UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
WASHINGTON, D.C. 20230

IN THE MATTER OF:	)	Docket Number:
Jesse H. Drinkwater and F/V Princess Elena, Inc., F/V Capt Joe	)	NE1202710
Respondents.	)	

ORDER DENYING RESPONDENT'S
PETITION FOR ADMINISTRATIVE REVIEW

This order addresses a petition for administrative review filed by Princess Elena, Inc. ("PEI" or "Respondent"). PEI appeals an Initial Decision issued by an Administrative Law Judge (ALJ). In that decision, the ALJ found PEI and Jesse H. Drinkwater, respectively the vessel owner and captain of the F/V Capt Joe, jointly and severally liable for two violations of the Magnuson-Stevens Fishery Conservation and Management Act ("the Magnuson-Stevens Act"). The violations stem from Respondents fishing in August 2012 with trawl gear that impermissibly contained an obstructed net or mesh sizes that were too small. For this violation, the ALJ assessed a penalty of $40,000 imposed jointly and severally against the vessel owner and operator.[1]

PEI now asks the Administrator of the National Oceanic and Atmospheric Administration (NOAA) to review the ALJ's Initial Decision. In the petition for review, PEI challenges the ALJ's application of the *respondeat superior* doctrine to impose liability on PEI, as the owner of the fishing vessel, for the actions of the vessel captain. For the reasons stated below, PEI's petition for review is **DENIED**.[2]

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[1] A separate petition for administrative review was filed in a companion case involving similar violations and bearing the caption, *Robert C. Roberge, Anthony & Enzo, Inc., and F/V Princess Laura*, Docket No. NE1300388. While the named parties in each case are different, the cases are nevertheless related because the corporate respondents in both cases are wholly owned by Guiseppe DiMaio. ALJ Initial Decision at 2.

[2] The vessel captain, Jesse H. Drinkwater did not contest the violation nor did he participate in these administrative proceedings. Despite this, Mr. Drinkwater remains liable for fishing with illegal fishing gear in violation of the Magnuson-Stevens Act. *See e.g., In the Matter of: Robert R. Flores and Astra Co.*, 2009 NOAA Lexis 15, at **5, 29-30, 36-38 (NOAA ALJ May 28, 2009) (establishing that under NOAA regulations a hearing request by one joint and several respondent operates as a hearing request by both respondents, and considering the liability of both respondents); *In the Matter of: Richard Geronimo, Jr.*, 2003 NOAA Lexis 9, at *7 (NOAA ALJ May 8, 2003) (explaining that the failure of a Respondent to

DECISION ON DISCRETIONARY REVIEW

On appeal, the NOAA Administrator has broad discretion in deciding whether to grant or deny a petition for administrative review.[3] The criteria guiding the Administrator's decision are twofold: (1) whether the initial decision contains significant factual or legal errors that warrant further review by the Administrator; and (2) whether fairness or other policy considerations warrant further consideration by the Administrator.[4] Examples of cases in which a petition for review might be granted include, but are not limited to, those in which:

- The initial decision conflicts with decisions of one or more other NOAA administrative decisions or federal court decisions on an important issue of federal law;
- The ALJ decided an important federal question in a way that conflicts with prior rulings of the Administrator;
- The ALJ decided a question of federal law that is so important that the Administrator should pass judgment upon it even absent a conflict; or
- The ALJ so far departed from the accepted and usual course of administrative proceedings as to call for an exercise of the Administrator's supervisory power.[5]

Applying these criteria to the parties' respective petitions, I decline to accept review.

The only issue on appeal is whether the ALJ correctly applied the *respondeat superior* doctrine to hold the vessel owner liable for actions of the vessel captain. In support of its petition for review, PEI raises three arguments: (i) the Magnuson-Stevens Act does not authorize the application of *respondeat superior* liability on vessel owners, instead NOAA is merely attempting to impermissibly extend NOAA procedural regulations at 15 C.F.R. § 904.107, which addresses joint and several respondents; ii) the

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appear at a hearing may be deemed consent to a decision on the record). On appeal, Respondents do not challenge the ALJ's determination of liability as to Mr. Drinkwater.

[3] *See* 15 C.F.R. §§ 904.273(c) ("Review by the Administrator of an initial decision is discretionary and is not a matter of right."); 904.273(i) ("The Administrator need not give reasons for denying review.").

[4] *E.g. In the Matter of: Stephen C. Daniels*, 2015 NOAA Lexis 7 (NOAA App. Mar. 18, 2015); *In the Matter of: Anthony Black*, 2014 NOAA Lexis 11 (NOAA App. Apr. 14, 2014), *aff'd sub. nom. Black v. Pritzker*, Civil Action No. 14-782 (D.D.C. Aug.10, 2015).

[5] *Stephen C. Daniels*, 2015 NOAA Lexis 7; *Anthony Black*, 2014 NOAA Lexis 11.

line of cases applying *respondeat superior* to Magnuson-Stevens Act cases were wrongly decided; and iii) even if *respondeat superior* is applied, the vessel owner should not be held liable under the particular facts of this case.

Respondent PEI's first argument is rejected because it reflects a misunderstanding of the law. The basis for applying the *respondeat superior* doctrine in Magnuson-Stevens Act cases is not 15 C.F.R. § 904.107;[6] rather, it is the Magnuson-Stevens Act's definition of "person" and how this term has been construed historically.[7] The Magnuson-Stevens Act includes in its definition of "person" entities that act vicariously through agents, such as a "corporation, partnership, association, or other entity . . . and any Federal, State, local or foreign government."[8] The inclusion of such entities as "persons" for whom it is unlawful to violate the Act supports the conclusion that the Act contemplates imposition of vicarious liability on corporate vessel owners for violations committed by vessel operators.[9] Past NOAA Administrators have held that the purpose behind the statutory scheme is to remove all possible incentive for owners to employ vessel operators inclined to law-breaking, only to later disclaim responsibility while retaining the fruits of the unlawful activity — i.e., the proceeds from the catch.[10]

Respondent PEI's next argument — that the line of past NOAA decisions applying *respondeat superior* liability to vessel owners were wrongly decided — was thoroughly addressed by the ALJ. As the ALJ explained, many NOAA decisions and several federal court decisions have upheld the application of *respondeat superior* liability on vessel owners in the context of Magnuson-Stevens Act violations committed by vessel operators.[11] In the present appeal, Respondent PEI has offered no good reason

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[6] Respondent also argues that the NOAA procedural regulation, 15 C.F.R. § 904.107, is void for vagueness. A law is found void for vagueness if it is not "sufficiently explicit to inform those who are subject to it what conduct on their part will render them liable to its penalties." *See Connally v. General Constr. Co.*, 269 U.S. 385, 391 (1926). Since 15 C.F.R. § 904.107 is a procedural regulation that does not proscribe conduct, the void-for-vagueness doctrine does not apply. *See id.* (noting that the void-for-vagueness doctrine applies to statutes that "forbid[] or require[] the doing of an act."). As such, no further consideration is given to this argument.

[7] *In the Matter of: Ronnie and Charlotte Boggess*, 1985 NOAA LEXIS 20, at *2 (NOAA App. Sept. 6, 1985).

[8] 16 U.S.C. § 1802(36).

[9] *See e.g., In the Matter of: Rebecca Irene Fisheries, LLC & Mark Decker*, 2004 NOAA LEXIS 4, at **18-22 (NOAA ALJ May 26, 2004).

[10] *Ronnie and Charlotte Boggess*, 1985 NOAA LEXIS 20, at **2-3.

[11] *See e.g., Bateman v. United States*, 768 F. Supp. 805, 808 (S. D. Fla. 1991) (acknowledging that vessel owners justifiably absorb their share of culpability in NOAA cases where the owners are likely to realize a benefit from the violation); *United States v. Kaiyo Maru Number 53*, 503 F. Supp. 1075, 1090 (D. Al. 1980) (holding that "[t]he regulatory program is designed to punish the vessel and its owners for any transgressions."); *Ronnie and Charlotte Boggess*, 1985 NOAA LEXIS 20, at *2; *Rebecca Irene Fisheries, LLC & Mark Decker*, 2004 NOAA LEXIS 4, at **18-21; *see also* ALJ Order on Respondent F/V Princess Elena, Inc.'s Motion to Dismiss/Strike the Notice of Violation and Assessment, dated April 18, 2014, at 5-10.

for a departure from NOAA case precedent.[12] Respondent PEI also has not identified any case altogether rejecting the application of *respondeat superior* in the Magnuson-Stevens Act context.[13]

Last, the ALJ's finding of *respondeat superior* liability is adequately supported by both facts and law. There are two major elements considered when determining whether a vessel owner is subject to *respondeat superior* liability for violations incurred by the captain. They include: 1) the scope of employment; and 2) the degree of control.[14] The scope of employment is satisfied by showing "the employee acted, at least in part, by a desire to serve his employer's interests,"[15] or the relationship between the vessel owner and vessel operator is that of a joint venture as evidenced by the parties' intent to carry out a single business venture, an inferred right of control by the vessel owner, and a right to each share the profits.[16] The degree of control element is sufficiently satisfied by establishing that the vessel owner, as a "major beneficiary of [the vessel's] operations, authorized the expedition which was illegally conducted."[17]

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[12] Although Respondent argues that the NOAA penalty policy containing "varying levels of penalty amounts depending on degree of fault" raises a question as to the applicability of *respondeat superior*, Respondent does not explain why these penalty factors should alter a long-standing *l*iability doctrine. Indeed, the ALJ did consider PEI's and Mr. Drinkwater's differing degrees of fault in rendering a penalty calculation. ALJ Initial Decision at 28-30.

[13] Although Respondent PEI cites *In the Matter of: John Fernandez & Dean Strickler*, 1999 NOAA LEXIS 9 (NOAA ALJ Aug. 23, 1999), in which the ALJ declined on the "unique facts" of the case to find the vessel owner liable for actions of the vessel captain, that case affirms that "in many cases, there is very good reason to assess joint and several liability against the vessel owner for a violation of law by the Captain. The owner may benefit from the illegal action and tolerate it with 'a wink and a nod.'" *Id.* at *12.

[14] *See, e.g.*, *In the Matter of: Shulterbrandt & Lewis*, 1993 NOAA LEXIS 26, at **6-7 (NOAA ALJ May 28, 1993) (holding that *respondeat superior* doctrine imposes liability on an employer or vessel owner for unlawful acts committed within the scope of employment if the employer had the right to control the actions of the wrongdoer); *In the Matter of: James Chan Song Kim*, 2003 NOAA LEXIS 4, at **27-29 (NOAA ALJ Jan. 7, 2003) (explaining that the "idea behind respondeat superior is to subject an employer to liability for whatever is done by the employee in virtue of his employment and in furtherance of its ends," and noting that it is the vessel owner's continued authority and legal control over the vessel, together with his unequivocal right to hire and fire the captain, that creates an agency relationship with the captain sufficient to impose respondeat superior liability on the vessel owner for the captain's wrongdoing).

[15] *James Chan Song Kim*, 2003 NOAA LEXIS 4, at *27.

[16] *In the Matter of: Peterson & Weber*, 1991 NOAA LEXIS 34, at *11 (NOAA ALJ July 19, 1991); *Shulterbrandt & Lewis*, 1993 NOAA LEXIS 26, at **6-7 (NOAA ALJ May 28, 1993). Although Respondents argue that *respondeat superior* does not apply to independent contractors, this argument lacks merit: the *respondeat superior* "doctrine has been extended in some cases to apply to those who claim to be independent contractors or charterers, on the rationale that the contract or charter may be characterized as a joint venture . . . ." *Shulterbrandt & Lewis*, 1993 NOAA LEXIS 26, at **6-7.

[17] *In the Matter of: Millis & Miss Charlotte, Inc.*, 1985 NOAA LEXIS 17, at *13 (NOAA ALJ Sept. 27, 1985).

Here, both elements have been satisfied. The ALJ appropriately relied on facts established in this case and the companion case — Robert C. Roberge and Anthony & Enzo, Inc., NOAA Docket No. NE1300388 — and listed multiple factors that support finding Respondent PEI liable for the fishery violations under the *respondeat superior* doctrine.[18] Specifically, Guiseppe DiMaio, who is the owner and sole shareholder of PEI, hired and assumed responsibility for training Mr. Drinkwater who was an inexperienced captain; PEI supplied the fishing vessel, permit, ship, fuel, supplies, and crew; PEI and Mr. Drinkwater agreed to share profits from the endeavor; PEI paid unemployment insurance on behalf of Mr. Drinkwater; and PEI was on notice of its potential liability for the captain's obstructions of nets.[19] In sum, there is no indication of a plain error of law or fact in the ALJ's application of the *respondeat superior* doctrine.

Accordingly, PEI's petition for review is hereby **DENIED**.

CONCLUSION

This Order constitutes the final administrative decision in this matter. This Order, and the civil penalties imposed by the ALJ, will become final on the date the Order is served on Respondents, and becomes effective for purpose of judicial review on the date of service.

11-18-15
Dated

Kathryn D. Sullivan, Ph.D.
NOAA Administrator and Under Secretary of Commerce for Oceans and Atmosphere

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[18] ALJ Initial Decision at 17, *see also id.* at 33 (noting that "If PEI had not hired Mr. Drinkwater, then he would not have been in a position to commit the violations. The Respondents agreed to pursue a common objective and each expended their labor and resources on a common plan they hoped would result in their mutual financial benefit.").

[19] ALJ Initial Decision at 17. Although Respondent PEI relies on *John Fernandez & Dean Strickler*, 1999 NOAA LEXIS 9 (NOAA ALJ Aug. 23, 1999), the facts of that case are distinguishable. In *Fernandez*, the ALJ declined to impose liability on the vessel owner for a fishing violation in which the captain of the vessel hauled back the fishing gear in contravention of a Coast Guard direction to cease operations and not haul back. The ALJ's decision not to apply *respondeat superior* liability in *Fernandez* was based on the following "unique circumstances:" the owner had an excellent reputation in the industry, was very cooperative, and participated in fishery regulation committees; the owner had previously brought to NOAA's attention instances where the captains violated the law; and the captain's decision to disregard the Coast Guard's order was made on the spot and did not involve the owner. *Id.* at **12-14. In this case, the ALJ recognized that Mr. DiMaio did have a history of cooperating with the Coast Guard on safety training and surveillance and Mr. DiMaio also brought to NOAA's attention at least one captain who was engaging in fisheries violations. However, the ALJ also recognized the pervasive nature of the fisheries violations on the ships. ALJ Initial Decision at 29.