

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

IN THE MATTER OF:

Richard L. Callais
Joshua Davis
F/V CUDA TOO

Respondents

Docket Number:

SE0803490FM

INITIAL DECISION

Issued:

December 1, 2011

Issued By:

Hon. Dean C. Metry

Appearances:

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I. PRELIMINARY STATEMENT

The National Oceanic and Atmospheric Administrative (NOAA or Agency) initiated this action by issuing a Notice of Violation and Assessment (NOVA) on June 26, 2009, against Respondents Richard L. Callais, owner of the F/V CUDA TOO, and Joshua Davis, operator of the F/V CUDA TOO. The NOVA charged Respondents with four (4) separate violations of the Magnuson-Stevens Fisheries Conservation Act (Magnuson-Stevens Act). NOAA seeks to impose civil penalties totaling \$18,750 jointly and severally against each Respondent for violating:

- (1) 50 C.F.R. § 622.7(a) – Engaging in fishing for Gulf coast migratory pelagic fish, Gulf reef fish and/or Atlantic HMS without the required Federal charter vessel permits - \$15,500;
- (2) 50 C.F.R. § 622.7(r) – Failure to comply with species-specific limitations to include possession and use of non-stainless steel circle hooks when fishing with natural baits, venting tool, and/or dehooker to remove embedded hooks - \$500;
- (3) 50 C.F.R. § 622.7(l) – Fishing in violation of the closure of the recreational Gulf red snapper fishery - \$2,500;
- (4) 50 C.F.R. § 622.7(o) – Failure to maintain king mackerel intact through offloading ashore - \$250.

Respondents filed a timely request for hearing and this matter was transferred to the United States Coast Guard Administrative Law Judge (ALJ) Docketing Center for adjudication pursuant to the legal authority contained in 15 U.S.C. § 1541 and the interagency agreement between NOAA and the United States Coast Guard. On May 4, 2010, this case was assigned to the undersigned judge. Following receipt of the Preliminary Positions on Issues and Procedures (PPIP) from the parties and after making rulings on several pre-trial motions, a hearing was held on July 13, 2011 in Houston, Texas. At the hearing, attorney Eddie Schroeder appeared on behalf of Respondent Callais and attorney Alto Watson appeared on behalf of Respondent Davis. Attorney Cynthia Fenyk appeared on behalf of the Agency.

In support of the allegations against Respondents, NOAA introduced the testimony of two (2) witnesses and offered eighteen (18) exhibits into evidence. No objections to NOAA's exhibits were made and all were admitted. (Tr. at 9-10). Respondent Callais and Respondent Davis each testified on their own behalf; they did not introduce the testimony of any other witnesses. Respondent Callais offered two (2) exhibits into evidence, both of which were admitted. Respondent Davis offered six (6) exhibits into evidence, all of which were admitted.

On September 12, 2011, the Agency filed a post-hearing brief which included the Agency's Proposed Findings of Fact and Proposed Conclusions of Law. To date, neither Respondent has filed a post-hearing brief or Proposed Findings of Fact/Conclusions of Law. The record is now closed and ripe for decision. Rulings on NOAA's Proposed Findings of Fact and Conclusions of Law are included in Attachment II.

After careful review of the entire record, I find NOAA established by a preponderance of reliable and credible evidence that Respondents Richard L. Callais and Joshua Davis committed four (4) separate violations of the Magnuson-Stevens Act and shall be jointly and severally liable for a civil penalty in the amount of \$15,250.

II. FINDINGS OF FACT

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

Richard L. Callais and F/V CUDA TOO

1. On or about August 28, 2008, Respondent Callais was the owner of the F/V CUDA TOO, United States documentation number 1173718. (Tr. at 21; Agency Ex. 7).
2. The F/V CUDA TOO was held by Respondent Callais as a vessel-for-hire. (Tr. at 21; Respondent Callais' Response to Complaint).

3. Respondent Callais gave permission for Respondent Davis to use the F/V CUDA TOO for fishing charters. (Tr. at 24-25).
4. Respondent Callais received \$500 whenever Respondent Davis used the F/V CUDA TOO for a fishing charter. (Tr. at 25).
5. On or about August 28, 2008, Respondent Callais allowed Respondent Davis to use the F/V CUDA TOO for a fishing charter. (Tr. at 21-25).
6. On January 30, 2009, Respondent Callais sold the F/V CUDA TOO to Respondent Davis for \$49,000. (Tr. at 21-22).
7. Respondent Callais was aware federal permits were needed when fishing in federal waters. (Tr. at 23).
8. Respondent Callais did not know if or what fishing permits Respondent Davis possessed. (Tr. at 24-25). Respondent Callais did not inquire with Respondent Davis as to if he had the needed permits. (Tr. at 38-39).
9. Respondent Callais has not been previously charged with any fishery violations. (Tr. at 22).

Joshua Davis and F/V CUDA TOO

1. Special Agents within NOAA had received complaints from properly permitted charter companies that certain charter vessels operating in the Gulf of Mexico were doing so within proper federal permits. (Tr. at 67).
2. The properly permitted companies made these complaints because non-permitted charter boats were able to charge lower rates and undercut the legal businesses. (Id.).
3. NOAA initiated an investigation in an attempt to determine what individuals were operating fishing charters into federal waters without the proper permits. (Tr. at 92-93).
4. Based upon an advertisement for offshore fishing found on a website, a NOAA undercover agent called and talked to an individual named Randy Foreman. (Tr. at 94-96, 233). Mr. Foreman informed the undercover agent that Respondent Davis ran his offshore charters and provided the agent with Respondent Davis' contact information. (Id.).
5. The undercover agent called Respondent Davis and booked an offshore fishing charter with him. (Tr. at 69, 96).
6. On or about August 28, 2008, Respondent Davis took five undercover law enforcement officers on an offshore fishing charter aboard the F/V CUDA TOO. (Tr. at 7-8 (stipulations), 21, 96, 134-35).

7. On or about August 28, 2008, neither a federal fishery charter vessel permits for Gulf reef fish or Gulf coastal migratory pelagic fish, nor a federal Atlantic HMS charter vessel permit had been issued to the F/V CUDA TOO or Respondent Davis. (Tr. at 7-8 (stipulations), 188, 242-43).
8. On or about August 28, 2008, while fishing within the EEZ, several king mackerel were harvested aboard the F/V CUDA TOO and thereafter their heads were removed and used as bait to catch other fish. (Tr. at 7-8 (stipulations), 163).
9. On or about August 28, 2008, twenty-eight (28) red snapper were harvested within the EEZ aboard the F/V CUDA TOO. (Tr. at 7-8 (stipulations), 72).
10. The last four (4) of the twenty-eight (28) red snapper harvested aboard the F/V CUDA TOO on August 28, 2008, were speared by Respondent Davis. (Tr. at 7 (stipulations), 72).
11. The recreational fishery for red snapper within the EEZ was closed from August 5, 2008 through December 31, 2008. (Tr. at 7-8 (stipulations), 234).
12. Respondent Davis was aware that the red snapper season was closed. (Tr. at 69, 234).
13. Respondent Davis planned to conceal the nature of the trip as a for-hire charter by instructing the undercover officers to state that we're all friends just splitting fuel, if stopped by law enforcement. (Tr. at 71-73).

III. DISCUSSION

A. AGENCY'S BURDEN OF PROOF

In the instant case, Respondents were charged with four (4) separate violations of the Magnuson-Stevens Act. In order to prevail on the charges instituted against Respondents, NOAA must prove the violations alleged by a preponderance of the evidence. See 5 U.S.C. § 556(d); see also In the Matter of: Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not Respondents committed the violation with which they are charged. See In the Matter of: John Fernandez, III, 1999 WL 1417462 (NOAA 1999). NOAA may rely on either direct or circumstantial evidence to establish the violations and satisfy the burden of proof. See In the Matter of: Cuong Vo, *supra*. The

burden of producing evidence to rebut or discredit the Agency's evidence will only shift to Respondents after NOAA proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Id.

B. STIPULATIONS AND ISSUES IN DISPUTE

The violations alleged in this matter stem from an undercover operation instigated by NOAA to determine if individuals were conducting offshore fishing charters without the required permits. Special Agents within NOAA received complaints from properly permitted charter companies that some charter vessels operating in the Gulf of Mexico were doing so without proper federal permits. (Tr. at 67). The companies made these complaints because non-permitted charter boats are able to charge lower rates and undercut legal businesses. (Id.). NOAA initiated an investigation in an attempt to determine what individuals were operating fishing charters into federal waters without proper permits. (Tr. at 92-93).

Finding a telephone number on a website advertising fishing charters, a NOAA undercover agent called and talked to an individual named Randy Foreman. (Tr. at 94-96, 233). Mr. Foreman informed the undercover agent that Respondent Davis ran his offshore charters and provided the agent with Respondent Davis' contact information. (Id.). No federal offshore fishing permits were held by Respondent Davis. The undercover agent called Respondent Davis and booked an offshore fishing charter with him. (Tr. at 69, 96). On or about August 28, 2008, Respondent Davis took five undercover law enforcement officers on an offshore fishing charter aboard the F/V CUDA TOO. (Tr. at 7-8 (stipulations), 21, 96, 134-35). The F/V CUDA TOO was owned by Respondent Callais, who in turn leased it to Respondent Davis. (Tr. at 21-25). Respondent Davis captained the vessel during the August 28, 2008 charter.

As a result of the August 28, 2008 fishing trip, NOAA charged Respondents with four (4) violations of the Magnuson-Stevens Act. During the hearing on these matters, the attorney for Respondent Davis informed the court his client stipulated to liability under Counts #1, #3, and #4. (Tr. at 6-8). In essence, Respondent Davis admitted to (1) captaining a vessel engaged in fishing for Gulf coast migratory pelagic fish, Gulf reef fish and/or Atlantic HMS without the required Federal permits, (2) fishing in violation of the closure of the recreational Gulf red snapper fishery, and (3) failing to maintain king mackerel intact through offloading ashore. (Id.). Respondent did not stipulate to liability under Count #2, failing to comply with species-specific limitations to include possession and use of non-stainless steel circle hooks when fishing with natural baits, venting tool, and/or dehooker to remove embedded hooks.

In contrast to Respondent Davis, Respondent Callais did not stipulate to any of the alleged violations. Respondent Callais did admit he was the owner of the F/V CUDA TOO on August 28, 2008 and permitted Respondent Davis to use the vessel on August 28, 2008. (Tr. at 21-25). Respondent Callais received \$500 whenever Respondent Davis used the F/V CUDA TOO for fishing charters. (Tr. at 25). Respondent Callais stated he was unaware Respondent Davis failed to maintain the proper permits and was unaware Respondent Davis was in violation of the law. (Tr. 24-25, 38-39). Respondent Callais argues he “had no control whatsoever of this particular incident” and he should not be held liable for the actions perpetrated by Respondent Davis. (Tr. at 22). During the hearing, NOAA presented no evidence which indicated Respondent Callais had active or constructive knowledge of the alleged infractions.

In view of the facts of the case and the positions of the parties, several issues remain in dispute. The issues that remain in dispute are, (1) has NOAA proved the violations alleged under Count #2, (2) should Respondent Callais be held jointly and severally liable for the actions of

Respondent Davis, and (3) what are the appropriate sanctions. These remaining issues will be addressed below.

C. COUNT #2

The Magnuson-Stevens Act sets species-specific limitations on individuals fishing for certain types of fish. 50 C.F.R. § 622.7(r); 16 U.S.C. § 1857(1)(A). One limitation requires vessels, which are being used to fish for Gulf reef fish in the Gulf EEZ to possess certain types of gear to include: (1) non-stainless steel circle hooks when fishing with natural bait, (2) dehooking devices, and (3) venting tools. 50 C.F.R. § 622.41(m). In Count #2, NOAA alleged Respondent Davis, while operating the F/V CUDA TOO within Gulf EEZ on August 28, 2008, violated these provisions by failing to fish with non-stainless steel hooks, dehooking devices, and venting tools. The minimum elements necessary to prove these allegations require the Agency to prove by a preponderance of the evidence:

- (1) That Respondent Davis was operating within the Gulf EEZ on August 28, 2008;
- (2) That Respondent Davis was fishing for Gulf reef fish while in the Gulf EEZ on August 28, 2008; and
- (3) That Respondent Davis was not using non-stainless steel circle hooks when fishing with natural bait, did not possess dehooking devices, and/or did not possess venting tools.

It is undisputed that Respondent Davis captained the F/V CUDA TOO into the Gulf EEZ on August 28, 2008 and was fishing for Gulf reef fish. (Tr. at 6-8). Therefore, in order to prove a violation of 50 C.F.R. § 622.41(m), NOAA must only prove Respondent Davis failed to fish with non-stainless steel hooks, dehooking devices, and/or venting tools on August 28, 2008.

During the hearing, NOAA undercover agents testified that J hooks and natural bait were used while they fished for red snapper on August 28, 2008, aboard the F/V CUDA TOO. Unlike circle hooks, J hooks do not form a complete circle and are in the shape of a J. (Tr. at 72-75).

The undercover agents took pictures of the J hooks that were used aboard the F/V CUDA TOO. (Tr. at 74, 143; Agency Ex 1 at 967 and 968). The agents testified no non-stainless steel circle hooks were used. (Id.). Likewise, the agents testified they did not use or see a venting tool or a dehooker when aboard the F/V CUDA TOO on August 28, 2008. (Tr. at 128).

In contrast to the agents' testimony, Respondent Davis testified that all snapper, except for one caught with a trawling line, were caught on circle hooks. (Tr. at 185, 254-55). Respondent asserts the agents' statements are incorrect. (Tr. at 185). Respondent admitted there were no pictures or other evidence which shows circle hooks being used aboard the F/V CUDA TOO. (Tr. at 185, 255). However, Respondent also notes there are no pictures of fish actually being landed on J hooks. (Tr. at 255). Therefore, Respondent Davis argues the evidence is not conclusive that he failed to use non-stainless steel circle hooks. (Id.).

I find the testimony of the agents to be more credible than Respondent Davis. Respondent Davis states it would have been nice to have photos of fish being landed in order to show what type of lures and hooks were used. While having such a photo would be ideal, there are pictures of J hooks (not circle hooks) being baited aboard the F/V CUDA TOO on August 28, 2008. In addition to the pictures, there is testimony from two agents that they remember, without a doubt, that baited J hooks were used to catch snapper. There is sufficient evidence to establish that naturally baited J hooks, not non-stainless steel circle hooks, were used to catch snapper aboard the F/V CUDA TOO on August 28, 2008.

In addition to testifying about circular hooks, the agents also testified they did not see a venting tool or dehooker aboard the F/V CUDA TOO. (Tr. at 128-29). However, they also testified that such equipment was not necessarily needed during the trip and they did not make a concerted effort to find it. (Id.). The court finds there is not enough evidence to establish the

F/V CUDA TOO did not have a venting tool or dehooker on board. However, Respondents are found to have violated 50 C.F.R. § 622.41(m) by failing to fish with non-stainless steel circle hooks.

D. JOINT AND SEVERAL LIABILITY

Respondent Callais admitted he was the owner of the F/V CUDA TOO on August 28, 2008, and leased the vessel to Respondent Davis to run fishing charters. (Tr. at 21). Respondent Callais gave permission for Respondent Davis to use the F/V CUDA TOO and received a \$500 payment whenever Respondent Davis used the F/V CUDA TOO. (Tr. at 24-25). Respondent Callais did not know what permits Respondent Davis needed for the charters and did not inquire with Respondent Davis as to if he had the needed permits. (Tr. at 24-25, 38-39). Respondent Callais states he “had no control whatsoever of this particular incident” and he should not be held liable for the actions perpetrated by Respondent Davis. (Tr. at 22). During the hearing, NOAA presented no evidence to indicate Respondent Callais had active or constructive knowledge of the alleged infractions.

The law is well-settled on the principle that an employer may be vicariously liable for its employee's acts committed in the scope of employment while furthering the employer's business. See Wilson v. Chicago, Milwaukee, St. Paul, and Pacific R. Co., 841 F.2d 1347, 1352 (C.A7 1998); cf. Consol. Rail Corp. v. Gottshall, 512 U.S. 532, 543 (1994). As such, the owner of a vessel may be held liable for crewmember committed regulatory violations. In the Matters of James Chan Song Kim, Askar Ehmes, Ulheelani Corp., 2003 WL 22000639 (NOAA 2003). “The idea behind *respondeat superior* is to subject an employer to liability for ‘whatever is done by the employee by virtue of his employment and in furtherance of its ends.’” Id., see also Weinberg v. Johnson, 518 A.2d 985, 988 (D.C. 1986). The doctrine of *respondeat superior* is

used to “prevent vessel owners and operators from reaping the benefits of illegal fishing activities while avoiding the responsibility that goes along with such tactics.” 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). When an individual owns a vessel, it acquires a share of the vessel's proceeds from the fishing trip and thus, the individual benefits financially from the illegal acts of the vessel's captain during the fishing trip. Id. Therefore, the vessel owner should not be allowed to escape responsibility for the transgressions of the captain the vessel owner hires to operate its boat and has the authority to fire. Id. An owner of a vessel can still be held liable for actions of an operator even after the operator was told to comply with the fishery regulations and was later discharged after the owner was notified of the violation. See United States v. Kaiyo Maru No. 53, 503 F.Supp. 1075 (D. Alaska 1980), aff'd 699 F.2d 989 (9th Cir. 1983).

Here, Respondent Callais was the owner of the F/V CUDA TOO and leased out the vessel to Respondent Davis for fishing charters. Respondent Davis was acting in the capacity as Captain of the F/V CUDA TOO when the violations were discovered to have taken place on the August 28, 2008 fishing charter. Respondent received \$500 whenever Respondent Davis used the F/V CUDA TOO for a charter. The fact Respondent Callais controlled Respondent Davis' access to the F/V CUDA TOO and received money from the proceeds Respondent Davis made while using the vessel charter trips illustrates that Respondent Callais Fisheries had control over Respondent Davis.

In some cases, the actions of the Captain have proven so egregious that the owner has been able to escape joint and several liabilities. This is not the situation in this case. There is no evidence showing Respondent Callais knew firsthand Respondent Davis was fishing without the proper permits. However, there is also no evidence to show Respondent Callais made any effort to ensure Respondent Davis was working within the law. Respondent Callais knew Respondent Davis was using the F/V CUDA TOO for fishing charters and he knew certain permits/licenses were needed to conduct charters. Respondent Callais was unaware if Respondent Davis had the necessary permits and made no effort to check with Respondent Davis to see if he had the proper permits. What Respondent Callais did know, was that every time Respondent Davis chartered the F/V CUDA TOO Respondent Callais received \$500. It is found Respondent Callais is liable for the violations of the F/V CUDA TOO's captain and crew.

E. PENALTY ASSESMENT

The Magnuson-Stevens Act authorizes the imposition of a civil penalty of up to \$140,000 for each violation involved and/or permit sanctions, both of which must be commensurate to the violation(s) involved. 16 U.S.C. § 1858(a), 1858(g). Once a violation has been established, NOAA's penalty schedule provides for the assessment of a civil penalty ranging from a written warning to a civil penalty in the amount of \$250 to \$140,000 per violation. (Agency Ex. 18).¹ When assessing penalties, the undersigned must consider a number of factors. "Factors to be taken into account in assessing a penalty . . . may include the nature, circumstances, extent, and gravity of the alleged violation; the respondent's degree of culpability, any history of prior

¹ On March 16, 2011, NOAA issued new civil penalty policy guidance which expressly supersedes previous guidance. (See http://www.gc.noaa.gov/documents/031611_penalty_policy.pdf). This Policy is to be applied to all civil administrative enforcement cases charged on or after March 16, 2011. Since the issuance of this case began prior to that date, the earlier enforcement guidelines were used.

offenses, and ability to pay; and such other matters as justice may require.” 15 C.F.R. § 904.108(a).

For the violations in this case, NOAA proposed an overall civil penalty in the amount of \$18,750:

- Count #1 – Violation regarding permits (acting without a permit)
Penalty Schedule Suggestions = \$1,500 - \$30,000
NOAA requested penalty = \$15,500
- Count #2 – Violation regarding the method of fishing/gear
Penalty Schedule Suggestions = \$500 - \$50,000
NOAA requested penalty = \$500
- Count #3 – Violation regarding fishing at the wrong time (season closure)
Penalty Schedule Suggestions = \$500 - \$50,000
NOAA requested penalty = \$2,500
- Count #4 – Violation regarding condition of fish
Penalty Schedule Suggestions = \$500 - \$50,000
NOAA requested penalty = \$250

In their PPIP, NOAA contends the suggested penalties are appropriate after considering the nature, circumstances, extent, and gravity of Respondents’ violations.

The nature, circumstances, extent, and gravity of the violation

An important aspect to consider in this case is how Respondents’ violations caused financial harm to other legitimate charter companies. At the time of the violations, federal charter permits cost between \$8,000 and \$10,000. (Tr. at 67-68). The companies who purchased the needed permits had much higher expenses than individuals who did not purchase the permits. (*Id.*). As a result, legal charter companies had to charge higher rates than illegal charter companies. (*Id.*). Illegal charter companies were therefore able to undercut legal businesses. This resulted in NOAA receiving complaints from properly permitted charter companies asking for NOAA to address this problem. (*Id.*). This is one of the reasons why NOAA is asking the

penalty associated with the failure to obtain a proper permit (Count #1) be more costly than the cost of purchasing the permit (which ranged upwards of \$10,000).

The degree of culpability

During the hearing, Respondent Davis testified he believed he possessed the correct licenses to be fishing in federal waters. (Tr. at 187-88, 233). NOAA did not present any evidence which specifically refuted this statement. However, even if Respondent believed he had all the needed licenses, this does not excuse Respondents of the requirement to follow the regulations. Individuals that engage in a highly regulated industry, such as offshore fishing, bear the responsibility of knowing and complying with the regulations. See In re Peterson, 6 O.R.W. 486, 490 (NOAA 1991). Confusion or ignorance of the fishing regulations are not an excuse to liability. See In re Duong Vo, 1998 WL 1277937 (NOAA 1988).

NOAA does assert Respondent Davis was well aware the snapper season was closed, but he purposely fished for snapper anyway. (Tr. at 71-73). NOAA highlights this assertion by presenting evidence Respondent informed his passengers to lie to authorities should they be stopped with snapper on board. (Id.). They were told to say they were just friends, this was not a charter boat, and they caught the snapper in state waters. (Id.). Respondent Davis was also not just a passive observer in the catching of snapper, as Respondent entered the water himself and caught four (4) snapper with a spear gun. (Tr. at 72).

Respondent attempts to explain his actions by stating he was aware the season was closed, but he going to throw back the snappers until everyone on board wanted to keep the fish. (Tr. at 183-86, 234). He then informed everyone if they wanted to keep the fish, any consequences would be on them. (Id.). Respondent also testified that some of the undercover agents were drinking beer and he felt intimidated. (Tr. at 192). Finally, Respondent testified he

only decided to catch a few snapper himself (with a spear gun) after everyone on board stated they wanted to keep the illegally caught fish. (Tr. at 235-36).

I do not find Respondent's testimony credible regarding the circumstances of the trip. First, as the Captain of a vessel, Respondent should not be deferring to his passengers on whether or not they keep illegally caught fish. As Captain, Respondent is responsible for the operation of his vessel, not the passengers. Respondent Davis attempts to sidestep this responsibility by initially saying the passengers intimidated him and asking, "[w]hat am I supposed to do?" (Tr. at 99). However, Respondent later testified he at no time felt threatened by the undercover agents. (Tr. at 232). Furthermore, if Respondent was actually averse to catching the snapper, it does not then make sense he would enter the water and catch four (4) snapper himself with the spear gun. It is noted Respondent stated, "[i]t would have been my first official trip. I wanted one pretty bad." In all likelihood, Respondent was excited about having his first paying customers for an offshore charter. (Tr. at 209). He wanted to ensure happy customers and receive a big tip. As stated by Respondent himself, if you start throwing back big snappers caught by the customers, "[t]he tip is going to go away, that's for sure." (Tr. at 187).

History of prior offenses

Neither Respondent Callais nor Respondent Davis have been cited for past fisheries violations.

Ability to pay

In accordance with 15 C.F.R. § 904.108, a party may assert a civil penalty should be reduced because of an inability to pay. If a party does assert an inability to pay, the burden of proving such inability will be on the respondent and such inability should be supported by

“verifiable, complete, and accurate financial information” 15 C.F.R. § 904.108(c). In this case, Respondent Davis asserted an inability to pay in his PPIPs and during the hearing.

Respondent Callais did not raise an inability to pay argument.

Prior to the hearing, Respondent Davis submitted tax returns for years 2005-2007. During the hearing, Respondent Davis introduced additional tax returns from years 2008-2010. (Tr. at 199). NOAA did not object to the introduction of these tax returns. (Tr. at 251). Respondent’s tax returns show his income level has been increasing over the last several years. (Resp’t Ex. 1-6). In 2005 he made \$10,153; in 2006 he made \$7,252; in 2007 he made \$14,650; and, in 2008 he made \$39,827. (Id.). While working as a fireman, he made about \$50,000 in 2009 and about \$60,000 in 2010. (Tr. at 201-02, 226-27). Respondent can expect to keep earning about \$50,000 to \$60,000 a year while working as a fireman. (Id.).

In addition to the tax returns, Respondent testified to several other aspects of his finances. On January 30, 2009, Respondent Callais sold the F/V CUDA TOO to Respondent Davis for \$7,000 down and then a note to be paid over time in the amount of \$49,000. (Tr. at 21, 40-41). Respondent has not missed any monthly payment for the F/V CUDA TOO. (Tr. at 42, 227). After the alleged violations, Respondent purchased a federal permit for offshore fishing. (Tr. at 204, 243-44). Because of the BP oil spill and the resulting negative impact on offshore fishing, it is extremely difficult to resell those federal permits to other fishermen and their worth is basically nothing. (Id.).

Although Respondent submitted some financial documentation regarding his ability to pay, the undersigned ALJ is not persuaded the penalty should be mitigated by this assertion. In accordance with the regulations, “[a] respondent will be considered able to pay a civil penalty even if he or she must take such actions as to pay in installments over time, borrow money,

liquidate assets or reorganize his or her business.” 15 C.F.R. § 904.108(d). Additionally, just because the civil penalty may result in bankruptcy or loss of business, this does not preclude respondent from being able to pay. *Id.* In this case, Respondent submitted some, but not comprehensive financial documentation. He did not submit information regarding the value of his cash and liquid assets, his ability to borrow, credit card debt, his net worth, or other important financial information. *See* 15 C.F.R. § 904.108(d).

From the information Respondent did submit, it appears he is making around \$60,000 per year. He has been making regular payments on the F/V CUDA TOO, but he did not mention other outstanding loans that needed to be paid on a regular basis. It also appears he has substantial equity built up in the F/V CUDA TOO, as he paid \$7,000 down when he purchased the vessel and has continued to make monthly payments on it since. If Respondent sold the vessel, he could likely pay off a substantial portion of the civil penalty. Assuming Respondent did sell the vessel, Respondent would still be able to earn a living as a fireman. Additionally, with Respondent making \$60,000 a year in income, it appears Respondent would not necessarily need to sell the F/V CUDA TOO since he likely has the income needed to enter into a installment plan with NOAA to pay for the civil penalty. Based upon the documentation entered into evidence and the testimony provided, Respondent Davis has not proven the civil penalty needs to be reduced because of inability to pay.

Appropriate sanction

In regards to Count #1, a penalty of \$15,500 is within the middle of the suggested penalty range. Since Respondents’ illegal fishing did undercut legitimate businesses and because the permits themselves cost between \$8,000 and \$10,000, a significant penalty is appropriate for Count #1. However, considering this was Respondent Davis’ first charter trip

and he has no prior offenses, I believe a slightly lower than requested penalty is in order. Therefore, in regards to Count #1, a \$12,000 penalty is deemed appropriate. In regards to Counts #2 and #4, both of these penalties amounts (\$500 and \$250 respectively) are on the extreme low end of the suggested penalty ranges. No aggravating factors have been shown for these counts and the suggested penalties are deemed appropriate. In regards to Count #3, the \$2,500 is below mid-range for the suggested penalty range but still significantly above the minimum. Considering Respondent Davis knowingly fished during a closed season, this penalty is deemed appropriate. A total civil penalty in the amount of \$15,250 is appropriate and shall be assessed jointly and severally against Respondents.

IV. ULTIMATE FINDINGS OF FACT AND CONCLUSIONS OF LAW

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

1. Respondents Richard Callais and Joshua Davis, are “persons” within the meaning of the Magnuson-Stevens Act, 16 U.S.C. § 1802 (36), and subject to the jurisdiction of the United States.
2. The Magnuson-Stevens Act is a strict liability statute, which makes it unlawful for any person to violate “any regulation or permit issued pursuant to [the] Act.” 16 U.S.C. § 1857(1)(A).
3. NOAA has proved by a preponderance of reliable, probative, substantial and credible evidence that:
 - a. On or about August 28, 2008, Respondent Davis, while operating the F/V CUDA TOO within the EEZ, engaged in fishing for Gulf coast migratory pelagic fish, Gulf reef fish and/or Atlantic HMS without the required Federal charter vessel permits in violation of 50 C.F.R. § 622.7(a).
 - b. On or about August 28, 2008, Respondent Davis, while operating the F/V CUDA TOO within the EEZ, failed to comply with species-specific limitations to include possession and use of non-stainless steel circle hooks when fishing with natural baits, in violation of 50 C.F.R. § 622.7(r).

- c. On or about August 28, 2008, Respondent Davis, while operating the F/V CUDA TOO within the EEZ, fished during the closure of the recreational Gulf red snapper fishery, in violation of 50 C.F.R. § 622.7(l).
 - d. On or about August 28, 2008, Respondent Davis, while operating the F/V CUDA TOO within the EEZ, failed to maintain king mackerel intact through offloading ashore, in violation of 50 C.F.R. § 622.7(o).
4. Under the theory of *respondeat superior*, Respondents Richard Callais and Joshua Davis are jointly and severally liable for violation of the Magnuson-Stevens Act. See 15 C.F.R. § 904.107.
 5. After consideration of all of the evidence of record and the factors contained in 15 C.F.R. § 904.108, an appropriate sanction for the violations in this matter is \$15,250. Both Respondents are jointly and severally liable for the assessed penalty.

V. CONCLUSION

Based on the record developed in this proceeding, it is found NOAA established by a preponderance of the reliable and credible evidence that Respondents committed four (4) violations of the Magnuson-Stevens Act.

WHEREFORE,

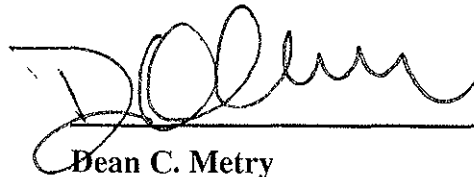
VI. ORDER

IT IS HEREBY ORDERED that a civil penalty in the amount of \$15,250 is assessed jointly and severally against Respondents Richard L. Callais and Joshua Davis.

PLEASE BE ADVISED that a failure to pay the civil penalty or to enter into a payment plan with NOAA within thirty (30) days from the date on which this decision becomes final Agency action will result in 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 the delinquent penalty. Further, in the event the penalty or any portion thereof becomes more than ninety (90) days past due, an additional penalty charge not to exceed six (6) percent per annum may be assessed.

PLEASE BE FURTHER ADVISED that any party may petition for administrative review of this decision. The petition for review must be filed with the Administrator of the National Oceanic and Atmospheric Administration within thirty (30) days from the day of this initial decision as provided in 15 C.F.R. § 904.273. Copies of the petition should also be sent to the ALJ Docketing Center, NOAA counsel, and the presiding judge. A copy of 15 C.F.R. § 904.273 is attached as Attachment III to this order.

If neither party seeks administrative review within 30 days after issuance of this order, this initial decision will become the final decision of the Agency.

A handwritten signature in black ink, appearing to read 'D. Metry', written over a horizontal line.

Dean C. Metry
Administrative Law Judge
United States Coast Guard

Done and dated this 1st day of December, 2011
Houston, Texas

ATTACHMENT I

LIST OF WITNESSES AND EXHIBITS

AGENCY WITNESS LIST

1. Charles Tyer
2. Robert Matthew Clark

AGENCY EXHIBITS

1. Photo Log
2. CD with audio files, photos and GPS tracking
3. Audio clips
4. Charts and map printouts
5. Charts
6. Investigation Report
7. Certificate of Documentation
8. Federal Fisheries Permits
9. NMFS permit information
10. Supplemental Investigation Report
11. Initial SAR checklist
12. Chart
13. Southeast Fishery Bulletin, December 18, 2007
14. Southeast Fishery Bulletin, March 25, 2008
15. Southeast Fishery Bulletin, May 2, 2008
16. Southeast Fishery Bulletin, July 22, 2008
17. Fishery Conservation and Management 622.4

18. Southeast Region Magnuson-Stevens Act Penalty Schedule

RESPONDENT'S WITNESS LIST

1. Richard Callais
2. Joshua Davis

RESPONDENT CALLAIS EXHIBITS

1. Bill of Sale
2. January 24, 2009 law office billing

RESPONDENT CALLAIS EXHIBITS

1. 2008 Tax Returns
2. 2009 Tax Returns
3. 2010 Tax Returns
4. 2005 Tax Returns
5. 2006 Tax Returns
6. 2007 Tax Returns

ATTACHMENT II

PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW

A. AGENCY'S PROPOSED FINDINGS OF FACT

1. On or about August 28, 2008, Respondent Richard L. Callais was the owner of the F/V CUDA TOO, United States documentation number 1173718, and Respondent Joshua Davis was the operator of the F/V CUDA TOO, United States documentation number 1173718.

ACCEPTED, as provided in the Decision and Order.

2. On or about August 28, 2008, the F/V CUDA TOO was engaged in a for-hire charter trip within the Exclusive Economic Zone (EEZ) fishing for and catching Gulf reef fish (red snapper and mangrove snapper), Gulf migratory pelagic fish (king mackerel and Spanish mackerel), and Atlantic highly migratory species (HMS) (Atlantic sharpnose).

ACCEPTED, as provided in the Decision and Order.

3. Charter fishermen aboard the F/V CUDA TOO on August 28, 2008 included five fishermen, later identified as undercover law enforcement personnel, who paid \$1,100 for the charter plus \$266 for fuel for the trip.

ACCEPTED, as provided in the Decision and Order.

4. On or about August 28, 2008, no federal fishery charter vessel permits for Gulf reef fish or Gulf coastal migratory pelagic fish, nor a federal Atlantic HMS charter vessel permit had been issued to the F/V CUDA TOO, United States documentation number 1173718, owned by Respondent Callais and being operated by Respondent Davis.

ACCEPTED, as provided in the Decision and Order.

5. Respondent Callais authorized Respondent Davis to use the F/V CUDA TOO for charter fishing on August 28, 2008.

ACCEPTED, as provided in the Decision and Order.

6. Respondent Callais received \$500 from Respondent Davis for the charter fishing trip that took place aboard the F/V CUDA TOO on August 28, 2008.

ACCEPTED, as provided in the Decision and Order.

7. Respondent Callais had the authority to refuse to allow Respondent Davis to use the F/V CUDA TOO on August 28, 2008.

ACCEPTED, as provided in the Decision and Order.

8. On or about August 28, 2008, while fishing within the EEZ, several king mackerel were harvested aboard the F/V CUDA TOO, United States documentation number 1173718, and thereafter their heads were removed and used as bait to catch other fish.

ACCEPTED, as provided in the Decision and Order.

9. On or about August 28, 2008, while fishing within the EEZ aboard the F/V CUDA TOO, United States documentation number 1173718, a “snapper slapper” lure with a standard J-hook tipped with natural baits was used to catch red snapper.

ACCEPTED, as provided in the Decision and Order.

10. Non-stainless steel circle hooks, a dehooking device, and a venting tool were not used aboard the F/V CUDA TOO, United States documentation number 1173718, at any time on or about August 28, 2008.

ACCEPTED IN PART, non-stainless steel circle hooks were not used. A dehooking device and a venting tool were not used, but it was not established that these items were not aboard the F/V CUDA TOO.

11. On or about August 28, 2008, twenty-eight red snapper were harvested within the EEZ aboard the F/V CUDA TOO, United States documentation number 1173718.

ACCEPTED, as provided in the Decision and Order.

12. The last four of the 28 red snapper harvested aboard the F/V CUDA TOO on August 28, 2008 were speared by Respondent Davis.

ACCEPTED, as provided in the Decision and Order.

13. The recreational fishery for red snapper within the EEZ was closed from August 5, 2008 through December 31, 2008.

ACCEPTED, as provided in the Decision and Order.

14. Respondent Davis knew the federal recreational fishery for red snapper was closed prior to booking the trip to be taken on August 28, 2008 aboard the F/V CUDA TOO, United States documentation number 1173718.

ACCEPTED, as provided in the Decision and Order.

15. Respondent Davis planned to conceal the location of the harvested red snapper as from within the EEZ by erasing his whole trip and only saving a waypoint once he headed into state waters.

ACCEPTED, as provided in the Decision and Order.

16. Respondent Davis further planned to conceal the nature of the trip as for-hire charter by instructing the undercover officers to state that they are all friends just splitting fuel, if stopped by law enforcement.

ACCEPTED, as provided in the Decision and Order.

17. On or about July 15, 2009, Respondent Davis received his NOVA dated June 26, 2009, the F/V CUDA TOO was again engaged in a for-hire charter trip within the EEZ intending to fish for Gulf reef fish and costal migratory pelagic fish, and Atlantic HMS.

NEITHER ACCEPTED NOR REJECTED, some evidence may be accepted, some may be rejected and some may be considered immaterial.

18. On or about August 27, 2009, Respondent Davis admitted that he knew it was against the law to engage in charter fishing in the EEZ for Gulf reef fish and Gulf coastal migratory pelagics, but decided to make the charter trip anyway since he had already accepted \$1,000 for the trip and had no way to refund the money.

NEITHER ACCEPTED NOR REJECTED, some evidence may be accepted, some may be rejected and some may be considered immaterial.

19. The Gulf coastal migratory pelagics permit and Gulf reef fish permit are moratorium permits, i.e., they are no longer available unless a current participant in the fishery seeks to exit the fishery. Anecdotal information indicates each permit available for purchase, at the time of the violation, was in the \$8,000 - \$12,000 range. This is a significant capital outlay that Respondents avoided, but that their lawful competitors had to absorb.

ACCEPTED IN PART, testimony during the hearing seemed to indicate that permits cost upwards of \$10,000, not \$12,000.

B. AGENCY'S PROPOSED CONCLUSIONS OF LAW

1. Respondent Davis and Respondent Callais are both a "person" under the Magnuson-Stevens Act. 16 USC 1802(36).

ACCEPTED, as provided in the Decision and Order.

2. Regulations at issue in this matter were properly filed with the Federal Register, thus Respondents had legal notice of the requirements. Federal Crop Insurance Corp. V. Merrill, 332 U.S. 380 (1947); Wolfson v. United States, 492 F.2d 1386 (Ct. Cl. 1974); see also 44 USC 1507.

ACCEPTED, as provided in the Decision and Order.

3. The Magnuson-Stevens Act, and the regulations promulgated thereunder, do not set forth a scienter requirement. Accordingly, any violations are strict liability offenses. See Northern Wind, Inc. V. Daley, 200 F.3d 13, 19 (1st Cir. 1999) (holding that scienter is not an element under the Magnuson Act because conservation-related offenses under the statute are strict liability offenses).

ACCEPTED, as provided in the Decision and Order.

4. Since its inception, and throughout its enforcement, cases have been decided and affirmed upholding the liability of the owner of the vessel for the Magnuson Act violations of the operator. In re Kepecz, 6 O.R.W. 556, 562 (NOAA 1991).

ACCEPTED, as provided in the Decision and Order.

5. Strict liability under the Magnuson Act applies even if the owner instructed the operator to comply with fisheries regulations applicable within the EEZ and the operator was discharged after the owner was notified of the violation. See United States v. Kaiyo Maru No. 53, 503 F.Supp. 1074 (D. Alaska 1980), aff'd 699 F.2d 898 (9th Cir. 1983).

ACCEPTED, as provided in the Decision and Order.

6. Each owner and operator is responsible for knowing the rules he is subject to when he goes fishing. A lack of knowledge about the rules is not a basis for mitigating the penalty. In re Anchor Fishing Co., LTD, 3 ORW 408, 412 (NOAA App. 1983). It is incumbent upon the Respondents, as participants in the highly regulated fishing industry to maintain a current knowledge of the regulations governing them. In re Ted and Lena Pitre, 1996 NOAA LEXIS 29 (August 29, 1996), aff'd 1997 NOAA LEXIS 9 (May 27, 1997).

ACCEPTED, as provided in the Decision and Order.

7. Respondent Callais is strictly liable for all the violations that occurred aboard the F/V CUDA TOO on August 28, 2008.

ACCEPTED, as provided in the Decision and Order.

8. The Agency has proven by a preponderance of the evidence all the allegations set forth in the NOVA issued on June 26, 2009 to Respondent Davis and Respondent Callais.

ACCEPTED IN PART, in regards to Count #2 it was determined that non-stainless steel circle hooks were not used. It was also determined that dehooking device and a venting tool were not used, but it was not established that these items were not aboard the F/V CUDA TOO.

ATTACHMENT III

PROCEDURES GOVERNING ADMINISTRATIVE REVIEW 15 C.F.R. § 904.273

§ 904.273 Administrative review of decision.

(a) Subject to the requirements of this section, any party who wishes to seek review of an initial decision of a Judge must petition for review of the initial decision within 30 days after the date the decision is served. The petition must be served on the Administrator by registered or certified mail, return receipt requested at the following address: Administrator, National Oceanic and Atmospheric Administration, Department of Commerce, Room 5128, 14th Street and Constitution Avenue, NW., Washington, DC 20230. Copies of the petition for review, and all other documents and materials required in paragraph (d) of this section, must be served on all parties and the Assistant General Counsel for Enforcement and Litigation at the following address: Assistant General Counsel for Enforcement and Litigation, National Oceanic and Atmospheric Administration, 8484 Georgia Avenue, Suite 400, Silver Spring, MD 20910.

(b) The Administrator may elect to issue an order to review the initial decision without petition and may affirm, reverse, modify or remand the Judge's initial decision. Any such order must be issued within 60 days after the date the initial decision is served.

(c) Review by the Administrator of an initial decision is discretionary and is not a matter of right. If a party files a timely petition for discretionary review, or review is timely undertaken on the Administrator's own initiative, the effectiveness of the initial decision is stayed until further order of the Administrator or until the initial decision becomes final pursuant to paragraph (h) of this section.

(d) A petition for review must comply with the following requirements regarding format and content:

- (1) The petition must include a concise statement of the case, which must contain a statement of facts relevant to the issues submitted for review, and a summary of the argument, which must contain a succinct, clear and accurate statement of the arguments made in the body of the petition;
- (2) The petition must set forth, in detail, specific objections to the initial decision, the bases for review, and the relief requested;
- (3) Each issue raised in the petition must be separately numbered, concisely stated, and supported by detailed citations to specific pages in the record, and to statutes, regulations, and principal authorities. Petitions may not refer to or incorporate by reference entire documents or transcripts;
- (4) A copy of the Judge's initial decision must be attached to the petition;
- (5) Copies of all cited portions of the record must be attached to the petition;

(6) A petition, exclusive of attachments and authorities, must not exceed 20 pages in length and must be in the form articulated in section 904.206(b); and

(7) Issues of fact or law not argued before the Judge may not be raised in the petition unless such issues were raised for the first time in the Judge's 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) The Administrator may deny a petition for review that is untimely or fails to comply with the format and content requirements in paragraph (d) of this section without further review.

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

(g) Within 30 days after service of a petition for discretionary review, any party may file and serve an answer in support or in opposition. An answer must comport with the format and content requirements in paragraphs (d)(5) through (d)(7) of this section and set forth detailed responses to the specific objections, bases for review and relief requested in the petition. No further replies are allowed, unless requested by the Administrator.

(h) If the Administrator has taken no action in response to the petition within 120 days after the petition is served, said petition shall be deemed denied and the Judge's initial decision shall become the final agency decision with an effective date 150 days after the petition is served.

(i) If the Administrator issues an order denying discretionary review, the 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 agency decision. The Administrator need not give reasons for denying review.

(j) If the Administrator grants discretionary review or elects to review the initial decision without petition, the Administrator will issue an order to that effect. Such order may identify issues to be briefed and a briefing schedule. Such issues may include one or more of the issues raised in the petition for review and any other matters the Administrator wishes to review. Only those issues identified in the order may be argued in any briefs permitted under the order. The Administrator may choose to not order any additional briefing, and may instead make a final determination based on any petitions for review, any responses and the existing record.

(k) If the Administrator grants or elects to take discretionary review, and after expiration of the period for filing any additional briefs under paragraph (j) 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, and is a final agency action for purposes of judicial review; except that an Administrator's decision to remand the initial decision to the Judge is not final agency action.

(l) An initial decision shall not be subject to judicial review unless:

(1) The party seeking judicial review has exhausted its opportunity for administrative review by filing a petition for review with the Administrator in compliance with this section, and

(2) The Administrator has issued a final ruling on the petition that constitutes final agency action under paragraph (k) of this section or the Judge's initial decision has become the final agency decision under paragraph (h) of this section

(m) For purposes of any subsequent judicial review of the agency decision, any issues that are not identified in any petition for review, in any answer in support or opposition, by the Administrator, or in any modifications to the initial decision are waived.

(n) If an action is filed for judicial review of a final agency decision, and the decision is vacated or remanded by a court, the Administrator shall issue an order addressing further administrative proceedings in the matter. Such order may include a remand to the Chief Administrative Law Judge for further proceedings consistent with the judicial decision, or further briefing before the Administrator on any issues the Administrator deems appropriate.