute that would have likely interrupted fishing operations." [Thomassen Appeal, ¶11; J. Thomassen Declaration I, ¶¶8-9]

For his part, Larry Pritchard states that at the time of signing the Agreement he fully expected to be aboard the vessel during fishing operations and, therefore, did not originally include in ¶18 the phrase "if owner aboard the vessel." He says that Thomassen insisted on this language change before signing the Agreement. Pritchard concedes that the disagreement over landing fish on Pritchard's permit occurred at the time of the third delivery and that he got angry at Thomassen, but he states that the Agreement in its final form had already been signed before the first settlement — well before this disagreement arose. Pritchard says he considers himself a "smart businessman" and that he decided it was better to allow Thomassen to continue as skipper of the vessel for the rest of the season, rather than replace him after the third delivery. [L. Pritchard Declaration I, at 5]

Pritchard acknowledges that he and Thomassen orally agreed that Thomassen would receive a 5% skipper's share. Pritchard states that this agreement was omitted from the written Agreement at Thomassen's request. [MSI Response, at 4] Thomassen asserts that the omission was due to his own oversight. [J. Thomassen Declaration I, ¶9]

During the period of the parties' agreement, the vessel made six deliveries:

1. April 6, 1990 — Seward, Alaska
2. April 14, 1990 — Seward, Alaska
3. April 23, 1990 — Seward, Alaska
4. May 5, 1990 — Seward, Alaska
5. May 17, 1990 — Seward, Alaska
6. June 10, 1990 — Petersburg, Alaska

Settlements for the first four deliveries were handled by Marilyn Pritchard. The fifth settlement was done by Jay Thomassen's wife, Carol. The sixth settlement was completed by Mary's Settlement House, Petersburg, Alaska.

DISCUSSION

1. What were the terms of the arrangement between the parties for the use of the F/V MISS CONCEPTION?

The most compelling evidence of the parties' agreement is their written contract. The contract itself provides that it is to be construed according to the laws of the state of Washington. Under Washington law, evidence extrinsic to a written contract is inadmissible to contradict the terms of the contract. This is the parol evidence rule, which is not a rule of evidence, but part of the substantive law of contracts in Washington. The rule applies only to a contract that is integrated, i.e., intended by the parties as a final expression of the terms of their agreement, or partially integrated, i.e., intended to be a final but not complete expression of the terms of their agreement. Emrich v. Connell, 105 Wash. 2d 551, 555-556, 716 P.2d 863, 865-866 (1986).

Under this rule, prior or contemporaneous negotiations and agreements are presumed to have been merged into the final written contract, and evidence of such negotiations or agreements is incompetent and immaterial. The absence of a merger or integration clause in the contract does not necessarily open the door to parol (extrinsic) evidence, but in determining whether the parties intended their agreement to be integrated, all relevant extrinsic evidence, oral or written, should be considered. *Ibid.* In addition, there are several exceptions to the parol evidence rule. Parol evidence may be considered, for example, to show the true date of the execution of a contract in order to supply a date where one is missing. It can also be used to explain ambiguous terms, to supply missing terms that are consistent with the writing, and to determine the validity of the agreement itself.

One test used to determine whether a written contract was integrated, or partially integrated, is whether the particular matter sought to be established by the alleged extrinsic negotiation is fully covered in the contract. Where the particular matter is mentioned or dealt with in the written contract, the contract will be presumed to contain the entire agreement with regard to that subject. 29A Am. Jur. 2d *Evidence* §1118-1119; 17A Am. Jur. 2d *Contracts* §398.

The written Agreement in this Appeal is clearly not a fully integrated agreement. The parties both state that they orally agreed that Thomassen was to receive a 5% skipper's share, which is not mentioned in the written Agreement. This admission by the parties rebuts the presumption of merger, at least as to that portion of their agreement, and shows that they did not intend the written Agreement to be the complete and final expression of their agreement.

The written Agreement provides that MSI was to receive a 35% share of the gross stock. Thomassen states that their original oral agreement was that MSI would receive a 30% share, and that MSI, in fact, never received more than 30%. [J. Thomassen Declaration I, ¶9] Larry Pritchard states that Thomassen's 5% skipper's share was taken from MSI's 35% share, in effect leaving MSI with a 30% share. The settlement sheets support this view. [L. Pritchard Declaration I, at 3; MSI Response to

Appeal, at 14] Thus, the parties' respective claims on this point are not really in conflict. I find that the parties agreed that MSI was to receive a 30% share and Thomassen was to receive a 5% share.

The parties do not dispute that their agreement was in effect from March 18, 1990 [when Thomassen left Seattle with the vessel] until June 20, 1990 [when Thomassen returned the vessel to MSI in Seattle]. Although the written Agreement did not mention the period of time in which it was to be in effect, the parties' acknowledgment of the time period supplies the missing term.

That the parties agreed to the other provisions in the written Agreement is not contradicted by Thomassen or the evidence in the record. Thomassen states that the provisions in the written Agreement were either consistent with the parties' oral agreement or with the manner in which they operated under the oral agreement; were new provisions that had not previously been covered under the oral agreement; or were agreed upon but not enforced. [J. Thomassen Declaration I, ¶9] Although there is testimony to the effect that some of the provisions in the written Agreement were not followed or not strictly followed, this testimony suggests only that some of the provisions may have been breached or disregarded. Such testimony, however, does not negate the fact that the provisions were part of the parties' agreement. Thus, I find that all the provisions in the written Agreement, other than ¶2 (MSI's share), were intended to be a final but not complete expression of the parties' agreement. I conclude, therefore, that the written Agreement was a partially integrated contract and, except for ¶2, its provisions may not be contradicted by extrinsic evidence.

The only other point that Thomassen claims was agreed to by the parties, but which Larry Pritchard disputes, is the assertion that Thomassen was to have total control of the vessel. [J. Thomassen Declaration I, ¶4; L. Pritchard Declaration I, at 3] The conflicting statements of the parties, standing alone, are inconclusive. More telling is the fact that the written Agreement contains certain provisions that appear to be inconsistent with Thomassen's asserted "total control of the vessel," depending on what that phrase means. For example, the Agreement provides that MSI would retain significant control over various aspects of the vessel's operations, such as advance notice of deliveries [¶13], turning over proceeds to MSI for disbursement [¶14], and advance approval of vessel repairs [¶15]. To the extent that these provisions may be inconsistent with Thomassen's "total control of the vessel," the parol evidence rule requires that I find that the parties' agreement on this point was as expressed in the written Agreement, and not as claimed by Thomassen. Nonetheless, the degree of Thomassen's control of the vessel and its operations will be addressed in part 3 of this Discussion section.

I find that the essential terms of the parties' arrangement consisted of: (1) all the provisions of the written Agreement, except ¶2; (2) the parties' oral agreement as to the amount of their respective shares; and (3) the dates during which the contract was in effect, which the parties do not dispute.

2. Was the written Agreement between the parties invalid because of duress or coercion?

Thomassen's argument that the written Agreement is invalid because his signature was the product of duress or coercion is not persuasive. If, as Larry and Marilyn Pritchard claim, the written Agreement was signed by both parties before the first delivery, or even before Thomassen left with the vessel from Seattle, then the disagreement that arose over making landings on Larry Pritchard's permit and his alleged threat to retake possession of the vessel occurred too late to affect Thomassen's decision to sign the Agreement.

Even if, as Thomassen claims, the written Agreement was not signed until the dispute arose in late April 1990, Thomassen has failed to prove any duress or coercion sufficient to invalidate the Agreement. Thomassen's assertion that he acquiesced in signing the Agreement to avoid an interruption in fishing operations is essentially a claim of economic coercion or duress. But hard bargaining, even nasty negotiating, does not constitute economic coercion or duress. There must be a showing of wrongful and oppressive conduct by MSI that effectively forced Thomassen's hand.

If the parties' agreement was not a lease, Pritchard would have had the legal right to retake possession of the vessel at will. Under those circumstances, Pritchard's alleged threat to do so would not constitute duress or coercion as a matter of law because it was merely a resort to permissible legal measures. On the other hand, even if Pritchard's alleged threats were wrongful and oppressive, they do not appear to have worked. By his own admission, Thomassen got Pritchard to withdraw his demands concerning the use of the permit and Thomassen was able to obtain concessions and modifications to the Agreement to his satisfaction. Thus, I find that the written Agreement was not invalid due to duress or coercion.

3. Did the arrangement between the parties constitute a vessel lease?

A valid written vessel lease agreement 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 lease holder, and the period of time during which the lease was in effect. In the absence of conclusive evidence of the existence of a lease, "[o]ther 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)]

I cannot find that the written Agreement in this Appeal constitutes conclusive evidence of the existence of a vessel lease because, as I have already found, it does not represent the parties' complete agreement, and because, as explained below, it does not identify the period of time during which it was in effect, as required by 50 C.F.R. § 679.40(a)(3)(iii).

The copy of the Agreement submitted by Thomassen is titled "1990 MISS CONCEPTION LEASE." The copy submitted by MSI, however, does not contain any title. After comparing the two copies of

the Agreement, I agree with RAM's assumption[3] that Thomassen added this language to the document sometime after it was executed to describe his view of what the document represents. I find that MSI's copy is the version that the parties signed, and I disregard this added language. Without that language, the Agreement contains no dates whatsoever. The Agreement contains no provisions that adequately describe when it began or ended.[4] Even the signatures of the parties are not dated. Therefore, I find that the Agreement does not identify the period of time during which it was in effect, and I conclude that it cannot be considered conclusive evidence of a vessel lease. I will, nevertheless, seek to determine from a review of all the evidence in the record, including the written Agreement, whether the overall arrangement between the parties constituted a vessel lease.

As this Office stated in O'Rourke v. Riddle,[5]

> Having considered . . . [various] views on what constitutes or demonstrates a vessel lease, it appears that the [North Pacific Fishery Management] Council intended to allocate Quota Share to those who acted like entrepreneurs in controlling and directing the fishing operations that produced the legal landings in question. An entrepreneur is one who organizes, operates, and assumes the risk in a business venture in expectation of gaining the profit.[6] This is the kind of person the Council seems to have had in mind when it decided that vessel lessees, as well as vessel owners, could be "qualified persons." The RAM Division, too, appears to have envisioned a lessee as one who was an entrepreneur with respect to the fishing operations.

In determining whether the parties' agreement constituted a vessel lease, I will analyze the agreement against the various factors we have employed in other decisions, including most prominently, O'Rourke v. Riddle, Kristovich v. Dell,[7] Smee v. Echo Belle, Inc.,[8] and Harper v. West.[9]

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[3]*See,* IAD, n.2, at 2.

[4]The closest the Agreement comes to specifying a time period is in ¶¶23 and 24. Read together, these implicitly provide that the vessel is to be returned "after the last opening of the season." But the fishing season and year are not specified, nor does the Agreement specify when it was to begin.

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

[6]WEBSTER'S II NEW RIVERSIDE UNIVERSITY DICTIONARY 436 (1988)

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

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

[9]Appeal No. 95-0105, July 17, 1997, at 32-33.

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 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.]

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

1. The parties' characterization of their business arrangement

When analyzing a written document purported to be a vessel lease, the title of the document and the terminology used in the document can be relevant evidence of whether the parties intended to enter into

a lease.[10] The written Agreement in this case does not have a title and does not contain any terminology indicative of a lease, such as "lease," "lessor," "lessee," "charter," or "rent." Marilyn Pritchard, who wrote the lease, states that she clearly understood that the Agreement was not a lease. She states that if MSI had intended the Agreement to be a lease, she would have used terms such as "lessee" and "lessor." [M. Pritchard Declaration I, at 2] Her former supervisor at the Municipality of Seattle states that Ms. Pritchard had a thorough understanding of general contract terms and conditions from her work in his division, and that she understood the terms "lessor" and "lessee." [Carl A. Johnson Declaration] While the absence of lease terminology in a writing does not, in itself, preclude a finding that the writing is a lease, in light of Ms. Pritchard's familiarity with contracts, such an absence in this Agreement is significant.

Thomassen does not state that he and Larry or Marilyn Pritchard ever used lease terminology in their discussions or communications. Thomassen says that "by the Fall of 1989, I had put out the word that I was looking for a vessel to lease for the 1990 long line season" and that he learned from a Mr. Terry MacDonald that the F/V MISS CONCEPTION might be available. [J. Thomassen Declaration I, at 1] Mr. MacDonald states that he "was aware from remarks Jay Thomassen made to me [in the fall of 1989] that he was looking to lease a commercial fishing vessel." MacDonald further states that he was "aware at that time that Larry Pritchard had a vessel that might be available to Mr. Thomassen." Significantly, MacDonald does not say that he knew that Larry Pritchard wanted to *lease* out his vessel, and he does not say that he ever told Pritchard that Thomassen was looking for a boat to *lease*. MacDonald says only that "I informed each about the other." [MacDonald Declaration]

Larry Pritchard states:

> At no time did anyone, including Terry McDonald [sic] or Jay Thomassen ever suggest that Jay would be leasing the Miss Conception. I called Terry McDonald [sic] and told him I was looking for a skipper and he said Jay Thomassen was wanting to get away from working for his Dad, Robert Thomassen and needed a break. There was **never** any oral or written indication that Jay was leasing our vessel. [Emphasis in original][L. Pritchard Affidavit]

Mr. Pritchard further states:

> We first heard about Jay through Terry MacDonald. We tendered for Trident Seafoods, and Terry had delivered fish to us. Somewhere along the way, Terry mentioned he knew a guy who had a lot of potential as a skipper. When we decided we needed an alternate skipper for the MISS CONCEPTION, I talked to Terry, and he suggested Jay. Jay and I later talked by telephone.

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[10]*See, e.g.*, Treinen v. Scudder, Appeal No. 95-0104, October 11, 1995, at 5.

> Jay Thomassen had **about 73 days** of experience skippering a longline fishing vessel prior to the time I hired him to be my skipper for the MISS CONCEPTION. . . . In 1990, when I hired Jay, he had never skippered a longline vessel over 58 ft. . . . [Emphasis in original]
>
> Because of his lack of his lack of experience, there is absolutely no way I would have considered leasing the vessel to Jay. Neither Marilyn nor I nor anyone else that we discussed the arrangements under which Jay operated the vessel ever used the word "lease" to describe those arrangements. [L. Pritchard Declaration I, at 3]

Marilyn Pritchard adds: "[N]either Larry nor Jay nor I ever used the word lease among us to refer to the agreement. We all considered Jay to be a hired skipper, and wrote the agreement accordingly." [M. Pritchard Declaraction I, at 2]

Tom Pritchard, Larry and Marilyn's son who worked as engineer aboard the MISS CONCEPTION during part of time in question, states: "At no time did I ever hear any conversation from Jay Thomassen, Terry MacDonald or Larry or Marilyn Pritchard to refer to Jay Thomassen as anything other than a hired skipper. I never heard the word 'Lessee' or 'Lessor' discussed in the presence of any of these individuals on land or on the Miss Conception." [T. Pritchard Declaration I, at 1]

MSI's former insurance broker states:

> At no time was Jay Thomassen described to me as being a lessee of the vessel, or as serving on it in any capacity other than as an alternate skipper. Jay Thomassen was covered as a crewmember under the P&I insurance [for the 1990 season]. Had we been told that a bare boat charter of the vessel or a time charter of the vessel existed, we would have added Mr. Thomassen as an additional named assured and not as a crewmember. [John E. Long, Jr., Declaration, ¶7]

Jay Thomassen presented the declarations of three crewmembers who worked on the F/V MISS CONCEPTION during the 1990 season. None of them state that Thomassen or anyone else ever mentioned that Thomassen was leasing the vessel. [Declarations of Randy Littleton, Troy Thomassen, and Peter Thynes]

Although not mentioned by Thomassen, I note here that the settlement sheet for the sixth delivery,[11] prepared by Mary's Settlement Service and dated June 12, 1990, identified Jay Thomassen as "Lessee" and uses that term throughout the sheet. [Attachment to J. Thomassen Declaration II] Since

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[11]Without explanation, the Thomassens did not submit the settlement sheet for the fifth delivery.

this settlement was done at Thomassen's direction, I presume that Thomassen identified himself to Mary Covington [owner of service] as a lessee. This document has no significance on the question of whether Thomassen, as a matter of law, held a lease. It does tend to show, however, that Thomassen referred to himself as a lessee to at least one person
during the period in question in this Appeal. There is no evidence in the record that MSI approved or was even notified of the characterization of Thomassen as a lessee on the settlement sheet. Marilyn Pritchard states that "Carol Thomassen refused to give me important information about settlements and expenses." [M. Pritchard Declaration I, at 6] I interpret this statement to mean that MSI was not given a copy of the sixth settlement sheet.

Jay Thomassen also states that he established a Capital Construction Fund [CCF] on the basis of his lease of the F/V MISS CONCEPTION in 1990. In support, he submitted to this Office a copy of letter from NMFS stating that his Interim Capital Construction Fund Agreement had been approved. [Thomassen Exhibit 6] Thomassen also submitted his 1990 federal income return, showing a CCF deposit of $20,000 on an attachment to his Schedule C. [Thomassen Exhibit 7] MSI's accountant, Charles E. Morgan, C.P.A., points out that Thomassen did not submit a Memorandum of Fishing Vessel Lease and Certificate, which is a form developed by NMFS to facilitate the processing of CCF applications. Morgan states that MSI refused to sign such a certificate because they had not leased the vessel to Thomassen. [Morgan Letter, at 6]

I do not accept NMFS's approval of Mr. Thomassen's CCF application as evidence of the existence of a lease, but only as evidence that Thomassen asserted to NMFS that he had a lease in order to participate in the CCF program. I infer from Mr. Thomassen's failure to submit a Memorandum of Fishing Vessel Lease and Certificate, and from Mr. Morgan's statement, that Mr. Thomassen never asked the Pritchards to sign the form or, if he did, they refused because they did not agree that he had a vessel lease. Because there was a financial incentive attached to Thomassen's lease claim on the CCF application, but no financial implications to the Pritchards' refusal to sign the CCF memorandum form, I give greater weight to their refusal as evidence of the parties' characterization of their business arrangement. But I consider this evidence relating to the CCF application as only slightly probative to the issue of whether a vessel lease existed between the parties.

I give much greater weight to the fact that the written Agreement contains no lease terminology and that the person who drafted the Agreement, Marilyn Pritchard, would have known to use such terminology if a lease was intended. I also give substantial weight to the evidence that the parties never discussed entering into a lease with each other. While it may be that Jay Thomassen wanted to enter into a lease, there is no evidence in the record that he or anyone else ever communicated that desire to the Pritchards. Thus, I find the evidence relating to this factor to be highly probative that the parties' agreement was not a lease.

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

A traditional characteristic of a lease is that the lessee has exclusive possession and control of the leased property during the period of the lease. One who is merely a hired skipper would, by definition, be in possession and direct control of the vessel and its navigation. A lessee, on the other hand, need not be aboard the vessel and could hire someone else to skipper it. Thus, a claimed lessee's presence on the vessel, and evidence showing that the claimant ran the vessel, do not necessarily tend to prove that the claimant was a lessee, rather than a hired skipper.

More probative is whether the owner was aboard the vessel or was directing the navigation of the vessel. In a lease, one would not normally expect to find that the lessor (owner) was aboard the vessel. And it would be inconsistent with a lease if the lessor interfered with the lessee's exclusive possession and permissible use of the vessel, or if the lessor asserted the right to do so, or if the lessee acknowledged such a right.

It is undisputed that Thomassen was aboard the vessel and in control of it during all the fishing operations, and that Larry Pritchard was not. But there is some evidence that Pritchard originally intended to operate the vessel himself, at least for part of the fishing season. Pritchard states that "When we signed the agreement, I thought I would be on the MISS CONCEPTION." [L. Pritchard Declaration I, at 5] This statement is supported by MSI's insurance broker, who says:

> Insurance for the MISS CONCEPTION for the 1990 fishing season was originally arranged on the understanding that Larry Pritchard would operate the vessel for black cod and halibut. He later asked that Jay Thomassen be added as an alternate skipper, because Larry wasn't sure he could be on the MISS CONCEPTION during the entire black cod and halibut season, as he hoped to spend part of that season tendering with the SILVER BAY. [John E. Long, Jr., Declaration, ¶5]

The very use of the term "alternate" skipper indicates that Thomassen was not, or might not be, the only person operating the vessel. Further evidence that Larry Pritchard anticipated that he would operate the vessel, at least part of the time, is the NMFS Commercial Fisheries Exemption Registration Form, on which Marilyn Pritchard listed both Jay Thomassen and Larry Pritchard as operators for 1990. [MSI Exhibit 4, accompanying M. Pritchard Declaration I]

The Agreement itself does not contain any provision expressly conferring exclusive possession of the vessel on Jay Thomassen, which is a type of provision one might expect to find in a vessel lease. Paragraph 18 of the Agreement, however, includes the phrase "if owner aboard the vessel." This language, added at the insistence of Thomassen, shows that both parties contemplated that Larry Pritchard might be aboard the vessel. It also is evidence that Thomassen acknowledged Pritchard's right to be aboard.

In the end, it turned out that Larry Pritchard did not operate the vessel himself that season. But Thomassen appears never to have doubted or challenged Pritchard's right to do so. The best example of this was Thomassen's response when, according to him, Pritchard threatened to retake possession of the vessel at the time of the third delivery in late April. Rather than assert his right as a lessee to the exclusive and uninterrupted possession of the vessel, Thomassen resigned himself to the possibility that Pritchard would remove him from the vessel and merely ascertained that the crew would go with him if that occurred. This evidence flies in the face of Thomassen's assertion that he was to have "total control of the vessel." It appears he understood that he would have control of the vessel only if and when Larry Pritchard allowed him to.

That Thomassen was the only skipper of the vessel during the fishing season is as consistent with the existence of a lease as with the existence of a hired skipper relationship. But his acceptance of Larry Pritchard's right to replace him with another skipper and retake possession of the vessel at will is inconsistent with the existence of a vessel lease. I find this latter evidence highly probative that the parties' agreement was not a lease.

3. Direction of the fishing operations of the vessel

This factor considers which party actually directed and controlled the overall operation of the fishing enterprise. It includes such considerations as who decided when, where, and how much to fish and who controlled the disposition of the catch. The assumption is that a lessee, as an entrepreneur, would be in full control of these matters.

The Agreement indicates that MSI was to maintain certain controls over disposition of the catch. For example, Thomassen was required to notify Larry Pritchard 24 hours before any delivery and to specify the time and location of each delivery. [¶13] The Agreement does not specify the reason for requiring such notice, and Thomassen refers to this as "an unnecessary nuisance." [J. Thomassen Declaration I, ¶9] But evidence in the record indicates that the notice requirement was intended to give the Pritchards an opportunity to approve or overrule Thomassen's choice of Icicle Seafoods as processor for each delivery. Larry Pritchard states:

> That would give us time to check out the prices and compare them to Icicle's prices. As it turned out, Icicle's prices with the adjustment were very competitive, so we never made Jay sell the product to any other cannery. [L. Pritchard Declaration I, at 4]

Likewise, the provision in the Agreement requiring that half the catch be landed on Larry Pritchard's fishing permit, if he was aboard the vessel during harvesting, [¶18] shows that the parties understood and agreed that MSI would retain some control over disposition of the catch and that Larry Pritchard might be directly involved in fishing activity. And, as discussed under factor 2, above, Larry Pritchard would almost certainly take over as operator whenever he might be aboard the vessel at sea.

Thomassen states that Larry Pritchard never sailed with him on the vessel and did not attempt to dictate where catches would be sold. [J. Thomassen Declaration I, ¶10] Larry Pritchard does not dispute this statement, but the fact remains that ¶13 and ¶18 of the written Agreement recognized his authority to be aboard the vessel during harvesting, to have as much as half the catch landed on his permit, and to have some control over the location and timing of deliveries. These provisions in the Agreement are inconsistent with a lease, and are highly probative that the parties' agreement was not a lease.

Thomassen also states that no MSI representative was aboard the vessel while at sea. [J. Thomassen Declaration I, ¶10] The record indicates, however, that the Pritchards' son, Tom, was aboard the vessel and served as engineer until after the first halibut opening (early May 1990), and that he was instructed by his father to maintain regular radio contact with him. [L. Pritchard Declaration I, at 4] Larry Pritchard's statements indicate that he wanted his son aboard the vessel because he lacked full confidence in Thomassen's ability to properly and safely operate the vessel, due to the latter's limited experience (73 days) as a longline vessel skipper. "In 1990, when I hired Jay, he had never skippered a longline vessel over 58 feet[12]. . . . I was willing to take a chance hiring Jay as long as either myself or my son was there to control the operation." [L. Pritchard Declaration I, at 3]

Tom Pritchard's statement indicates that his father's reasons for wanting him on the F/V MISS CONCEPTION went beyond a concern for protecting his property and investment. It is apparent that Tom Pritchard was also on board to assist his father in controlling and directing the fishing operations. Tom Pritchard states that he understood his responsibilities on the vessel to be: (1) engineering and safety of the vessel; (2) advising his father about any problems with Jay Thomassen or the rest of the crew as MSI's representative; (3) making certain that radio contact was maintained with his father; and (4) monitoring fish deliveries and prices. [T. Pritchard Declaration I, at 4]

Further, Tom Pritchard indicates that he took his orders directly from his father instead of Thomassen when there was a conflict, such as when a problem developed with the vessel's refrigeration system during the first black cod trip. "I contacted Larry on the Silver Bay . . .. Larry said . . . to go ahead and deliver to Icicle and have them offload quickly and we would turn the boat right around [and] get back out." [T. Pritchard Declaration I, ¶10]

Jay Thomassen states that "MSI never required of me that he [Tom Pritchard] be hired, and it was never stipulated that he was an owner's representative, or that he was empowered to exercise any authority over the boat or over me." [J. Thomassen Declaration II, ¶2] Nonetheless, Thomassen does not deny that Tom Pritchard performed the four functions listed above.

I find that Tom Pritchard was aboard the vessel as MSI's agent to protect his parents' interests,

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[12]The F/V MISS CONCEPTION is a 77-foot vessel.

regardless of whether Larry Pritchard ever expressly told Thomassen that Tom would be aboard as MSI's representative or that he would have any authority over Thomassen. The evidence in the record shows that Thomassen made the day-to-day decisions regarding when, where, and how much to fish;[13] he made the initial decision on where and when to make each delivery; and, on the whole, he does not appear to have been subject to Tom Pritchard's authority with regard to any of these decisions.[14] The evidence also shows that Larry Pritchard was not aboard the vessel or directly involved in harvesting fish with the vessel, but that Tom Pritchard maintained contact with him by radio or telephone. [*See, e.g.*, M. Pritchard Declaration I, at 4, and accompanying MSI Exhibit 6] I find that Tom Pritchard's presence on the vessel assisted Larry Pritchard in exercising a significant degree of control and direction of the fishing operations of the vessel. Such control and direction by an owner is inconsistent with a lessee's authority and, therefore, is probative that the parties' agreement was not a lease.

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

This factor is more useful for finding the lack of a lease than the existence of a lease. That is because a hired skipper will often, if not usually, be responsible for selecting a crew and is responsible for their conduct while aboard the vessel. The skipper also usually has the authority to replace crewmembers who are unsatisfactory, and to establish and pay crew shares. A hired skipper's authority over the crew, of course, is limited by the fact that a vessel owner can replace the skipper. A lessee, on the other hand, always has the authority to hire, fire, and pay the crew. This authority can be delegated to the lessee's own hired skipper, if there is one, but the ultimate authority is in the hands of the lessee, who stands in the shoes of the vessel owner during the term of the lease. Thus, the existence of the authority in the vessel operator to hire, fire, and pay the crew does not necessarily distinguish a lessee from a hired skipper; but the retention of some or all of this authority by the vessel owner suggests that a lessor/lessee relationship does not exist.

The evidence in the record is that Jay Thomassen selected the majority of crewmembers who worked aboard the F/V MISS CONCEPTION during the 1990 season. Most of the crew were friends of Thomassen or had previously worked with him. Thomassen states that "On March 18, 1990, I sailed

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[13]Larry Pritchard states: "Jay and I discussed in detail the fact that I did not want the MISS CONCEPTION fishing in certain areas because it was just too hard on the vessel and it could put MSI at risk for more P&I claims and so forth. . . . I, naturally did not tell Jay exactly where to fish because that would be impossible, as there are hundreds of other boats fishing and weather that can change the fishing locations." [L. Pritchard Declaration I, at 4]

[14]Larry Pritchard describes one exception, although I do not determine whether his version of events is accurate: "During the first trip, the MISS CONCEPTION had refrigeration problems, and Tom and I decided that we should repair the vessel in Seward right away. Tom had Jay bring the boat in short of a complete trip, and Tom and I took care of the problem." [L. Pritchard Declaration I, at 5]

the MISS CONCEPTION out of Seattle bound for Petersburg. I hired all the crew aboard at that time and that later joined the vessel. The Pritchards knew I was hiring crew in Seattle, and never expressed any interest in exerting any control over hiring and firing." [J. Thomassen Declaration I, ¶6] Larry Pritchard, however, states that he reviewed Thomassen's crew selections. "When we met at my house in Burien [in late 1989], Jay told me that he had several crewmembers he had previously fished with and would like to take them with him on the MISS CONCEPTION. I told him that was fine but that I wanted to meet them and interview them." [L. Pritchard Declaration I, at 4] Pritchard does not state if and when he interviewed them. The crewmembers apparently selected by Thomassen included: Robert Horchover, Gary Petrick, Randy Littleton, Troy Thomassen, Peter Thynes, Patrick Hagen, and John Abrahamson.

Tom Pritchard

As discussed previously, another crewmember was Tom Pritchard. Larry Pritchard states: "I told Jay that my son Tom was going on the MISS CONCEPTION as the engineer to represent MSI because he knew the boat and I wanted to make sure the boat was taken care of the way I would myself. There was no more further discussion regarding Jay having to take Tom as MSI's representative on board because Jay knew there was no other option." [L. Pritchard Declaration I, at 4]

It is apparent that Larry Pritchard initiated the idea of having his son on the vessel. Thomassen does not state that he ever objected to having Tom serve as the vessel's engineer, and the Pritchards do not state that Thomassen had to be pressured into taking Tom as part of the crew. It appears from the evidence that Thomassen acquiesced in taking Tom aboard. It also appears that if he had objected, Larry Pritchard would have demanded that Tom be taken. Larry Pritchard states clearly that Tom's presence on the vessel was a critical factor in his willingness to let Thomassen skipper the vessel. Thus, I find that Thomassen was not free to reject Tom Pritchard, nor would he have been free to fire him. This finding is highly probative that Thomassen did not have full authority over hiring and firing of the crew, and that the parties' agreement was not a lease.

Robert Horchover

In December 1989, Jay Thomassen introduced his long-time friend, Robert Horchover, to Larry Pritchard. Thomassen said he wanted to use Horchover as a cook and back-up skipper. [L. Pritchard Declaration I, at 4] He also wanted Horchover to help rig the MISS CONCEPTION in Seattle. [J. Thomassen Declaration I, ¶5] Horchover worked on preparing fishing lines and building a bait house on the vessel in Larry Pritchard's back yard. This work was under Pritchard's supervision and direction, and Horchover expected to be paid by Pritchard for the bait house work at an hourly rate over and above his anticipated crew share. [Horchover Deposition, at 20-22] Horchover was a crewmember aboard the vessel in March 1990, when it left Seattle to go fishing.

Marilyn Pritchard states: "Jay [Thomassen] and I discussed his [Jay's] lack of experience as a skipper of a vessel the size of the MISS CONCEPTION, and we decided to submit an application for

insurance that also named Robert Horchover as Jay's back-up, because Robert had a master's license." [M. Pritchard Declaration I, at 3] "After the MISS CONCEPTION left Seattle, Mr. Long at Griffin MacLean [insurance brokers] notified me by telephone that our insurance would be canceled if Robert Horchover remained on the MISS CONCEPTION. It had to do with a previous loss that Mr. Long was not at liberty to discuss. Larry called Mr. Long back to ask if he could keep Horchover on the MISS CONCEPTION if Larry guaranteed that Horchover would not take a wheel watch or be involved with navigation at any time. Mr. Long called me back and said that Horchover could not stay on the vessel under any circumstances. Larry then told Thomassen to get Horchover off the boat the minute it touched dock in Petersburg, which Jay did." [M. Pritchard Declaration I, at 4]

Jay Thomassen states: "I transferred Robert Horchover off the MISS CONCEPTION when Larry Pritchard advised me that the vessel's insurers did not want him on the boat. I transferred Horchover to accommodate the insurers' requirements. From my perspective, I was cooperating to preserve the vessel's insurability, and MSI did not have to attempt to instruct me in that regard." [J. Thomassen Declaration II, ¶3]

The evidence in the record shows that both Larry Pritchard and Jay Thomassen would have preferred to keep Horchover as a crewmember on the vessel. The objection to his presence on the vessel came from only one of the three carriers with whom MSI's broker placed insurance. GRE/America refused to allow Horchover to be added as an alternate vessel operator or to remain on the vessel in any capacity because of a previous claim in which GRE was involved. The Underwriters threatened to cancel MSI's insurance policy unless Horchover was removed from the vessel. [John E. Long, Jr., Declaration, ¶6, and accompanying memoranda] Despite his friendship with Horchover, Jay Thomassen does not appear to have objected to removing him after learning about the insurer's ultimatum. I cannot say that the result would have been any different if Thomassen had been responsible for obtaining the insurance, and had received the ultimatum directly from the insurer rather than through Larry Pritchard. Because Horchover's removal was being dictated by the insurer, neither Thomassen nor Pritchard had any effective choice in the matter. Thus, Horchover's removal is not probative on the issue of which party had the right to fire crewmembers or whether the parties' agreement was a lease.

Gary Petrick

Crewmember Gary Petrick[15] had been working on a vessel operated by Bob Thomassen (Jay's father). Jay Thomassen arranged to have Petrick switch places with Horchover, replacing him as cook on the F/V MISS CONCEPTION. [T. Pritchard Declaration I, ¶8] There is no evidence in the record that Larry Pritchard objected to Petrick or had any role in his hiring.

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[15]Tom Pritchard identified Petrick only as "Gary." I obtained Petrick's surname from the form 1099 issued to him by Jay Thomassen. [Exhibit 7 accompanying J. Thomassen Declaration I]

Pat Lindhartsen

The evidence in the record is that Pat Lindhartsen came to the F/V MISS CONCEPTION from MSI's other vessel, the F/V SILVER BAY. The parties' statements are in conflict on whether Pritchard ordered Thomassen to take Lindhartsen [L. Pritchard Declaration I, at 4], or whether Pritchard merely asked Thomassen to hire Lindhartsen and Thomassen independently decided to do so. [J. Thomassen Declaration II, ¶4] The Pritchards do not deny Thomassen's claim that he determined what level of crew share Lindhartsen would be paid. [*Ibid.*] The evidence is inconclusive and, thus, Lindhartsen's hiring is not probative on the issue of which party had the right to hire crewmembers or whether the parties' agreement was a lease.

Randy Littleton, Troy Thomassen, and Peter Thynes

These crewmembers submitted declarations that contain an identically worded Paragraph 3:

> Jay Thomassen hired me to work as a crewmember on the MISS CONCEPTION for the entire 1990 longline season. I considered Mr. Thomassen to be my employer. All instructions to me about the conduct of my work on the MISS CONCEPTION came from him. He was the only person in charge of the vessel. Neither Larry Pritchard nor Marilyn Pritchard, nor anyone representing them, were ever aboard the vessel at any time during my employment aboard the vessel. Neither of them, nor anyone representing them, ever issued or attempted to issue any instructions to me, nor did either ever control or attempt to control any aspect of my work. I never saw or heard of either of them, or anyone representing them, controlling or attempting to control the work of any other crewmember, nor of Mr. Thomassen's operation of the vessel or choice of fishing location or method. I stood many wheel watches in the wheelhouse and never heard any instructions or directions come in over the ship's radio, which was in the wheelhouse, concerning the operation of the vessel.

MSI argues that the statement by two of these three crewmembers (Littleton and Thynes) that they considered Jay Thomassen their employer is contradicted by their signatures on federal W-4 forms (Employee Withholding Allowance Certificate) provided to them by Marilyn Pritchard. [MSI Exhibit 7, accompanying M. Pritchard Declaration I] Mechanics Services, Inc., is listed as their employer on both forms. Although I normally would give substantial weight and significance to signatures on federal tax-related forms, I give little weight to these forms as evidence of the crewmembers' acknowledgment that they were employed by MSI, rather than Jay Thomassen, because: (1) the name and address of the employer, which is shown in box 8 on the forms, appears to be in a different ink than that used by the crewmembers; (2) the employer's name and address appears to be in the same handwriting on both forms, and does not appear to match the handwriting of either of these crewmembers; (3) I cannot determine whether the employer's name and address were entered on the forms before or after the crewmembers signed; and (4) Marilyn Pritchard states that she asked the crewmembers to sign the

forms only so that she could collect their social security numbers and addresses. (These four points apply equally to W-4 forms signed by crewmembers Patrick Hagen and Patrick Lindhartsen.) [M. Pritchard Declaration I, at 5]

The crewmember declarations are evidence that the crewmembers were hired by, and considered themselves to be working directly for, Jay Thomassen. I give no weight to their opinions that Thomassen was their *employer* because, as a matter of law, they were independent contractors. Under lay share arrangements on a vessel with a crew of less than 10 (as here), all crew members are treated as self-employed individuals for federal tax purposes. [Internal Revenue Code § 3121(b)(20)] I read the declarations not as saying that Thomassen was, technically, their employer, but merely that he was their supervisor — the person to whom they were accountable and from whom they took orders. Such evidence does not tend to prove that Thomassen was a lessee rather than a hired skipper.

Settlements and cash advances to crew

Jay Thomassen states that in the parties' discussions and oral agreement MSI did not reserve any control over hiring or firing crew. [Thomassen Written Hearing Memorandum, at 4] This is consistent with the terms of the written Agreement, which does not mention the hiring and firing of the crew. But the written Agreement does indicate that MSI would be responsible for paying the crew. Paragraph 14 provides that checks received by Thomassen for fish deliveries would be signed over to MSI or deposited in an account designated by MSI, and that MSI would disburse all funds.

The evidence in the record is that Thomassen signed over the checks from the first four deliveries; that Larry or Marilyn Pritchard deposited the checks into MSI's Alaska account; and that MSI paid the crew for the first four settlements. [M. Pritchard Declaration I, at 5] The fifth and sixth settlements were handled by Carol (Hoogland) Thomassen and Mary's Settlement House, respectively. Crewmembers were paid in these settlements from Jay Thomassen's own accounts. [J. Thomassen Declaration I, ¶9; C. Thomassen Declaration I, ¶¶3, 5, and C. Thomassen's Exhibit 1]

Jay Thomassen states that the first four settlements were done by the Pritchards "purely as a matter of administrative convenience; there was no contractual or other requirement that it be done this way." He states that he arranged for the fifth and sixth settlements and crew payments to be handled differently because the Pritchards had by then departed from Seward to Seattle on the F/V SILVER BAY. [J. Thomassen Declaration I, ¶¶7, 9]

Marilyn Pritchard acknowledges that she and Larry left Seward before the end of the season because they unexpectedly got a halibut contract. She states, however, that before leaving she asked Thomassen to deposit future cannery checks in MSI's Alaska account and fax the expenses to her, and that she would do the settlements from Seattle. The Pritchards assert that Thomassen breached the Agreement when he put checks into his own account and paid the fifth settlement himself. [M.

Pritchard Declaration I, at 5-6] Marilyn Pritchard's version of these events is supported by her Exhibit 9B and the Declaration of Robert Baskerville, with attachments. These documents show that MSI was willing to ratify Thomassen's handling of the fifth settlement and to approve in advance his handling of the sixth settlement, if Thomassen would agree to indemnify MSI, its officers, and the vessel against crew claims that might arise from the settlements. Thomassen's response to Marilyn Pritchard's letter proposing indemnification is not contained in the record, and Ms. Pritchard does not state whether Thomassen ever did respond.

Cash advances to Jay Thomassen and nine crewmembers totaling $5,000 were made from the Icicle cannery account on April 6 and May 15, 1990, on Thomassen's authorization. The advances were deducted from the gross fish proceeds, and crew shares were adjusted accordingly. [Exhibit 8, accompanying J. Thomassen Declaration I; Exhibit 3, accompanying C. Thomassen Declaration I] The vessel and the gross fish stock were used as security for the advances, and there is no evidence in the record that the advances were made without MSI's approval. This arrangement for cash advances was contemplated by the parties and provided for in ¶6 of the written Agreement. Thus, although the cannery account was in Thomassen's name, I find that the cash advances do not represent Thomassen's assumption of responsibility for paying the crew. [*See*, discussion of charges to cannery account for trip expenses under analysis of factor 5 in this Decision, at 23.]

I find by a preponderance of the evidence that under the written Agreement MSI reserved to itself the authority to pay crewmembers. The reservation of such authority by a vessel owner is inconsistent with the existence of a vessel lease and is highly probative that the parties' agreement was not a lease.

5. Responsibility for operating expenses

In Smee, this Office 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]
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> * * * *
>
> 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]

a. Trip expenses

Trip expenses include such items as groceries, ice, bait, fuel, and other supplies that will be consumed during a fishing trip, as well as other trip-specific expenses such as transient moorage and lost gear.

The written Agreement provides that fuel, oil, lubricants, filters, and supplies will be the crew's expense "from homeport to homeport." [¶16] The fact that the crew was to share the cost of these trip expenses does not, in itself, help in determining whether Thomassen held a vessel lease because such costs are almost always ultimately paid by the crew through adjustments to the gross and/or their crew shares, regardless of whether the crew is working under a lessee, a hired skipper, or the vessel owner.

As this Office stated in Kristovich v. Dell,[16] 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.

The record in this Appeal shows that prior to the fishing season, MSI paid more than $2,000 for fuel, oil, and filters, and more than $1,000 for galley provisions for the vessel. [Exhibits 1 & 2, accompanying T. Pritchard Declaration I; Exhibit 5, accompanying M. Pritchard Declaration I] MSI also paid almost $300 for transient moorage on May 31, 1990, while the vessel was in Seward, Alaska. [Exhibit 10A, accompanying M. Pritchard Declaration I] Thomassen asserts that he paid transient moorage on September 25, 1990 (three months after the period in question in this Appeal), presumably while the vessel was in Petersburg, and supports this with evidence of a check paid to "Port Authority" and drawn on his account. [Thomassen Reply to Response to Appeal, at 10; Check #174, Exhibit 1, accompanying C. Thomassen Declaration I]

In addition, the written Agreement [¶6] provides that expenses for fuel, lubricants, and bait could be charged against the credit of the vessel or the gross fish stock without prior MSI approval, but that any

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[16]Appeal No. 95-0010, March 20, 1996, at 17, *aff'd*, March 27, 1996, *NMFS motions for partial summary judgment and summary judgment granted, sub nom.* Dell v. National Marine Fisheries Service, No. C96-613C (W.D. Wash. 1997).

other charges would have to be approved in advance by MSI.[17] Thomassen states that if "the boat had not generated enough income to meet those expenses, I, and only I, would have been personally responsible for paying them." He apparently bases this statement on the fact that the cannery account was established in his own name, and that MSI and the Pritchards did not have access to or control over that account. [J. Thomassen Declaration I, ¶6]

MSI correctly points out, however, that a vessel's credit is presumed to be relied upon by creditors of the vessel operator. To overcome this presumption, evidence must be introduced that the supplier deliberately intended to forego a lien and look solely to the operator's personal credit. [MSI Response to Appeal, at 7, (citing case law)] But there is no evidence in the record that Icicle intended to forego a lien on the vessel, or to hold Thomassen solely liable.

Under the Federal Maritime Lien Act [46 U.S.C. § 31341(a)(2)], vessel masters, as agents of the owner, are presumed to have authority to subject a vessel to maritime liens for the procurement of necessaries for the vessel. Likewise, a vessel charterer is presumed to have such authority, unless express notice is given to third parties that the charterer is not authorized to encumber the vessel on behalf of the owner. [MSI Response to Appeal, at 7, (citing case law)] No evidence has been presented that MSI ever insulated the vessel from liens for goods and services provided to Thomassen, or that anyone notified Seward Fisheries (Icicle) that it was not to extend credit to Thomassen with the vessel as security. To the contrary, the parties anticipated, and the Agreement provided for, just the opposite.

Thus, I find that advances made to Thomassen for trip expenses by Icicle were, in fact, made against the credit of the vessel and the gross fish stock, and that Thomassen was not solely liable for the cannery charges. [*See,* Exhibit 8, accompanying J. Thomassen Declaration I; Exhibits 2A, 2B, 2E, and 2G, accompanying C. Thomassen Declaration I. *See also,* Smee v. Echo Belle, Inc., Appeal No. 95-0076, August 1, 1996, at 18, *aff'd,* September 3, 1996.]

Thomassen's wife states that his checking accounts were funded primarily from surplus funds in the cannery account. [C. Thomassen Declaration I, ¶5] The checks from the accounts that she submitted indicate that Thomassen paid for trip expenses only from the proceeds of the fifth and sixth deliveries.[18]

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[17]This provision shows that the parties agreed that the gross fish stock belonged to MSI, since it recognizes MSI's authority to control the circumstances under which the stock could be used as security for credit.

[18]With only two exceptions [#263 for his fishing permit, dated February 1, 1990, and #434 to Karl Risdal on May 6, 1990], all canceled checks in the record from Thomassen's accounts are dated after the fifth delivery. Half of these checks are dated in August, September, or December 1990, well after the sixth delivery.

Thomassen's payment of trip expenses, therefore, did not represent an initial capitalization or financial risk of the enterprise.

I find that the Agreement's provisions regarding trip expenses, MSI's initial advancement of funds for trip expenses, and Icicle Seafood's use of the vessel and the gross fish stock as security for credit in supplying Thomassen, all indicate that MSI was not acting as a lessor. Rather, MSI was acting as an entrepreneur that assumed a substantial financial risk of the enterprise. This finding is probative that the parties' agreement was not a lease.

b. P&I insurance expense

The written Agreement [¶10] originally provided that crewmembers would pay for their own Personal and Indemnity insurance. Thomassen rejected that proposal, however, and it was crossed out in the final agreement. MSI ended up absorbing the total P&I burden. There was no sharing of this expense by Thomassen through his skipper share or his crewmember share. Vessel owner payment of P&I insurance is indicative of a hired skipper arrangement and shows added financial risk and capitalization assumed by MSI. This evidence, therefore, is probative that the parties' agreement was not a lease.

c. Gear expenses

The cost of initially providing gear, as distinguished from the trip expense of replacing lost gear, is a separate operating expense category. Because gear is ordinarily an owner's expense, regardless of whether the owner hired a skipper or leased out the vessel, payment of a substantial portion of initial gear costs by a captain could be probative of the existence of a vessel lease. In this case, however, Thomassen did not bear any of the expense associated with gearing or outfitting the F/V MISS CONCEPTION. Thus, the evidence regarding responsibility for gear costs does not support Thomassen's claim that he held a vessel lease.

d. Repair and maintenance

The costs for more than minor repairs and maintenance during operation are usually an owner's responsibility. A captain's payment for more than minor repairs or maintenance, therefore, could be a significant indicator of a lease arrangement, particularly if the payment is not attributable to operator fault.[19]

The written Agreement provided that all repairs to the vessel would be a crew expense, except for those specific problems of which Larry Pritchard was given advance written notice. A repair fund of

[19]*C.f.*, Gillman v. Bell, Appeal No. 95-0091, August 2, 1996, at 9-10, *aff'd*, September 3, 1996.

10% of the gross was to be set aside for repairs. [¶15] Thomassen states that this provision was too impractical to be carried out, and that a repair fund was never established. [J. Thomassen Declaration I, ¶9] Marilyn Pritchard states that all vessel repairs were arranged and paid for by MSI, or were performed by Larry and Tom Pritchard. [M. Pritchard Declaration I, at 5] Thomassen states that he arranged for an engine repair by Cummins, and that $3,200 was paid from the cannery account. [J. Thomassen Declaration II, ¶7; Exhibit 8, accompanying J. Thomassen Declaration I] Settlement sheet no. 6 shows that approximately $6,500 in repairs were charged to MSI, and I presume that this charge included the Cummins engine repair. There is no evidence of any repair work charged to Thomassen or the crew. Nor is there any evidence that the 10% repair fund specified in the Agreement was ever established.

The evidence under the repair and maintenance expense category provides no basis for finding the existence of a vessel lease arrangement between the parties.

e. Observer expenses

Under former 50 C.F.R. § 672.27(c) (1990), which was in effect during the period of time in question in this Appeal,[20] an operator of a vessel fishing for groundfish in the Gulf of Alaska was required to carry an observer on board the vessel.[21] Section 672.27(a) required the vessel owner to ensure that the operator complied. The written Agreement does not address who was to be responsible for acquiring and paying for the observer. The Pritchards state that this was because the observer requirement was new at the time, they were unaware of it, and it was not raised in the parties' discussions by either side. [L. Pritchard Declaration I, at 3; M. Pritchard Declaration I, at 4]

The Pritchards learned of the observer requirement from NMFS, and they contracted with and paid for an observer. They also had their broker add the observer as an additionally insured party. [L. Pritchard Declaration I, at 3; M. Pritchard Declaration I, at 4] The observer contract expense was paid in advance, and later deducted from the gross. [Settlement sheet no. 1 ($1,000), settlement sheet no. 2 ($1,000), and settlement sheet no. 3 ($2,000)]

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[20]The observer program for groundfish fisheries in the Gulf of Alaska was authorized in 1989 [54 Fed. Reg. 51,042 (December 12, 1989)] and first implemented in 1990 [55 Fed. Reg. 4839 (February 12, 1990)].

[21]Operators of domestic vessels between 60 and 125 feet LOA that fished more than 10 days in a calendar quarter were required to carry an observer 30% of the time. [55 Fed. Reg. 4842 (February 12, 1990); codified as 50 C.F.R. § 672.27(c)(1)(iii)(D) at 56 Fed. Reg. 30,876 (July 8, 1991)] This vessel size category applies to the F/V MISS CONCEPTION. This requirement now applies to vessels fishing more than three days in a calendar quarter, and appears in 50 C.F.R. § 679.50(c)(1)(v) (1997).

The record does not indicate whether the parties ever discussed how the cost and burden of providing an observer would be allocated. Because the regulatory requirement was addressed primarily to the vessel operator, one might expect the vessel owners to shift this burden and expense entirely to the operator if a vessel lease actually existed. By taking full responsibility for finding, contracting with, and insuring the observer, and by advancing the costs of the observer, MSI was yet again capitalizing the fishing operation and assuming a financial risk of the enterprise. MSI's handling of the observer expenses shows it was not acting as a lessor, and is probative that the parties' agreement was not a lease.

6. Treatment of fishing operations for tax and other purposes

This factor concerns which party treated the fishing venture as his or its own business for tax and other purposes.

a. Income taxes

Form 1099-MISC

In the development of the IFQ program, NMFS considered using federal 1099-MISC forms (Report of Miscellaneous Income) to document the existence of vessel leases. The agency rejected this as a vague standard, however, because the forms can be submitted by hired skippers on behalf of vessel owners, and therefore would not necessarily show that the issuer was a lessee. [Comment 56 to proposed rule, 58 Fed. Reg. 59,393 (November 9, 1993)] Thus, the evidence that Jay Thomassen issued form 1099s for the amounts he paid in crew shares is not instructive on the questions of whether he treated the fishing operation as his own business and whether a vessel lease existed, and therefore I disregarded this evidence.

Issuance of 1099s by the vessel owner, however, does not suffer from the same confusion. MSI's issuance of a 1099 to Jay Thomassen [Exhibit B, accompanying Charles Morgan Report], is evidence that the Pritchards viewed him as an independent contractor/hired skipper, and not a lessee. This is consistent with the written Agreement [¶9], which provided that MSI would prepare and send a 1099 to each crew member and would not be responsible for crewmembers' federal income taxes, social security taxes, or unemployment taxes. I find that the evidence of 1099 forms issued by MSI, and the written Agreement's provision for tax reporting tend to show that MSI treated the fishing operation as its own business enterprise. This evidence is probative that the parties' agreement was not a lease.

Thomassen's form 1040 (1990)

The fact that Thomassen filed his individual federal income tax return as a sole proprietorship (Form1040, Schedule C) does not, in itself, tell us whether or not he was a lessee. While one would expect an individual lessee to file as a sole proprietor, a hired skipper could do so also. That is because, under the Internal Revenue Code, fishermen on vessels with a usual crew of fewer than 10

and who work for a share of the catch, or a share of the proceeds from the sale of the catch, are considered independent contractors, not employees. 26 U.S.C. § 3121(b)(20)[22] Those who worked on the F/V MISS CONCEPTION in 1990 met these requirements. Thus, the statement by Thomassen's CPA witness, Allan Bingham, that "the tax return of a self-employed sole proprietor is facially readily distinguishable from that of the return of one who has been the employee of another" is irrelevant and not helpful in determining whether Thomassen was a lessee or a hired skipper. [A. Bingham Declaration, ¶8]

When reviewing the tax return of a person claiming to have held a vessel lease, an important factor is whether the return includes a deduction for a lease fee. Thomassen deducted $188,537 under Item 20b (rent or lease of business property, other than machinery and equipment). According to Bingham, the deducted amount includes all cannery checks paid to Thomassen and passed on to MSI for the first four deliveries. [A. Bingham Declaration, ¶6][23] This, of course, represents substantially more than MSI's 30% of the gross, which Thomassen asserts is a lease fee. Bingham states that, had he been asked at the time, he would have advised that all shares be disbursed by Thomassen or in his name. Given that MSI made the share disbursements from the first four checks, and held all the records of those disbursements, Bingham states that it was appropriate for Thomassen to include the full amount of those checks on line 20b. Bingham acknowledges, however, that Thomassen's tax return was not reported "in strict conformity with his status as lessee." [A. Bingham Declaration, ¶5]

I find that Thomassen's reporting of a "lease fee" or "rental fee" does not support his claim to being a lessee. Item 20b on his tax return merely reflects the fact that, for the first four deliveries, Thomassen received proceeds from the cannery and turned them over to MSI for disbursement, in accordance with the parties' agreement. Nothing in Thomassen's tax return establishes that the Pritchards were acting as his agent. Rather, Thomassen's reporting of Item 20b is more consistent with the view that he was acting as MSI's agent, i.e., a hired skipper, by passing the fishing proceeds through to the Pritchards.

MSI's form 1120 (fiscal 1989)

The record contains only the front page and an attached Detail Schedule from a copy of MSI's Form 1120 (U.S. Corporation Income Tax Return) for the period July 1, 1989 through June 30, 1990. The return was submitted by Thomassen and attached to the declaration of Allen Bingham. It was prepared by Smith & Just, P.S., of Seattle.

Item 26 (Other deductions) lists $285,434 in deductions. It is supported by the attached Detail

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[22]This rule was in effect in 1990.

[23]Bingham did not prepare Thomassen's 1990 tax return, but he states that he did provide Carol Hoogland (now Carol Thomassen) with advice concerning the issuance of 1099-MISC forms. [A. Bingham Declaration, ¶3] Thomassen's tax return was prepared by Diana Davis of Seward, Alaska.

Schedule, which shows an entry for Crew Shares of $138,753. I presume this figure includes the $27,538.08 to Jay Thomassen reported on a Form 1099-MISC. MSI's return does not contain an entry at Item 6 for Gross Rents income, which one would expect to find if MSI had leased out the F/V MISS CONCEPTION. Allen Bingham, C.P.A., a witness for Thomassen, argues that the absence of a rental income entry on MSI's tax return does not necessarily mean there was no lease because IRS regulations do not require personal property lease income to be reported under Item 6. Even if this contention is true, MSI's return is still consistent with their position that they did not lease out their vessel to Thomassen.

Bingham also argues that if Thomassen had been a hired skipper, MSI would have paid substantially all operating expenses and would have made all share disbursements. [A. Bingham Declaration, ¶5] These matters have previously been discussed and explained under factor 5. In any event, I find that MSI's tax return does reflect the payment of substantial operating expenses, including insurance, licenses and fees, gas and fuel, food provisions, fish observer, moorage, gear, and non-food provisions. I find that MSI's income tax return does not support Thomassen's claim that he held a vessel lease.

According to witness, Charles Morgan, C.P.A., MSI's total investment in vessel improvements to the F/V MISS CONCEPTION as of June 30, 1990, was $385,000. He states that these investment figures are reflected in MSI's depreciation schedules. [C. Morgan Report, at 4] The 1989 Form 1120, Item 20, reports depreciation of $96,265 from Form 4562, which is not attached. Because these schedules and attachments are not contained in the record, I disregard this evidence.

b. Settlements and control of fishing proceeds

As previously discussed under factor 3, relating to responsibility to hire, fire, and pay the crew, the written Agreement [¶14] placed control of all fishing proceeds in the hands of MSI. The parties' arrangement for handling fishing proceeds and settlements is a significant element of factor 6, for it shows which party exercised financial control over the entire fishing enterprise, not merely over payment of the crew.

The fact that Icicle issued checks to Thomassen is not indicative of the existence of a lease. The operator of a vessel, whether a lessee, a hired skipper, or the vessel owner, normally receives a check from the cannery upon delivery of fish because the practice in Alaska, by law,[24] is for canneries to pay the person who holds the fishing permit, which is usually the vessel operator. [J. Woodruff Declaration, ¶3]

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[24]AS 16.05.680 provides, in relevant part: "It is unlawful for a person, or an agent or representative of the person, . . . (2) to purchase fish from a fisherman who neither is the holder of a limited entry, interim-use, or landing permit issued under AS 16.43, nor is exempt under AS 16.05.660."

Nor does the fact that Thomassen controlled the final two settlements signify the existence of a lease. In the event that the vessel owner is absent at the time of delivery, a hired skipper (by agreement with the owner) might well handle settlements as the owner's agent in order to ensure more prompt payment of vendors and crewmembers. A lessee, however, does not act as the owner's agent. (Nor, for that matter, does an owner act as the lessee's agent.) For the lessee, as for the owner, control of the proceeds and settlements is an incident of entrepreneurial control of the enterprise and a strong indicator of whose business the fishing operation is. Such control enables the entrepreneur to make certain that all crewmembers are paid their proper shares and that vendors receive their proper payments, thereby insuring against personal liability and liens against the vessel.

Thomassen states that he agreed to let MSI control the proceeds and settlements only because "MSI expressed a desire to receive its funds without the delay of sending my check to Mary's [Settlement House in Petersburg] and having her issue the appropriate checks and send them back to Seward. . . . This was done purely as a matter of administrative convenience; there was no contractual or other requirement that it be done this way [at the time of the first and second deliveries]." [J. Thomassen Declaration I, ¶7] Once the Pritchards left the Seward area, after the fourth delivery, Thomassen took control of the proceeds and settlements. [J. Thomassen Declaration I, ¶9]

I find this explanation of events unpersuasive. The parties agreed in ¶7 of the written Agreement that final settlements would be withheld until the crew rigged new gear and overhauled old gear for the next year. When read in conjunction with ¶14 of the written Agreement, which states that cannery checks were to be turned over to MSI and that "MSI will disburse all funds," ¶7 can only mean that MSI was to control the final settlements to ensure that the crew completed its gear work at the end of the season. This reading of the Agreement further supports the view that Thomassen's taking control of the final two settlements was a breach of the parties' agreement. I find that ¶¶14 and 7 of the written Agreement reflect Thomassen's understanding and acknowledgment that the fishing operation was MSI's business enterprise, not his own. This finding is highly probative that the parties' agreement was not a lease.

c. Cannery account

Jay Thomassen argues that the nature of his account with Icicle Seafoods shows that he was a lessee of the F/V MISS CONCEPTION, not a hired skipper. He states that the account was opened in his name, rather than the vessel owner's name; and that neither MSI nor the Pritchards had any access or control over the account. [J. Thomassen Declaration I, ¶6] However, John Woodruff, a vice-president for Icicle Seafoods, states that it is standard practice for his company to open an account in the permit holder's name, because Alaska law requires canneries to deal directly with the permit holder. Woodruff also states that, in setting up Thomassen's account, Icicle made no judgment about whether he was a hired skipper or leaseholder. [Woodruff Declaration, ¶¶3, 4] Melody Jordan, who was office manager of Icicle's Seward facility in 1990, confirms that the company's standard practice is to

open an account in the permit holder's name. [M. Jordan Statement]

Jordan also states:

> My recollection is that Mr. Thomassen's account was not handled like that of a hired skipper, but instead was handled as though Mr. Thomassen was operating as a legally independent businessman. Accounts involving hired skippers had monetary and record controls, and rights of access to account information, in favor of the vessel owner that I believe were not present in the case of the Thomassen account established with us. [M. Jordan Declaration, ¶2]

Jordan acknowledges, however, that the company makes no determination about the status of a permit holder as hired skipper or lessee. And Jordan does not say that Thomassen was a lessee; she says his account was handled *as though he was operating as a legally independent businessman.* As I have already discussed, fishermen paid on a share basis, with a usual crew of fewer than 10, are considered independent contractors. Thus, if Thomassen was a hired skipper, he would have been an independent contractor and, arguably, as much a *legally independent businessman* as a lessee would be.

Marilyn Pritchard states that "[w]e had been told that the canneries would only issue checks to permit holders, so we put language in the agreement that the checks would be signed over to MSI or deposited in our Alaska account." [M. Pritchard Declaration I, at 2] Clearly there was no consensual understanding that opening the cannery account in Thomassen's name was intended to signify MSI's acknowledgment that the business enterprise was his. To the contrary, the Pritchards appear to have tried to retain as much control as possible over the financial aspects of the business enterprise, given their understanding of the practices of, and legal constraints on, the canneries. The evidence in the record suggests that, if the Pritchards had known it were possible for a vessel owner to place account restrictions on a skipper's cannery account, they would have attempted to do so.

I find that the weight of the evidence regarding the nature of Thomassen's cannery account does not support his lease claim.

d. Unemployment taxes

The written Agreement [¶9] provides that MSI would not be responsible for paying unemployment taxes for any crew members. Thomassen argues that, under Washington law, if MSI were the crew's employer, it would have had to pay Washington state unemployment taxes. Because it would have been "an employing unit that [operates a fishing vessel in Alaska and] maintains a land based office in Washington from which operations of the vessel are ordinarily and regularly supervised, managed and controlled." [Thomassen Written Hearing Memorandum, at 8, and Exhibit 1, Washington Tax Branch Circular No. 3-89, at 3, (November 14, 1989)] Thomassen asserts that by explicitly providing in the

Agreement that it would not pay the tax, MSI revealed its "true view that it was not an employer." [Thomassen Written Hearing Memorandum, at 9]

The purpose of analyzing evidence regarding Washington state's unemployment tax provisions and the parties' Agreement is not to determine MSI's tax liability. The purpose here is to determine whether the parties entered into a lease agreement, and to consider tax information only to the extent that it may shed light on that question.

Without admitting or denying that MSI might have been liable for Washington unemployment taxes, MSI explains why it believed it was not responsible for these taxes and why it provided in the written Agreement that it would not take responsibility for them. Marilyn Pritchard states that she contacted the Washington Employment office in early January 1990 to check on MSI's unemployment tax liability. She states that, based on the information she provided, the office told her that MSI would not be liable for Washington unemployment taxes. [M. Pritchard Declaration I, at 3]

MSI's accountant, Charles Morgan, asserts that within the fishing industry there is a substantial misunderstanding about when unemployment taxes must be paid. [C. Morgan Report, at 6] Apparently he is implying that the Pritchards did not know that they were or might be liable for Washington unemployment taxes and, therefore, this Office should not infer anything from their actions.

While I do not resolve the question of MSI's unemployment tax liability for 1990, which is not at issue in this Appeal, I find the evidence insufficiently probative to support an admission by the Pritchards that they knew they were entering into a lease with Thomassen, and not a hired skipper arrangement.

7. Set or guaranteed term

The written Agreement does not specify a set or guaranteed term during which Thomassen was to have exclusive, uninterrupted possession and use of the vessel. The parties do not dispute that the vessel was to be fished during the period in question in this Appeal, and returned to MSI in Seattle around June 27, 1990. But as previously discussed in this Decision, Thomassen appears to have understood and accepted that Larry Pritchard had the right to replace him as skipper and retake possession of the vessel at will.

As this Office stated in Kristovich v. Dell,[25]

> "If the arrangement could terminate any time the owner decides to board the vessel and take command, this would appear to be inconsistent with the interests of a claimed

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

lessee operating a viable independent business. It would also be inconsistent with the normal definition of a 'lease,'quoted above."

Although Thomassen did, in fact, have possession and control of the F/V MISS CONCEPTION during the period in question, the evidence is that his possession and control was not guaranteed to be exclusive and uninterrupted for any period of time, as one would expect to find if Thomassen held a lease. I find that the lack of a set or guaranteed term is highly probative that the parties' agreement was not a lease.

8. Preparation work by Thomassen

Thomassen raises an additional factor for consideration. He states that the work he did to prepare the vessel and gear for fishing was "far beyond that which was expected of crew share fishermen," and "far beyond what is required of a 'hired skipper,' and was the kind of owner's work a lessee will do." [J. Thomassen Declaration I, ¶5] Thomassen also submitted the statement of Terry MacDonald, who asserts that the preparation work Thomassen did "was much more extensive that [sic] the work that would be carried out by a hired skipper. . . . What I saw him doing was 'owner's work' one would expect of a boat owner or lessee, not of a hired skipper." [MacDonald Declaration, ¶5]

In response, MSI submitted evidence disputing the amount and nature of the preparatory work Thomassen claims he did on the vessel and gear, as well as evidence of a supposed "industry standard" of what preparatory work a hired skipper normally performs. [L. Pritchard Declaration I, ¶¶2, 4, 5; T. Pritchard Declaration, ¶¶5, 6; Horchover Deposition, at 23; Declarations of C. Crawley, D. Johnson, and G. Steele; C. Morgan Report, at 4]

It is clear from the evidence in the record that the F/V MISS CONCEPTION required substantial work to prepare it for commercial fishing after it was salvaged and purchased by MSI. It is apparent that considerable work was done on the vessel and gear in preparation for the 1990 fishing season. The overall work was supervised by Larry Pritchard, and was performed by several persons, including: Larry and Tom Pritchard, Chris Crawley, Robert Horchover, Jay Thomassen, and possibly others.

The evidence in the record is insufficient to enable me to determine whether there exists an industry standard for the amount and nature of preparatory work hired skippers perform, and if so, what that standard is. I do not accept the declarations of Johnson and Steele as expert witness opinions. Their statements merely supply anecdotal evidence that it is not unheard of that a hired skipper would perform the type and amount of work Thomassen claims to have done.

Even if I accept as true the amount and nature of preparatory work Thomassen claims, I do not find such evidence particularly probative in determining whether he was a lessee or a hired skipper. Given the great variety of business arrangements found in the commercial fishing industry, I cannot say that the

amount of preparatory work done in a particular case reflects anything more than the preseason condition of the vessel and gear, and the relative bargaining power of the parties. Thus, I do not find that the evidence of preparatory work supports Thomassen's lease claim.

FINDINGS OF FACT

1. The essential terms of the parties' arrangement consisted of: all the provisions of the written Agreement, except ¶2; the parties' oral agreement as to the amount of their respective shares; and the dates during which the contract was in effect, which the parties do not dispute.

2. The parties' written Agreement was not invalid due to duress or coercion.

3. MSI's copy of the written Agreement is the version that the parties signed.

4. The written Agreement contains no lease terminology; the parties never discussed entering into a lease with each other; and Thomassen never communicated to the Pritchards his desire to enter into a lease.

5. Thomassen was the only skipper of the F/V MISS CONCEPTION during the fishing season in question, but his acceptance of Larry Pritchard's right to replace him with another skipper and retake possession of the vessel at will is inconsistent with the existence of a vessel lease.

6. Tom Pritchard was aboard the F/V MISS CONCEPTION as MSI's agent, and his presence on the vessel assisted Larry Pritchard in exercising a significant degree of control and direction of the fishing operations of the vessel.

7. Thomassen was not free to reject Tom Pritchard as a crewmember, nor would he have been free to fire him.

8. Thomassen selected the majority of crewmembers who worked aboard the F/V MISS CONCEPTION during the 1990 season.

9. Under the written Agreement, MSI reserved to itself the authority to pay crewmembers.

10. Advances made to Thomassen for trip expenses by Icicle were made against the credit of the vessel and the gross fish stock, and Thomassen was not solely liable for the cannery charges.

11. The Agreement's provisions regarding trip expenses, MSI's initial advancement of funds for trip expenses, and Icicle Seafood's use of the vessel and the gross fish stock as security for credit in supplying Thomassen, all indicate that MSI was not acting as a lessor. Rather, MSI was acting as an

entrepreneur that assumed a substantial financial risk of the enterprise.

12. MSI absorbed the total P&I insurance burden. Thomassen did not share in this expense through his skipper share or his crewmember share.

13. MSI's handling of the observer expenses shows it was not acting as a lessor.

14. The evidence of 1099 forms issued by MSI and the written Agreement's provision for tax reporting tend to show that MSI treated the fishing operation as its own business enterprise.

15. Thomassen's reporting of a lease fee or rental fee on his federal income tax return does not support his lease claim. His reporting is more consistent with the view that he acted as MSI's agent, i.e., hired skipper, by passing the fishing proceeds through to the Pritchards.

16. MSI's federal corporation income tax return does not support Thomassen's lease claim.

17. Paragraphs 14 and 7 of the written Agreement reflect Thomassen's understanding and acknowledgment that the fishing operation was MSI's business enterprise, not his own.

18. The weight of the evidence regarding the nature of Thomassen's cannery account does not support his lease claim.

19. The evidence of MSI's unemployment tax liability for 1990 is insufficiently probative to support an admission by the Pritchards that they knew they were entering into a lease with Thomassen, and not a hired skipper arrangement.

20. Although Thomassen had possession and control of the F/V MISS CONCEPTION during the period in question, his possession and control was not guaranteed to be exclusive and uninterrupted for any period of time, as one would expect to find if Thomassen held a lease.

21. The evidence of Thomassen's preparatory work on the vessel and gear does not support his lease claim.

CONCLUSIONS OF LAW

1. Thomassen did not hold a lease of the F/V MISS CONCEPTION during the period in question in this Appeal.

2. The Respondent qualifies as the party who should receive the initial QS resulting from legal landings of sablefish and halibut made from the F/V MISS CONCEPTION during the period March 18, 1990

to June 20, 1990.

DISPOSITION

RAM's Initial Administrative Determination that rejected Jay Thomassen's claim that he held a lease of the F/V MISS CONCEPTION during the period March 18 to June 20, 1990, is AFFIRMED. This Decision takes effect on August 28, 1998, unless by that date the Regional Administrator orders a review of the Decision.

Any party, including RAM, may submit a Motion for Reconsideration, but it must be received at this Office not later than 4:30 p.m. Alaska Time, on August 10, 1998, the tenth day after the date of this Decision. 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.

Because the prevailing party in this appeal still has an opportunity to receive QS and the corresponding IFQ for the 1998 fishing season, I recommend that the Regional Administrator expedite review of this Decision and, if there is no substantial disagreement with it, affirm the Decision promptly after the period for reconsideration has expired, and thereby give it an immediate effective date.

Edward H. Hein
Chief Appeals Officer