UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:	)	
BRANT MCMULLAN & ROGER A. GALES.	)	DOCKET NO. SE0900591FM
	)	HON. BRUCE TUCKER SMITH ADMINISTRATIVE LAW JUDGE
RESPONDENTS.	)	

INITIAL DECISION & ORDER

DATE ISSUED:

DECEMBER 7TH, 2010

ISSUED BY:

HON. BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

APPEARANCES:

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION
Cynthia Fenyk, Esq.
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FOR RESPONDENTS
Brant McMullan, pro se
Roger A. Gales, pro se

I. Preliminary Statement

On December 4, 2009, the United States Department of Commerce, National Oceanic and Atmospheric Administration (NOAA or Agency) issued a Notice of Violation and Assessment of Administrative Penalty (NOVA) to Respondents Brant McMullan and Roger A. Gales (collectively, Respondents; individually, Respondent McMullan and Respondent Gales). The NOVA alleged that Respondents are jointly and severally liable for violating the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson-Stevens Act or Act), as provided at 16 U.S.C. §1857(1)(A), and its implementing regulation as codified at 50 C.F.R. §635.71(b)(2).

Specifically, in Count One, NOAA charged that on or about January 4, 2009, Respondent McMullan and/or Respondent Gales, jointly and severally, transferred at sea an Atlantic Tuna, as specified in 50 C.F.R. §635.29(a) in violation of the Magnuson-Stevens Act, at 16 U.S.C. §1857(1)(A) and 50 C.F.R. §635.71(b)(21).

Alternatively, NOAA alleged in Count One that Respondents, jointly and severally, illegally fished with a vessel that had been issued an Atlantic Tuna or Atlantic HMS permit under §635.4, because the person operating that vessel had brought a Blue Fin Tuna (BFT) under control with assistance from another vessel.

In Count Two, NOAA alleged that Respondents, jointly and severally, made a false statement to an authorized officer concerning the taking, catching, harvesting or landing of a BFT, in violation of the Magnuson-Stevens Act 16 U.S.C. §1857(1)(A) and 50 C.F.R. §600.725(i).

As a result, the Agency sought a civil penalty totaling $12,500.00.

The Agency also issued a Notice of Permit Sanction (NOPS) to Respondent McMullan suspending all federal fisheries permits issued to the F/V WORLD CAT for a period totaling sixty days or thirty days for each Count alleged.

On March 8, 2010, Respondent McMullan filed a request for an administrative hearing to contest the allegations contained within the NOVA. Pursuant to 15 C.F.R. §904.107(b), "[a] hearing request by one joint and several respondent is considered a request by the other joint and several respondent(s)." Therefore, Respondent Gales is also deemed to have requested a hearing in the instant matter.

On May 7, 2010, NOAA transmitted the request for hearing to the Administrative Law Judge (ALJ) Docketing Center. On May 20, 2010, Chief Administrative Law Judge Joseph N. Ingolia issued a Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PPIPs). NOAA and Respondents timely filed their respective PPIPs with assigned ALJ Bruce Tucker Smith.[1]

On June 25, 2010, the court held a telephonic pre-hearing conference with the parties. The court explained to Respondents the basic form and structure of a NOAA administrative case as it developed, as well as Respondents' various procedural rights in the present proceeding.

On September 1, 2010, the Agency filed an Amended NOVA against Respondents, jointly and severally, containing essentially the same information contained in the original NOVA, but amending the names of the vessels involved. The proposed

[1] Pursuant to 15 U.S.C. §1541, United States Coast Guard Administrative Law Judges may perform all adjudicatory functions required by Chapter 5 of Title 5 of the United States Code to be performed by an Administrative Law Judge for any marine resource conservation law or regulation administered by the Secretary of Commerce acting through the National Oceanic and Atmospheric Administration.

monetary penalty was the same as in the original. Likewise, in the Amended Notice of Permit Sanction, NOAA sought a 30-day suspension for each of the two Counts alleged, for a total potential suspension of Respondent's fishing permits for 60 days.

On October 12, 2010, this matter came on for hearing at the Brunswick County Courthouse in Bolivia, North Carolina. Cynthia S. Fenyk, Esq. appeared on behalf of the Agency. Respondents each appeared on their own behalf without legal counsel.

At the outset of the hearing, NOAA counsel made a spoken motion to amend Count Two of the Amended NOVA and NOPS to read "On or about February 2, 2009 . . . " vice "On or about January 4, 2009 . . . " The motion was granted by the court. (Tr. at 11 - 12).

NOAA presented the testimony of three witnesses and offered twenty one exhibits into evidence, twenty of which were admitted. Respondents presented the testimony of one witness and offered no items of documentary exhibits into evidence.[2] The hearing was concluded in one day.

The parties' respective witnesses, as well as exhibits entered into evidence, are identified in Attachment I.

II. Findings of Fact

The following Findings of Fact are based on a thorough and careful analysis of the documentary evidence, the testimonies of witnesses, the exhibits entered into evidence and the entire record as a whole.

[2] Citations referencing the transcript are as follows: Transcript followed by the volume number and page number (Tr. at ___). Citations to Agency Exhibits are marked Agency Ex. 1, 2, 3, etc.; Respondent's Exhibits are marked Resp. Ex. A, B, C, etc.; ALJ Exhibits are marked ALJ Ex. I, II, III etc.

1. On or about January 4, 2009 Respondent Brant McMullan owned two commercial sport-fishing vessels: the CAROLINA CONTENDER, Coast Guard certificate number 1109777; and the CAROLINA CAT, Coast Guard certificate number 1215258. (Agency Ex. 10, 11). [3]

2. On or about January 4, 2009, Respondent Brant McMullan held Federal Fisheries Permits for Atlantic Highly Migratory Species for the vessels CAROLINA CAT, permit number 10125739 and the CAROLINA CONTENDER, permit number 10071769. (Agency Ex. 13, 14).

3. On or about and before January 4, 2009, Respondent Brant McMullan owned a business entity known as Ocean Isle Fishing Center in Ocean Isle, North Carolina.

4. On or about January 4, 2009, the National Marine Fisheries Service set a limit of two large medium or giant Atlantic Bluefin Tuna per vessel per day/trip. (Agency Ex. 18).

5. On or before January 4, 2009, LT Matthew Miller, a dental officer with the United States Navy, was a charter-fishing customer of the business entity known as Ocean Isle Fishing Center, Ocean Isle Beach, North Carolina. (Tr. at 56, 93).

6. On or about January 4, 2009, LT Matthew Miller contracted with Ocean Isle Fishing Center to take him on a one-day fishing trip for Bluefin Tuna and Wahoo. LT Miller paid Ocean Isle Fishing Center $635.00 for the trip. (Tr. at 93 - 94).

7. On or about January 4, 2009, at approximately 11:00 in the morning, LT Matthew Miller was aboard the CAROLINA CAT with Respondent Roger Gales as captain. (Tr. at 57, 93 – 95).

8. On or about January 4, 2009, at approximately 11:00 in the morning, as he was aboard the CAROLINA CAT with Respondent Roger Gales, LT Matthew Miller heard a radio call from the CAROLINA CONTENDER, at which time the CAROLINA CAT sped toward the CAROLINA CONTENDER at a speed of thirty to forty knots. (Tr. at 57, 93 – 98, 105 - 106).

9. On or about January 4, 2009, at approximately 11:00 in the morning, and as the CAROLINA CAT approached the CAROLINA CONTENDER, and at the direction of Respondent Roger Gales, LT Matthew Miller put on a "Brady" stand-up harness in anticipation of fighting a large fish. (Tr. at 97).

[3] Respondent McMullan owned a third vessel, the OIFC WORLD CAT 33, Coast Guard certificate number 1205525. That vessel was not involved in any of the events contemplated in this action.

10. On or about January 4, 2009, at approximately 11:00 in the morning, as he was aboard the CAROLINA CAT, LT Matthew Miller was handed, or transferred, a rod and reel with a fish attached to the end of the line. The rod and reel were passed to him from a person aboard the CAROLINA CONTENDER. (Tr. at 98, 106; Agency Ex. 17).

11. LT Matthew Miller fought the fish for approximately one and one half to two hours. (Tr. at 99; Agency Ex. 17).

12. After LT Matthew Miller fought the fish, the fish was brought alongside the CAROLINA CAT. The fish was subsequently gaffed and then secured to the vessel by tying a rope through its mouth. The fish was then pulled alongside the CAROLINA CAT then pulled through the water to allow the fish to bleed. (Tr. at 99).

13. After the fish caught by LT Matthew Miller was brought aboard through the transom door of the CAROLINA CAT, the fish was field dressed and put on ice. The fish caught by LT Miller measured eighty-one inches in length and weighed approximately 350 pounds, undressed. (Tr. at 100; Agency Ex. 17).

14. After the fish he landed was field dressed and put on ice aboard the CAROLINA CAT, LT Matthew Miller was informed that he would have to pay for his trip because the fish was, according to Respondent Gales, "the other boat's kill." (Tr. at 101; Agency Ex. 17).

15. On or about January 4, 2009, Respondent Roger Gales completed a "landing report" indicating that his vessel, the CAROLINA CAT, had landed a giant Atlantic Bluefin Tuna, measuring eighty-one inches in length and weighing 263 pounds, dressed. This was the fish LT Matthew Miller caught. (Agency Ex. 5; Tr. at 43 – 47).

16. On or about January 4, 2009, Respondent Brant McMullan completed a "landing report" indicating he, as captain of the CAROLINA CONTENDER, had landed a giant Atlantic Bluefin Tuna, measuring eighty-eight inches in length and weighing 311 pounds, dressed. (Agency Ex. 5; Tr. at 43 – 47).

17. On or about January 4, 2009, the market value of the giant Atlantic Bluefin Tuna landed by LT Matthew Miller aboard Respondent Roger Gales' boat, was $4,808.28 United States Dollars, after expenses. (Agency Ex. 6).

18. On or about February 2, 2009, Special Agent Gregory Byrd of the National Oceanic and Atmospheric Administration, Office of Law Enforcement, in the course of his official duties, conducted an investigation pertaining to the matters which form the basis of the instant litigation. On that day, Special Agent Byrd interviewed Respondent Roger Gales, at Gale's home. (Tr. at 31).

19. During the February 2, 2009 interview by Special Agent Byrd, Respondent Gales interrupted the interview and placed a telephone call to Respondent McMullan. During that telephone call, Respondent McMullan told Respondent Gales, "...the best thing to do was not to say nothing and ask him to leave." (Tr. 163-164).

20. On or about February 2, 2009, Respondent Gales told Special Agent Byrd that he "could not recall meeting Mr. McMullan or [being involved with] passing a rod" or words to that effect on January 4, 2009, and by doing so, Respondent Gales made an intentional, material misrepresentation of fact to Special Agent Byrd. (Tr. at 32 – 33, 161 – 162, 163-164, 167-168;Agency Ex. 2, 3).

III. Discussion

A. Agency's Burden of Proof

In order to prevail on the charges instituted against a respondent, the Agency must prove the violations alleged by a preponderance of the evidence. 5 U.S.C. § 556(d); see also Dept. of Labor v. Greenwich Collieries, 512 U.S. 267 (1994). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. See Herman & MacLean v. Huddleston, 459 U.S. 375, 390 (1983). The Agency may rely on either direct or circumstantial evidence to establish the violation and satisfy the burden of proof. See generally, Monsanto Co. v. Spray-Rite Serv. Corp., 465 U.S. 752, 764-765 (1984). The burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. See Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

In this case, no material facts are disputed by the parties. The evidence at trial revealed that on or about and before January 4, 2009, Respondent Brant McMullan held title to the vessels CAROLINA CAT and CAROLINA CONTENDER (Agency Ex. 10,

11). Likewise, on or before January 4, 2009, Respondent McMullan held Federal Fisheries Permits for Atlantic Highly Migratory Species for the vessels CAROLINA CAT, permit number 10125739 and the CAROLINA CONTENDER, permit number 10071769). (Agency Ex. 13, 14).

The evidence indicates that Respondent Brant McMullan owns and operates a business entity known as the Ocean Isle Fishing Center, Ocean Isle Beach, North Carolina. The evidence further indicates that Respondent Roger Gales is a former employee of that business. (Tr. at 159).

The undisputed testimony further reveals that on or before January 4, 2009, LT Matthew Miller, a dental officer with the United States Navy, was a charter-fishing customer of the Ocean Isle Fishing Center. (Tr. at 56, 93). LT Miller had contracted with the Ocean Isle Fishing Center to take him fishing for Bluefin Tuna and Wahoo. LT Miller paid Ocean Isle Fishing Center $635.00 for the trip. (Tr. at 93 - 94). LT Miller believed that if he caught a "commercial sized" tuna (i.e., seventy-three inches in length or greater) his payment would be reimbursed but that the commercial-sized fish would become the property of Ocean Isle Fishing Center. (Tr. at 100; Agency Ex. 17).

On January 4, 2009, at approximately 11:00 in the morning, and while he was aboard the CAROLINA CAT with Respondent Roger Gales as captain, LT Miller heard a radio call from the CAROLINA CONTENDER, at which time the CAROLINA CAT immediately sped toward the CAROLINA CONTENDER at a speed of thirty to forty knots. (Tr. at 57, 93 – 98, 105 - 106).

After the CAROLINA CAT arrived and pulled alongside the CAROLINA CONTENDER, LT Miller was handed, or transferred to, a rod and reel with a fish

hooked to the end of the line. The rod and reel were passed to him from the CAROLINA CONTENDER. LT Miller then fought the fish for approximately one and one half to two hours. (Tr. at 98 – 99, 106; Agency Ex. 17).

After LT Miller fought the fish for nearly two hours, the fish was brought alongside the CAROLINA CAT. The fish was subsequently gaffed and then secured to the vessel by tying a rope through its mouth. The fish was then pulled alongside the vessel to allow the fish to bleed. Afterward, LT Miller's fish was brought aboard through the transom door of the CAROLINA CAT, and was then field-dressed and put on ice. LT Miller's fish measured eighty-one inches and weighed approximately 350 pounds, undressed. (Tr. at 99 – 100; Agency Ex. 17).

Soon after his fish was field-dressed and put on ice aboard the CAROLINA CAT, LT Miller was informed that he would have to pay for his trip because the fish was, according to Respondent Gales, "the other boat's kill." (Tr. at 101; Agency Ex. 17). This, in apparent contravention of Ocean Isle Fishing Center's earlier promise to LT Miller.

Agency Exhibit 5 reveals that on January 4, 2009, Respondent McMullan and Respondent Gales each individually attested to having landed a giant Atlantic BFT on their respective vessels, as indicated by their respective signatures on National Marine Fisheries Service Landing Reports. According to the respective landing reports, Respondent McMullan's BFT measured eighty eight inches in length and weighed 311 pounds, dressed. Respondent Gales' BFT, aboard the CAROLINA CAT, measured eighty one inches in length and weighed 263 pounds, dressed. (Agency Ex. 5).

Agency Exhibit 6 reveals the commercial value of the two dressed BFT was approximately $13,912.00, before expenses.

On February 2, 2009, Special Agent Gregory Byrd of the NOAA Office of Law Enforcement interviewed Respondent Gales, who told Special Agent Byrd that he "could not recall meeting Mr. McMullan or [being involved with] passing a rod" on January 4, 2009, or words to that effect. By doing so, Respondent Gales made an intentional, material misrepresentation of fact to Special Agent Byrd. (Tr. at 31 – 33, 161 – 162, 163, 167-168; Agency Ex. 2, 3, 9).

B. Count One

Count One of the Agency's NOVA is inartfully pled, because it alleges alternate violations within the same Count. Initially, Count One alleges that on or about January 4, 2009, Respondents, jointly and severally, transferred at sea, an Atlantic Tuna in violation of both 16 U.S.C. §1857(1)(A) and 50 C.F.R. §635.29(a)[4] and 50 C.F.R. §635.71(b)(21)[5].

Conversely, Count One alleges an alternative theory that Respondents, jointly and severally, illegally fished with a vessel that had been issued an Atlantic Tunas or Atlantic HMS permit, because the person operating that vessel brought a BFT under control with assistance from another vessel . . . " in violation of 50 C.F.R. §635.71(b)(1).

As indicated above, the material facts are not in dispute. The parties are in general accord, and the evidence supports a finding that on January 4, 2009, Respondent McMullan, aboard the CAROLINA CONTENDER, hooked a fish (at that exact time, the species could not be determined) and made a radio call to his employee, Respondent

[4] Specifically, 50 C.F.R. §635.29(a) provides in part: "Persons may not transfer an Atlantic tuna, blue marlin, white marlin, or swordfish at sea in the Atlantic Ocean, regardless of where the fish was harvested." (Emphasis added).

[5] Likewise, 50 C.F.R. §635.71(b)(21) provides in part: "It is unlawful for any person or vessel subject to the jurisdiction of the United States to...Transfer at sea an Atlantic tuna." (Emphasis added).

Gales, aboard the CAROLINA CAT and urged him to come along side so that the rod could be passed to LT Miller, the charter passenger aboard the CAROLINA CAT. The rod was passed to LT Miller who then fought the fish for approximately two hours before bringing a giant Atlantic BFT alongside the CAROLINA CAT. (Agency Ex. 9, 17).

NOAA's own witness, Navy LT Miller, a sport fisherman with extensive experience, testified that a game fish such as an Atlantic BFT "isn't really under control until it's to the boat and wired and gaffed." (Tr. at 107, 112).

It is the transfer of the rod from the CAROLINA CONTENDER to Miller aboard the CAROLINA CAT that forms the basis for the alternative theories pled in Count One.

1. **"Transfer"**

Query: Whether the passing of a rod, whereupon a BFT is hooked, is a "transfer" under the regulations.

Pursuant to 50 C.F.R. §635.29(a), it is illegal to "transfer" an Atlantic Tuna at sea "regardless of where the fish was harvested" (emphasis added) and 50 C.F.R. §635.71(b)(21) makes it illegal to "transfer" an Atlantic Tuna at sea.

Notably, 50 C.F.R. Subpart A does not define the term "transfer." See 50 C.F.R. §635.2. But a plain reading of 50 C.F.R. §635.29(a) indicates that a fish must be harvested before it can be transferred. In short, to transfer a thing, once must first catch or take or harvest a thing.

As instructed by 50 C.F.R. §600.10, "[c]atch, take or harvest includes, but is not limited to, any activity that results in killing any fish or bringing any live fish on board a vessel." (Emphasis added.) Mr. Bradley McHale, an employee with the Highly Migratory Species Management Division of the National Marine fishery Service, offered

as an expert by NOAA, agreed, saying that "harvested" means: "I guess it would be when the fish is brought on board the vessel."[6] (Tr. at 151).

An early NOAA case is somewhat enlightening. In the Matter of Patrick Sterling, 6 O.R.W. 805, 808 (N.O.A.A. 1992), the ALJ addressed the question whether "hooking" a fish constitutes "possession" of a fish. The learned Judge wrote:

> First, under the doctrine of ferae naturae, creatures of the wild, including the [fish] at issue, are not in anyone's possession until captured. Here, by hooking the [fish] Respondent both restricted it and established sufficient dominion over it to disallow another's interference with his continued harvesting of the fish. I find that Respondent's hooking of the [fish] restricted its movement and created a possessory interest in Respondent superior to that of any other potential claimant. Thus, the hooking, while not necessarily resulting in complete possession is the first step toward possession.

(Emphasis added; internal citations omitted). Accord In the Matter of Anthony F. Favaloro, 1994 WL 1246352 (N.O.A.A. 1994).

Sterling clearly recognizes that the mere hooking of a fish is only the first step toward possession. Sterling clearly defines possession as capture.

Hence, before a fish can be transferred, it must have been first killed or captured aboard a vessel.

Such was not the case, here. All that was transferred was a rod and reel with a fish on the hook . . . and two hours away from the boat. It had neither been killed nor brought aboard a vessel when the rod and reel was passed. A transfer had not occurred because the precondition of a capture, a harvest had not yet occurred.

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[6] Miriam-Webster's on-line dictionary is in accord. There, the verb "harvest" is defined to mean: " to gather, catch, kill, remove or extract; to accumulate a store." The undersigned ALJ reads this definition to mean "to exercise dominion or control" over a thing. See http://www.merriam-webster.com/dictionary/harvest

NOAA did not prove Respondent's were liable under the first theory of Count One.

2. **"Under control with no assistance"**

The second alternative theory pled under Count One cites 50 C.F.R. §635.71(b)(1), which makes it illegal for a person operating a vessel that brought a BFT "under control" to do so with assistance from another vessel. The regulation provides its own definition of the phrase at issue:

> b) Atlantic tunas. It is unlawful for any person or vessel subject to the jurisdiction of the United States to:
>
> (1) Engage in fishing with a vessel that has been issued an Atlantic Tunas or Atlantic HMS permit under §635.4, unless the vessel travels to and from the area where it will be fishing under its own power and the person operating that vessel brings any BFT under control (secured to the catching vessel and/or brought on board) with no assistance from another vessel, except as shown by the operator that the safety of the vessel or its crew was jeopardized or other circumstances existed that were beyond the control of the operator.

(Emphasis added).

Plainly, "under control" is defined to mean "secured to the catching vessel and/or brought on board." Here, LT Miller was aboard the CAROLINA CAT when he received the rod and reel from the CAROLINA CONTENDER. He then fought the fish and eventually brought the BFT alongside the CAROLINA CAT. The BFT was eventually gaffed and secured; thus, the CAROLINA CAT was the "catching vessel."

The question then obtains whether LT Miller received "assistance" from another vessel in securing the BFT to the catching vessel and/or bringing the BFT

aboard the CAROLINA CAT in violation of 50 C.F.R. §635.71(b)(1). That question must be answered in the affirmative.

Read strictly, 50 C.F.R. §635.71(b)(1) prohibits the crew of one vessel from assisting the crew of another vessel in bringing any BFT "under control," as that term is defined in the regulation. The evidence is undisputed that Respondent McMullan handed LT Miller the rod and reel with a "hooked" fish attached. LT Miller then proceeded to fight the fish and, eventually, brought the BFT alongside the CAROLINA CAT, where it was ultimately secured and/or brought on board. Despite the minimal degree of his participation in the chain of events, Respondent McMullan did assist LT Miller in eventually bringing the BFT "under control." Hence, technically speaking, Respondent McMullan did violate the letter of 50 C.F.R. §635.71(b)(1), by assisting LT Miller land the fish.

A slightly different conclusion (with the same result) is supported by Respondent Gales' own statements to LT Miller on January 4. Recall that immediately after the fish was brought aboard the CAROLINA CAT, Respondent Gales told LT Miller that the fish was, "the other boat's kill." (Tr. at 101; Agency Ex. 17). Clearly, Respondent Gales believed that his vessel had assisted the CAROLINA CONTENDER in landing the BFT at issue.

Regardless of which boat was the "catching vessel," the facts at bar reveal that the crew of one vessel assisted the crew of another vessel in bringing a BFT under control. Hence, NOAA has proved the second alternate theory of Count One.

Based upon the forgoing, the court hereby finds that the Agency proved by a preponderance of reliable, probative, substantial, and credible evidence that Respondents,

jointly and severally, illegally fished with a vessel that had been issued an Atlantic Tuna or Atlantic HMS permit under §635.4, because the person operating that vessel had brought a BFT under control with assistance from another vessel, in violation of 50 C.F.R. §635.71(b)(1).

Therefore, the court finds that Count One is **PROVED**.

C. Count Two

Count Two of the Agency's NOVA alleges that on or about February 2, 2009, Respondent Gales made a false statement to an authorized officer concerning the taking, catching, harvesting, or landing of any fish in violation of 16 U.S.C. §1857(1)(A) and 50 C.F.R. §600.725(i). The Agency further alleges that Respondent McMullan is liable for Respondent Gales' actions under the doctrine of joint and several liability, infra.

As in COUNT ONE, the facts supporting the second Count are virtually undisputed. In fact, in response to direct examination by co-Respondent McMullan, Respondent Gales admitted that he had knowingly deceived Agent Byrd when the agent interviewed him in February 2009. (Tr. at 161).

Likewise, in response to inquiry by both NOAA counsel and the Administrative Law Judge, Respondent Gales admitted that he lied to Special Agent Byrd. (Tr. At 162 – 167).

Based upon the forgoing, the court hereby finds that the Agency proved by a preponderance of reliable, probative, substantial, and credible evidence that Respondent Gales made a false statement to an authorized officer concerning the taking, catching, harvesting or landing of a BFT, in violation of the Magnuson-Stevens Act 16 U.S.C. §1857(1)(A) and 50 C.F.R. §600.725(i). Whether Respondent Gales' conduct was such

that vicarious liability can be imposed upon Respondent McMullan, however, is a subject of discussion, infra.

Therefore, the court finds that, in regard to Respondent Gales, Count Two is **PROVED.**

D. Joint and Several Liability

The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Northern Wind, Inc. v. Daley, 200 F.3d 13, 19 (1st Cir. 1999) (citing Tart v. Massachusetts, 949 F.2d 490, 502 (1st Cir. 1991) for the proposition that "scienter is not required to impose civil penalties for regulatory violations when the regulation is silent as to state of mind"). Accordingly, any violations of the Act are strict liability offenses. Id. (internal citations omitted).

Joint and several liability, as it applies in cases arising under the Magnuson-Stevens Act, is set forth at 15 C.F.R. §904.107 and provides that:

> (a) A NOVA may assess a civil penalty against two or more respondents jointly and severally. Each joint and several respondent is liable for the entire penalty but, in total, no more than the amount finally assessed may be collected from the respondents.
>
> * * *
>
> (c) A final administrative decision by the Judge or the Administrator after a hearing requested by one joint and several respondent is binding on all parties including all other joint and several respondent(s), whether or not they entered an appearance unless they have otherwise resolved the matter through settlement with the Agency.

Id. (emphasis added).

It is not necessary that a vessel owner exercise detailed control over the operations of his vessel in order to be held liable for the illegal activities of its master and crew. It is sufficient that the owner of the vessel, and the major beneficiary of its

operations, authorized the fishing expedition that was illegally conducted. Since it acquires a share of the vessel's production, so must it bear a major responsibility, along with the captain, for the latter's unlawful acts. To hold otherwise would be to allow vessel owners to escape responsibility for the transgressions of the captains that they hire, authorize to operate their boats, and have the authority to fire. Such a holding would substantially inhibit the effective enforcement of the Magnuson Act and the applicable regulations. In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corporation, 2003 WL 22000639 (NOAA 2003); In the Matter of Atlantic Spray Corporation, 1996 WL 1352603 (NOAA 1996); In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); In the Matter of Atlantic Spray Corporation, 1997 WL 1402870 (NOAA 1997).

Joint and several liability is imposed on the vessel's owner if the violation occurs within the scope of the crewmembers duties. See In the Matter of Corsair Corporation, F/V CORSAIR, 1998 WL 1277924 (NOAA 1998); see also In the Matter of Blue Horizon, Inc., 6 O.R.W. 467 (NOAA 1991) (holding that owners of a fishing vessel are jointly and severally liable for the acts of an employee if the acts are directly related to duties that the employees have broad authority to perform).

The doctrine of respondeat superior also applies to individuals who claim to be independent contractors. In the Matter of Kenneth Shulterbrandt, William Lewis, 1993 WL 495728 (NOAA 1993); See also, In the Matter of Charles P. Peterson, James D. Weber, 1991 WL 288720 (NOAA 1991). The rationale behind applying the doctrine of respondeat superior to independent contractors is that the contract may be "characterized as a joint venture if there is the intention of the parties to carry out a single business

undertaking, a contribution by each of the parties to the venture, and inferred right of control and a right to participate in the profits." Id. "Generally, the test used to determine whether the doctrine applies is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer." Id.

COUNT ONE: Vicarious or joint and several liability may be imposed for the proved violation of Count One, because both Respondents illegally participated assisted one another in landing the BFT in violation of 50 C.F.R. §635.71(b)(1). Respondent Gales was engaged in Respondent McMullan's business and under the direction and control of Respondent Gales and was clearly acting in the course and scope of his duties as Respondent McMullan's employee.

COUNT TWO: More problematic is whether Respondent McMullan can be held vicariously liable for Respondent Gales' violation of Count Two; namely 16 U.S.C. §1857(1)(A) and 50 C.F.R. §600.725(i). Normally, joint and several liability is imposed on the vessel's owner if the violation occurs within the scope of the crewmembers duties. See In the Matter of Corsair Corporation, F/V CORSAIR, supra. Hence the inquiry: Whether Respondent Gales was acting in the course and scope of his duties when he lied to Special Agent Byrd.

At the court's request, the parties submitted post-hearing memoranda in response to the question whether the doctrine of vicarious liability applies in this situation.

As Respondent McMullan's brief succinctly points out, a finding of vicarious liability or respondeat superior "depends upon the particular facts of the case."

Here, the undersigned made an essential finding of fact that on or about February 2, 2009, Special Agent Gregory Byrd of the NOAA's Office of Law Enforcement, in the

course of his official duties, conducted an investigation pertaining to the matters which form the basis of the instant litigation. On that day, Special Agent Byrd interviewed Respondent Gales, at Gale's home. (Tr. at 31). Special Agent Byrd interviewed Respondent Gales as part of an official investigation into Respondent Gale's duties and conduct while acting as an employee of Respondent McMullan. As NOAA's post-hearing brief correctly notes, "But for his employment as a vessel operator under Respondent McMullan, Respondent Gales would have never had the meeting at his home with Agent Byrd."

The facts further reveal that during the February 2, 2009 interview by Special Agent Byrd, Respondent Gales interrupted the interview and placed a telephone call to Respondent McMullan. During that telephone call, Respondent McMullan told Respondent Gales not to lie and further instructed that "...the best thing to do was not to say nothing and ask him to leave." (Tr. 163-164).

NOAA's post-hearing brief cites Lyon v. Carey, 533 F.2d 649 (D.C. Cir. 1976) for the proposition that an employer can be held liable for the torts[7] of its employees if the employee's conduct is a consequence of a job-related controversy and not the employee's personal adventure. Id. at 651. But Lyon ALSO says that whether the employee was acting on his own or in furtherance of his employer's business is a question of fact, to be determined by the trier. Id. at 655; see also Grimes v. Saul, 47 F.2d 409 (1931).

[7] The undersigned notes that federal appellate case law is replete with decisions that hold an employer can be held liable for the criminal acts of the employee, given the appropriate factual findings. See e.g., Tichenor v. Roman Catholic Church of New Orleans, 32 F.3d 953, 959 (5th Cir. 1994). See generally, West's Federal Practice Digest, Labor & Employment §3026, 3046-3047. This distinction is important, because in the case at bar, NOAA proved that a person risks criminal prosecution under 18 U.S.C. §1001 for lying to a law-enforcement officer. (Agency Ex. 5).

Scope of employment questions are governed by the law of the jurisdiction where the employment relation exists. Rasul v. Myers, 512 F.3d 644, 655 (D.C.Cir. 2008). Thus, a more pertinent case, from the Fourth Circuit (where the instant matter arose), is McNair v. Lend Lease Trucks, Inc., 95 F.3d 325 (4th Cir. 1996). There, the court stated the principle that while an employer is liable for an employee's torts committed while on the master's business, and employer can escape liability if the employee deviated from his work by engaging in some "pursuit of his own." Id. at 328. The Fourth Circuit noted that the "deviation" from the employee's duties must be "complete," explaining "if there is a total departure from the course of the master's business, the master is no longer answerable . . . " Id. at 328.

The question whether an employee engaged in a total departure from his employer's business is a question of fact; but in Council on American Islamic Relations v. Ballenger, 444 F. 3d 659, 663 (D.C. Cir. 2003), the court cited with approval a four-part test identified in the Restatement (Second) of Agency §228(1)(1958). According to the Restatement, an employee's conduct is within the scope of his master's business only if:

1. It is of the kind he is employed to perform
2. It occurs substantially within the authorized time and space limits
3. It is actuated, at least in part, by a purpose to serve the master
4. If force is intentionally used, by the servant against another, the use of force is not unexpectable by the master. [sic]

An application of the facts at bar to the four-part test, reveals that Respondent Gales strayed too far from his employer's business to justify imposition of vicarious liability upon Respondent McMullan.

An evaluation of the first and second elements of the test indicate that Respondent Gales was responding to questions posed by Agent Byrd who was acting in an official law-enforcement capacity and was seeking information concerning Respondent's activities. It is reasonable to expect that answering questions during an official investigation would be a task an employee would be expected to perform, especially in a highly-regulated enterprise such as commercial fishing. Thus, for the purposes of this litigation and parts one and two of the Restatement test, it is a foreseeable and proper part of Respondent Gales' duties to respond to an official inquiry into his employer's business.

The third element is problematic, however, because there is simply no evidence that Respondent Gales' deceptive statements were actuated, even in part, by a purpose to serve his master. (Certainly, one might speculate that Respondent Gales' deception of Special Agent Byrd might inure to Respondent McMullan's benefit. One might even speculate that there was some collusion between the Respondents. But the court declines to engage in such speculation.) The facts and evidence at bar reveal that during a break in the February 2, 2009, interview with Special Agent Byrd, Respondent Gales telephoned Respondent McMullan. Importantly, during that telephone call, Respondent McMullan told Respondent Gales, not to lie and "the best thing to do was not to say nothing and ask him to leave." (Tr. 163-164 (emphasis added)). In short, the undisputed evidence is that Respondent McMullan instructed Respondent Gales to remain quiet . . . which was his right . . . but Respondent Gales made an affirmative choice to lie, in contravention of his employer's orders and, ostensibly, 18 U.S.C. §1001.

If we interpret the fourth element of the Restatement test in light of the pertinent facts (replacing the phrase "use of force" with "lying"), the inquiry turns on whether the lie was "unexpectable" by the employer. Again, the undisputed fact is that Respondent McMullan reasonably expected Respondent Gales to follow his orders and either tell the truth or to remain quiet. Respondent Gales' lie was, therefore, "unexpectable." The facts at bar are thus distinguishable from those in In the Matter of Blue Horizon, Inc., supra, because lying to an Agent was not a task Respondent Gales enjoyed "broad authority to perform."

Because the facts do not satisfy each element of the Restatement four-part test, Respondent Gales' conduct cannot be imputed to Respondent McMullan under the theory of respondeat superior.

1. Ultimate Findings of Fact

1. On or about January 4, 2009 Respondent Brant McMullan was the owner of two commercial sport-fishing vessels: the CAROLINA CONTENDER, Coast Guard certificate number 1109777; and the CAROLINA CAT, Coast Guard certificate number 1215258.

2. On or about and before January 4, 2009, Respondent Brant McMullan was the owner of a business entity known as Ocean Isle Fishing Center in Ocean Isle, North Carolina. Respondent Roger Gales was an employee of Respondent McMullan.

3. On or about January 4, 2009, Respondent Brant McMullan held Federal Fisheries Permits for Atlantic Highly Migratory Species for the vessels CAROLINA CAT, permit number 10125739 and the CAROLINA CONTENDER, permit number 10071769.

4. On or about January 4, 2009 Respondent Brant McMullan was the master of the commercial sport-fishing vessel, the CAROLINA CONTENDER. On that same day, Respondent Roger Gales was the master of the commercial sport-fishing vessel the CAROLINA CAT.

5. On or about January 4, 2009, at approximately 11:00 in the morning, LT Matthew Miller was a passenger aboard the CAROLINA CAT, under the command of Respondent Roger Gales. At that time, LT Miller was handed

a rod and reel with a fish attached to the end of the line from a person aboard another vessel, the CAROLINA CONTENDER, under the command of Respondent Brant McMullan. LT Matthew Miller fought the fish, an Atlantic Bluefin Tuna, and thereafter, the fish was brought alongside and secured to the CAROLINA CAT. Thus, Respondents, jointly and severally, illegally fished with a vessel that had been issued an Atlantic Tuna or Atlantic HMS permit under §635.4, because the person operating that vessel had brought a Bluefin Tuna under control with assistance from another vessel, in violation of 50 C.F.R. §635.71(b)(1).

6. On or about February 2, 2009, Special Agent Gregory Byrd of the National Oceanic and Atmospheric Administration, Office of Law Enforcement, in the course of his official duties, conducted an investigation pertaining to the matters which form the basis of the instant litigation. On that day, Special Agent Byrd interviewed Respondent Roger Gales, at Gale's home.

7. During the February 2, 2009 interview by Special Agent Byrd, Respondent Gales interrupted the interview and placed a telephone call to Respondent McMullan. During that telephone call, Respondent McMullan told Respondent Gales not to lie and that "...the best thing to do was not to say nothing and ask him to leave."

8. On or about February 2, 2009, Respondent Gales told Special Agent Byrd that he "could not recall meeting Mr. McMullan or [being involved with] passing a rod" or words to that effect on January 4, 2009, and by doing so, Respondent Gales made an intentional, material misrepresentation of fact to Special Agent Byrd.

9. Respondent Roger Gales acted outside the course and scope of his employment with Respondent Bran McMullan when he intentionally deceived, misled and/or lied to Special Agent Byrd. Respondent McMullan is not jointly and severally liable for Respondent Gales' deception to Special Agent Byrd.

IV. Penalty Assessment

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to $100,000 and permit sanctions commensurate to the violations involved. In assessing penalties and or permit sanctions, the court must consider a number of factors including the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior offenses, and ability to pay; and such other

matters as justice may require." 16 U.S.C. §1858(g)(2); 15 C.F.R. §904.108(a).

The Southeast Region Magnuson-Stevens Act Penalty Schedule in effect at the time of the violations shows a penalty range for first time violators as follows:

> Violations Regarding Size/Condition/Quantity of Fish: $500 - $50,000; Permit Sanctions 0 - 45 days
>
> Violations Regarding Fishing/Possessing: $500 -$50,000; Permit Sanctions 0 - 45 days

Considering the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, (there was no probative evidence of any history of prior offenses), and ability to pay; the following penalties are appropriate:

Regarding COUNT ONE -- a civil penalty, in the amount of $5,543.28, is jointly and severally imposed on Respondent Brant McMullan and Roger Gales. This figure is the sum of the market value of the Atlantic BFT landed by LT Miller aboard the CAROLINA CAT (after illegal assistance from the CAROLIONA CONTENDER) i.e., $4,808.28 plus the $635.00 LT Miller paid to Ocean Isle Fishing Center, upon a promise that those funds would be refunded in the event the boat kept a commercial-sized Atlantic BFT.

However, given the facts of this particular case, it appears that although the "letter" of the regulation was violated, it does not appear that the "spirit" of same was offended. I take particular note of the testimony of NOAA's witness, Mr. Bradley McHale, an employee of the Highly Migratory Species Management Division, National Marine Fishery Service. (Tr. 143-154). Mr. Bradley's testimony, read in conjunction with Agency Exhibits 20 and 21, reveals an administrative intent to prevent commercial fishermen from "gaming the system" by manipulating their vessels and catches so that no

one vessel exceeded its daily limit; even though that one vessel might have harvested excessive or illegal numbers of fish. Such was plainly not the case here. On January 2, 2009, Respondent McMullan's vessel, the CAROLINA CONTENDER was entitled to possess two, giant Atlantic BFT. At the time persons aboard the CAROLINA CONTENDER passed the rod and reel to the CAROLINA CAT, there was only one Atlantic BFT aboard the CAROLINA CONTENDER. More importantly, however, was LT Miller's testimony that the apparent reason he was handed the rod and reel from the CAROLINA CONTENDER was because he, LT Miller, the paying customer, had caught no fish and Respondent McMullan simply wanted to ensure that a customer landed a fish that day and that he had fun catching a tuna. (Tr. at 93 – 100, 108). In sum, the facts reveal no overt actions by either Respondent to violate the spirit, intent or purpose of 50 C.F.R. §635.71(b)(1).

Thus, no permit sanction shall be imposed against Respondent McMullan for Count One.

COUNT TWO: A civil penalty imposed on Respondent Roger Gales, in the amount of $5,000.000. The rationale for this penalty is that Respondent Gales, like all American citizens, enjoys the Constitutionally-protected right to remain silent in the face of questioning by law enforcement. Conversely, no citizen has the right to lie to or deceive law enforcement personnel in the discharge of their official duties; thus, the existence of 18 U.S.C. §1001. The court regards this transgression as a serious matter. Respondent Gales is solely responsible for his deceit and he is solely responsible for the payment of this penalty. For the purposes of this Count, the doctrine of joint and several liability is inapplicable to Respondent McMullan.

Likewise no permit sanction shall be imposed against Respondent McMullan for Count Two.

WHEREFORE,

V. Order

IT IS HEREBY ORDERED, that the following penalties are appropriate and imposed:

COUNT ONE: A civil penalty, in the amount of $5,543.28, is jointly and severally is imposed on Respondent Brant McMullan and Roger Gales. **IT IS FURTHER ORDERED** that NO permit sanction be imposed against Respondent McMullan for COUNT ONE.

COUNT TWO: A civil penalty in the amount of $5,000.000 is imposed on Respondent Roger Gales. Respondent Gales is solely responsible for the payment of this penalty, inasmuch as the doctrine of joint and several liability is inapplicable to this Count or to Respondent McMullan. **IT IS FURTHER ORDERED** that NO permit sanction be imposed against Respondent McMullan for COUNT TWO.

PLEASE TAKE NOTICE, that a failure to pay the civil penalty to the Treasurer of the United States within thirty (30) days from the date on which this decision becomes final Agency action will result in the total penalty becoming due and payable, and interest being charged at the rate specified by the United States Treasury regulations and an assessment of charges to cover the cost of processing and handling of the delinquent penalty. Further, in the event the penalty, or any portion thereof, becomes more than 90 days past due, Respondents may also be assessed an additional penalty charge not to exceed 6 percent per annum.

PLEASE TAKE FURTHER NOTICE, that any petition for review of this decision must be filed within 30 days of this date with the Administrator of the National Oceanic and Atmospheric Administration as subject to the requirements of 15 C.F.R. §904.273. If neither party seeks administrative review within 30 days after issuance of this order, this initial decision shall become the final decision of the Agency. A copy of 15 C.F.R. §904.273 is attached hereto as Attachment II.

IT IS SO ORDERED.

Done and dated this the 7th day of December, 2010,
at New Orleans, Louisiana.

Bruce T. Sm

HONORABLE BRUCE TUCKER SMITH
ADMINISTRATIVE LAW JUDGE

VI. Attachment I: Exhibit & Witness Lists

NOAA EXHIBITS – AS OFFERED/ADMITTED CHRONOLOGICALLY

1. Print-out of OIFC website regarding BFT harvests on January 4, 2009
2. Handwritten notes of Gales interview dated February 2, 2009
3. Typewritten notes of Gales interview
4. 18 U.S.C. §1001 Acknowledgement Form signed by Gales on February 2, 2009
5. Two Large Medium & Giant Atlantic BFT Landing Reports signed by Respondents on January 4, 2009
6. Tuna Fish Consignment documents for tuna tagged #001854 and #001855
7. Handwritten notes of Miller interview on February 28, 2009
8. Typewritten notes of Miller interview
9. Offense Investigative Report, dated June 12, 2009
10. Certificate of Documentation and Abstract of Title for F/V CAROLINA CAT
11. Certificate of Documentation and Abstract of Title for F/V CAROLINA CONTENDER
12. Certificate of Documentation and Abstract of Title for F/V WORLD CAT
13. Federal Fisheries Permits issued to the F/V CAROLINA CAT
14. Federal Fisheries Permits issued to the F/V CAROLINA CONTENDER
16. NOAA GCEL/SE Magnuson-Stevens Act Penalty Schedule
17. Voluntary Written Statement of Matt Miller dated February 28, 2009
18. Atlantic HMS News, titled NMFS Adjusts General Category Atlantic Bluefin Tuna Retention Limit for January 2009
19. Various sections of 50 C.F.R. Ch. VI
20. 64 Fed. Reg. 3,154 (Jan. 20, 1999) (to be codified at 50 C.F.R. Part 285, et al).
21. 64 Fed. Reg. 3,154 (May 28, 1999) (to be codified at 15 C.F.R. Part 902 and 50 C.F.R. Part 285, et al).

RESPONDENTS' EXHIBITS – AS OFFERED/ADMITTED CHRONOLOGICALLY

None

NOAA WITNESSES

1. Gregory Bird
2. LT Matthew Miller, M.D. (USN)
3. Bradley McHale

RESPONDENTS' WITNESSES

1. Roger Gales

VII. Attachment II: Procedures Governing Administrative Review

§904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party may petition for review of an initial decision of the Judge within 30 days after the date the decision is served. The petition shall be addressed to the Administrator and filed at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue NW, Washington, DC 20230.

(b) Review by the Administrator of an initial decision is discretionary and is not a matter of right. A petition for review must be served upon all parties. If a party files a timely petition for discretionary review, or action to review is taken by the Administrator upon his or her own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator.

(c) Petitions for discretionary review may be filed only upon one or more of the following grounds:

(1) A finding of a material fact is clearly erroneous based upon the evidence in the record;

(2) A necessary legal conclusion is contrary to law or precedent:

(3) A substantial and important question of law, policy, or discretion is involved (including the amount of the civil penalty); or

(4) A prejudicial procedural error has occurred.

(d) Each issue must be separately numbered, concisely stated, and supported by detailed citations to the record, statutes, regulations, and principal authorities. Issues of fact or law not argued before the Judge may not be raised on review unless they were raised for the first time in the initial decision, or could not reasonably have been foreseen and raised by the parties during the hearing. The Administrator will not consider new or additional evidence that is not a part of the record before the Judge.

(e) No oral argument on petitions for discretionary review will be allowed.

(f) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. No further replies are allowed.

(g) If the Administrator declines to exercise discretionary review, such order will be served on all parties personally or by registered or certified mail, return receipt requested, and will specify the date upon which the Judge's decision will become effective as the final decision of NOAA. The Administrator need not give reasons for declining review.

(h) If the Administrator grants a petition for discretionary review, he or she will issue an order specifying issues to be briefed and a briefing schedule. Such issues may constitute one or more of the issues raised in the petition for discretionary review and/or matters the Administrator wishes to review on his or her own initiative. Only those issues specified in the order may be argued in the briefs and considered by the Administrator. No oral argument will be permitted.

(i) After expiration of the period for filing briefs under paragraph (h) of this section, the Administrator will render a written decision on the issues under review. The Administrator will transmit the decision to each of the parties by registered or certified mail, return receipt requested. The Administrator's decision becomes the final administrative decision on the date it is served, unless otherwise provided in the decision.