

UNITED STATES DEPARTMENT OF COMMERCE
NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:

**PETER PAN SEAFOODS, INC., and SEVEN
SEAS FISHING COMPANY,**

Respondents.

Docket Number:

AK0401011

INITIAL DECISION AND ORDER

Issued:

September 26, 2011

Issued By:

Hon. Parlen L. McKenna
Presiding

APPEARANCES:

FOR THE NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

Garland M. Walker, Esq.
Susan Auer, Esq.
National Oceanic and Atmospheric Administration
Office of General Counsel - Alaska
709 West 9th Street, Room 909A
Juneau, AK 99802-1109

FOR THE RESPONDENT PETER PAN SEAFOODS, INC.

James P. Walsh, Esq.
Gwen Fanger, Esq.
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111

FOR THE RESPONDENT SEVEN SEAS FISHING COMPANY

J. Timothy Hobbs, Esq.
K&L Gates LLP
925 4th Ave., Suite 2900
Seattle, WA 98104

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I. Statement of the Case

This case involves an administrative enforcement and penalty action filed by the National Oceanic and Atmospheric Administration's (NOAA or Agency) against Respondents Peter Pan Seafoods, Inc. (Peter Pan) and Seven Seas Fishing Company (Seven Seas) for alleged violations occurring between January 1, 2004 and February 28, 2005 (the charged period). The Agency alleges in its Notice of Violation and Assessment (NOVA) that on forty-five (45) separate occasions Peter Pan and Seven Seas violated Section 211(c)(2)(A) of the American Fisheries Act (AFA), Pub. L. 105-277, Div. C, Title II, 112 Stat. 2681 at 634 (1998) (codified at 16 U.S.C.A. Section 1851 note) and the Magnuson-Stevens Fishery Conservation and Management Act (Magnuson Act) by processing 4,164,357 pounds of crab in excess of Peter Pan's AFA crab processing cap.

The AFA imposes crab processing limits (crab caps) on entities, such as Peter Pan, that participate in the Bering Sea and Aleutian Island (BSAI) pollock fishery – so-called “AFA entities”. See AFA § 211(c)(2)(A). Under the AFA, Seven Seas did not participate in the pollock fishery and therefore is not an AFA processor subject to any crab processing caps. However, any entity (e.g., Seven Seas) in which ten percent (10%) or more of the interest is owned or controlled by another individual or entity (e.g., Peter Pan) is deemed the same entity for calculating an AFA entity's compliance with the cap. *Id.* The Agency asserts that Peter Pan controlled 10% or more of Seven Seas and therefore all of the crab processed by Seven Seas must be included in calculating whether Peter Pan exceeded its designated crab cap.

Many of the basic facts of this case are not disputed. Peter Pan is an AFA processor, whose participation in the BSAI crab fishery was limited by AFA § 211(c)(2)(A). These AFA

restrictions included sideboard limits on the amount of crab Peter Pan could lawfully process during the charged period.

As noted above, Seven Seas did not participate in the pollock fishery and therefore is not an AFA processor. Seven Seas was free to process as much crab as it wished, so long as it was not an affiliated entity with Peter Pan or any other AFA processor. Seven Seas processed crab from the BSAI initially through its wholly-owned subsidiaries, Blue Wave Seafoods, Inc., that operated the M/V BLUE WAVE,¹ and Stellar Seafoods, Inc., which bareboat chartered the processing vessel M/V STELLAR SEA. Seven Seas had various agreements and historical relationships, including a Custom Processing Agreement and an Advance of Funds Agreement with Peter Pan. Through these agreements, the overwhelming majority of crab the M/V STELLAR SEA processed was for Peter Pan.

Respondents assert that the relationship between Peter Pan and Seven Seas was a simple business arrangement between two separate, non-affiliated companies. However, NOAA alleges that Peter Pan exerted an impermissible amount of control over Seven Seas and thus any crab processed by Seven Seas (and its subsidiaries) should count against Peter Pan's crab cap. Indeed, during the charged period, NOAA asserts that when the crab processed by Seven Seas through the M/V STELLAR SEA is included with the amount of crab Peter Pan processed, 45 AFA violations occurred (i.e., 45 separate crab loads were processed after Peter Pan's crab cap was reached). As a result, the Agency alleges that Peter Pan exceeded its lawful crab cap by a total of 4,164,357 pounds for the years 2004-2005 – consisting of 235,001 pounds of Red King crab and 1,769,731 pounds of Snow crab in excess of Peter Pan's 2004 cap and 2,159,625 pounds of Snow crab in excess of Peter Pan's 2005 cap.

¹ As explained below, the M/V BLUE WAVE was tied up and not used to process any crab during the charged period.

The undersigned carefully examined the applicable statutory and regulatory requirements, the relationship between Peter Pan and Seven Seas, and all evidence and argument of record. After such review and given the breadth of the Agency's final regulations implementing the AFA, the undersigned concludes that Respondents violated the AFA on forty-five (45) separate occasions. Peter Pan exerted a level of control over Seven Seas that legally requires all of Seven Seas' crab processing poundage be included in Peter Pan's crab cap for determining compliance with the AFA.

As discussed below, the undersigned is precluded from considering and ruling upon several arguments challenging Agency regulations and precedent (particularly, the Agency Administrator's decision In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (NOAA, April 1, 2009)).² These arguments are included in this record and deferred for consideration by the appropriate appellate body in the event Respondents file an appeal.

Pursuant to the Agency's regulations, the undersigned considered the amount of penalty de novo and finds that a significant reduction in the amount of the proposed penalty is appropriate based on all the facts and circumstances of this case. Not the least of these facts is Respondents' efforts to comply with the AFA's requirements. Even in this context, a distinction must arise between unlawful evasion and lawful avoidance measures. Undoubtedly, Respondents structured their business relationship in an effort to avoid running afoul of the AFA. The central issue is the distinction between formal separation of the entities and substantive effect of the entities' actual relationships in practice.

² The undersigned notes the Administrator's decision to further review the Adak case. See Peter Pan's Notice of Related Development (March 17, 2011) (which provided a copy of the Administrator's Order Granting Petition for discretionary Review and Motion for Reconsideration). The undersigned's staff contacted the parties to inquire whether either party wished to move for a stay in light of the Administrator's order, but both Peter Pan and the Agency believed it best to proceed with a decision in this case. Given the Administrator's limited scope of review in Adak (i.e., discretionary review was granted only on policy grounds – not due to any factual or legal errors in the judge's decision following remand), the undersigned decided to proceed with this Initial Decision and Order.

Respondents had a reasonable, but ultimately incorrect, interpretation of how they could comply with the law. Such efforts do not excuse Respondents' violations, but do serve as a mitigating factor in assessing an appropriate penalty. Furthermore, the Agency's basis for seeking the amount of penalty in this case based on supposed lost opportunities from other non-AFA processors is questionable. Most importantly, this is not a resource depletion case – the crab Respondents processed were legally caught and no degradation to fish stocks or harm to the resource resulted from such actions. Rather, the focus of the Agency's significant penalty assessment is alleged recoupment of the gross revenue (reduced by the amount Peter Pan paid the fishermen) of the crab Respondents processed over Peter Pan's crab cap.

This case is thus about the Agency seeking to manage the rights of individual participants (i.e., protecting non-AFA processors) in the crab fishery in light of the AFA's proscriptions. For the reasons discussed in detail below, a significant penalty is appropriate for Respondents' violations. However, the Agency's proposed penalty far exceeds what is reasonable and appropriate under the circumstances. Therefore, the undersigned imposes a civil penalty against Respondents in the amount of \$10,000 for each proven violation for a total civil penalty of \$450,000.

II. Procedural History

On June 18, 2009, the Agency served its NOVAs on Respondents.³ On September 1, 2009, Peter Pan filed its Request for Hearing and Response to the NOVA and on September 10, 2009, Seven Seas filed its Request for Hearing and filed a Response to the NOVA on September

³ The parties entered into a tolling agreement and extension to that agreement so that the statute of limitations did not run prior to the Agency's filing of the NOVAs. See Resp. Exh. 44-45.

17, 2009.⁴ On September 17, 2009, the Coast Guard Chief Administrative Law Judge issued a Notice of Transfer and Assignment of Administrative Law Judge and Order Requesting Preliminary Positions on Issues and Procedures (PPIP), by which this case was assigned to the undersigned for hearing and disposition.

On October 19, 2009, the parties filed their respective PPIPs. On October 20, 2009, the Agency filed a correction to its charging documents that clarified the regulatory basis of the Agency's case.

The parties engaged in extensive discovery practice (including requests for the production of documents and deposition by written questions) and took a number of witness depositions that took place over the course of the next year. See Record Index.

On September 28, 2010, the undersigned issued an Order and Notice of Modified Hearing Date, which set the case for hearing to commence on October 26, 2010 in Seattle, Washington. On October 26, 2010, the hearing commenced as scheduled. The hearing lasted a total of five days and ended on November 1, 2010.

At the hearing, Seven Seas and the Agency reached an agreement that allowed Seven Seas to withdraw from further participation in the hearing in exchange for NOAA's commitment to seek the recovery of any civil penalty imposed first from Respondent Peter Pan.⁵ See Tr. at 998:18-1001:6.

⁴ Respondents' hearing requests were timely pursuant to an agreement with the Agency allowing an extension of time to make such requests.

⁵ As part of that agreement, Seven Seas remained a party, maintained all its legal rights and arguments, including its asserted inability to pay. However, it waived participation in the hearing and in any subsequent appeals.

The Agency offered 3 witnesses and 110 exhibits in support of its case. Respondents offered 2 witnesses and 83 exhibits in rebuttal.⁶ The parties' witnesses and exhibits entered into evidence are identified in Attachment A.

The undersigned deferred ruling on the admission of several exhibits during the hearing and requested further argument on these exhibits as part of post-hearing briefing. See Tr. at 26:2-5; 27:3-7. The parties failed to make further, specific arguments in their post-hearing briefs on the admission of these exhibits. However, Peter Pan's counsel stated objections on the record. See Tr. at 520:23-521:22, 526:11-13, 529:12-17, and 532:25-533:9 (objections on the basis of hearsay and hearsay within hearsay, probative value and reliability for Agency Exhs. 88, 89, 110 and 111). Agency regulations provide that "[a]ll evidence that is relevant, material, reliable and probative, and not unduly repetitious or cumulative, is admissible" and "[f]ormal rules of evidence do not necessarily apply" and "hearsay is not inadmissible as such." 15 C.F.R. § 904.251(a)(2). The disputed exhibits constitute official memoranda of interviews conducted by a NOAA Special Agent, who testified at the hearing.

Respondents' counsel had every opportunity at the hearing to cross-examine this Special Agent concerning these reports and also had a full opportunity to argue about these exhibits' reliability and relevance at that time and in post-hearing briefing. Such memoranda are regularly admitted and considered in Agency proceedings and the undersigned finds no reason to summarily exclude them from evidence and so they are hereby **ADMITTED**. Peter Pan's objections address more centrally the weight to be afforded such exhibits, and the objections have been considered in reviewing the exhibits.

⁶ Pursuant to an agreement by the parties and in the interests of judicial economy, both parties entered the deposition testimony of witnesses into the record. Key witnesses (including experts for each side and the CEO of Peter Pan) nevertheless testified at the hearing. See 49 C.F.R. § 904.241(d) (use of depositions in NOAA proceedings).

On January 14, 2011, Peter Pan submitted its Post-Hearing Memorandum and Proposed Findings of Fact and Conclusions of Law. On January 13, 2011, the Agency filed its Post-Hearing Brief. Rulings on the parties' Proposed Findings of Fact and Conclusions of Law are found in **Attachment B**. On January 27, 2011, the Agency filed its Reply Brief. On February 3, 2011, Peter Pan filed their Post-Hearing Reply Brief.

On May 26, 2011, the undersigned issued an Order to Show Cause Following Release of Special Master Swartwood's Report, with an Errata to that Order issued on May 31, 2011. On June 1, 2011, Peter Pan filed its Response to the Order to Show Cause and on June 3, 2011, Seven Seas filed its Response to the Order to Show Cause. On May 31, 2011, NOAA filed its Response to the Order to Show Cause. All parties asserted that no basis existed to move for the undersigned's recusal on the basis of the Special Master's Report and that they would not be filing such a motion.

The record of this proceeding, including the transcript, evidence, pleadings and other submissions, has now been reviewed and the case is ripe for decision. The findings of fact and conclusions of law that follow are prepared upon my analysis of the entire record, applicable regulations, statutes, and case law. Each exhibit entered, although perhaps not specifically mentioned in this decision, has been carefully examined and given thoughtful consideration.

III. Principles of Law

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); In re Cuong Vo, 2001 WL 1085351 (NOAA 2001). Preponderance of the evidence means the Agency must show it is more likely than not a respondent committed the charged violation. 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 its 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 a respondent after the Agency proves the allegations contained in the NOVA by a preponderance of reliable, probative, substantial, and credible evidence. Steadman v. S.E.C., 450 U.S. 91, 101 (1981).

As provided in the recent change to the Agency's regulations, the Agency must justify "that its proposed penalty or permit sanction is appropriate, taking into account all the factors required by applicable law" and no presumption of correctness attaches to NOAA's proposed penalty amount. See 75 Fed. Reg. 3563, 2010 WL 2505213 (June 23, 2010) (amending 15 C.F.R. § 904.204(m) and providing that the judge is empowered to assess a sanction de novo in light of applicable law). The Agency designated this change as merely "procedural" and not substantive in nature, which means that it could be applied to pending cases.

B. The AFA, Agency Regulations and the Charges against Respondents

1. The American Fisheries Act

On October 21, 1998, then President Clinton signed the AFA into law. (Pub. L. 105-277, Div. C, Title II, 112 Stat. 2681 at 616-637 (1998)). The AFA had two primary objectives, the first of which was to complete the process begun in 1976 to give U.S. interests a priority in the harvest of U.S. fishery resources. This objective was accomplished through increased restrictions on foreign ownership and control of fishing/processor vessels (see Subtitle I of the AFA). The task implementing and monitoring these new ownership standards fell to the United States Maritime Administration (MARAD).

The second objective was to significantly reduce the size of the Bering Sea pollock⁷ fishery through decapitalization (see Subtitle II of the AFA).⁸ Specifically, “the AFA addressed the problem of overcapitalization through buyouts of certain vessels that had previously participated in the fishery and then reallocating the pollock harvest among a reduced number of participants.” Arctic King Fisheries, Inc. v. United States, 59 Fed.Cl. 360, 364 (Fed. Cl. 2004). See also Sea Hawk Seafoods, Inc. v. Locke, 568 F.3d 757, 761 (9th Cir. 2009) (recognizing that the AFA rationalized the pollock fishery by providing exclusive rights to certain companies to engage in the BSAI pollock fishery).

The AFA also made a number of significant changes to the BSAI pollock fishery. One such change was allocation of the directed pollock fishery annual Total Allowable Catch (TAC) quota. As originally passed, ten percent (10%) of the TAC was allocated to the Community Development Quota (CDQ) program. See AFA Section 206(a); 16 U.S.C. § 1855(i). The AFA then divided the remaining TAC among the inshore component (50%), the offshore component (40%) and the mothership component (10%).⁹ AFA Section 206(b). Such percentages were

⁷ Pollock is sometimes spelled “pollack”. For general information on the pollock fishery in Alaska, see http://www.nmfs.noaa.gov/fishwatch/species/walleye_pollock.htm.

⁸ As originally introduced by Senator Stevens, the AFA did not contain explicit rationalization components of the BSAI fishery but only addressed the citizenship requirements of the fishing vessels conducting operations in United States waters. See Congressional Record at S9972-9974 (September 27, 1997) (Sen. Stevens’ introduction of the bill). It was not until later, after extensive meetings with North Pacific fishery participants that the additional components of the AFA were added. See Congressional Record at S12777 (October 21, 1998) (Sen. Stevens’ observing that “a consensus had been achieved among Bering Sea fishing representatives on an agreement to reduce capacity in the Bering Sea pollock fishery. For the next three weeks, we drafted the legislation to give effect to the agreement, and spent considerable time with the fishing industry from other fisheries who were concerned about the possible impacts of the changes in the Bering Sea pollock fishery. The legislation we are passing today includes many safeguards for other fisheries and the participants in those fisheries. By delaying implementation of some measures until January 1, 2000, it also provides the North Pacific Council and Secretary with sufficient time to develop safeguards for other fisheries.”).

⁹ The offshore component included all vessels not included in the definition of “inshore component” that process groundfish harvested in the BSAI. See AFA Section 205(10).

valid under the statute until 2004, at which time the North Pacific Fishery Management Council (Council) was authorized to review and modify those allocations if necessary.¹⁰

The AFA also specified by name twenty catcher-processors (i.e., the offshore sector) that were owned at the time by nine different companies, which were deemed eligible to continue participating in the pollock fishery.¹¹ The AFA retired nine catcher-processor vessels from further participating in the U.S. fishery and extinguished those vessels' catch history with respect to future management actions where such catch history might be relevant. See AFA Section 209. The AFA also listed seven catcher vessels that remained eligible to fish in the BSAI pollock fishery and deliver pollock within the offshore sector's allocation.¹² The buyout provisions of the AFA included a program to compensate the owners of the nine retired catcher-processors. See AFA Section 207.

The AFA further specified three motherships that were allowed to process the mothership allocation under the AFA and listed nineteen catcher vessels that were eligible to fish and deliver that sector's allocation of pollock.¹³ See AFA Section 208(c), (d).

For the inshore sector, the AFA did not list by name specific processing plants or catcher vessels but rather established minimal landing/processing history for continued eligibility to participate in the pollock fishery.¹⁴ For catcher vessels over 60 feet in length, such vessels had to have delivered more than 250 metric tons of pollock onshore in 1996, 1997 or through

¹⁰ The Council manages the federal groundfish, halibut, and crab fisheries in federal waters off the coast of Alaska under the authority of the Magnuson Act. See 16 U.S.C. § 1852(a)(1)(G).

¹¹ Catcher-processors refer to vessels that are used for catching fish and processing it on board that vessel. See AFA Section 205(2).

¹² Catcher vessels refer to vessels that harvest fish but do not process that fish on board. See AFA Section 205(3).

¹³ A mothership is a vessel that receives and processes fish from other vessels in the exclusive economic zone of the United States and is not used for, or equipped to be used for, harvesting fish. See AFA Section 205(8).

¹⁴ The AFA defines the "inshore component" as shoreside processors and vessels less than 125 feet in length that process less than 126 metric tons per week in round-weight equivalents of an aggregate amount of pollock and Pacific Cod. See AFA Section 205(6).

September 1, 1998. AFA Section 208(a). For vessels under 60 feet in length, the threshold was delivery of greater than 40 metric tons. Id.

A shoreside processor, like Peter Pan, must have processed more than 2,000 metric tons in both 1996 and 1997 to remain eligible (although processors who processed less than 2,000 metric tons could still be eligible to participate in the pollock fishery but would be restricted from processing more than 2,000 metric tons in future years).¹⁵ See AFA Section 208(f).

The AFA also outlined specific provisions for the creation of fishery cooperatives for catcher vessels who would then deliver their catch to the inshore processors. See AFA Section 210. This section encouraged participants in the pollock fishery to form such cooperatives and allocated shares in the fishery to those cooperatives based on historical fishing results.

To protect participants in other non-pollock fisheries from any adverse impacts or spillovers that might be caused by the rationalization of the pollock fishery, the AFA mandated certain sideboard provisions and caps be placed on any AFA entities' participating in non-pollock fisheries. See generally AFA Section 211. The AFA specifically stated with respect to crab processing that the Council had to submit to the Secretary of Commerce "measures to protect processors not eligible to participate in the directed pollock fishery from adverse effects of a result of [the AFA] or fishery cooperatives in the directed pollock fishery." AFA at Section 211(c)(1)(B). These measures were meant to prevent certain entities participating in the pollock fishery from redirecting their idle vessels/resources to other fisheries, thereby creating unintended adverse impacts to other fisheries and fishing communities. In order to address

¹⁵ Shoreside processor refers to any person or vessel that received unprocessed fish, except catcher/processors, motherships, buying stations, restaurants, or persons receiving fish for personal consumption or bait. See AFA Section 205(12).

potential adverse impacts of the pollock rationalization on the crab fishery, the AFA imposed limits on the amount of crab that AFA processors such as Peter Pan could process.

Section 211(c)(2)(A) provides specific guidance with respect to crab processing by motherships and shoreside processors (the offshore sector AFA processors are not involved in crab processing). That section states that “the owners of shoreside processors and motherships are prohibited, in the aggregate, from processing more than the percentage of total catch of each species of crab than they did, on average, in 1995, 1996, and 1997” and specified the 10% rule by which affiliated entities of such processors and motherships would be considered the same entity for AFA purposes. The Council later recommended adding the year 1998 (with double weight) in determining the caps by percentage of allowable processing for these AFA processors in the crab fishery and NMFS implemented this change. See 66 Fed. Reg. 7327, 7329 (January 22, 2001).

The AFA outlined the basic standard for determining when an AFA and a non-AFA entity were closely enough affiliated that the crab processed by a non-AFA entity should apply to an AFA entity’s crab cap. Specifically, AFA § 211(c)(2)(A) provided:

Effective January 1, 2000, the owners of the motherships eligible under section 208(d) and the shoreside processors eligible under section 208(f) that receive pollock from the directed pollock fishery under a fishery cooperative are hereby prohibited from processing, in the aggregate for each calendar year, more than the percentage of the total catch of each species of crab in directed fisheries under the jurisdiction of the North Pacific Council than facilities operated by such owners processed of each such species in the aggregate, on average, in 1995, 1996, 1997.

For the purposes of this subparagraph, the term “facilities” means any processing plant, catcher/processor, mothership, floating processor, or any other operation that processes fish.

Any entity in which 10 percent or more of the interest is owned or controlled by another individual or entity shall be considered to be the same entity as the other individual or entity for the purposes of this subparagraph.¹⁶

The intent behind this provision of the AFA was to eliminate anticipated adverse economic effects on other fisheries and non-participating processors created by the AFA's rationalization of the pollock fishery.¹⁷

The Agency Administrator issued a seminal decision on the AFA, which is binding on the undersigned, and provides authority for determining several of Respondents' arguments in this case.¹⁸ See In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (NOAA, April 1, 2009). These arguments impacted by the Adak decision will be analyzed in the Analysis and Penalty Sanction sections that follow.

2. The Agency's AFA Regulations

After the AFA's passage, the National Marine Fisheries Service (NMFS) (an Agency component), issued an emergency regulation to implement permit requirements under the AFA. See 65 Fed. Reg. 380, 2000 WL 3515 (January 5, 2000). This regulation clarified the issue of affiliation between AFA and non-AFA entities for purposes of applying crab caps, and included definitions for several terms and concepts used within the regulation, including "10 percent

¹⁶ The AFA does not define the terms "interest" or "control" for purposes of Section 211(c)(2)(A). In a pretrial motion, Respondents argued that the definition of "control" provided in Section 202 of the AFA applied to Section 211(c)(2)(A). The undersigned rejected this argument finding that the Section 202 definition was explicitly limited to 46 U.S.C. § 12102(c)(2). See Order Denying Peter Pan Seafoods, Inc.'s Motion to Establish Law of the Case (September 2, 2010).

¹⁷ In discussing the bill that enacted the AFA, Senator Patty Murray stated: "While we have attempted to include at least a minimum level of protections for these other fisheries, it is clear to many of us that unintended consequences are likely. It is therefore imperative that the fishery management councils not perceive the protections provided in this bill as a statement by Congress that these are the only protections needed. In fact, the opposite is true Those of us involved intimately in the development of this legislation strongly urge the Councils to monitor the formation of fishery cooperatives closely and ensure that other fisheries are held harmless to the maximum extent possible." Congressional Record at S12696-03, 12708 (October 20, 1998) (emphasis added).

¹⁸ Respondents argue that the Adak decision has little, if any, precedential or persuasive force. The undersigned rejects that argument because while the facts between that case and this one obviously differ (e.g., in Adak there were direct, interlocking ownership and control interests), the Administrator made several important determinations that speak to legal issues directly relevant here that are not so limited to the particular facts of Adak.

control standard” and “control.” Id. The term “10 percent control standard” was defined as “an entity is deemed to exercise 10 percent or greater control of a crab processing facility if the entity controls another entity that directly or indirectly owns a 10 percent or greater interest in the crab processing facility.” Id. at 385. NMFS defined the term “control” as “[o]wnership of more than 50 percent of the entity; [t]he right to direct the business of the entity; [t]he right to limit the actions of or replace the chief executive officer, a majority of the board of directors, any general partner, or any person serving in a management capacity of the entity; or [t]he right to direct the operation or manning of the crab processing facility.” Id. The term “control” “[did] not include the right to simply participate in the above actions.” Id.

As part of the permitting process, the Agency required that AFA entities disclose in any application for crab processing permits “all entities directly or indirectly owning or controlling a 10-percent or greater interest in the AFA mothership or AFA inshore processor and the names of BSAI crab processors in which such entities directly or indirectly own or control a 10-percent or greater interest.” Id. at 383. The rule was thus bidirectional – i.e., the Agency was interested in all the vertical and horizontal relationships between AFA processors and those non-AFA crab processors under this 10-percent control standard. The Agency wanted to know not only who controlled the AFA processors but also which non-AFA processors were controlled by those processors.

The Agency provided further clarity to the crab processing sideboards via an emergency interim rule on January 28, 2000. See 65 Fed. Reg. 4520, 2000 WL 84509 (January 28, 2000). This rule discussed the crab sideboard issues in some significant detail. Specifically, this rule stated that under the AFA “[AFA processors] are hereby prohibited from processing, in the aggregate for each calendar year, more than the percentage of the total catch of each species of

crab in directed fisheries under the jurisdiction of the North Pacific Council than facilities operated by such owners processed of each such species in the aggregate, on average, in 1995, 1996, 1997.” *Id.* at 4529. The rule implemented the statutory deadline for imposing the crab processing sideboard set out in AFA § 211(c)(2)(A) by:

implementing a crab processing sideboard management program on an entity-by-entity basis in this emergency interim rule. Under the interim program set out in this emergency interim rule, all of the individuals, corporations, or other entities that directly or indirectly own or control a 10-percent or greater interest in the AFA mothership or inshore processor will be considered a single AFA inshore or mothership entity and will have crab processing caps issued to the entity based on its collective 1995 through 1997 crab processing activity. To implement this interim program, NMFS is requiring that the owners of an AFA mothership or AFA inshore processor wishing to process pollock harvested by a cooperative identify on their permit applications all individuals, corporations, or other entities that directly or indirectly own or control a 10-percent or greater interest in the AFA mothership and/or inshore processor (collectively the AFA inshore or mothership entity), and any other crab processors in which such entities have a 10-percent or greater interest (the associated AFA crab facilities). For each BSAI king and Tanner crab fishery, NMFS will calculate the average percentage of the total crab harvest processed by the associated AFA crab facilities and issue entity-wide crab processing caps for each crab fishery to each AFA inshore or mothership entity on its AFA mothership or AFA inshore processor permit. Each individual, corporation, or other entity comprising an AFA inshore or mothership entity will be responsible for insuring that the AFA crab processing facilities associated with the AFA inshore or mothership entity do not exceed the entity’s caps. The individuals, corporations and other entities comprising the AFA inshore or mothership entity will be held jointly and severally liable for any overage.

These crab processing caps will apply to all crab processed by the associated AFA crab processing facilities including any “custom processing” activity. Custom processing refers to a contractual relationship in which one processing facility processes crab on behalf of another processor. Under this emergency interim rule, custom processing of crab is not prohibited, but any custom processing of crab done under contract with an AFA crab processor will be counted against the associated AFA inshore or mothership entity’s crab processing cap.

Id. at 4530 (emphasis added).

On December 24, 2000, the emergency regulation expired. From that date until January 29, 2003, no regulation was in effect that contained clarification of the phrase “10 percent or more of the interest is owned or controlled” contained in section 211(c)(2)(A) of the AFA.¹⁹

On December 17, 2001, NMFS published a proposed regulation under the AFA setting out definitions of several terms, including “affiliation for the purpose of defining AFA entities,” “10-percent or greater ownership standard,” “10 percent control standard,” “indirect interest,” and “control.” See 66 Fed. Reg. 65028, 2001 WL 1597518 (December 17, 2001).

This proposed regulation provided a more expansive definition of “10 percent control standard” and “control” than had been included in the earlier emergency regulation. Under the proposed regulation, “affiliation” was defined more broadly to include several specific circumstances in which one entity took over operational or management control or risks of another entity, or had the power to do so. For example, the proposed regulation defined “control” to include circumstances in which one entity “absorbs all the costs and normal business risks associated with ownership and operation of a . . . processor” or “has the responsibility to procure insurance on the . . . processor, or assumes any liability in excess of insurance coverage.”

The Agency published a final regulation on December 30, 2002 which took effect January 29, 2003. See 67 Fed. Reg. 79692, 2002 WL 31881766 (December 30, 2002), codified at 50 C.F.R. Part 679. The Agency observed that:

The AFA requires that harvesting and processing limits be placed on AFA vessels and processors in other groundfish, crab, and scallop fisheries to protect the

¹⁹ Judge Brudzinski (the presiding administrative law judge) and the Administrator correctly looked to the plain meaning of the definition of control in the Adak case for: (1) there was no operative statutory definition of “control” and (2) there were no Agency regulations in effect for at least some of the time respondents’ conduct in that case took place. Indeed, in Adak Judge Brudzinski applied the regulatory definition of “control” found at Section 679.2 for that part of respondents’ conduct occurring in 2003 through 2004 (when there were regulations in effect) – a decision not overturned by the Administrator on appeal.

participants in other fisheries from spillover effects resulting from the rationalization of the BSAI pollock fishery and the formation of fishery cooperatives in the BSAI pollock fishery. Potential spillover effects could take many forms. Most obviously, excess harvesting and processing capacity from the rationalization of the BSAI pollock fishery could flood into other fisheries as a result of the AFA to the detriment of current participants in other fisheries.

Id. at 79702. The Agency identified additional potential spillover effects as:

[F]ishery cooperatives provide vessels with greater flexibility to schedule their fishing activity because they are no longer racing for pollock at the start of every season. As a result, vessels in cooperatives will have the ability to enter other fisheries that might previously have been conducted concurrent with the BSAI pollock fishery. Finally, companies involved in the AFA pollock fishery are expected to benefit financially from the formation of fishery cooperatives and non-AFA companies fear that such profits may be used to expand into other groundfish and crab fisheries.

Id.

The final rule dealt specifically with the crab processing sideboards and noted that it was continuing to require owners of an AFA mothership or AFA inshore processor (like Peter Pan) intending to process pollock harvested by a cooperative “to identify on their permit applications all individuals, corporations, or other entities that directly or indirectly own or control a 10-percent or greater interest in the AFA mothership and/or inshore processor (collectively the AFA inshore or mothership entity), and any other crab processors in which such entities have a 10-percent or greater interest (the associated AFA crab facilities).” Id. at 79705.

The Agency adopted an “AFA entity” definition that was used to determine compliance with the excessive harvesting share limit and the crab processing sideboard limits the AFA mandated. Id. In making this definition, the Agency clearly stated that “the concept of ‘affiliation’ is central” to that definition. Id. The final rule expounded upon the meaning of “affiliation” as follows:

Simply stated, “affiliation” means a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10 percent or greater interest in the other, exerts 10 percent or

greater control over the other, or has the power to exert 10 percent or greater control over the other; or a third individual, corporation, or other business concern directly or indirectly owns a 10-percent or greater interest in both, exerts 10 percent or greater control over both, or has the power to exert 10 percent or greater control over both. Ownership and control are two overlapping concepts that may arise through a wide variety of relationships between two or more individuals, corporations, or other concerns.

Id. at 79705 (emphasis added).

The Agency thus determined that, while overlapping, “ownership” did not equate with “control.” The intent was nevertheless clear that a “wide variety of relationships” could lead to “affiliation” for AFA purposes. Indeed, the Agency had determined that the concept of “control” in particular needed expansion from the emergency rule earlier in effect. See Tr. at 284:25-285:9²⁰ (Lind deposition excerpt) (“[I]t became clear, during the implementation of the emergency rule during those two years, that the definition was not as expansive as it needed to be to provide clarity to the industry as to what exactly ownership control means, especially control, so -- and we got comments, I believe, from industry to that effect on the proposed rule. So this was the final version of the definition of control that was developed by the Agency to expand upon what that term meant and how it was going to be implemented by the National Fisheries Service.”).

The Agency then articulated various forms of affiliation, including (1) affiliation through ownership; (2) affiliation through stock ownership; (3) affiliation through management control; (4) affiliation through cooperative agreements; and (5) affiliation through control over operation and manning. Id.

²⁰ References to the hearing transcript are designated as “Tr. at [page #:line#]”. The excerpts to depositions offered by the Agency are also contained in Agency Exh. 108; whereas the deposition transcripts offered by Respondents can be found at Resp. Exhs. 63-71. References to deposition testimony in this Initial Decision and Order generally refer to the hearing transcript where excerpts from such depositions were entered into the record at the hearing.

These final regulations are the ones operative for the charged period in this case.

Specifically, 50 C.F.R. § 679.2 at the time of the alleged violations provided the following (emphasis added):

AFA crab processing facility means a processing plant, catcher/processor, mothership, floating processor or any other operation that processes any FMP species of BSAI crab, and that is affiliated with an AFA entity that processes pollock harvested by a catcher vessel cooperative operating in the inshore or mothership sectors of the BS pollock fishery.

AFA entity means a group of affiliated individuals, corporations, or other business concerns that harvest or process pollock in the BS directed pollock fishery.

AFA inshore processor means a shoreside processor or stationary floating processor permitted to process BS pollock under § 679.4(1)(5).

....

Affiliates, for purposes of subpart E of this part, means business concerns, organizations, or individuals are affiliates of each other if, directly or indirectly, either one controls or has the power to control the other, or a third party controls or has the power to control both. Indicators of control include, but are not limited to, interlocking management or ownership, identity of interests among family members, shared facilities and equipment, common use of employees, or a business entity organized following the decertification, suspension, or proposed decertification of an observer provider that has the same or similar management, ownership, or principal employees as the observer provider that was decertified, suspended, or proposed for decertification.

Affiliation for the purpose of defining AFA entities means a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10-percent or greater interest in another, exerts control over another, or has the power to exert control over another; or a third individual, corporation, or other business concern directly or indirectly own a 10 percent or greater interest in both, exerts control over both, or has the power to exert control over both.²¹

²¹ Despite Peter Pan's arguments about the statutory requirement that a legal or equitable "interest" is required for exertion of control under the AFA (see Peter Pan's Post-Hearing Brief at 18-22; Peter Pan's Reply at 2-4), this regulatory language disposes of any such necessary connection. Affiliation for the purpose of defining AFA entities is a relationship in which one entity "owns a 10-percent or greater interest in another, exerts control over another, or has the power to exert control over another". As explained in parts (1)-(3) of that definition, the Agency separated ownership, indirect interest and control. Indeed, "control" is the most fully discussed element under the Agency's regulations with nine specific relationships articulated – any one of which would trigger unlawful "control" of one

(1) What is 10-percent or greater ownership? For the purpose of determining affiliation, 10-percent or greater ownership is deemed to exist if an individual, corporation, or other business concern directly or indirectly owns 10 percent or greater interest in a second corporation or other business concern.

(2) What is an indirect interest? An indirect interest is one that passes through one or more intermediate entities. An entity's percentage of indirect interest in a second entity is equal to the entity's percentage of direct interest in an intermediate entity multiplied by the intermediate entity's direct or indirect interest in the second entity.

(3) What is control? For the purpose of determining affiliation, control is deemed to exist if an individual, corporation, or other business concern has any of the following relationships or forms of control over another individual, corporation, or other business concern:

(i) Controls 10 percent or more of the voting stock of another corporation or business concern;

(ii) Has the authority to direct the business of the entity which owns the fishing vessel or processor. The authority to "direct the business of the entity" does not include the right to simply participate in the direction of the business activities of an entity which owns a fishing vessel or processor;

(iii) Has the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor. Standard rights of minority shareholders to restrict the actions of the entity are not included in this definition of control provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially all the assets, to enter into a different business, to contract with the major investors or their affiliates or to guarantee the obligations of majority investors or their affiliates;

(iv) Has the authority to direct the transfer, operation or manning of a fishing vessel or processor. The authority to "direct the transfer, operation, or manning" of a vessel or processor does not include the right to simply participate in such activities;

(v) Has the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor;

entity over another for determining AFA affiliation. Peter Pan is free to argue before the Administrator that the Agency overstepped its statutory bounds in implementing these regulations, but this is not the proper forum for determining such issues.

- (vi) Absorbs all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor;
- (vii) Has the responsibility to procure insurance on the fishing vessel or processor, or assumes any liability in excess of insurance coverage;
- (viii) Has the authority to control a fishery cooperative through 10-percent or greater ownership or control over a majority of the vessels in the cooperative, has the authority to appoint, remove, or limit the actions of or replace the chief executive officer of the cooperative, or has the authority to appoint, remove, or limit the actions of a majority of the board of directors of the cooperative. In such instance, all members of the cooperative are considered affiliates of the individual, corporation, or other business concern that exerts control over the cooperative; and
- (ix) Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor.

This regulatory definition of “affiliation” and “control” for AFA purposes requires some further exploration. The regulation tends to define “control” with reference to the word “control” itself by articulating nine instances where “control” will be deemed to exist. Some are quite clear and need little further extrapolation (e.g., (i) controls 10 percent or more of the voting stock); whereas others are quite broad in scope (e.g., (ix) ability through any means whatsoever to control the entity that holds a 10 percent or greater interest in a fishing vessel or processor) (emphasis added).

An understanding of the plain meaning of the term “control” is thus useful as the regulation defines “control” with reference to the term itself. Black’s Law Dictionary (9th ed., 2009) defines the noun “control” as: “[t]he direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee <the principal exercised control over the agent>.” The verb form of “control” is defined as: “[t]o exercise power or influence over <the judge controlled the proceedings> [t]o regulate or govern <by law, the budget office controls expenditures> . . . [t]o have a controlling interest in <the five shareholders

controlled the company>.” Id.²² These definitions of “control” – particularly as a noun – no doubt encompass a wide range of activities. “Control” – as used in the Agency’s regulations – must be construed as not requiring the controlling entity to have a legal right (through ownership interests or contracts) to direct, manage or influence the controlled entity.

(a) The Establishment of Crab Sideboards

The Agency’s regulations provided the following substantive discussion of crab processing sideboard limits and the process for assigning crab processing caps:

(a) What is the purpose of crab processing limits? The purpose of crab processing sideboard limits is to protect processors not eligible to participate in the directed pollock fishery from adverse effects as a result of the AFA and the formation of fishery cooperatives in the directed pollock fishery.

(b) To whom do the crab processing sideboard limits apply? The crab processing sideboard limits in this section apply to any AFA inshore or mothership entity that receives pollock harvested in the BSAI directed pollock fishery by a fishery cooperative established under § 679.61 or § 679.62

(c) How are crab processing sideboard percentages calculated? Upon receipt of an application for a cooperative processing endorsement from the owners of an AFA mothership or AFA inshore processor, the Regional Administrator will calculate a crab processing cap percentage for the associated AFA inshore or mothership entity. The crab processing cap percentage for each BSAI king or Tanner crab species will be equal to the percentage of the total catch of each BSAI king or Tanner crab species that the AFA crab facilities associated with the AFA inshore or mothership entity processed in the aggregate, on average, in 1995, 1996, 1997, and 1998 with 1998 given double-weight (counted twice).

(d) How will AFA entities be notified of their crab processing sideboard percentages? An AFA inshore or mothership entity's crab processing cap percentage for each BSAI king or Tanner crab species will be listed on each AFA mothership or AFA inshore processor permit that contains a cooperative pollock processing endorsement.

(e) How are crab processing sideboard percentages converted to poundage caps? Prior to the start of each BSAI king or Tanner crab fishery, NMFS will convert each AFA inshore or mothership entity’s crab processing sideboard percentage to

²² See Peter Pan’s Post-Hearing Memorandum at 22-23 (outlining Black’s Law Dictionary definitions and urging that these definitions “can lead to uncertainty” but acknowledging that the definition of the noun “control” “seems most appropriate”).

a poundage cap by multiplying the crab processing sideboard percentage by the pre-season guideline harvest level established for that crab fishery by ADF&G.

(f) How will crab processing sideboard poundage caps be announced? The Regional Administrator will notify each AFA inshore or mothership entity of its crab processing sideboard poundage cap through a letter to the owner of the AFA mothership or AFA inshore processor. The public will be notified of each entity's crab processing sideboard poundage cap through information bulletins published on the NMFS-Alaska Region world wide web home page (<http://www.fakr.noaa.gov>)

50 C.F.R. § 679.65.²³

The regulations also specifically provide that an AFA processor is prohibited from exceeding its AFA crab processing cap. See 50 C.F.R. § 679.7(k)(8). The AFA itself made any violation of its Section 210 or 211 an “act prohibited by section 307 of the Magnuson Stevens Act”. AFA § 210(g).

Referring to the allegations against Respondents, these regulatory definitions require the Agency to demonstrate that Peter Pan had “control” over Seven Seas – not necessarily the M/V STELLAR SEA and/or its owner – so that the two entities are affiliated entities for AFA purposes. Contrary to Respondents’ arguments, the focus is not on the “interest” of the actual vessel itself, but rather the non-AFA processing entity, i.e., Seven Seas. To find otherwise would unduly limit the scope of the AFA, which was clearly intended to prohibit AFA processors, like Peter Pan, from controlling non-AFA processors like Seven Seas in non-pollock fisheries like crab. The requisite analysis of the Peter Pan/Seven Seas relationship is thus not focused on whether Peter Pan “controlled” Seven Seas from a formal corporate perspective, but rather whether such “control” existed under the breadth of Agency regulations.

²³ The processing caps that are at issue here were superseded in 2005 when NOAA began to implement a Crab Rationalization Plan. See Resp. Exhs. 41, 42.

C. MARAD's Responsibilities to Ensure AFA U.S. Citizenship/Ownership Requirements

The AFA designated MARAD as the agency responsible for ensuring compliance with the U.S. citizen ownership and control requirements for U.S.-flag fishing industry vessels of 100 feet and greater in registered length. Specifically, under the AFA, MARAD was (1) to establish regulations to prohibit impermissible transfers of ownership or control; (2) to identify transactions that required prior MARAD approval and those that did not; and (3) to the extent practicable, to minimize disruptions to the commercial fishing industry. See AFA at Section 203(a) and (b). The AFA also increased the amount of U.S. citizen ownership and control necessary for a vessel to be eligible for documentation with a fishery endorsement from 51 percent to 75 percent at each tier and in the aggregate.

In this regard, MARAD must determine whether these vessels are owned and controlled by U.S. citizens and eligible for documentation with a fishery endorsement. MARAD's AFA implementing regulations are found at 46 C.F.R. Part 356. See 65 Fed. Reg. 44860-44890 (July 19, 2000). All vessel owners were required to come into compliance with the new ownership requirements by October 31, 2001 in order to obtain a fishery endorsement allowing the vessel to fish in United States waters. See Resp. Exh. 15.

MARAD examined the ownership and control of the M/V STELLAR SEA, particularly, reviewing the potential issues of unlawful foreign ownership/control of that vessel by Peter Pan (a subsidiary of Nichiro Corporation (Nichiro), a Japanese company). Examining MARAD's responsibilities and interest in the M/V STELLAR SEA is therefore important because the

parties have argued about what effect, if any, MARAD's determinations have on this case.²⁴

MARAD's duties (as outlined in its statutory authority and regulations – see AFA Section 202; 46 U.S.C. § 50501 (formerly Section 2 of the Shipping Act of 1916); 46 U.S.C. § 12113 (fishery endorsements); and implementing regulations found at 46 C.F.R. Part 356 – differ from those delegated to NOAA. As clearly stated in MARAD's regulations, 46 C.F.R. Part 356's purpose is as follows:

Part 356 implements the U.S. Citizenship requirements of the American Fisheries Act of 1998, as amended, Title II, Division C, Public Law 105–277, for owners, Mortgage Trustees, and Mortgagees of vessels of 100 feet or greater in registered length that have a fishery endorsement to the vessel's documentation or where a fishery endorsement to the vessel's documentation is being sought.

46 C.F.R. § 356.1(a) (emphasis added).

Subtitle I of the AFA thus governs the foreign ownership and control issues between and among the M/V STELLAR SEA, Cypress (the applicable owner of the vessel), Seven Seas (the bareboat charterer of the vessel), and Peter Pan, which used the vessel to custom process crab it purchased from the BSAI fishery. However, a given vessel's endorsement requirements with respect to required United States citizenship, while relevant to fishery management concerns, are not coextensive with NOAA's delegated authority to oversee appropriate regulations implemented under the AFA and prosecute fishery violations. A vessel's endorsement status and

²⁴ This case is not about evaluating MARAD's actions. The undersigned's duty is not to determine whether MARAD made the correct decisions under its statutory and regulatory authority with respect to the ownership/control of the M/V STELLAR SEA under the Shipping Act. MARAD's ultimate determination about the Peter Pan/Seven Seas relationship is simply not determinative of the Agency's efforts to enforce its regulations. As such, the undersigned will not speculate as to what MARAD might (or might not) have determined about the Peter Pan/Seven Seas relationship had the Advance of Funds Agreement been disclosed during the charged period. Nor will the undersigned rule that such an agreement should have been disclosed under MARAD's regulations, which are not the subject matter of this case. See Agency Post Hearing Brief at 28-29 (arguing that the Advance of Funds Agreement should have been disclosed to MARAD); Peter Pan Reply at 24-25 (arguing that the Advance of Funds Agreement was not required to be disclosed). However, the discussion about MARAD is important to provide background into Respondents' business relationship. The undersigned will review MARAD's involvement based solely on the record evidence available to the extent that it is relevant to this case.

the concomitant inquiries into “control” for those purposes involve a different point of statutory and regulatory reference than those at issue here.

Specifically, MARAD was concerned about ensuring the appropriate ownership and control of the M/V STELLAR SEA under the AFA. Part of that analysis involved examining the Peter Pan/Seven Seas relationship because Seven Seas bareboat chartered the vessel. But such analysis was conducted through a different statutory and regulatory rubric than operates in this case.

In contrast to MARAD, the Agency was concerned about the potential control/affiliation of Seven Seas (a non-AFA processor) with Peter Pan (an AFA processor) at the processor level in light of NOAA’s regulations and the crab cap requirements of the AFA – not the ownership/citizenship requirements of the vessel M/V STELLAR SEA. To establish an AFA violation under the statute and its implementing regulations, the Agency thus need not establish any control or affiliation of the M/V STELLAR SEA (which was owned by a separate entity and bareboat chartered by Seven Seas). Rather, the focus remains directed at the Peter Pan/Seven Seas relationship. The processing vessel itself – the M/V STELLAR SEA – merely served as the mechanism by which Seven Seas – through its subsidiary Stellar Sea, Inc. – processed crab from the BSAI fishery for Peter Pan. An ownership interest in the processing vessel is simply not required to find an AFA violation.²⁵

²⁵ Peter Pan’s arguments about the importance of the distinction between bareboat charterers versus owners – at least for MARAD’s purposes – are thus misplaced. See Peter Pan’s Post Hearing Brief at 16-18; Reply at 23-24.

IV. Findings of Fact²⁶

A. The Parties and Other Entities.

Nichiro/Peter Pan

1. The Agency's and Respondent's accepted Proposed Findings of Fact contained in Attachment B are hereby incorporated herein as if set forth below.
2. At the time of the alleged violations, Respondent Peter Pan was a wholly owned subsidiary of Nichiro Corporation (Nichiro), a Japanese company and was not a U.S. citizen corporation within the meaning of the AFA or the Vessel Document Act. Agency Exh. 3 at 3; Resp. Exh. 60 at 10.²⁷
3. Peter Pan is a fish processing company organized under the laws of the State of Washington with operations in the State of Alaska. Resp. Exh. 60 at 10.
4. Peter Pan receives and processes pollock from a pollock fishery cooperative and is therefore an AFA processor within the meaning of the AFA. Id.
5. During 2004 and 2005, Peter Pan contracted with Seven Seas for custom processing services onboard the floating processing vessel the M/V STELLAR SEA, which Seven Seas had bareboat chartered from Cypress. Res. Exh. 26.
6. Custom processing is the practice of having a company's facilities process fish or crab for another company (usually another processing company that bought the fish from fishing enterprises or a cooperative) on a fee basis. Tr. at 1223:5-1224:6.

²⁶ References to the transcript are abbreviated as "Tr. [page number]:[line number]"; references to Agency Exhibits as "Agency Exh. [numeric]"; and Respondents' Exhibits as "Resp. Exh. [numeric]". References to deposition testimony read into the record include the deponent's last name.

²⁷ Peter Pan is currently a wholly owned subsidiary of Maruha-Nichiro Holdings, Inc. (a successor to Nichiro) and is not a U.S. citizen corporation within the meaning of the AFA or the Vessel Documentation Act. Resp. Exh. 60 at p.10.

7. All the king and tanner crab processed on the M/V STELLAR SEA for Peter Pan during 2004 and 2005 was owned by Peter Pan after purchase from fishing vessels in Alaska. Resp. Exh. 60 at 10.
8. Peter Pan was allotted its crab processing caps based on its crab processing history for two processing facilities – the Peter Pan King Cove shoreside processing plant and the M/V BLUE WAVE, a crab processing vessel owned by Seven Seas and in which Peter Pan had an ownership interest until October 2001. See Resp. Exhs. 2, 10-13; Agency Exh. 3 at 3 (Peter Pan’s Dec. 1999 AFA permit application indicates that Peter Pan owned 10% of Seven Seas, which owned 100% of Blue Wave Seafoods, Inc., that operated the M/V BLUE WAVE); Agency Exh. 4 (Peter Pan’s January 2003 AFA permit application indicates that Peter Pan had divested itself of all ownership in Seven Seas as of October 29, 2001).
9. Since Peter Pan was involved in the BSAI pollock fishery, i.e., was considered an AFA processor during the years 1995-1998, it was eligible to have its historic crab processing included under the AFA.²⁸ These individual crab caps included all crab caught by the listed affiliates of the AFA processor. Because the M/V STELLAR SEA was not listed

²⁸ In order to have an AFA crab cap, the entity had to be historically involved in the BSAI pollock fishery. Section 211(c)(2)(A) of the AFA, as supplemented by 50 C.F.R. § 679.65(c), established the individual crab caps for each AFA processor by taking the average of that processor’s crab catch for the years 1995, 1996, 1997 and 1998 (doubled). These individual crab caps included all crab caught by listed affiliates of the AFA processor. For example, if the entity was not historically involved in the pollock fishery during the above-noted years, it was not an AFA processor and it would not have a crab cap. Since the M/V STELLAR SEA was not listed as an affiliate of Peter Pan in its AFA permit application, none of the crab processed by the M/V STELLAR SEA would have been included in calculating Peter Pan’s crab cap. However, if an AFA processor acquired a company that was also an AFA processor, the acquired company’s crab cap would have been added to the acquiring processor’s crab cap. Conversely, since no new non-AFA participants were allowed to become AFA processors, any historic crab poundage (even during the 1995-98 time-period) would not be added to the AFA processors crab cap upon acquiring such company. Importantly, non-AFA processors were free to process as much crab as they wished and this regulatory scheme was specifically established to protect the non-AFA processors from the freed-up capacity entering the crab processing market as a result of the regulatory rationalization of the BSAI pollock fishery.

by Peter Pan as an affiliate in its AFA permit application, none of the crab processed by the M/V STELLAR SEA was included in calculating Peter Pan's crab cap.

10. The M/V BLUE WAVE, while not involved in the pollock fishery, was affiliated with Peter Pan through Peter Pan's ownership interest at the time of Seven Seas and thus the crab it processed was included in the crab that was processed by Peter Pan in establishing Peter Pan's crab cap based on historical participating in the fishery. See Tr. at 1239:5-15; 1239:25-1240:5.
11. The M/V BLUE WAVE was eventually tied up, i.e., not used as a working fish processor, sometime in 2001 or 2002 and was later sold. See Tr. at 1253:15-24.
12. During the charged period, Peter Pan held no ownership interests in Seven Seas, Cypress, or the M/V STELLAR SEA. Tr. at 1236:1-12.

Seven Seas

13. Seven Seas is a corporation organized under the laws of the State of Washington. Resp. Exh. 60.
14. Prior to the charged period, Nichiro and Peter Pan held an ownership interest in Seven Seas, but during the charged period, neither Peter Pan nor Nichiro owned any stock in Seven Seas. Resp. Exh. 60 at p. 11, ¶4.
15. Seven Seas was determined to be a U.S. citizen by MARAD. Id.
16. Through its subsidiary Stellar Seafoods, Inc., Seven Seas operated the M/V STELLAR SEA via a bareboat charter from that vessel's owner, Cypress, in various fisheries of Alaska, including the King and Tanner crab fisheries. Resp. Exhs. 25, 29.
17. Seven Seas, through its subsidiary, Stellar Seafoods, Inc., provided custom processing services to Peter Pan, using the M/V STELLAR SEA during the charged period and

received and processed crab purchased from Peter Pan fishermen, processed that crab and then delivered it for shipping to Peter Pan's customers as a finished product. Resp. Exh. 26; Tr. at 1223:5-1224:6.

18. Because the M/V STELLAR SEA did not participate in the pollock fishery for the 1995-1998 timeframe, it was not an AFA processor vessel and Seven Seas could not add the crab it processed historically to increase Peter Pan's crab cap – unless Peter Pan had listed Stellar Seafoods, Inc. (and the M/V STELLAR SEA) as an affiliate in its AFA permit application. Tr. at 564:2-21; 965:6-966:10; 1061:23-25.

The M/V STELLAR SEA

19. The M/V STELLAR SEA is a floating processor that custom processed crab for Peter Pan during the alleged period of violations. Resp. Exh. 25.

20. The M/V STELLAR SEA was initially owned by Aleutian Fishing Company, a subsidiary of Seven Seas. In 1992, the M/V STELLAR SEA was sold to First Hawaiian Bank (FHB) and FHB then chartered the vessel back to Stellar Seafoods, Inc. See Agency Exhs. 70 at Attachment 16, 97; Resp. Exhs. 25, 27.

21. FHB was 45% owned by a French financial institution and upon passage of the AFA, FHB's ownership of the M/V STELLAR SEA was contrary to the new U.S. citizen ownership requirements the AFA mandated.²⁹

22. In 2001, FHB sold the M/V STELLAR SEA to Cypress Stellar Sea LLC (Cypress). Agency Exh. 73.

23. Cypress, a California limited liability company, was 100 percent owner of the M/V STELLAR SEA during the charged period. Tr. at 1236:8-10.

²⁹ In order to be U.S. flagged vessel, the AFA mandated 75% or greater U.S. ownership. The previous threshold was 51%.

24. Neither Peter Pan nor Seven Seas owned or controlled any interest in Cypress during the charged period at issue. Resp. Exh. 60 at 11; Tr. at 507:11-20; 565:1-4, 10-13.
25. Cypress then bareboat chartered the M/V STELLAR SEA to Stellar Seafoods, Inc. on the condition that Peter Pan and Nichiro guaranteed the lease payments. See Agency Exh. 68, 69, 100, 102.
26. The charter agreement was in effect during the charged period and expired in 2008, when the vessel was returned to Cypress and sold to a new owner. Resp. Exh. 48; Tr. at 1289:10-19.
27. Seven Seas was responsible for hiring the M/V STELLAR SEA's crew; paying for its operations; and for paying charter payments each quarter to Cypress, the vessel's owner. Tr. at 1254:22-24; Resp. Exh. 25 (at Sections 3, 6).
28. In 2001, MARAD reviewed the charter agreement and required that certain provisions be included in the agreement to prevent any improper control by Peter Pan over the M/V STELLAR SEA, its owner, or its charterer. Resp. Exh. 30; Tr. at 1225:12-21.
29. The Agency has not charged Cypress with any civil penalty violation in connection with the commission of the alleged prohibited acts that are the subject of this proceeding. Resp. Exhs. 52 and 60 at p. 11.
30. MARAD reviewed and approved the citizenship of Cypress under the AFA and other applicable laws. Resp. Exh. 60 at p. 11.
31. Neither MARAD nor the United States Coast Guard ever requested the fishery endorsement for the M/V STELLAR SEA or Cypress be revoked and the vessel was documented to fish in United States waters during the charged period. Id. (Peter Pan's Statement of Undisputed Facts).

32. MARAD determined that Cypress was a United States citizen within the meaning of the AFA and the Vessel Documentation Act for the charged period. Id. (Peter Pan's Statement of Undisputed Facts).

33. During the charged period, Peter Pan contracted with Seven Seas for custom processing services onboard the M/V STELLAR SEA. Resp. Exh. 26.

B. The AFA and Agency Regulations

38. The AFA had two primary legislative purposes: (1) enhancing U.S. citizenship ownership and control standards for all U.S. fishing vessels and (2) rationalizing the BSAI pollock fishery. Tr. at 271:20-272:6 (Lind deposition excerpt).

39. In a rationalized fishery, the number of participants, boats or processing companies that have access to the resource is restricted and the fishery is regulated through limited entry. Tr. at 271:9-273:23; 274:1-25; 275:3-2772 (Lind deposition excerpt).

40. The AFA rationalized the BSAI pollock fishery in several ways: first, by defining what entities were allowed to participate in the pollock fishery in various capacities as catcher vessels, factory trawler off-shore fishery (the "mothership") and inshore processors; second, by dividing up the pollock fishing quota among these three subsectors; and third, by establishing guidelines and standards for each individual sector of the fishery to form cooperatives through which individual participants could divide the quotas among themselves. Tr. at 274:1-25 (Lind deposition excerpt).

41. In 2004, the BSAI Pollock fishery was the largest fishery (by volume) in the United States. Agency Exh. 2; Tr. 272:22-273:2 (Lind deposition excerpt).

42. The AFA listed the AFA-beneficiary entities by name of vessel, and specified that certain other vessels would be eligible to engage in the BSAI pollock fishery if they met certain

tonnage harvest conditions in certain years. See AFA Section 208(a), (b), (c), (d), and (e).

43. The AFA also identified thresholds for AFA-beneficiary shoreside processors (e.g., Peter Pan) eligible to engage in processing pollock caught by vessels operating in the BSAI pollock fishery, i.e. a company that processed more than 2,000 metric tons round weight of pollock during 1996 and 1997. AFA, Section 208(f).
44. These AFA-beneficiary processing companies (and their processing facilities) are referred to as "AFA-Processors".
45. Companies that did not qualify are referred to as "Non-AFA Processors".
46. Non-AFA entities were concerned about the economic and operational advantages that the AFA entities would acquire under the AFA. Agency Exh. 7; Tr. 275:3-277:2 (Lind deposition excerpt).
47. Fishery management programs that rationalize a fishery generally will need to consider implementation of sideboard restrictions or caps as a management tool to prevent spillover effects from impacting other, non-rationalized fisheries (e.g., crab caps were instituted as part of the AFA). Tr. 286:14-287:10 (Lind deposition excerpt).
48. Sideboards were restrictions placed on AFA entities to prevent pollock fishers and processors from expanding their participation in other non-pollock fisheries. Agency Exh. 2; Tr. 277:5-23.
49. The crab sideboard restrictions at issue here were debated extensively by the North Pacific Management Council beginning in October 1998 (passage of the AFA) to December 2002 (NMFS final rule published implementing the AFA). Tr. at 277:5-23.

50. Since the AFA was enacted, other fisheries were rationalized like the Alaskan crab fishery. Tr. at 286:14-287:10 (Lind deposition excerpt).
51. The crab processing cap regulations issued under the AFA and applicable to this case were superseded and expired on April 1, 2005 when NOAA began to implement the Crab Rationalization Plan. Resp. Exhs. 41, 42.
52. AFA processors, like Peter Pan, were required to list in their applications for an AFA shoreside cooperative processor permit “the percentage of ownership or control and describe the nature of the interest in each AFA crab facility that is affiliated with the AFA entity . . .” See 50 C.F.R. § 679.4(l)(5)(iv)(E).
53. NMFS placed the obligation of identifying their affiliated crab processing entities on the AFA processors because the AFA processors were best positioned to analyze their own intercompany business arrangements. See Tr. at 298:24-299:5 (Balsiger deposition excerpt); 282:12-283:13 (Lind deposition excerpt).
54. Peter Pan listed the M/V BLUE WAVE as an affiliated crab processing entity on all of its applications for an AFA Processor Permit. Agency Exhs. 3, 4 (Peter Pan’s AFA processing permits); Tr. at 324:20-325:2 (Hughes deposition excerpt).
55. Peter Pan did not list Stellar Sea, Inc. (or the M/V STELLAR SEA) as an affiliated crab processing entity on any of its applications for an AFA Processor Permit. See Tr. at 323:9-323:20 (Hughes deposition excerpt):
56. Prior to setting the AFA processor percentages for each crab species, the Agency sent the crab poundage numbers (for the years 95 – 97) to each AFA processor for the AFA processor to verify the numbers being used by NMFS to generate the crab species percentages. See Agency Exh. 5; Tr. at 280:6-281:20 (Lind deposition excerpt).

57. In a March 9, 2000 email to AFA processors, including Peter Pan, the Agency reminded such processors that the crab caps would be implemented on an individual entity basis. See Agency Exh. 5, Tr. at 281:20-282:1 (Lind deposition excerpt).
58. In September 2000, the North Pacific Fishery Management Council (Council), using the authority that Congress had given it under AFA section 213(c), changed the statutory qualifying years set out in AFA section 211(c)(2)(A) by adding 1998 and giving double weight to the amount of processing done by AFA entities in 1998. 66 Fed. Reg. 7327, 7329 (January 22, 2001); Tr. at 292:21-293:17 (Oliver deposition excerpt).
59. Once NMFS set an AFA processor's crab cap percentage for each crab species (which is determined as a percentage of the historical processing done by the AFA processor in the years 95 – 97 and 98 (multiplied by 2)), then the AFA crab processor simply had to multiply that percentage by the appropriate annual (yearly) GHL as set by the state of Alaska for a specific crab species in order to determine the AFA processor's yearly crab cap limit for that specific crab species. Tr. at 285:9-286:11 (Lind deposition excerpt).
60. In April 1999, the Council formed an industry committee, among other things, to make recommendations on the development and implementation of crab processing limits with respect to AFA pollock processors. This committee met and presented its recommendations to the Council at its October 1999 Council meeting. Resp. Exhs. 2, 3, 4, and 6.
61. On January 5, 2000, NOAA issued an Emergency Interim Rule, which expired on June 27, 2000, to provide for the issuance of AFA permits for the BSAI pollock fishery and to implement sideboard restrictions (for example, crab processing caps) to protect other

Alaska fisheries from negative impacts as a result of fishery cooperatives formed under the AFA. 65 Fed. Reg. 380-390 (Jan. 5, 2000); Resp. Exh. 8.

62. The Emergency Interim Rule laid out the AFA permit process and included definitions for an “AFA crab facility” (as an amendment to 50 C.F.R. § 679.2).
63. In the Federal Register Notice, NMFS stated that the purpose of this definition was “to implement the crab processing restrictions contained in subsection 211(c)(2)(A) of the AFA.” 65 Fed. Reg. at 383
64. On January 28, 2000, NOAA issued another Emergency Interim Rule, which also expired on July 20, 2000, that addressed how crab processing caps were determined and allocated. 65 Fed. Reg. 4520-4544 (Jan. 28, 2000); Resp. Exh. 9.
65. The January 28th Emergency Interim Rule contained a provision codified at 50 C.F.R. § 679.64 (“AFA Inshore processor and AFA mothership crab processing sideboard limits”).
66. In the Federal Register Notice, NMFS stated that the purpose of these interim rules was to implement the actions by the Council taken in December 1999 so that AFA regulations would be in place by the start of the 2000 fishing season and included provisions to implement the limits on crab processing set forth in Section 211(c)(2)(A) of the AFA. 65 Fed. Reg. at 4521, 4529.
67. NMFS also noted that “[a]t its October 1999 meeting, the Council recommended that NMFS implement these crab processing sideboards through processing caps that would be managed in the aggregate through inseason crab processing closures for AFA entities.” Id.

68. However, NMFS stated that, instead of following this recommendation, it would be implementing the crab processing sideboard management program on an entity-by-entity basis in this emergency interim rule. 65 Fed. Reg. at 4530.
69. The Agency also stated that it was “requiring that the owners of an AFA mothership or AFA inshore processor wishing to process pollock harvested by a pollock cooperative identify on their permit application all individuals, corporations, or other entities that directly or indirectly own or control a 10-percent or greater interest in the AFA mothership and/or inshore processor (collectively the AFA inshore or mothership entity), and any other crab processors in which such entities have a 10 percent or greater interest (the associated AFA crab facilities).” Id.
70. The January 28, 2000 rule also stated that assigned crab processing caps will apply to all crab processed by the associated AFA crab processing facilities including any “custom processing” activity. 65 Fed. Reg. at 4530.
71. Under the interim rule, any custom processing done at an AFA crab processing facility was charged against the associated AFA inshore or mothership entity’s crab processing cap. Id.
72. NOAA extended both emergency interim rules for another six months, but both rules expired thereafter and were not renewed. 65 Fed. Reg. 3917-39110 (Jun. 23, 2000).
73. On December 17, 2001, NOAA published a proposed rule to implement the major portions of the AFA. 66 Fed. Reg. 65028-65069 (Dec. 17, 2001); Resp. Exh. 31.
74. None of the provisions of the proposed rule were made immediately effective, and the steps taken by NOAA and the Council to implement the AFA were summarized at 66 Fed. Reg. 65029-65031.

75. On December 30, 2002, NOAA's published AFA implementing regulations. 67 Fed. Reg. 79692-79739 (Dec. 30, 2002); Resp. Exh. 33.
76. These final rules contained key provisions, including definitions of "AFA crab processing facility" and "Affiliation for purposes of defining AFA entities" (codified at 50 C.F.R. § 679.2); AFA permit requirements and applications (codified at 50 C.F.R. § 679.4); prohibitions against exceeding crab processing limits (codified at 50 C.F.R. § 679.7(k)(8)); and crab processing sideboard limits (codified at 50 C.F.R. § 679.65). *Id.*
77. The definition of "affiliation", specifically the guidance as to what types of business actions and/or arrangements would constitute 10% or more control, was expanded under the final AFA rule (published December 30, 2002) from the definition of affiliation contained in earlier emergency rules that implemented the AFA. Tr. at 284:19-285:9 (Lind deposition excerpt).
78. These final regulations applied from January 1, 2004 to March 31, 2005, (i.e., during the charged period).

C. Issuance of Crab Processing Caps to Peter Pan

79. AFA processors, like Peter Pan, were required to list in their applications for an AFA shoreside cooperative processing permit "the percentage of ownership or control" and to "describe the nature of the interest in each AFA crab facility that is affiliated with the AFA entity". 50 C.F.R. § 679(4)(1)(5)(iv)(E).
80. NMFS placed the obligation of identifying the affiliated crab processing entities on the AFA processors themselves because the AFA processors were best positioned to analyze their own intercompany business relationships and apply the regulatory guidance. Tr. at 282:12-283:13 (Lind deposition excerpt); 298:24-299:5 (Balsiger deposition excerpt).

81. Prior to setting the AFA processor percentages for each crab species (which the AFA processor would subsequently use to multiply against the annual Guideline Harvest Level (GHL) of that species to establish that AFA entity's annual crab cap), the historical crab poundage numbers for the years 1995-1997 were sent via electronic mail to each AFA processor for that processor to verify the numbers being used to determine that processors assigned percentage. Agency Exh. 5; Tr. at 280:6-281:2 (Lind deposition excerpt).
82. This communication (an electronic mail) reminded the AFA processors that the crab caps would be implemented on an individual entity basis – not in the aggregate. Agency Exh. 5; Tr. at 281:21-282:1 (Lind deposition excerpt).
83. This electronic mail was sent to DaleSc@PeterPan.com among other recipients. Agency Exh. 5; Tr. 282:2-6 (Lind deposition excerpt).
84. Once an AFA processor's crab cap percentage was set by NMFS for each crab species (determined as a percentage of the historical processing done by the AFA processor in the years 1995-1997 and 1998 (counted twice)), the AFA processor had to multiply that percentage by the appropriate annual GHL as set by the State of Alaska for a given crab species to determine the AFA processor's yearly crab cap limit for that crab species. Tr. at 285:9-286:11 (Lind deposition excerpt).
85. By application dated December 22, 1999, Peter Pan filed an Application for an AFA Mothership & Inshore Processor Permit with NMFS. Resp. Exh. 7.
86. This application identified two facilities to be covered by the AFA permit being sought: (a) a shoreside processing plant at King Cove, Alaska; and (b) the floating processor M/V BLUE WAVE, owned by Seven Seas through its subsidiary, Blue Wave Seafoods, Inc.
- Id.

87. Peter Pan listed the M/V BLUE WAVE as an affiliated crab processing entity on all of its applications for an AFA processor permit. Agency Exh. 108 (Hughes deposition at 76:7-14); Agency Exhs. 3 (Peter Pan's AFA Processor Permit Application from December 1999), 4 (Peter Pan's AFA Processor Permit Application dated January 2003).
88. Peter Pan's 1999 AFA permit application disclosed that it owned the King Cove facility, held a 10 percent stock ownership interest in Seven Seas, and was affiliated with Nichiro. Resp. Exh. 7.
89. On March 24, 2000, the NMFS Regional Administrator for Alaska informed Peter Pan by letter of its processing cap percentages for king and tanner crab, identifying two processing facilities as the basis for calculating the cap: i.e., the King Cove shoreside facility (F-0142) and Blue Wave Seafoods, Inc. (M/V BLUE WAVE) (F-1636). Resp. Exh. 13.
90. This letter also enclosed a memorandum from the head of NMFS Enforcement in Alaska indicating that: "So long as the aggregate amount of crab processed by AFA entities does not exceed 15,328,630 lbs. round weight, or 58.15 percent of the final official harvest amount of *Opilio tanner* crab as determined by ADF&G, whichever is greater, then no enforcement action will be taken against any individual AFA entity for processing crab in excess of the crab processing sideboard established for that individual AFA entity". Resp. Exh. 14.
91. Peter Pan did not list Stellar Sea, Inc. or the M/V STELLAR SEA as an affiliated crab processing entity on any of its applications for an AFA Processor Permit. Agency Exhs. 3, 4; Tr. at 323:9-323:20 (Hughes deposition excerpt).

92. In or around late March 2000, the Agency conducted an investigation into the relationship between Peter Pan and Seven Seas and the M/V STELLAR SEA because other industry participants questioned the relationship and why Seven Seas had not been listed as an affiliated entity with Peter Pan for crab cap calculation purposes. Resp. Exhs. 10, 12, 17.
93. Following the investigation, Special Agent Rohn Nelson, the Agency investigator, drafted a memorandum dated July 31, 2000 that stated he had conducted a telephonic conference call with Mr. Kent Lind and a supervisory agent that outlined the findings of his investigation and all concurred that "given the corporate makeup and the relationship of the entities, the F/V STELLAR SEA was not required to be listed as a facility under the Peter Pan/Nichiro Entity by definition of the ownership and 10% control standard. Kent Lind will modify the definitions of 679.2 based on the findings of this investigation. Based on the above information, I request that this case be closed as unfounded." Resp. Exh. 17.
94. By letter dated August 1, 2000 from the NMFS Regional Administrator for the Alaska Region (Dr. James Balsiger), the Agency informed Peter Pan of its crab processing cap percentages and listed two facilities in the letter: King Cove and M/V BLUE WAVE. Resp. Exh. 18.
95. By facsimile transmittal dated August 8, 2000, NMFS provided a "corrected table" with respect to Peter Pan's king crab processing crab cap, which included references to the two facilities listed in the August 1, 2000 letter and identified Stellar Seafoods, Inc. (F1604) as "NON-AFA." Resp. Exh. 20.

96. The North Pacific Fishery Management Council and the Alaska Department of Fish and Game published a Discussion Paper entitled "Crab Processing Sideboard Caps" dated August 7, 2000 on which Appendix 2 listed Blue Wave Seafoods, Inc. and PPSF-King Cove as "AFA" and Stellar Seafoods, Inc. as "Non-AFA." Resp. Exh. 19.
97. By letter dated January 11, 2001, NMFS informed Peter Pan of its crab processing cap percentages for that year, which included new calculations based on adding crab processing history for 1998 and giving it double weight. Resp. Exh. 22.
98. The crab processing history for Peter Pan related solely to crab processed at the Peter Pan King Cove facility and on board the processing vessel M/V BLUE WAVE and not any crab processed by the M/V STELLAR SEA. Tr. at 965:6-966:10.
99. The letter also included the same notice as in the March 24, 2000 letter that no enforcement action would be taken against any individual entity unless the aggregate cap was exceeded, plus a table summarizing the crab processing history for Peter Pan's facilities, broken down by species. Resp. Exhs. 14, 22.
100. On August 29, 2001, Dr. James Balsiger, as NMFS Regional Administrator, wrote to the Commissioner of the Alaska Department of Fish and Game requesting a written determination as to whether public release of AFA crab processing cap percentages would violate state confidentiality laws. Resp. Exh. 23.
101. Attached to that letter was a spreadsheet containing NMFS' calculations of the aggregate historical processing percentage of AFA processors for various crab species, which calculated that, in the red crab fishery, the relative percentages were 78.62% for AFA processors and 23.38% for non-AFA processors. Resp. Exh. 23.

102. In the tanner crab fishery, the relative percentages were 65.33% for AFA processors and 34.67% for non-AFA processors. Resp. Exh. 23.
103. The spreadsheet indicated that, for Peter Pan, the historical processing percentages included King Cove and the M/V BLUE WAVE, but not the M/V STELLAR SEA. Resp. Exh. 23.
104. Dr. Balsiger's letter also contained a sentence that reads, in part, "... Peter Pan has two processors under its control although a third processor may be included in the Peter Pan entity under a revision of the entity rules." Resp. Exh. 23.
105. There is no evidence in the record that the Regional Administrator ever determined that any "third processor" would be included in the Peter Pan entity, including after the final NOAA AFA regulations were issued at the end of 2002. Tr. at 966:15-968:5.
106. In 2002 and 2003, NMFS sent notices to Peter Pan indicating the same crab processing cap percentages as calculated by NMFS in 2001. Resp. Exhs. 32, 34.
107. By application received by NMFS on January 29, 2003, Peter Pan informed NMFS that Peter Pan and Nichiro had divested themselves of all interest in Seven Seas. Resp. Exh. 35.
108. In August 2004, NMFS informed Peter Pan that, as a result of the divestiture of its interest in Seven Seas, the parent of Blue Wave Seafoods, Inc., which owned the M/V BLUE WAVE, Peter Pan's crab processing caps were being reduced to eliminate the crab processing history of the M/V BLUE WAVE and Peter Pan was given notice of its right to appeal the decision. Resp. Exh. 36.
109. Peter Pan appealed the decision in accordance with the AFA permit regulations and by letter dated October 6, 2004, the Program Director for Restricted Access Management at

NMFS sustained the appeal and reinstated Peter Pan's prior crab processing caps and included the crab processing history of the M/V BLUE WAVE in the calculation of PPSF's crab processing cap. Resp. Exh. 38.

110. During the charged period, NMFS treated the M/V STELLAR SEA and its owner Cypress as a non-AFA processor and no record evidence indicates that NMFS ever assigned a crab processing cap to Seven Seas, the M/V STELLAR SEA or the vessel's owner, Cypress.

D. MARAD's Involvement with the M/V STELLAR SEA and U.S. Ownership Requirements under the AFA

111. The AFA required the U.S. Maritime Administration (MARAD) to develop final regulations for fishing industry vessels over 100 feet in register length, including regulations to prohibit impermissible transfers of ownership or control, specify any transactions which do not require prior approval of an implementing agency, identify transactions which do not require prior agency approval, and to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives. AFA, Section 203(a) and (b).

112. MARAD issued its final regulations implementing the AFA on July 19, 2000. 65 Fed. Reg. 44860-44890 (Jul. 19, 2000) (amending 46 C.F.R. Part 356).

113. Under those regulations, all vessel owners were to come into compliance with the new AFA requirements by October 31, 2001 in order to obtain a fishery endorsement. Resp. Exh. 15.

114. The MARAD regulations govern the "control" relationships for vessel registry purposes under Subtitle I of the AFA between and among the owner of the M/V STELLAR SEA,

Cypress, Seven Seas, as charterer of the vessel, and Peter Pan, which used the vessel to custom process crab it purchased from fishermen in Alaska.

115. In 2001, the then-owner of the M/V STELLAR SEA, FHB, sought MARAD's approval to transfer ownership of the vessel to Cypress. Resp. Exh. 24.

116. By letter dated October 15, 2001, MARAD determined that an impermissible level of control under the AFA and the Shipping Act of 1916 would not be transferred to Stellar Seafoods, Inc., the wholly owned subsidiary of Seven Seas, by reason of the overall arrangements, so long as the following changes were made: (a) Peter Pan and Nichiro would be required to sell their interests in Seven Seas and no officer, director, employee or significant shareholder of Peter Pan or a related company could serve as a director of Seven Seas or be an employee of Seven Seas or Stellar Seafoods, Inc.; (b) Seven Seas and Stellar Seafoods, Inc. must have separate office space from Peter Pan and provide for their own administrative services and office equipment; (c) the Charter Performance Guaranty Agreements between Peter Pan and Cypress and Nichiro and Cypress must be modified to provide only a limited guaranty in which Peter Pan and Nichiro agree to indemnify Cypress for specific expenses if Stellar Seafoods, Inc. fails to perform under certain provisions of the charter. Resp. Exhs. 24, 30.

117. Because of MARAD's directives, Peter Pan and Nichiro divested themselves of any stock ownership in Seven Seas, effective October 31, 2001. Resp. Exh. 30; Tr. at 1230:5-18; 1236:21-1237:12; 1267:13-25.

118. The shareholder agreement for Seven Seas between and among Mr. Greenwood, Peter Pan, and Nichiro expired on that date and ceased to be effective. Agency Exh. 83.

119. The United States Coast Guard issued a certificate of documentation, with a fishery endorsement, on or about November 1, 2001 to Cypress Stellar Sea LLC as the new owner of the M/V STELLAR SEA. Resp. Exhs. 47, 48.
120. This certificate of documentation was never revoked by the United States Coast Guard. Resp. Exhs. 47, 48.
121. In a letter dated December 10, 2001, MARAD informed Seven Seas that financing agreements did not have to be reviewed for purposes of determining citizenship until April 1, 2003. Resp. Exh. 30.
122. In 2007, MARAD conducted an investigation into the relationship between Seven Seas and Peter Pan in order to verify compliance with U.S. citizenship rules under the Vessel Documentation Act. Agency Exh. 32.
123. On June 9, 2008, MARAD sent a letter to Mr. William Myhre, counsel for Seven Seas, stating that the agency has “determined that Stellar Seafoods, Inc. continues to qualify as a United States citizen within the meaning of 46 U.S.C. § 50501 and is eligible to document the vessel herein identified with a fishery endorsement.” Agency Exh. 34; Tr. at 1277:5-1278:1.
124. In 2008, MARAD reviewed the Advance of Funds Agreement but did not determine that the agreement gave Peter Pan control over Seven Seas for MARAD purposes – but MARAD did require a restructuring/reduction of Seven Seas’ debt owed to Peter Pan/Nichiro. Agency Exhs. 33, 34.

E. The Peter Pan/Seven Seas Relationship Prior to the Charged Period

125. Until about 2000, Mr. Barry Collier, President of Peter Pan, held 75 percent of the stock in Seven Seas, Peter Pan held 10 percent of the stock and Nichiro held 15 percent of the stock. Tr. at 1238:9-22.
126. Peter Pan covered Seven Seas financial losses in 2000. Agency Exh. 9; Agency Exh. 108 (Collier deposition at 31:4-32: 3; 83:19-84:3).
127. On October 31, 2001, Mr. Gary Greenwood purchased the 75 percent ownership interest in Seven Seas from Mr. Collier for approximately \$75,000, which was paid in cash. Tr. at 496:2-5; 506:23-507:4; 1230:16-23.
128. Mr. Greenwood's equity investment was carried on Seven Seas' books as paid-in equity capital. Tr. at 120:24-1231:2.
129. Mr. Greenwood subsequently sold his 100 percent stock ownership in Seven Seas to Mr. Mark Weed, the current president of Seven Seas for \$78,000 cash and Mr. Weed was the owner of all stock in Seven Seas during the charged period. Tr. at 373:5-24.
130. As of June 1, 2001, Peter Pan made a \$3 million loss coverage payment to Seven Seas as part of the "true up" of Seven Seas' balance sheet per the parties' agreement. Agency Exh. 11 at p. 7; Agency Exh. 108 (Collier deposition at 34:21-35:1).
131. The President of Seven Seas, Mr. Gary Greenwood, at that time did not know about the June 1, 2001 loss coverage payment from Peter Pan. Tr. at 334:6-14 (Greenwood deposition excerpt).
132. Mr. Greenwood attended Peter Pan's Board of Directors meeting on November 19, 2001, along with Seven Seas' then Vice President, Mr. Mark Weed. Tr. at 334:17-335:3 (Greenwood deposition excerpt); Agency Exh. 12.

133. Mr. Greenwood presented Seven Seas' consolidated financial statement to Peter Pan's Board of Directors at the November 19, 2001 meeting and indicated that Seven Seas no longer had a bank loan but was borrowing from Peter Pan. Tr. at 335:11-22 (Greenwood deposition excerpt); Agency Exh. 12.
134. Mr. Greenwood also reviewed the status of the AFA and MARAD considerations and reported that MARAD would require further separation of Seven Seas from Peter Pan and that some details on these requirements were still being worked out. Tr. 335:22-336:1 (Greenwood excerpt); Agency Exh. 12.
135. Seven Seas began exclusively borrowing from Peter Pan by November 19, 2001. Agency Exh. 12.
136. Seven Seas began borrowing from Peter Pan because Seven Seas could not obtain operating funds elsewhere as Seven Seas did not have sufficient security for transactions with lending institutions. Tr. at 331:16-24 (Greenwood deposition excerpt).
137. During a May 30, 2002 Peter Pan Board of Directors Meeting, a cost reduction plan for Seven Seas was discussed with a reduction in Seven Seas salary and a line item for "attempt to sell" the BLUE WAVE even though no Seven Seas personnel were at this meeting and Peter Pan had no ownership interest in Seven Seas. Agency Exh. 108 (Collier deposition at 42:2-3); Agency Exh. 13.
138. During the November 26, 2002 Board of Directors Meeting for Peter Pan, Mr. Mark Weed from Seven Seas presented a Seven Seas' financial report to the Peter Pan board. Agency Exh. 14.

139. On May 27, 2004, Seven Seas' business was discussed at Peter Pan's Board of Directors Meeting even though there were no Seven Seas personnel present and Peter Pan had no ownership interest in Seven Seas. Agency Exh. 15.

F. The Peter Pan/Seven Seas Relationship During the Charged Period

140. Seven Seas, through its subsidiary, Stellar Seafoods, Inc., provided custom processing services to Peter Pan. This was accomplished by the M/V STELLAR SEA, during the charged period receiving crab purchased by Peter Pan from fisherman, processing that fish, and then delivering it for shipping to Peter Pan's customers as a finished product. Resp. Exh. 26; Tr. at 1223:5-1224:6.

141. Seven Seas never owned the fish that was custom processed for Peter Pan. Tr. at 1255:12-19.

142. Peter Pan and Seven Seas would set an initial, preseason price for the custom processing. Tr. at 1226:13-25.

143. At the end of the season, they would adjust the price depending on how many pounds of crab Peter Pan purchased and Seven Seas processed. Id.

144. Typically, Peter Pan paid Seven Seas more than the industry standard because Seven Seas' costs were high and the resource return at the time was low. Tr. at 1227:1-13.

145. Peter Pan also paid a premium to Seven Seas because it was more costly to operate a floating processor than a shoreside facility. Id.

146. Peter Pan also paid a premium to have priority to use the processing capacity onboard the M/V STELLAR SEA – as reflected in a right of first refusal to use the M/V STELLAR SEAS. Tr. at 1227:1-1229:7.

147. Peter Pan, Seven Seas, and Cypress entered into the following contracts with respect to the M/V STELLAR SEA that were in effect during the period January 1, 2004 to April 1, 2005: (a) Bareboat Charter Agreement between Stellar Seafoods, Inc. and Cypress, including the Agreement Regarding the Extension of the Charter Term, dated September 30, 2002, extending the original charter term to September 30, 2008 and Amendment No. 3 to Bareboat Charter Party, dated September 30, 2002 (Resp. Exh. 25); (b) Amended and Restated Custom Processing Agreement between Peter Pan and Stellar Seafoods, Inc. dated October 31, 2001, including Amendment No. 1 to Amended and Restated Custom Processing Agreement (Resp. Exh. 26); (c) Charter Acknowledgment and Agreement dated February, 2004, including Exhibit A (Bareboat Charter Party dated as of September 25, 1992 between Stellar Seafoods, Inc., as Charterer, and First Hawaiian Bank, as Owner; Amendment of Charter Party, dated December 28, 1992; Amendment No. 2 to Bareboat Charter Party dated October 31, 2001; and Amendment No. 3 to Bareboat Charter Party dated September 30, 2002) (Resp. Exh. 29); (d) Amended and Restated Charter Performance Guaranty Agreement between Peter Pan and Cypress dated October 31, 2001 (Resp. Exh. 28); and (e) Amended and Restated Charter Performance Guaranty Agreement between Nichiro and Cypress dated October 31, 2001 (Resp. Exh. 27).

148. All of these agreements expired when the M/V STELLAR SEA was returned to Cypress by Seven Seas and subsequently sold to Icicle Seafoods, Inc. Agency Exh. 87; Tr. at 1288:9-1289:19.

149. From 2000 to 2005, Seven Seas processed seafood almost exclusively for Peter Pan with 97% of its processing done for Peter Pan in 2000, 100% of its processing done for Peter Pan in 2001; 100% of its processing done for Peter Pan in 2002; 100% of its

processing done for Peter Pan in 2003; 100% of its processing done for Peter Pan in 2004; and 92% of its processing done for Peter Pan in 2005. Agency Exh. 21.

150. Seven Seas processed crab for other companies, including Trident Seafoods, Inc., but Peter Pan was Seven Seas' primary customer. Tr. at 1084:18-1085:10.

151. The Advance of Funds Agreement did not provide that Peter Pan could direct Seven Seas regarding personnel decisions. Tr. at 1249:24-1250:5; 1259:19-23.

152. Peter Pan did not have control over who Seven Seas hired to work on the M/V STELLAR SEA or who Seven Seas would employ. Tr. at 1254:22-1255:2; 1259:19-23.

153. During the charged period, Mr. Collier, President of Peter Pan, did not believe he had the power to direct who would be put on the Seven Seas Board of Directors. Tr. at 1259:24-1260:2.

G. The Advance of Funds Agreement

154. Peter Pan and Seven Seas entered into a \$5 million Advance of Funds Agreement in March 2002 which provided operating funds "in advance of the time processing fees are due." Agency Exh. 22; Resp. Exh 82.

155. Mr. Kirk Koch, the VP of Finance for Peter Pan in 2002, was not involved in the negotiation of the Advance of Funds Agreement. Tr. at 436:20-437:1 (Koch deposition excerpt).

156. The Advance of Funds Agreement guided Seven Seas' borrowing from Peter Pan. Tr. at 387:24-388:2 (Weed deposition excerpt).

157. Seven Seas paid for its operating expenses by borrowing against the Advance of Funds Agreement. Tr. at 344:3-7; 344:12-347:16 (Scott deposition excerpt).

158. Seven Seas used money borrowed under the Advance of Funds Agreement to make payments unrelated to Seven Seas' business for Peter Pan, i.e., not just for operating expenses related to the M/V STELLAR SEA. Tr. 349:10-20 (Scott deposition excerpt); Agency Exh. 22.
159. The Advance of Funds Agreement provided that the Agreement terminated on December 31, 2001 unless extended in writing. Agency Exh. 22 at Section 2.1
160. The Advance of Funds Agreement was not extended in writing until January 2007. (However, between January, 2002 and December, 2006, the parties operated under the Agreement as if it was still operative.) Agency Exh. 108 (Weed deposition at 139:9-13).
161. The terms of the Advance of Funds Agreement required that each time Seven Seas borrowed funds under that agreement, it needed to specify the use of the funds to be borrowed, with the funds borrowed being necessary to provide service under the custom processing agreement between Peter Pan and Seven Seas. Agency Exh. 22 at Section 2.2.
162. The pattern and practice of fund requests under the Advance of Funds Agreements indicates that Seven Seas did not specify the use of funds to be borrowed. Tr. at 426:13-427:8 (Adams deposition excerpt).
163. Seven Seas' borrowing under the Advance of Funds Agreement covered practically every expense of the M/V STELLAR SEA's operating expenses. Tr. at 332:27-10 (Greenwood deposition excerpt); 385:1-16 (Weed deposition excerpt).
164. Seven Seas used money borrowed under the Advance of Funds Agreement to pay its accounts payable and tax obligations. Agency Exh. 108 (Weed deposition at 151:16-152:24).

165. Seven Seas used money borrowed under the Advance of Funds Agreement for its payroll expenses. Agency Exh. 24; Tr. at 391:9-11 (Weed deposition excerpt).
166. Seven Seas used money borrowed under the Advance of Funds Agreement to pay its insurance premiums. Agency Exh. 24; Agency Exh. 108 (Weed deposition at 154:22-155:2).
167. Seven Seas used money borrowed under the Advance of Funds Agreement to pay Peter Pan for services rendered by Peter Pan to Seven Seas. Agency Exh. 24; Agency Exh. 108 (Weed deposition at 155:11-16).
168. Seven Seas used money borrowed under the Advance of Funds Agreement to pay for shipyard services. Agency Exh. 24; Agency Exh. 108 (Weed deposition at 156:1-11).
169. Peter Pan never rejected Seven Seas' requests for funds under the Advance of Funds Agreement. Tr. at 426:13-427:24; 428:2-8; (Adams deposition excerpt); 423:18-22 (Roque deposition excerpt).
170. Peter Pan never questioned the funds Seven Seas requested under the Advance of Funds Agreement. Id.
171. The Advance of Funds Agreement provided that accrued interest on advances made would be payable monthly, no later than the fifteenth day of the month following the month for which such interest accrued. Agency Exh. 22 at Section 2.3.
172. Peter Pan capped the annual interest charged to Seven Seas at \$200,000 under the Advance of Funds Agreement. Tr. at 443:25-444:12 (Koch deposition excerpt); 452:23-453:11 (Collier deposition excerpt); 391:14-392:7 (Weed deposition excerpt).

173. According to Mr. Weed, the reason for the \$200,000 limit on accrued interest was that Peter Pan “didn’t want to charge me more interest if they were just having to pay me back later for operating expenses.” Tr. 392:4-7 (Weed deposition excerpt).
174. Under the terms of the Advance of Funds Agreement, Seven Seas was required to repay Peter Pan all outstanding interest and principal at the time of settlement for each fishing season, but in no event later than ninety (90) days after the end of each calendar year. Agency Exh. 22 at Section 2.4.
175. Seven Seas never paid off the debt at the end of the fishing season or at the end of the year while Mr. Weed was President of Seven Seas. Agency Exh. 108 (Scott deposition at 69:21-25; Weed deposition at 141:18-22; 143: 13-17).
176. Peter Pan retained sole discretion to lend Seven Seas funds under the Advance of Funds Agreement. Agency Exh. 22 at Section 2.8.
177. Under the terms of the Advance of Funds Agreement, Seven Seas could not create, allow to be created, or permit to exist, any lien except those existing on the date of the agreement and disclosed and consented to by Peter Pan. Id. at Section 6.2.
178. This provision of the Advance of Funds Agreement gave Peter Pan prior approval authority over Seven Seas’ ability to seek funding from any source other than Peter Pan if such funding required the creation of a lien against any Seven Seas’ asset as collateral. Id.
179. Under the terms of the Advance of Funds Agreement, if Seven Seas failed to pay any amount of principal or interest on the advances due within 10 days, Seven Seas was in default of the agreement. Id. at Section 8.1.

180. Seven Seas was in default of this provision after the first fishing season because it never paid back the borrowed funds in full to Peter Pan (and 90 days after calendar year 2002) and was continually in default from thereafter. Agency Exh. 27; Agency Exh. 108 (Weed deposition 141:18-22; 143:13-17).
181. Under the terms of the Advance of Funds Agreement, upon any default by Seven Seas, Peter Pan could declare all principal and interest due immediately due and payable. Agency Exh. 22 at Section 8.2.
182. Following Seven Seas' initial failure to pay its debt to Peter Pan in full, Peter Pan had the right to demand all debt due in full from Seven Seas. Agency Exh. 27.
183. Seven Seas was never in a financial position to pay off the amount of its indebtedness to Peter Pan while Mr. Greenwood was President of Seven Seas (from 2001 to 2002). Tr. at 333:1-5 (Greenwood deposition excerpt).
184. All extensions and amendments to the Advance of Funds Agreement were required to be in writing. Agency Exh 22 at Section 9.8.
185. Peter Pan's Treasurer, who was responsible for approving advances to Seven Seas under the Advance of Funds Agreement, was not aware of any limit as to amounts of outstanding debt under the agreement. Tr. at 428:2-8 (Adams deposition excerpt).
186. The amount of funds borrowed by Seven Seas from Peter Pan routinely exceeded \$5 million. Agency Exh. 27.
187. Peter Pan never raised any concern to Mr. Weed over the Seven Seas debt exceeding the \$5 million amount noted as the limit in the Advance of Funds Agreement. Tr. at 392:11-18 (Weed deposition excerpt); 428:2-429:2 (Adams deposition excerpt).

188. Mr. Weed did not demonstrate any “great concern” over the amount of Seven Seas’ indebtedness to Peter Pan. Tr. at 364:7-14 (Scott deposition excerpt).
189. Peter Pan took no action when the amount of Seven Seas borrowing under the Advance of Funds Agreement exceeded \$5 million. Tr. at 453:11-15 (Collier deposition excerpt).
190. Peter Pan placed no limits on the amount of money that could be borrowed by Seven Seas (despite the express limitation in the Advance of Funds Agreement). Tr. at 426:18-21 (Adams deposition excerpt).
191. Mr. Adams, Treasurer of Peter Pan, had no knowledge of a similar advance of funds agreements with any other processor. Tr. at 427:14-17 (Adams deposition excerpt).
192. The Peter Pan employee who processed the Advance of Funds Agreement requests by Seven Seas was not aware of any concerns at Peter Pan about the amount of debt Seven Seas owed Peter Pan. Tr. at 423:4-15; 425:12-16 (Roque deposition excerpt).
193. Peter Pan never called Seven Seas’ debt under the Advance of Funds Agreement. Tr. 389:25-390:6 (Weed deposition excerpt).
194. Seven Seas was in significant debt to Peter Pan from 2001 through 2007, with such debt amounting to \$4,463,256 as of December 31, 2001; \$8,473,450 as of December 31, 2002; \$7,157,946 as of December 31, 2003; \$8,479,599 as of December 31, 2004; \$8,632,150 as of December 31, 2005; \$6,281,613 as of March 31, 2006; and \$10,307,778 as of January 26, 2007. Agency Exh. 27.
195. The Advance of Funds Agreement does not contain a provision that gives Peter Pan any security interest in any of Seven Seas’ assets, stock or the M/V STELLAR SEA. Tr. at 1249:16-23; Resp. Exh. 82.

196. Peter Pan did retain a security interest in the fish products aboard the M/V STELLAR SEA. Resp. Exh. 82; Tr. at 1250:6-8.

197. The Advance of Funds Agreement contains a provision that specifically states: "Lender [Peter Pan] shall be granted no rights whatsoever to control the operation, management or processing activities of the Vessels, except as specifically provided for in 46 CFR Sec. 356.43." Resp. Exh. 82 (at Art. 6).

198. The Advance of Funds Agreement also specifically stated: "No failure by Lender to exercise, and no delay in exercising any right, power or remedy hereunder shall operate as a waiver thereof." Resp. Exh. 82 (at Art. 9.1).

H. The Second Advance of Funds Agreement of January 1, 2007

199. A second Advance of Funds Agreement was subsequently entered into between Peter Pan and Seven Seas on or about January 1, 2007. Agency Exh. 23.

200. NMFS informed MARAD about this Second Advance of Funds Agreement. Agency Exh. 32.

201. Seven Seas did not notify MARAD of the first Advance of Funds Agreement until MARAD's investigation in 2007. Tr. at 405:9-15 (Weed deposition excerpt).

202. According to Mr. Collier, Peter Pan is still owed approximately \$4.5 million under the Advance of Fund Agreements. Tr. at 1249:3-15.

203. Mr. Collier also expressed during the hearing that Peter Pan plans to enforce the terms of the Advance of Funds Agreement against Seven Seas when the assets (primarily the fishing permit of the F/V AJ, cash, and equity in Seven Seas) appreciates enough to retire the debt. Tr. at 1260:17-24; 1279:22-1280:13.

I. The Custom Processing Agreements between Peter Pan and Seven Seas

204. Seven Seas had two Custom Processing Agreements with Peter Pan that ran from 1992 to 2001 and 2001 to 2008 respectively. Agency Exhs. 97, 100.
205. Custom processing agreements that span such long terms are uncommon in the processing industry. Tr. at 386:9-13 (Weed deposition excerpt); Tr. at 534:1-2.
206. Mr. Koch, Peter Pan's Vice President of Finance, was not aware of any other long term processing agreements between Peter Pan and processing companies other than Seven Seas. Tr. at 435:9-13 (Koch deposition excerpt).
207. According to Mr. Greenwood, the Custom Processing Agreement was "in response to the American Seafoods Act [sic] and the separation of control of the vessel from Peter Pan Seafoods, or at least to clarify whether there was any control by Peter Pan Seafoods." Tr. at 331:10-13 (Greenwood deposition excerpt).
208. According to Mr. Collier, the Custom Processing Agreement required Peter Pan to make Seven Seas break even (i.e., "true up") on an annual basis. Tr. at 451:18-452:9 (Collier deposition excerpt).
209. Seven Seas and its subsidiary Stellar Sea, Inc. were completely dependent on the long term contract with Peter Pan for its economic viability. See Tr. at 1289:10-19 (Mr. Collier's testimony stating that Mr. Weed could not get enough business without Peter Pan's custom processing agreement).
210. Peter Pan would make Seven Seas "break even" for the cost of its processing for Peter Pan at the end of every fiscal year. Tr. at 385:19-386:3 (Weed deposition excerpt); 355:3-7 (Scott deposition excerpt).

211. The loss coverage paid by Peter Pan to Seven Seas in order to make Seven Seas break even exceeded the amount that Peter Pan would have owned to Seven Seas only for processing services rendered. Tr. at 384:16:22 (Weed deposition excerpt).

212. Maintaining this "true up" arrangement under the Custom Processing Agreement between Seven Seas and Peter Pan was necessary in order for Cypress to agree to purchase the M/V STELLAR SEA from FHB and bareboat charter the vessel back to Seven Seas. Agency Exh. 73 (handwritten notation to "Contingencies" paragraph).

J. Peter Pan's Loss Reimbursements to Seven Seas

213. Beginning in 1996, Seven Seas received annual loss reimbursements from Peter Pan. Tr. at 453:22-24 (Collier deposition excerpt); 431:20-432:5 (Koch deposition excerpt).

214. Sometime prior to June 1, 2001, Seven Seas received \$3 million in loss reimbursement from Peter Pan. Agency Exh. 11; Tr. at 431:7-20 (Koch deposition excerpt).

215. According to Mr. Weed, in the financial year ending in 2002, Seven Seas should have received \$1,739,921.50 in loss reimbursement from Peter Pan, although he was uncertain as to the exact amount received. Agency Exh. 35; Tr. at 381:17-382:3 (Weed deposition excerpt).

216. In the Financial Year ending March 26, 2004, Seven Seas received \$1,865,000 in loss reimbursements from Peter Pan. Agency Exh. 70.

217. Ms. Linda Scott, Seven Seas' bookkeeper, stated that for Financial Year ending on March 25, 2005, Seven Seas probably received \$1,768,000 in loss reimbursement from Peter Pan. Agency Exh. 35; Tr. at 355:18-357:5 (Scott deposition excerpt).

218. In the Financial Year ending March 31, 2006, Seven Seas received \$1,125,000 in loss reimbursement from Peter Pan. Agency Exh. 35; Tr. at 382:17-384:22 (Weed deposition excerpt); Agency Exh. 108 (Scott deposition at 110:13-111:3).
219. Mr. Koch, Vice President for Peter Pan, did not know where the obligation to “break even Seven Seas” came from. Tr. at 440:15-19 (Koch deposition excerpt).
220. Peter Pan did not have any loss coverage arrangements with any other company. Tr. at 439:20-24 (Koch deposition excerpt); 454:4-7 (Collier deposition excerpt).
221. Seven Seas’ Consolidated Financial Statements reflect annual losses by Seven Seas in 2002-2004 and in 2006. Agency Exh. 35; Tr. at 401:12-404:13 (Weed deposition excerpt).

K. Procurement of Seven Seas’ Insurance

222. Seven Seas and Peter Pan had separate insurance policies (from the same insurer) but went into the insurance market together and the insurance coordinator for Peter Pan helped procure insurance for Seven Seas (who did not have an insurance coordinator). Tr. at 406:17-407:3 (Stromberg deposition excerpt).
223. Peter Pan, Seven Seas, and Golden Alaska Seafoods purchased insurance as a group to save money on premiums. Tr. at 407:22-25 (Stromberg deposition excerpt); 413:9-414:23 (Maiers deposition excerpt).
224. Representatives of Peter Pan, Seven Seas and Golden Alaska Seafoods³⁰ would meet together with insurance brokers to discuss insurance strategy. Tr. at 407:15-408:7;

³⁰ Golden Alaska Seafoods is a fish processing company headquartered in Seattle, Washington, which owns an AFA pollock processing mothership. Golden Alaska was a Peter Pan subsidiary and was previously co-located with Seven Seas. See Findings of Fact below discussing Golden Alaska Seafoods.

410:22-411:13 (Stromberg deposition excerpt); 412:24-413:3; 415:13-417:22 (Maiers deposition excerpt)).

225. Mr. Stromberg, a Peter Pan employee, was the point of contact for Seven Seas' insurance matters, and received insurance related correspondence for Seven Seas.

Agency Exh. 58; Tr. at 406:17-407:12; 408:25-409:21 (Stromberg deposition excerpt).

226. In addition to Mr. Stromberg, Mr. Dale Schiffler, Vice President of Operations for Peter Pan, was copied in Seven Seas' insurance correspondence. Agency Exhs. 59, 60, 61, 62; Tr. at 409:7-21 (Stromberg deposition excerpt).

227. Seven Seas and Peter Pan had several mutual insurance policies during the period April 1, 2004 through April 1, 2005. Agency Exhs. 37-47.

228. Seven Seas, Peter Pan and Golden Alaska Seafood had some insurance policies written so that these policies covered the same events and all three companies were named as insureds or additional insureds on the policies. Agency Exhs. 37-46; Tr. at 409:24-410:19 (Stromberg deposition excerpt).

229. Peter Pan was the listed "manager" and Seven Seas as the member on Seven Seas' Protection and Indemnity Club insurance policy (i.e., marine insurance covering workers compensation for anything other than land-based operations). Agency Exh. 49; Tr. at 418:15-419:9 (Maiers deposition excerpt).

230. Some Seven Seas vehicles were insured under Peter Pan's automotive insurance policy with part of the total billed to Seven Seas. Agency Exh. 53; Tr. at 408:8-22; 411:15-412:13 (Stromberg deposition excerpt).

231. Seven Seas paid its insurance premiums through funds obtained from the Advance of Funds Agreement with Peter Pan. Agency Exh. 63.

232. Peter Pan did not have the formal responsibility to procure insurance for the M/V STELLAR SEA or Seven Seas directly. Tr. at 1250:9-19.

233. In several insurance policies, Peter Pan and Seven Seas were named as respective additional insured on the other's policies in order to cover risks to each company or their interests when doing business together (e.g., such as when Peter Pan's processed crab was aboard the M/V STELLAR SEA). Tr. at 1250:24-1251:16.

L. Seven Seas' Bank Account #3859519

234. All funds Seven Seas requested under the Advance of Funds Agreement were transferred by wire to Seven Seas' bank account #3859519. Agency Exh. 108 (Scott deposition at 55:7-11; 55:20-56:1).

235. The funds in Seven Seas account #3859519 were distributed to Seven Seas' subsidiaries. Agency Exh. 108 (Scott deposition at 60:22-61:3).

M. Seven Seas' Income from 2001-2006

236. Seven Seas reported taxable income for April 1, 2001 to March 29, 2002 of -\$1,832,305; for March 30, 2002 to March 28, 2004 of -\$447,782; for March 29, 2003 to March 26, 2004 of \$19,261; for March 27, 2004 to March 25, 2005 of -\$162,725; and for March 26, 2005 to March 31, 2006 of -\$70,571. Agency Exhs. 16-20, 112.

N. First Hawaiian Bank's Sale of the M/V STELLAR SEA to Cypress

237. Under the AFA's new vessel ownership requirements, all vessels that commercially fished or processed fish in United States waters had to be owned and controlled by a United States citizen to the extent of at least 75%. Agency Exh. 70 at attachment 15.

238. The vessel documentation requirements of the AFA required that First Hawaiian Bank (FHB), the owner of the M/V STELLAR SEA prior to October 2001, be owned by 75%

U.S. citizenship. FHB did not meet the required AFA citizenship standards. Therefore, FHB was required to sell the M/V STELLAR SEA in order to comply with the AFA. Agency Exh. 71.

239. Mr. Greenwood, who was identified by Cypress as a Peter Pan representative, was intimately involved in the transaction by which Cypress would purchase the M/V STELLAR SEA. Agency Exh. 71.

240. Mr. Greenwood outlined for Cypress Peter Pan's goals in the sale of the M/V STELLAR SEA from FHB to Cypress, which included that Peter Pan would like to have long term access to the M/V STELLAR SEA; reducing the charter cost for the vessel; and restructuring the chart to replace it with a custom processing agreement. Agency Exh. 71.

241. The M/V STELLAR SEA was sold to Cypress Leasing because Cypress met the AFA's ownership and control standards. Agency Exh. 71.

242. Cypress' analysis of the Seven Seas-Peter Pan relationship stated that for all practical purposes Seven Seas was part of Peter Pan. Agency Exh. 71.

243. Cypress considered Peter Pan and Nichiro as the primary credit for the purchase of the M/V STELLA SEA from FHB. Agency Exh. 72.

244. Seven Seas' renewal of the M/V STELLAR SEA's charter from Cypress in April 2002 was delayed due to the fact that Mr. Collier, the President of Peter Pan, was out of the country and would not be able to deal with that issue until his return. Agency Exh. 75.

245. Cypress Leasing subsequently used (i.e., leveraged) its ownership in the M/V STELLAR SEA to obtain a non-recourse loan from Fuyo bank on the basis of Nichiro's guaranty of Seven Seas' lease payments. Agency Exh. 76.

246. Fuyo based its approval of the non-recourse loan to Cypress on the financial backing of Seven Seas by Peter Pan and Nichiro. Agency Exh. 76 (indicating that Seven Seas “was regarded as effectively an affiliate of Peter Pan”).

247. Fuyo’s analysis of the Seven Seas-Peter Pan business relationship stated that Seven Seas “is practically the same entity as Peter Pan.” Agency Exh. 76.

O. Golden Alaska Seafoods

248. As of August 2010, Peter Pan owned 25% of Golden Alaska Seafoods. Tr. at 445:24-25 (Collier deposition excerpt).

249. Prior to 2001, Seven Seas and Golden Alaska Seafoods were co-located in the same office. Tr. at 379:3-12 (Weed deposition excerpt).

250. As Mr. Weed understood it, Seven Seas obtained separate offices because of “restructuring” caused by MARAD’s concerns over “control” issues. Tr. at 379:13-380:4 (Weed deposition excerpt).

251. Mr. Greenwood understood that the restructuring of Seven Seas that occurred in 2001 was because of MARAD’s concerns about Peter Pan having too much control over Seven Seas and the vessel M/V STELLAR SEA. Tr. at 330:2-13; 497:11-498:11 (Greenwood deposition excerpt).

252. Ms. Karen Conrad served as a director for Seven Seas. Agency Exh. 77.

253. During her time on the Seven Seas Board of Directors, annual meetings consisted of a lunch between Mr. Weed and Ms. Conrad and Ms. Conrad filling out the form that said a meeting was held on a given date, with the directors signing the form. Tr. at 365:12-366:9 (Conrad deposition excerpt).

254. Ms. Conrad also served as the human resources director for Golden Alaska Seafood and had 50% of her annual income paid by Golden Alaska Seafood. Tr. at 367:9-17 (Conrad deposition excerpt).

255. Ms. Conrad maintained an office at Seven Seas but her phone was connected to the Golden Alaska switchboard. Tr. at 367:20-368:7; 268:15-17 (Conrad deposition excerpt).

P. Seven Seas Purchase of the F/V AJ

256. Peter Pan personnel advised Mr. Weed of the opportunity to purchase the F/V AJ. Tr. at 393:5-18 (Weed deposition excerpt); 455:12-20 (Collier deposition excerpt).

257. Peter Pan negotiated the deal between the F/V AJ's owner and Seven Seas. Tr. at 456:7-13 (Collier deposition excerpt).

258. In consideration for Nichiro/Peter Pan's financing the purchase of the F/V AJ, Seven Seas agreed to transfer the pollock quota associated with the F/V AJ from the previous co-operative to the Peter Pan pollock co-operative for fifteen years. Agency Exh. 78; Tr. at 455:6-11 (Collier deposition excerpt).

259. Nichiro provided the funds necessary for Seven Seas to purchase the F/V AJ. Tr. at 394:4-9 (Weed deposition excerpt).

260. Seven Seas posted no security for the \$4.6 million it borrowed to purchase the F/V AJ. Agency Exh. 108 (Weed deposition at 190:18-20).

261. Peter Pan supplied the security for Nichiro's \$4.6 million loan to Seven Seas for the purchase of the F/V AJ. Tr. at 394:10-13 (Weed deposition excerpt).

262. Seven Seas purchased the F/V AJ sometime prior to 2004. Tr. at 1245:12-1247:25.

263. The purchase of the F/V AJ also included its pollock quota. Tr. at 1246:17-21.

264. MARAD reviewed and approved the financing transaction between Seven Seas and Peter Pan for the purchase of the F/V AJ. Tr. at 1247:22-1248:3.

265. Funds provided under the Advance of Funds Agreement were used to pay for the loan payments to Nichiro for the F/V AJ's loan. Agency Exh. 81; Tr. at 395:6-397:16 (Weed deposition excerpt).

266. The \$4.6 million debt to Nichiro arising from the purchase of the F/V AJ was additional debt of Seven Seas, separate from the debt it owed Peter Pan under the Advance of Funds Agreement. Tr. at 430:4-8 (Adams deposition excerpt).

Q. The M/V BLUE WAVE

267. Peter Pan paid the expenses accrued by the M/V BLUE WAVE while it sat idle during the 2001 fishing season. Agency Exh. 10; Tr. at 372:17-373:3 (Weed deposition excerpt); 336:5-337:10 (Greenwood deposition excerpt).

268. The cost to tie up the M/V BLUE WAVE was approximately \$500,000 annually. Agency Exh. 10.

269. Peter Pan paid all costs of tying up the M/V BLUE WAVE in order to "break even" Seven Seas at the end of the fiscal year. Tr. at 454:16-24 (Collier deposition excerpt); 442:22-443:7 (Koch deposition excerpt).

270. Mr. Weed discussed the sale of the M/V BLUE WAVE with Peter Pan's Vice President for Operations, Mr. Clyde Sterling, and/or Mr. Collier. Tr. at 398:1-11 (Weed deposition excerpt).

271. The proceeds from the sale of the M/V BLUE WAVE went to Peter Pan to pay down some of Seven Seas' accumulated debt. Tr. at 398:12-15 (Weed deposition excerpt).

272. Mr. Koch, Peter Pan's Vice President of Finance, was unaware that the proceeds from the sale of the M/V BLUE WAVE were paid by Seven Seas to Peter Pan. Tr. at 443:7-11 (Koch deposition excerpt).

R. 2006 Fire on the M/V STELLAR SEA and MARAD's Review of the Advance of Funds Agreement

273. The M/V STELLAR SEA suffered a severe fire in 2006. Peter Pan paid for the repairs to the vessel because Seven Seas did not have sufficient funds for the repairs. Agency Exh. 86; Tr. at 358:3-13 (Scott deposition excerpt); 421:15-22 (Maiers deposition excerpt).

274. On May 29, 2001, MARAD approved Seven Seas' Custom Processing Agreement with Peter Pan but informed Seven Seas that MARAD must be notified if Peter Pan or Nichiro supplied any funding to Seven Seas beyond the guarantee of fees that was contained in the Custom Processing Agreement. Agency Exh. 28.

275. Mr. Weed, as 100% owner of the F/V AJ and 100% owner of Seven Seas, was advised by MARAD on October 2, 2003 to review MARAD's revised regulations (published on February 4, 2003), which amended MARAD's reporting requirements for citizenship affidavits in light of the American Fisheries Act. Agency Exh. 31.

276. MARAD's revised regulations, published on February 4, 2003, required that loans to applicants from foreign-owned entities must be reported in the applicant's affidavits for vessel citizenship. 46 C.F.R. § 365.13(a)(5).

277. On December 21, 2007, after reviewing the Advance of Funds Agreement, MARAD found, "the level of non-citizen participation reflected in the unsecured lending is evidence which suggests the possible existence of impermissible non-citizen control over the fishing industry vessel STELLAR SEA." Agency Exh. 33.

278. On June 8, 2008, MARAD required Seven Seas to enter into a debt restructuring agreement with Peter Pan. Agency Exh. 34.

279. Seven Seas eventually did not renew the charter on the M/V STELLAR SEA (which expired on September 30, 2008). Tr. at 393:2-4 (Weed deposition excerpt); Agency Exh. 87.

280. By the end of February 2009, Seven Seas had only one employee, Mr. Weed. Tr. at 401:7-12 (Weed deposition excerpt).

281. On March 1, 2009, Mr. Weed began working for Golden Alaska Seafoods. Tr. at 380:9-13 (Weed deposition excerpt).

V. Analysis

A. Peter Pan's Control over Seven Seas

Agency counsel focused on five areas of alleged control under 50 C.F.R. § 679.2's "affiliation" definition. See Agency Post-Hearing Memorandum at 4. The following regulatory definitions of control for affiliation purposes provides: (1) the authority to direct the business of the entity, which owns the processor; (2) the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a processor; (3) absorbs all the costs and normal business risks associated with the ownership and operation of a processor; (4) has the responsibility to procure insurance on the processor, or assumes any liability in excess of the insurance coverage; and (5) has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in the processor. Id. (paraphrasing some of Section 679.2's elements indicating "control").

1. Alleged Indicia of Control

Agency counsel pointed to various alleged indicia of control over Seven Seas by Peter Pan. Id. at 7-11. These indicia included the following during the charged period:

- The overwhelming majority of Seven Seas' processing was done for Peter Pan (100% in 2004 and 92% in 2005). See Agency Exh. 21. Agency counsel asserted that Seven Seas was not financially viable without Peter Pan's support.
- Seven Seas reported negative taxable income for the years 2002-2005, except in 2003 (reported income of \$19,261). See Agency Exhs. 16-19.
- Seven Seas' working capital position (i.e., current assets minus liabilities – calculated from Seven Seas' filed tax returns) was negative (-\$8,446,775 in FY 2003 and -\$8,451,587 for FY 2004). See Agency Exh. 70 at p. 6.
- Seven Seas owed Peter Pan significant sums under the Advance of Funds Agreement, ranging from \$7,717,946 as of December 30, 2003 to \$8,632,150 as of December 31, 2005. See Agency Exh. 27.
- During the charged period, Seven Seas received a total of \$11,400,000 via wire transfers from Peter Pan. See Agency Exh. 25.
- This money represented approximately 98% of the amount of funds deposited into a particular Bank of America account controlled by Seven Seas. See Agency Exh. 63.
- That Bank of America account was the primary, if not exclusive, source of Seven Seas' operating funds and its subsidiaries Stellar Seafoods, Inc. and F/V AJ LLC. See Scott Depo. at 60:22-61:3; Agency Exh. 65.
- Peter Pan provided annual "true ups" or loss reimbursements to Seven Seas in the amounts of \$1,865,000 for financial year ending March 26, 2004, \$1,768,000 for

financial year ending March 25, 2005, and \$1,125,000 for financial year ending March 26, 2006. See Agency Exhs. 35 at p. SSMAR000565, SSMAR000567; 70, Attachment 39.

- During the charged period, Seven Seas provided its quarterly consolidated financial statements to Peter Pan. See Scott Depo. at 91:21-92:3.
- On May 27, 2004, Seven Seas' financial condition was discussed at Peter Pan's Board of Directors meeting, even though no Seven Seas personnel were at this meeting and Peter Pan held no shares in Seven Seas. Agency Exh. 15.
- Mr. Mark Weed's salary as president of Seven Seas was his only source of income during the charged period. Weed deposition at 70:14-16.
- Mr. Weed worked directing and indirectly for Peter Pan for approximately 22 years prior to purchasing 100% of Seven Seas' shares from Mr. Gary Greenwood. Weed deposition at 14:7-20.
- Ms. Karen Conrad, an officer and the second director of Seven Seas, concurrently worked 50% of the time for Golden Alaska Seafoods (receiving 50% of her salary from Golden Alaska Seafoods), which was primarily owned by Peter Pan. See Agency Exhs. 18, 19, 67, 70; Conrad deposition at 30:25-31:8; Collier deposition 13:7.

Peter Pan correctly points out that none of these alleged indicia of control are explicitly listed in the AFA or the Agency's regulations. Peter Pan's Reply at 6-11. Indeed, Peter Pan argues that these facts do not indicate control, but rather an ordinary business relationship between two separate companies. For example, Peter Pan was obligated to provide funds to Seven Seas under the Advance of Funds Agreement and many of the Agency's asserted indicia

of control flow naturally from the terms of that agreement. Agency counsel argues, in contrast, that the analysis should be guided by a concept of one corporation's dominance over another that "may spring as readily from subtle or unexercised power". Agency Post-Hearing Memorandum at 7 (citing North American Co. v. Securities and Exchange Comm., 327 U.S. 686, 692 (1946)).³¹

Several of these facts individually are of little direct import in terms of evaluating the degree of control Peter Pan exercised over Seven Seas during the charged period. However, taken as a whole, these facts point to a degree of control by Peter Pan such that Seven Seas should be considered an affiliate of Peter Pan for the limited purposes of the AFA and the Agency's implementing regulations.

Clearly, Peter Pan and Seven Seas structured their business relationship in a rational manner in an attempt to take every perceived lawful advantage of the state of the law as they understood it. There is no evidence in the record of a knowing, willful disregard for the law's requirements. Nevertheless, just because Peter Pan and Seven Seas observed all proper corporate formalities does not equate with compliance with the AFA, Congressional intent, or the Agency's regulations.

Indeed, this is not a "corporate control" case under Washington state law where the Agency is seeking to "pierce the corporate veil" and hold Peter Pan liable for acts committed by Seven Seas under that rubric. Rather, this is a case dealing with the AFA and the Agency's regulations that define key terms like "affiliation" and "control" for purposes of enforcing the statute's mandates. As discussed earlier, the AFA was meant to ensure that AFA processors

³¹ The general perspective is valid and applicable here that one should look beyond the formal relationships between the companies at issue (given the breadth of the Agency's regulations). But the persuasive force of this cited case is lessened by the fact that the Supreme Court relied in no small part on the fact that not only were there historical ties between the companies in question, but also such ties were combined with strategic holdings in stock, which is not present here during the charged period.

were limited in their participation in non-pollock fisheries. A narrow construction of the statute by which an actual, tangible ownership interest is required before finding “affiliation” and “control” for AFA purposes runs counter to that intent. Respondents’ arguments requiring such interest before finding liability under the AFA and the Agency’s regulations is therefore rejected.

Examining each of the particular regulatory outlines of “control” for affiliation purposes under 50 C.F.R. § 679.2 in light of the record evidence leads to the following conclusions with respect to each articulated control definition.³²

i. Peter Pan did not “[c]ontrol[.] 10 percent or more of the voting stock of another corporation or business concern” because Peter Pan had divested itself of the stock ownership in Seven Seas in October 2001. See Finding of Fact No. 12. Because of MARAD’s directives in light of the AFA and that agency’s concerns about foreign ownership and control issues of the M/V STELLAR SEA, Peter Pan and Nichiro divested themselves of all stock ownership in Seven Seas. See Finding of Fact No. 117. Because neither Peter Pan nor Nichiro held any stock ownership in Seven Seas during the charged period, this regulatory factor is inapplicable.

ii. Peter Pan did not have “the authority to direct the business of the entity which owns the fishing vessel or processor” because “[t]he authority to ‘direct the business of the entity’ does not include the right to simply participate in the direction of the business activities of an entity which owns a fishing vessel or processor”. Clearly, Peter Pan was heavily involved in and reasonably had the ability to direct the business of Seven Seas prior to the charged period,

³² Peter Pan correctly points out that Agency counsel did not direct its arguments in its Post-Hearing Brief to any definite analysis or discussion of the Agency’s own regulations providing the outlines of what “control” means under 50 C.F.R. § 679.2. See Peter Pan’s Post-Hearing Reply at 5-6. Indeed, Agency counsel argues various “indicia of control” generally, but did highlight five of the regulatory examples of “control”. See Agency Post-Hearing Brief at 4 (presenting ii), v), vi), vii), and ix) as particularly applicable). However helpful it might have been to the undersigned to have the Agency’s explicit and detailed position on which of the factors listed under the regulations applied (and what particular pieces of evidence supported each claimed regulatory outline of “control”) and which ones did not, the undersigned has an independent duty to performing such analysis.

particularly when Peter Pan and its then-President owned the majority in Seven Seas stock. See Finding of Fact Nos. 125-138.

However, the question becomes whether Peter Pan had any such authority during the charged period. Seven Seas, through its subsidiary, Stellar Seafoods, Inc., provided custom processing services to Peter Pan. Finding of Fact Nos. 140-147.³³ Indeed, Peter Pan and Seven Seas and the M/V STELLAR SEA's owner entered into various contractual relationships that were effective during the charged period. See Finding of Fact No. 147. Key among these was the Advance of Funds Agreement that essentially provided the sole source of funds for Seven Seas' operations during the charged period. See Finding of Fact Nos. 154-198.

Under these contractual arrangements and the Advance of Funds Agreement, Peter Pan was deeply involved and participated in Seven Seas' business activities. The question is whether such participation rose to a level sufficient to trigger the regulatory prohibition of Peter Pan having an impermissible ability to direct Seven Seas' business. Undoubtedly, Peter Pan – as Seven Seas' sole source of funding and primary creditor – had significantly more influence over Seven Seas than if the funding and creditor issues were not present. However, the Agency's regulations carefully exclude the mere right of participation – so “authority to direct the business” must necessarily encompass something greater than such participation.

Under this regulatory prohibition, the Agency must demonstrate some basis by which Peter Pan had the “right or permission to act legally” on Seven Seas' behalf in directing Seven Seas' business to run afoul of this regulatory prohibition. See Black's Law Dictionary (9th ed.

³³ As Peter Pan's President described the Custom Processing Agreement: “We did not renew our custom processing agreement with Stellar Sea, thus Mark Weed could not get enough business without Peter Pan Seafoods and he allowed the [M/V STELLAR SEA] to return to the leasing company.” See Tr. at 1289:10-19. Peter Pan's counsel also accurately characterized the agreement as one that provided if Seven Seas chartered the M/V STELLAR SEA and made it available to Peter Pan to process Peter Pan's crab, Peter Pan agreed to pay Seven Seas for such services and to “ensure the financial viability of [Seven Seas'] operation should there be bad years, for example, through the life of the charter.” Tr. at 20:17-23.

2009) (defining authority). “Authority” thus does not equal “power” to direct the business. While Peter Pan’s control over Seven Seas was substantial due to it being the sole source of funding for Seven Seas – such control cannot be fairly construed as Peter Pan’s “authority to direct” Seven Seas’ business. Participation in such business – even as extensive as Peter Pan’s was – also cannot serve as the basis for liability due to the explicit excision by Agency regulations of such participation as not equating with the “authority” to direct the business.

iii. Peter Pan did not have “the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor.” Peter Pan could have called in the debt Seven Seas owed under the Advance of Funds Agreement at any time or enforce any provisions of the Advance of Funds Agreement that would have severely impacted Seven Seas’ business. See Finding of Fact Nos. 154-198. Similar to the analysis contained in ii) above, such indirect power, however significant, does not lead to the conclusion that Peter Pan had legal authority to limit the actions of or to replace Seven Seas chief executive officer, any of its board of directors or any management personnel.

Peter Pan could, under the explicit terms of the Advance of Funds Agreement, limit Seven Seas (and presumably its chief executive officer) from seeking financing from any other source or creating any new liens in Seven Seas’ property. See Finding of Fact Nos. 177-188. Surely, the ability of one business entity (i.e., Peter Pan), which was lending a significant amount of money to another (i.e., Seven Seas), to protect its creditor interests by limiting the ability of the debtor to incur additional debt is not fairly encompassed within this part of the Agency’s

regulations. Such arrangements are commonplace within the creditor/debtor environment and do not indicate “control” for this particular regulatory definition.

iv. Peter Pan did not have “the authority to direct the transfer, operation or manning” of the M/V STELLAR SEA and/or Seven Seas, especially as the Agency limited this aspect of control as not including the “right to simply participate in such activities.” No record evidence exists that Peter Pan had any such formal authority. Indeed, the Advance of Funds Agreement contained a provision disclaiming any right by Peter Pan to “control the operation, management or processing activities” of the M/V STELLAR SEA except as provided for in 46 C.F.R. § 356.43. See Finding of Fact No. 197. The undersigned need not reach the question of whether Peter Pan’s possible de facto authority to direct the operations or manning of M/V STELLAR SEA – as the Agency presented no such evidence. Indeed, Respondents presented credible contrary evidence. See Findings of Fact Nos. 27, 151.

v. Peter Pan did not have “the authority to control the management of or to be a controlling factor in” Seven Seas that held “10 percent or greater interest in a fishing vessel or processor” (i.e., Stellar Seafoods, Inc.). Similar to factor number ii. above, the “authority” to control the management of or to be a “controlling factor in” Seven Seas must reside in some legal basis to exercise such formal authority. Nothing in the agreements between Peter Pan and Seven Seas provided any such formal authority for Peter Pan to control Seven Seas’ management or to be a “controlling factor” in Seven Seas. Even if read more broadly to separate “controlling factor” from “legal authority” – it is not clear what “controlling factor” means in this context. Was Peter Pan – as Seven Seas’ primary creditor – a “controlling factor” in Seven Seas management decisions? Surely, any company that owes a significant debt to another will consider the relationship between itself and its creditor in making management decisions that

might impact its creditor, but the undersigned will not read this particular regulatory definition of “control” so broadly as to encompass such creditor interest as a “controlling factor” for Seven Seas’ management.

vi. Peter Pan functionally “absorb[ed] all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor”, i.e., Seven Seas. First, given the Advance of Funds Agreement and the Custom Processing Agreement, Seven Seas was under virtually no risk for its processing activities because Peter Pan would “true up” Seven Seas for its operational costs at the conclusion of each fishing season. Seven Seas was not a viable, independent economic entity without such agreements from Peter Pan. The transfers of funds from Peter Pan had very little to do with the actual processing Seven Seas performed, as Peter Pan essentially made sure that Seven Seas was a break even enterprise operationally no matter what the overall market conditions were or how much Seven Seas’ operational costs were during the period that the agreements were effective.

vii. Peter Pan was involved in procuring insurance for Seven Seas but did not have the formal responsibility to procure such insurance on Seven Seas’ behalf and so this element of control under the Agency’s regulations does not pertain.

Agency counsel argued that Peter Pan essentially was responsible for procuring insurance for Seven Seas. See Agency Post-Hearing Memorandum at 22-23. Agency counsel bolters this claim by pointing out that Peter Pan’s insurance coordinator during the charged period, Mr. Stromberg, handled the placement of insurance for Peter Pan, Golden Alaska Seafoods (a Peter Pan subsidiary) and Seven Seas. Agency Exh. 58. Furthermore, the record indicates that Mr. Stromberg and/or a Peter Pan executive were routinely copied on correspondence addressed to Seven Seas’ president, Mr. Weed, concerning Seven Seas’ insurance matters. See Agency Exhs.

57 (indicating that insurance summaries provided “are intended only as an outline for the insurance coverage arranged by Marsh, Inc. for Peter Pan Seafoods, Inc.”), 59-61.

Under 50 C.F.R. § 679.2, “control” is indicated where an entity “[h]as the responsibility to procure insurance on the fishing vessel or processor, or assumes any liability in excess of insurance coverage.” The key consideration to determine is whether this indicia of control existed and whether Peter Pan had the responsibility to procure Seven Seas’ insurance. Peter Pan argues that Respondents merely entered the insurance market together in order to obtain better rates as a group.

Peter Pan is correct that it makes little sense for the Agency to allege that Peter Pan had the responsibility to procure Seven Seas’ insurance merely based on the fact that Seven Seas paid for its insurance via funds provided under the Advance of Funds Agreement. Seven Seas’ source of funds used to pay for its own insurance premiums is of little probative value as to whether Peter Pan had the responsibility to procure such insurance. Agency counsel’s argument (see Agency Post-Hearing Memorandum at 23) that the most important factor in analyzing this indicia of control is that Seven Seas paid for its insurance premiums from funds provided by Peter Pan must therefore be rejected. The fact that Seven Seas used funds obtained under the Advance of Funds Agreement for virtually all of its operating costs is not sufficient for a finding of control.

Also problematic is the Agency’s insistence that there is something untoward in Respondents listing each other as co-insureds or additional insureds on their respective policies. See Agency Post-Hearing Memorandum at 23 (the language in the policies “demonstrates the referenced policies were not merely two separate policies held by two independent companies that covered the same potential event [but] were intentionally coordinated to cover all

policy holders as if they were on one single policy”). Given the nature of the business transactions between Respondents (i.e., crab that belonged to Peter Pan from its cooperative was being processed aboard a Seven Seas’ vessel), such co-insurance makes perfect business sense and is in no way unusual or indicative that Peter Pan was responsible for procuring Seven Seas’ insurance. Companies routinely list other entities and individuals on insurance policies when exposure to loss is possible due to such coordinated activities. While broad, the Agency’s regulations were not intended to make violations out of such common-place, routine business practices.

However, Peter Pan neglects to fully account for the practical impact of how Seven Seas’ insurance was obtained. Could Seven Seas have procured its own insurance without Peter Pan’s involvement? Seven Seas did not have its own insurance coordinator (relying on Peter Pan’s insurance coordinator) and also had some of its vehicles insured by Peter Pan. This is a somewhat close call but the undersigned will not rely on the fact of Peter Pan’s involvement (though undoubtedly significant) in obtaining insurance for Seven Seas as indicating control by being responsible for procuring such insurance.

viii. This case was not about Peter Pan’s “authority to control a fishery cooperative” and so that element of Section 679.2 is inapplicable.

ix. Peter Pan had the ability through any other means whatsoever to control the entity (i.e., Seven Seas) that held a 10 percent or greater interest in a fishing vessel or processor (i.e., Stellar Seafoods, Inc., the processor. Particularly in light of the Agency’s very broad definition of what “control” means for determining affiliated entities under the AFA, these indicia of control provide evidence that Peter Pan had “the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor.” 50

C.F.R. § 679.2 (emphasis added). The indicia of control given above – while not explicitly mentioned in the regulations – can fairly be encompassed within the “any other means whatsoever” language Section 679.2 provides.

Without Peter Pan’s continued support, Seven Seas almost certainly would not have been a viable enterprise during the charged period, as the record evidence demonstrates.³⁴ To be clear, there is nothing untoward from a formal corporate or business contract perspective in the Peter Pan/Seven Seas relationship.³⁵ Compliance with the AFA and Agency regulations is another matter and the significant amount of debt Seven Seas owed Peter Pan resulted in unlawful control by Peter Pan over Seven Seas.

Furthermore, contrary to Peter Pan’s arguments, the question is not whether Peter Pan owned or controlled the M/V STELLAR SEA but whether Peter Pan was affiliated with Seven Seas – a processor. The ownership of the M/V STELLAR SEA is not therefore the focus of this inquiry. Rather, the record evidence must be examined to evaluate the possible control of a particular non-AFA processor (i.e., Seven Seas) by Peter Pan to determine whether Peter Pan unlawfully participated in crab processing through its affiliation with that entity. Reviewing all

³⁴ See, e.g., Peter Pan’s President statements concerning the effect of Peter Pan’s failure to renew the Custom Processing Agreement with Seven Seas. Tr. at 1289:10-19.

³⁵ Agency counsel also spent a great deal of time in briefing and in submissions of evidence regarding the Peter Pan/Seven Seas business relationship before and after the charged period. See, e.g., Agency Post-Hearing Memorandum at 11-17. Peter Pan objected to the use and consideration of any such material and evidence outside the charged period. Indeed, the relationship between Respondents changed from the time before the charged period to what it was during and after the charged period in no small part as a reaction to the AFA’s passage and the involvement of MARAD in scrutinizing the M/V STELLAR SEA’s ownership. However, while the focus must necessarily be on Respondents’ relationship and conduct during the charged period in terms of establishing the violation, consideration of the entities’ relationship outside of that charged period provides texture and context to the overall business relationships and clarifies how Respondents’ operated during the charged period. Nothing formally precludes the undersigned from taking note of and considering such evidence to inform this Decision and Order. Even in the criminal context where procedural protections are necessarily greater than in these proceedings, consideration of evidence of conduct outside the charged period is not precluded where the material presented at trial was not so at variance with the indictment that substantial prejudice to the defendant resulted. See, e.g., United States v. Emor, 573 F.3d 778, 786-787 (C.A.D.C. 2009). Given the extensive prehearing discovery in this case, Respondents knew that the Agency intended to introduce evidence of conduct both prior to and after the charged period to bolster its case and provide context as to the parties’ relationship. Respondents had every opportunity to refute and/or argue about the impact, if any, such evidence should have on establishing the fact of violation at issue.

the record evidence clearly demonstrates that Seven Seas and Peter Pan were so affiliated through Peter Pan's financial backing of Seven Seas through the various agreements between the two companies.

2. The Advance of Funds Agreement

On March 19, 2002, Peter Pan and Seven Seas entered into an Agreement for Advance of Funds (Advance of Funds Agreement).³⁶ See Agency Exh. 22. According to the Recitals, the Advance of Funds Agreement was entered into because the borrowers had entered into Custom Processing Agreements with Peter Pan, had previously had difficulty obtaining bank financing and Peter Pan wanted to ensure, in part, that the M/V STELLAR SEA was properly outfitted and maintained to perform the custom processing agreement. Id. at 1.

Agency counsel alleges that the parties ignored several provisions of the Advance of Funds Agreement and that it amounted to "nothing more than a 'fig leaf' to cover Peter Pan's unlimited funding of all of Seven Seas' operating expenses." Agency Post-Hearing Brief at 21. For example, Agency counsel argues that the Advance of Funds Agreement was intended by the parties to ensure that Seven Seas' obligations under the custom processing agreements with Peter Pan (with respect to the M/V STELLAR SEA and the M/V BLUE WAVE) were met. However the funds from the agreement were used to make loan payments for another vessel – the F/V AJ. Id. at 18; see Agency Exh. 80. The Advance of Funds Agreement contained an explicit provision providing that the "advances" would be used "exclusively for expenditures necessary to provide services under the custom processing agreements between the parties." See Advance of Funds Agreement at Section 5.1. Nevertheless, Seven Seas used the funds Peter Pan provided for all its costs – not those necessarily related to the custom processing agreements. See Agency

³⁶ On Seven Seas' part, the borrowers included Seven Seas, Stellar Seafoods, Inc. and Blue Wave Seafoods, Inc. Agency Exh. 22 at 1.

Exh. 108 (Weed deposition at p. 109:9-10 (stating, “I can’t think of a cost off the top of my head that would not be covered.”)).

Agency counsel also points out that the parties extended the Advance of Funds Agreement without providing a written extension in violation of Section 2.1 of that agreement. Agency Post-Hearing Brief at 18. Seven Seas also allegedly failed to provide a written notice of borrowing indicating the use of the funds borrowed under the agreement, contrary to Section 2.2 of that agreement. *Id.* at 19; Agency Exhs. 24, 108 (Adams deposition at p. 16:5-9).

Interest under the Advance of Funds Agreement was to accrue and be payable on a monthly basis under Section 2.3 of the agreement, but Peter Pan and Seven Seas had an understanding that the annual interest would be capped at \$200,000 per year no matter what the outstanding balance of loans under the agreement. *See* Agency Exh. 27 at SSMAR-000430 (“As of June 2007 Seven Seas has paid a total of \$180,863.70. Based on a \$200,000 contract agreement for interest per fiscal year, Seven Seas still has a balance of \$19,136.30 to be paid which is reflected on the July statement.”); Agency Exh. 108 (Scott deposition at p. 86:2-15; Weed deposition at 170:15-25 (reflecting that the interest cap “had something to do with the fact that they didn’t want to charge me more interest if they were just having to pay me back later for operating expenses.”)).

Furthermore, Seven Seas was obligated under Section 2.4 of the Advance of Funds Agreement to repay all outstanding interest and principal at the time of settlement for each fishing season, “but in no event later than ninety (90) days after the end of each calendar year”. But Seven Seas never timely paid the outstanding balance back. *See* Agency Exh. 108 (Weed deposition at p. 141:18-22; Koch deposition at p. 61:13 – 62:5); *see also* Advance of Funds

Agreement at Section 5.2 (borrowers under affirmative covenant to pay all principle and interest on the advances in accordance with the agreement's terms).

Under Section 2.8 of the agreement, Peter Pan retained sole discretion to continue providing funds to Seven Seas under the Agreement, which Agency counsel argues is further indication of Peter Pan's control over Seven Seas. See Agency Post-Hearing Brief at 19.

As a legal document, there is nothing untoward about the Advance of Funds Agreement. Indeed, many of the provisions highlighted by Agency counsel are common elements to any lending agreement between two sophisticated corporate entities: From a formal perspective, nothing in particular about these provisions necessarily indicates anything other than a legally structured business relationship between Respondents.

The undersigned agrees with Peter Pan that the Advance of Funds Agreement clearly did not contain any provision giving Peter Pan formal corporate control over the "interest" of Seven Seas – e.g., no control over Seven Seas stock or other legal or equitable share in the ownership interests of Seven Seas. See Peter Pan Post-Hearing Brief at 25-26. But the Agency's regulations are not so limited as to require the ownership or control of such legal interest. As discussed in this Initial Decision and Order, the regulations implementing relevant portions of the AFA indicate that the focus was centered on ownership of a 10 percent or greater interest in the other, exertion of a 10 percent or greater control over the other, or having the power to exert 10 percent or greater control over the other. See 67 Fed. Reg. 79692 at 79705, 2002 WL 31881766 (December 30, 2002). It is not, as Peter Pan contends, necessary for there to be a controlling interest that "the evidence must show near-total subservience or abdication on the part of the actual owner of all the stock in Seven Seas." Peter Pan Post-Hearing Brief at 14.

Respondents' activities under the Advance of Funds Agreement point toward Peter Pan's control of Seven Seas under the broad rubric of the Agency's regulations and the AFA. Peter Pan clearly did not enforce specific provisions of the agreement as highlighted by Agency counsel. Such action is not legally questionable – i.e., this proceeding is not about the enforceability of the Advance of Funds Agreement or what Peter Pan did or did not do under its provisions with respect to Seven Seas. See, e.g., Advance of Funds Agreement at Section 9.1 (no waiver clause). Peter Pan's decision not to strictly enforce the Advance of Funds Agreement's terms might very well have made good business sense in terms of allowing Seven Seas to maintain operations. See Peter Pan Reply at 16.

Contrary to Peter Pan's arguments (see id.), however, the question is not whether the Advance of Funds Agreement is enforceable, but rather whether the actual business relationship between Respondents constituted impermissible control of Seven Seas by Peter Pan. The undersigned is not tasked with second-guessing such business decisions but is required to examine the practical effect of such decisions on the Peter Pan/Seven Seas relationship in terms of the AFA and the Agency's regulations.

Even the modification of the agreement without observing written formalities is not the subject of scrutiny – at least in terms of evaluating the legal enforceability of such modifications. See, e.g., Peter Pan Reply at 16 (arguing that under Washington law, a written contract may be modified by the mutual consent of the parties and additional consideration). Rather, the focus must remain on what the parties did through the Advance of Funds Agreement and all such unwritten modifications in terms of indicating control of Seven Seas by Peter Pan.

Providing the sole source of funding to Seven Seas under terms that from a practical perspective precluded Seven Seas from gaining any other source of funding (even assuming

Seven Seas could get such funding from another source)³⁷ leads to Peter Pan's control of the lifeblood of Seven Seas as an independent corporate entity for AFA purposes. In this instance, the debt owed by Seven Seas to Peter Pan amounts to millions of dollars and unquestionably allowed Peter Pan through this means "to control the entity that holds 10 percent or greater interest in a fishing vessel or processor." 50 C.F.R. § 679.2 (definition of "Affiliation" at (3)(ix)). Peter Pan was able to use the processing capacity of Seven Seas (i.e, the M/V STELLAR SEA) to expand the amount of crab it processed to beyond the crab caps it was assigned. This activity is a circumvention of the AFA restrictions on AFA crab processors (like Peter Pan) that Congress intended to prevent and represents a violation of the AFA and the Agency's implementing regulations.

3. The Agency's Expert – Mr. Gerald Hellerman

Prior to the hearing, the undersigned overruled Respondents' objections concerning the admission of the Agency's proposed expert – Mr. Gerald Hellerman. See Order Denying Motions Objecting to Agency Witnesses Gerald Hellerman and Brent Pristas and Peter Pan Seafoods, Inc.'s Witness Steven Hughes (October 22, 2010).

During the hearing Mr. Hellerman testified at the hearing and afterwards Peter Pan objected to his testimony, using similar arguments raised in its prehearing objections. See Peter Pan's Post-Hearing Memorandum at 19-20, 27; Reply at 20-21. Mr. Hellerman was offered for the purpose of examining Respondents' business relationships and general measures of corporate control. Mr. Hellerman need not be an expert in either the fisheries industry or the particular business Respondents' conducted to provide insight into how the financial arrangements between

³⁷ See Advance of Funds Agreement at Section 6.2 (any additional liens by Seven Seas required disclosure to and approval from Peter Pan).

Peter Pan and Sevens Seas worked. Mr. Hellerman's testimony was appropriately admitted during the hearing and was given consideration when formulating this Decision and Order.³⁸

4. MARAD's Examination of the Peter Pan/Seven Seas Relationship

MARAD reviewed the Peter Pan/Seven Seas business relationship to determine whether the AFA's U.S. citizenship requirements had been met with respect to the M/V STELLAR SEA. Under the Shipping Act, in order for a vessel to receive the necessary documentation to participate in U.S. fisheries, that vessel must be at least 75% owned and controlled by a United States citizen. See 46 U.S.C. §§ 50501, 12113.

Peter Pan is wholly owned by Nichiro Corporation (Nichiro), a Japanese corporate conglomerate. As such, it is foreign owned and not a U.S. citizen for purposes of the AFA's vessel ownership requirements. See Agency Exh. 29. While the M/V STELLAR SEA was owned by an entity not affiliated with or in any way related to Respondents (i.e., Cypress Stellar Sea, LLC (Cypress)), Stellar Seafoods, Inc. bareboat chartered the M/V STELLAR SEA. Id.

In March 2001, counsel for Peter Pan requested that MARAD review (1) the guarantee arrangement made by Peter Pan (and Nichiro) in connection with Stellar Seafoods, Inc.'s charter of the M/V STELLAR SEA and (2) the Custom Processing Agreement by which Seven Seas would perform crab processing for Peter Pan. See Agency Exh. 28. On May 29, 2001, MARAD approved the arrangement provided that Peter Pan was not involved in financing the M/V

³⁸ Peter Pan also takes issue with the Agency's reliance upon opinions of "three independent financial analysts" (i.e., two additional "analysts" and Mr. Hellerman). See Peter Pan's Reply at 19-21. The undersigned agrees that the Agency's reliance on what Mr. Harwood, President of Cypress, stated in a 2001 memorandum (see Agency Exh. 71 – generated during a time in which Peter Pan held an ownership interest in Seven Seas) has little direct relevance to issues of control during the charged period. The weight accorded Agency Exh. 76 (credit application memorandum from FUYO Bank) is similarly limited in determining explicit measures of control during the charged period. However, these documents provide some context to the overall business arrangements between Peter Pan and Sevens Seas and were thus admitted into evidence.

STELLAR SEA other than allowing the Custom Processing Agreement to be used as security for obtaining financing of the vessel. Id.

MARAD further examined the Peter Pan/Seven Seas relationship sometime in 2001 in response to Seven Seas' request for a determination that Stellar Seafoods, Inc. is owned and controlled by U.S. citizens. See Agency Exh. 29. As a result of that review, MARAD determined that an impermissible level of control over Stellar Seafoods, Inc. was "being conveyed to non-citizens" in the then-present structure. Id. MARAD required certain changes be made to Respondents' business arrangements so that the M/V STELLAR SEA could obtain a fishery endorsement. Id. Respondents made the changes MARAD requested and the M/V STELLAR SEA received its fisheries endorsement.

Following MARAD's examination in 2001, Peter Pan and Seven Seas entered into the Advance of Funds Agreement in March 2002. In 2007, MARAD became aware of the Advance of Funds Agreement when NMFS provided that agreement to MARAD. See Agency Exh. 32. MARAD then asked Seven Seas to submit information about the Advance of Funds Agreement and the relationship it had with Peter Pan. Id. MARAD subsequently determined that it was:

unable to provide an unqualified finding that Stellar Seafoods, Inc. remains eligible to document the vessel STELLAR SEA. Specifically, the Advance of Funds Agreement extend by Peter Pan Seafoods, Inc. to Seven Seas Fishing Company, and Stellar Seafoods, Inc. (collectively "Stellar") as of March 19, 2002, the level of non-citizen participation reflected in the unsecured lending is evidence which suggests the possible existence of impermissible non-citizen control over the fishing industry vessel STELLAR SEA.

Id. at 1. MARAD nevertheless did not withhold the M/V STELLAR SEAS endorsement and issued a temporary eligibility determination. MARAD required Seven Seas to submit a proposal "to restructure and reduce all non-citizen held debt." Id.

Peter Pan attempts to blunt the force of MARAD's 2007 re-evaluation of the Peter Pan/Seven Seas relationship following MARAD becoming aware of the Advance of Funds

Agreement. See Peter Pan Reply at 24-27. First, Peter Pan states that there is no record evidence to indicate that MARAD's regulations required Seven Seas to disclose the Advance of Funds Agreement to MARAD. Peter Pan is correct that the Agency did not produce a MARAD witness during the hearing to provide evidence about MARAD's regulations and/or whether MARAD specifically found that the Advance of Funds Agreement should have been disclosed to MARAD. Nevertheless, as the correspondence of 2007 indicates, MARAD was concerned about the impact of the Advance of Funds Agreement upon its analysis of the Peter Pan/Seven Seas relationship as it related to the citizenship requirements of the M/V STELLAR SEA. Whether Peter Pan was required to disclose the Advance of Funds Agreement is irrelevant to the question of whether Peter Pan exercised impermissible control over Seven Seas. The actual relationship, as seen through the lens of the Agency's regulations, is the focus of this case not what MARAD did or did not determine based on information that Respondents might (or might not) have been required to disclose. Nowhere does the Agency assert that its AFA regulations required Respondents to have disclosed that agreement in any event.

Second, Peter Pan argues it is significant that: (1) the M/V STELLAR SEA continued to hold a fishery endorsement even after MARAD became aware of the Advance of Funds Agreement; (2) that "MARAD did not rule that the Advance of Funds Agreement vitiated MARAD's earlier approvals of the Cypress transaction; and (3) that such arrangement did not result in, nor provide the basis for any kind of penalty." Peter Pan Reply at 26.

However, as Peter Pan itself stated, the correspondence between MARAD and Seven Seas beginning on September 13, 2007 and ending on June 8, 2008 "speaks for itself" – which indeed it does – and not in any kind of exculpatory fashion. Id. Peter Pan argues that the relevance of this correspondence in 2007 and 2008 to the alleged violations occurring in 2004

and 2005 is “highly questionable.” *Id.* I disagree. Just because MARAD’s correspondence concerning the Advance of Funds Agreement (about which the agency was unaware until apparently 2007) post-dates the charged period, does not render such correspondence irrelevant to understanding the Peter Pan/Seven Seas business relationship. Surely, this fact does not render MARAD’s prior determinations concerning that relationship and requested changes to comport with the Shipping Act and MARAD’s regulations exculpatory in any respect.

B. Respondents’ Additional Arguments

1. The Agency’s Final Administrative Record Regarding Peter Pan’s Crab Processing Caps

Peter Pan argues that the Agency’s formal AFA administrative record during the charged period indicates that the Agency’s authorized officials issued crab processing caps to Peter Pan predicated only on the historical processing for two facilities – i.e., the M/V BLUE WAVE and the Peter Pan King Cove shoreside plant – and never indicated that Cypress or Seven Seas were affiliated with Peter Pan for AFA purposes. Peter Pan Post-Hearing Memorandum at 2. Peter Pan suggests that the issuance of crab caps to Peter Pan that did not indicate Seven Seas as an affiliate of Peter Pan represents a non-reviewable Agency decision that prevents the Agency from now seeking to make Seven Seas an affiliate of Peter Pan. *Id.* at 3, 15; see also Peter Pan’s Motion for Summary Adjudication (Oct. 18, 2010). Such administrative decisions, Peter Pan asserts, are “entitled to a presumption of finality and regularity that cannot be set aside without a clear showing of bad faith or improper behavior.” Peter Pan’s Post-Hearing Memorandum at 3.

In support of this argument, Peter Pan directs attention to Agency regulations dealing with permitting decisions that are subject to appeal within sixty days and are thereafter not considered reviewable. See Resp. Exh. 75 (drawing attention particularly to 50 C.F.R. § 679.4(l)(8)(iii)). Such permitting decisions were to be made on the basis of the “official AFA

record.” See 50 C.F.R. § 679.4(l)(8). Under 50 C.F.R. § 679.2, the definition of the “official AFA record” is:

[T]he information prepared by the Regional Administrator about vessels and processors that were used to participate in the BSAI pollock fisheries during the qualifying periods specified in § 679.4(l). Information in the official AFA record includes vessel ownership information, documented harvests made from vessels during AFA qualifying periods, vessel characteristics, and documented amounts of pollock processed by pollock processors during AFA qualifying periods. The official AFA record is presumed to be correct for the purpose of determining eligibility for AFA permits. An applicant for an AFA permit will have the burden of proving correct any information submitted in an application that is inconsistent with the official record.

Peter Pan’s arguments miss the mark and must be rejected. The initial permitting eligibility decisions Section 679.4 contemplates differ markedly from enforcement actions subsequently taken against permit holders. The procedural framework Peter Pan highlights are directed toward an applicant’s appeal of a decision by the Regional Administrator concerning an entity’s allotted crab cap. Such decisions do not bind the Agency’s efforts to enforce its regulations when it believes there has been a violation of the AFA by such a processor exceeding its assigned crab cap. If the permit applicant – here Peter Pan – had not agreed with the Regional Administrator’s calculations of its historical participation in the crab fishery, it had sixty days to appeal such decision and present evidence and the elements of 15 C.F.R. § 679.4 would pertain to such appeals. The “official AFA record” is presumed to be correct for the limited purpose “of determining eligibility for AFA permits.” Nothing in the permit application process precludes the enforcement action at issue.

Furthermore, as explained in this Decision and Order, NMFS placed the burden on the AFA processors to disclose its affiliations for AFA purposes. NMFS did not independently analyze the Peter Pan/Seven Seas relationship for permitting eligibility purposes.

While the Agency did conduct an investigation into the relationship, that investigation was closed with no enforcement action taken. Special Agent Nelson conducted an investigation into the Peter Pan/Seven Seas relationship in 2000 and issued an investigation report dated July 31, 2000. Resp. Exh. 17. Special Agent Nelson closed the investigation after speaking with Peter Pan's counsel about the Peter Pan/Seven Seas relationship and discussed that relationship under the 2000 Agency regulations. *Id.* Special Agent Nelson apparently took Peter Pan counsel's analysis as credibly assuaging concerns about the Peter Pan/Seven Seas relationship. No detailed analysis of the actual working and business relationship was conducted as far as the record reveals. Special Agent Nelson's recommendation that the matter be closed without charges being filed cannot serve to estop the government from seeking to enforce subsequent final regulations. Agency counsel correctly points out that the United States cannot be bound by the acts of such officers. *See* Agency Reply Brief at 7. However, it is not unreasonable to assume that having been the subject of this investigation, Peter Pan could have believed that its relationship with Seven Seas, as explained to Special Agent Nelson, failed to bring about an enforcement action in 2000. Such failure to bring an action could have intimidated to Peter Pan and Seven Seas that they were not running afoul of the AFA and Agency regulations.³⁹

2. The Proper Statutory and Regulatory Focus is on the Peter Pan/Seven Seas Relationship, and Not on Peter Pan's Lack of Ownership in the M/V STELLAR SEA and/or its Owner.

Peter Pan argues that the proper focus of the control provisions in the AFA should be placed upon whether Peter Pan owned or controlled 10 percent or more of the "interest" in the processing facility – i.e., the M/V STELLAR SEA. For the reasons already discussed above,

³⁹ Nothing in the record indicates that Peter Pan's counsel did anything in the interview with Special Agent Nelson other than explain what he believed the state of the law was – arguments that were repeated in this case. There are no apparent misleading statements or obfuscation on Peter Pan's part to Special Agent Nelson during this investigation by Special Agent Nelson.

Peter Pan's arguments about the proper focus of AFA statutory and regulatory analysis are rejected. Agency regulations make it absolutely clear that if Stellar Seafoods, Inc. was an operation that processed BSAI crab and was affiliated with Peter Pan, any crab it processed would have to be counted as applying to Peter Pan's crab cap. Agency counsel argues that it would be improper to limit the scope of the AFA and Agency regulations concerning "crab processing facilities" to include only physical processing plants and a processing vessel and not the company that operates such plants or vessels. I agree. Indeed, such a conclusion would run completely counter to the intent and purpose of the AFA as articulated in this Decision and Order. See Agency Reply at 10-11.

3. The Agency Need Not Demonstrate that Peter Pan held a Legal Share or Equitable Right to Exercise the Powers of an Ownership Interest in Seven Seas.

Peter Pan asserts that the term "the interest" in Section 211 of the AFA requires that Peter Pan hold a legal share or equitable right equivalent to an ownership interest in Seven Seas to be held liable. However, as articulated in this Decision and Order, the focus of the Agency's regulations and the statute reside in ownership and control as separate considerations. Even assuming Peter Pan's argument on the language of Section 211 of the AFA is correct, such argument fails to account for the breadth of the Agency's implementing regulations. Whether Peter Pan could persuasively argue that the Agency's regulations implementing the AFA overreached the intent and language of the AFA is a matter for a different forum. See 15 C.F.R.

§ 904.200(b) (limiting the judge's authority in the proceedings to consider a facial challenge to the Agency's regulations).⁴⁰

VI. Ultimate Findings of Fact and Conclusions of Law

1. The Agency's and Respondents' accepted Proposed Conclusions of Law contained in Attachment B are hereby incorporated herein.
2. Peter Pan filed AFA Cooperative Processing Applications in January 2000 and January 2003 listing the Peter Pan King Cove plant and M/V BLUE WAVE as affiliated crab processing entities. Agency Exhs. 3, 4.
3. Seven Seas, Stellar Seafoods Ind. and/or the M/V STELLAR SEA were not listed as affiliated crab processing entities on any of Peter Pan's AFA applications. Id.
4. The January 5, 2000 AFA rule established that AFA crab caps will be applied on an individual AFA entity basis and sets out a 10% control definition. 65 Fed. Reg. 380-390 (Jan. 5, 2000).
5. NMFS annually informed Peter Pan of its individual entity AFA crab processor caps (2000 – 2005). Agency Exh. 36.
6. Peter Pan's crab cap percentage for Opilio and Red King crab remained the same during 2000 – 2005 (i.e., for Opilio, 10.083%; for Red King Crab, 15.827%). Id.

⁴⁰ Peter Pan cites to decisions concerning In the Matter of the Citizenship of DHL Airways, n/k/a Astar Air Cargo, Inc. (Docket No. OST-2002-103089)) as support for its assertions that the Agency failed to demonstrate the requisite amount of control by Peter Pan over Seven Seas. See Peter Pan's Post Hearing Memorandum at 13-14. However, the DHL case concerned a different set of statutory concerns (e.g., the regulations at issue here are quite broad as discussed to implement the AFA protections of non-AFA processors) and even in the DHL case, the decision notes that at times "a lender's powers under its lending agreement could lead to a control finding." See DHL Recommended Decision at 37; see also 49 U.S.C. § 40102(a)(15) (2003) (defining U.S. citizenship as involving for the DHL case).

7. Agency regulations at 50 C.F.R. § 679.65(e) during the charged period provided that the annual AFA crab cap was determined by “by multiplying the crab processing sideboard [a.k.a., cap] percentage by the pre-season guideline harvest level established for that crab fishery by ADF&G.”

8. The final AFA rule effective during the charged period again stated that AFA crab caps would be applied on individual AFA entity basis. See 67 Fed. Reg. 79692 (December 30, 2002).

9. Peter Pan’s AFA entity processing crab cap (for the Peter Pan AFA entity as identified by Peter Pan in its AFA applications) was:

In 2004, for Opilio, $10.083\% \times$ the 2004 GHL for Opilio of 19,269,000 pounds = a processing cap of 1,942,893 pounds of Opilio; for Red King Crab, $15.827\% \times$ 2004 GHL of 14,267,000 pounds = a processing cap of 2,258,038 pounds of Red King Crab.

In 2005, for Opilio, $10.083\% \times$ 2005 GHL for Opilio = a processing cap of 9,362,000 pounds of Opilio. (Peter Pan did not exceed its 2005 processing cap for Red King Crab.) Agency Exh. 93.

10. From January 1, 2004, through March 30, 2005, Peter Pan exerted 10% or more control over Seven Seas and its subsidiary company Stellar Seafoods, Inc. (operator of the M/V STELLAR SEA) in violation of AFA Section 211(C)(2)(A), the Magnuson Act at 16 U.S.C. § 1857⁴¹ and Agency regulations at 50 C.F.R. § 679.7(k)(8) (under the definitions provided at 50 C.F.R. § 679.2 (specifically control definitions at (3)(vi) and/or (ix)).

⁴¹ The AFA made any violations of its Sections 210 or 211 violations of the Magnuson Act. See AFA at Section 210(g).

11. During the period January 1, 2004, through March 30, 2005, pursuant to Section 211(c)(2)(A) and 50 C.F.R. 679.2, Seven Seas and Peter Pan were affiliated for AFA purposes and are considered to be one AFA entity.

12. During the period January 1, 2004, through March 30, 2005, Peter Pan and Seven Seas received 45 deliveries of crab after the Peter Pan crab cap had been reached, which constitute 45 separate violations of the AFA, the Magnuson Act and Agency regulations. Agency Exh. 93.

13. Peter Pan and Seven Seas processed a combined total of:

In 2004 -- 1,769,731 pounds of Opilio and 235,001 pounds of Red King Crab over Peter Pan's AFA entity crab cap; and,

In 2005 -- 2,159,625 pounds of Opilio over Peter Pan's AFA entity crab cap.

Id.

14. The total crab processing overage for the Peter Pan AFA entity (i.e., including both Peter Pan and Seven Seas) equaled 4,164,357 pounds of crab. Id.

15. The gross revenue accrued by the processing of this 4,164,357 pounds of crab in excess of Peter Pan AFA individual entity crab cap was \$4,232,048. Id.

16. Respondents' processing of the 4,164,357 pounds of crab in excess of their crab cap was directly contrary to Congress' intent to preserve market opportunities for non-AFA processors.

17. The final AFA rule expanded the description of what constitutes 10% control for AFA affiliation purposes from the previous AFA Emergency Rules. See 67 Fed. Reg. 79692 (December 30, 2002).

18. Respondents' 45 violations occurred more than 12 months after the promulgation of the final AFA rule on December 30, 2002.

19. As participants in a highly regulated industry, Respondents were obliged to keep abreast of the regulations that govern their business. See, e.g., In re Cuong Vo, 2001 WL 1085351 (noting that "when one participates in the highly regulated commercial fishing industry, that person is presumed to possess knowledge of the rules and regulations governing that industry and is subject to the rules and regulations governing that business, regardless of whether the individual has actual knowledge of such rules or regulations).

VII. Consideration of Penalty Assessment

In assessing a penalty, the undersigned considered each of the factors required by law. "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 violations . . . and such other matters as justice may require." 15 C.F.R. § 904.108(a). See also 16 U.S.C. § 1858(a) (statutory factors under the Magnuson Act). In 1990, Congress raised the maximum penalty under the Magnuson Act from \$25,000 to \$100,000, but the House Report cautioned that civil penalties of that magnitude should be pursued only "in cases of significant and sever offenses or serious repeat offenses." H.R. Rep. No. 393, 101st Cong., 2d Sess. 230-31 (1989). Under the Federal Civil Penalties Inflation Act, Pub. L. 101-410, the amount of the maximum penalty per violation during the charged period ranged from \$120,000 until December 14, 2004 at which time the maximum penalty increased to \$130,000. 15 C.F.R. § 6.4(e)(14) (2004); 69 Fed. Reg. 74416 (Dec. 14, 2004). Peter Pan did not

assert an inability to pay in accordance with the requirements of Agency regulations. See 15 C.F.R. § 904.108(b)-(h).⁴²

The Agency seeks a total civil penalty of \$4,457,048 against Respondents based on forty-five separate violations (representing separate deliveries of crab to the M/V STELLAR SEA to be processed once Peter Pan's crab cap was met). NOVA at Table 1. These deliveries continued over a number of days in 2004 and 2005, with many of the deliveries occurring on the same day but the total number of days on which such violations occurred equaled six. Id.

The Agency calculated its assessed penalty based on the value of the crab after processing (approximately \$12.85 million) minus the price paid to the fishermen who caught the crab (approximately \$8.62 million). Resp. Exh. 46 at 3. Agency counsel argues that non-AFA processors lost the market opportunity to process a total of 4,164,357 pounds of crab due to Respondents' violations, which the Agency calculated to be worth \$4,232,048. Id. The assessed penalty was arrived at by calculating each violation (i.e., each delivery) at a penalty amount of \$99,045.51 and then adding an additional \$5,000 for each of the forty-five violations to arrive at the total civil penalty amount of \$4,457,048. Agency counsel attempts to justify this penalty on the basis of recouping Respondents' alleged proceeds from unlawful processing activities.

In this regard, the Agency did not conduct an actual income or economic gain analysis of Peter Pan's operations to determine exactly how much, if any, net profit Peter Pan obtained through Seven Seas' crab processing activities. Agency counsel merely calculated the simple difference between the value of the crab, as processed, and the price it paid to the fishermen who caught the crab. See Tr. at 558:10-559:1; 1107:2-1108:23. Peter Pan claimed that it lost \$1.4-

⁴² Seven Seas submitted documentation regarding its inability to pay and this issue was resolved through a Stipulated Agreement reached with the Agency during the hearing.

\$1.5 million on the crab processed by the M/V STELLAR SEA in 2004-2005. Tr. at 1257:4-1258:5.

Importantly, the starting point for determining the appropriate sanction must be to determine what level of fine satisfies the public interest. This is a regulatory compliance case and the Agency does not have a penalty schedule applicable to this violation. Therefore, the use of a resource depletion schedule is not appropriate absent preponderant record evidence to support its applicability. The record evidence is devoid of such evidence. Similarly, Agency counsel wrongfully attempts to apply the theory of recoupment of “ill gotten gain” or “value of the illegal catch” (which is clearly the law for resource violations) to this case. Even assuming arguendo that the penalty schedule amount of \$5,000 per violation for a total of \$225,000 was appropriate, the addition of the value of the processed crab increases the penalty amount approximately twenty (20) times to \$4,457,048.

The undersigned specifically finds that the utilization of this multiplier is patently unreasonable under the particular facts and circumstances of this case. Indeed, this cross-utilization is wrong because it attempts to impose a penalty designed to protect threatened national fisheries resources for a significantly less serious infraction involving attempted regulatory compliance, which ultimately proved to be unsuccessful.

Illustrative of this point is the difference between the handling of “control” issues by the United States Department of Transportation and Agency Counsel. See In the Matter of the Citizenship of DHL Airways, N/K/A Astar Air Cargo, Inc. (Docket No. ST- 2002-103089) (an administrative law judge from DOT made a cursory analysis, which is obviously not applicable in this case, of United States citizenship issues for airlines and determined that no violation existed). While that case was decided on different facts and law, it provides a stark contrast

between the DOT approach and that proposed by Agency Counsel regarding the appropriate level of sanction for such regulatory violations.

Finally, these two issues are matters of first impression for the Administrator. In the Adak case, Agency Counsel did not propose to utilize a resource penalty schedule for a compliance case. Secondly, the recoupment of “ill gotten gain” theory was not specifically addressed in Adak although the issue was present. Since that case is currently under review by the Administrator strictly on policy grounds, the Administrator should carefully consider these issues should either party appeal this case.

Based on all the regulatory and statutory factors that must be considered by law, the appropriate monetary penalty for Respondents’ actions is \$10,000 for each of the forty-five proven violations for a total penalty of \$450,000. Under the Magnuson Act, the statutory maximum for violations during the charged period was \$120,000/\$130,000 per violation. Since the \$10,000 fine per violation here is at the bottom of the statutory range, Respondents cannot rightly complain that the amount is unreasonable or excessive. Indeed, as set forth below, the Administrator should not, as a matter of policy and law, adopt Agency counsel’s recommendation on how to calculate the sanction in this case.

First, the Agency’s penalty schedules effective during the charged period (see Agency Exh. 94) explicitly do not apply to processing activities and instead address harvesting activities. Agency counsel admitted that the Agency had no directly applicable penalty schedule in place for the violations at issue but argued that the penalty schedule offered may be used by analogy. See Agency Post-Hearing Brief at 30-31.

The purpose of such penalty schedules (which have now been superseded by a new Agency penalty policy) was generally twofold: 1) to promote some uniformity in penalty

assessments for similar offenses (in particular fisheries) while recognizing specific facts of a violation and 2) to provide the public with notice of what penalties attach to particular offenses.⁴³

Under the penalty schedule proposed as analogous, the schedule states that for “FISHING VIOLATIONS” a penalty range of \$5,000 to \$50,000 is appropriate for each violation involving a respondent who conducts “fishing contrary to a notice of in-season adjustment, in a closed area, during a closed season, after a catch limit has been reached” Agency Exh. 94. This penalty schedule clearly does not apply, by its terms, to a processing violation and Agency counsel’s attempt to use it is unnecessary. Indeed, the Administrator can simply assess any penalty within the statutory maximum, applying the statutory/regulatory factors that must be considered to arrive at an appropriate penalty rather than attempting to ram a square peg into a round hole. While it might very well have been valid to use such penalty schedules for other resource cases where no applicable penalty schedule existed, that theory is inapplicable here given the nature of violations at issue.

Second, the Administrator should not accept Agency counsel’s proposed rationale to recoup the value of the crab overage utilizing the established legal precedent of recoupment of the value of the catch. As discussed previously, this case does not involve a harvest violation or the protection of the fisheries. Indeed, this is an administrative compliance case dealing with an allocation of economic participation within a fishery.

This issue is critically important in addressing the proper penalty in this case because so much of the Agency’s proposed penalty resides in recapturing the value of the crab processed in excess of Peter Pan’s crab cap. The Agency presented the testimony of an Agency witness who

⁴³ See <http://www.gc.noaa.gov/schedules/preface/Prefacefinal.pdf> at i (text of superseded penalty schedules). The public notice function was accomplished by the Agency publishing the schedules on its publically available website although these penalty schedules represent Agency policy – not official rules. Nevertheless, the public is entitled to rely on stated policies unless the Agency revokes or modifies such policies or deviates from such policies with stated reasons.

offered that all types of caps (vessel caps, harvesting caps, and processing caps) represent a “constraint on a type of activity” and therefore are analogous. Tr. at 783:10-15. Furthermore, the Agency witness stated that the purpose of all harvesting caps does not simply equate to preventing harm to a resource, i.e., exceeding a harvesting cap also takes an opportunity from another participant. *Id.* at 783:16-25. Here, the AFA explicitly requires that measures be taken to prevent harm to non-AFA processors by establishing caps on AFA processors who received the benefit of being able to participate in the BSAI pollock fishery.

The undersigned recognizes the multiple purposes of the crab caps at issue, including the effect of general deterrence and keeping a level playing field for all participants. However, the use of a penalty schedule and a principle of recouping the “value of the catch”, which explicitly addresses more directly a resource/harvesting violation as opposed to a statutory/regulatory economic allocation issue, is problematic.

Rather than trying to use an artificial construct (i.e., a penalty schedule addressing primarily resource depletion issues versus a regulatory compliance matter for a resource legally caught), it makes better sense to arrive at the appropriate penalty for these particular violations after considering all of the factors required by law. As provided in the Agency’s regulations, the undersigned is tasked with assessing an appropriate penalty de novo with no presumption

attaching to the reasonableness of the Agency's proposed penalty or strictly adhering to the Agency's penalty schedule. See 15 C.F.R. § 904.204(m).⁴⁴

A. The Nature, Circumstances, Extent and Gravity of the Violations

There is no record evidence that any non-AFA processor was harmed by Respondents' exceeding their crab cap. One could presume that any crab Respondents processed over Peter Pan's crab cap might have been processed by a non-AFA processor. However, the lack of discernable harm to non-AFA processors militates against the amount of the Agency's proposed sanction in this case. The Agency clearly need not prove harm to non-AFA processors for the fact of violation. In re Adak Fisheries, LLC, et al., 2009 WL 1034813 at n.10 (noting that there was no reliable evidence in the record that any non-AFA crab processor was harmed by [respondents'] business venture."). However, in a case such as this one, where the government is seeking to enforce what essentially is a straight economic allocation between private interests, the lack of demonstrating such actual harm leads the undersigned to cast a wary eye upon Agency counsel's proposed penalty.

Furthermore, it is clear that the proper measure for determining how much Respondents exceeded the applicable crab caps is the GHF. However, the fact that the Agency had, in prior years, a regulation and enforcement policy for one crab species related to the actual harvest levels and the aggregate amount of crab processed by AFA processors, respectively, gives the undersigned pause. Apparently, the Agency at one time believed that the gravity of violations

⁴⁴ The earlier presumption of correctness attaching to the Agency's proposed penalty that the revision to 15 C.F.R. § 904.204(m) had its origin in no small part from efforts to cabin the judge's discretion in assessing a penalty given the Agency's assertion of the primacy of the recommended penalty schedules that were "derived from experience and conversations with the National Marine Fisheries Service." In re Verna, 4 O.R.W. 64, 65 (N.O.A.A. App. 1985); see also In re Kuhnle, 5 O.R.W., 514 (N.O.A.A. App. 1989 (observing that the previous version of 15 C.F.R. § 904.204(m) (then Section 904.204(l)), which required the judge to depart from the Agency's assessed penalty only for stated good reason was a codification of Verna). Given the Agency's recent changes to its penalty policy and development of a new penalty assessment process, such issues as the applicability of now inapplicable regional penalty schedules have little relevance to future cases.

depended in no small part on the actual harvest of crab and the amounts the AFA processors, as a whole, processed relative to such amounts. While such policies and regulations were changed for the charged period, the existence in prior years makes it difficult to assess Respondents' actions as particularly grave here. See also Tr. at 783:10-15 (Agency witness admitting that exceeding a processing cap is not a common type of violation in the Alaska region).

Additionally, the fact that the Agency had no published penalty schedule for this particular offense also raises a question of how Respondents reasonably could understand the practical consequences of not complying with a very complex regulatory system.

B. Respondents' Degree of Culpability

As the Administrator stated in Adak, a respondent's attempts to structure their business relationships to comply with the regulations in this type of case should be taken into account. See In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (April 1, 2009) (noting that "Respondents' purpose in establishing their business relationships is not relevant to the decision" – but later stating in the penalty discussion that on remand the judge should consider "[t]he fact that [respondents] did not succeed in achieving compliance does not increase their culpability" where Respondents attempted to comply with the law). Ample evidence exists in the record that Respondents were in contact with at least one government body (i.e., MARAD) and structured their business relationships according to input and conversations with that entity. Furthermore, Peter Pan's counsel spoke with a NOAA investigator and presented his theory (not coincidentally the same theory Peter Pan largely presents in this case) and rationale as to why Seven Seas was not affiliated with Peter Pan for AFA crab processing purpose. The Agency closed its investigation at that time with a recommendation for no enforcement action.

Agency counsel rightly points out that the final regulations changed and that the operative definitions of control were far more expansive during the charged period than in the initial Agency investigation. While the government is in no way estopped from pursuing this current action based on this earlier investigation, it is reasonable to assume that the Agency knew enough of the details about the Peter Pan/Seven Seas relationship to “try to close the loopholes” associated with that relationship in its final AFA regulations and let Peter Pan know that it was seeking to do so. Peter Pan and Seven Seas were on notice in any event what the final regulations said and needed to comply with such regulations. Their failure to do so is the issue here, but the overall facts and circumstances of Respondents’ attempt to comply and their explicit and considered structuring of their dealings to comply both with MARAD and the Agency’s regulations must not be discounted in assessing an appropriate penalty for the violations.

C. Respondents’ Prior Offenses

Neither of the Respondents has any prior offenses of the Magnuson Act in the past five years.

D. Other Matters As Justice Requires

Several additional matters must be considered to assess the proper sanction in this case. First, the Agency changed the regulations applicable to this case in April 2005 so that crab caps have been replaced by a crab rationalization program. Specific deterrence is thus no longer an issue as this kind of violation cannot recur under the current rules and regulations. Conversely, the penalty must be significant enough to deter Respondents from not complying with other Agency regulations in the future. Peter Pan still operates in the Alaskan fisheries and its future compliance must be ensured by appropriately penalizing its noncompliance in this instance.

However, as discussed throughout this Initial Decisions and Order, this case is essentially about the economic allocation of an opportunity to process crab – not a resource depletion case. The crab Respondents processed was legally caught. It is merely a question of whether Peter Pan and Sevens Seas exceeded the amount of crab they were entitled to process under the AFA and the Agency’s regulations. Unquestionably, the regulations in this case are complex and extremely broad in terms of what amounts of crab Respondents were legally able to process and what constitutes unlawful control of one entity over another. Peter Pan and Seven Seas made significant efforts to comply with such regulations and had numerous encounters over the years with MARAD and NOAA enforcement personnel prior to the charged period. Under these circumstances, Peter Pan clearly had a reasonable basis to believe that their business arrangements did not run afoul of Agency regulations at that time. However, given the expansion in the regulations, Respondents’ business arrangement did run afoul of the regulations and their actions violated the AFA as discussed herein.

Furthermore, an Agency witness admitted that exceeding a processing cap is not a common type of violation in the Alaska region, which cautions against placing too large a value on the deterrent effect of the penalty in this case. See Tr. at 782:23-25.⁴⁵

E. Peter Pan’s Penalty Arguments

Peter Pan made several other arguments concerning the appropriateness of the Agency’s proposed penalty. See generally Peter Pan Post Hearing Memorandum at 28-38. First, Peter Pan argued that the Agency failed to produce any evidence to establish that NOAA considered all the relevant statutory factors required by the Magnuson Act. Id. at 30. This defect in the Agency’s

⁴⁵ Furthermore, the specific deterrence value is cancelled out by the fact that the Agency implemented a crab rationalization scheme in April 2005 that did away with the crab cap system at issue in this case. In other words, it is impossible for this specific violation to occur again under the current regulatory system.

presentation according to Peter Pan results in a requested penalty that is arbitrary and capricious. Id. This argument must be rejected.

While the undersigned has concerns about the nature and amount of the proposed penalty (as fully discussed above), the Agency proffered witnesses who explained the purpose of the penalty and the manner in which the value of the “overage” was calculated. Much of the consideration of the appropriate penalty NOAA would seek undoubtedly resides in the thought processes of Agency counsel who brought the case. NOAA’s revised regulations on penalty assessments and the judge’s authority to assess a sanction de novo clarify that the Agency bore the burden during the hearing of justifying “that its proposed penalty . . . is appropriate, taking into account all the factors required by applicable law.” 75 Fed. Reg. 35631 (June 23, 2010). The Agency thoroughly presented its arguments concerning the reasons it was seeking the proposed penalty in this case through both its NOVA, its briefing and through its witness testimony at hearing. Respondents had ample opportunity to challenge this proposed penalty and the rationale behind it.

Second, Peter Pan argued that the proper calculation of whether the cap was exceeded by Peter Pan requires that the Agency demonstrate that the aggregate amount of crab processed by all the AFA processors during the charged period exceeded the cap – not that Peter Pan’s individual crab cap was exceeded. Id. at 31-33. Peter Pan stated that NOAA offered no administrative record evidence that the AFA’s aggregate cap language was properly superseded (unlike the statutory modification to the qualifying period that added 1998 (counted twice) to processors’ historical participation in the BSAI pollock fishery). Id. at 31. Indeed, Peter Pan asserted that “[t]he regulations adopted by NOAA that deviate from the plain meaning of Section

211 of the AFA, without a formal vote [by the Council on its recommendations], cannot be enforced.” Id. at 31-32.⁴⁶

Two separate reasons exist to reject Peter Pan’s argument at this stage of these proceedings: (1) the undersigned has no authority to invalidate Agency regulations that established individual crab caps instead of aggregate caps (see 15 C.F.R. § 904.200(b) (“The Judge has no authority to rule on constitutional issues or challenges to the validity of regulations promulgated by the Agency or statutes administered by NOAA.”); and (2) the Administrator specifically considered and rejected this argument in the Adak case. See In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (April 1, 2009). Specifically, the Administrator determined that “the Secretary’s chosen method to implement the statutory directive was reasonable and consistent with the statute, and it carried out Congress’ intent. The approach of using individual entity caps did not supplant or otherwise supersede Congress’ intent or the provisions of the AFA.” Id. Peter Pan acknowledges the Adak decision, but took issue with the Administrator’s reasoning, asserting that it “suffers from an apparent misunderstanding of the basic rules of statutory construction” and is marked by “the worst kind of sophistry” in reaching this result. Peter Pan Post Hearing Memorandum at 32. Whatever Peter Pan may think of the Administrator’s decision, the undersigned is bound to adhere to Agency precedent as articulated

⁴⁶ Indeed, the Agency supplied AFA processors with explicit guidance on enforcement policies during this early period, which stated that so long as the total, aggregate amount of opilio crab species processed by AFA processors did not exceed the overall cap, no enforcement action would be taken against an individual entity. See Resp. Exh. 14. However, in Adak, the Administrator considered this enforcement policy and stated that the Agency “was not required to prove that all processors together exceeded an aggregate cap in order to prosecute an individual processor for exceeding its individual cap” despite this enforcement policy for the years 2000 and 2001, as the violations in that case occurred both at a different time and with respect to a different crab species. See In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (April 1, 2009). However, no record evidence indicates that the Agency ever formally withdrew this policy, and it is not unreasonable to conclude that AFA processors (like Peter Pan) could expect that such a statement reflected a general enforcement perspective beyond 2001 and in the crab fishery generally.

in Adak and will similarly reject Peter Pan's argument on the necessity of adhering to aggregate vs. individual crab caps.

Third, Peter Pan argued that the AFA processing cap under Section 211 had to be based on the total catch of each species of crab – not based on the Guideline Harvest Level (GHL) set by Alaska Department of Fish and Game (ADF&G). Id. at 33. Peter Pan points out that the Agency's emergency rule (see Resp. Exh. 9) provided that overages would be calculated based on the final official harvest amounts of the crab species as determined by ADF&G. Id. Peter Pan is undoubtedly correct on this point concerning the interim rules. However, those are not the regulations at issue during the charged period. No such statement exists in the operative regulations and therefore the Agency's use of the GHL as the measure for calculating Peter Pan's overage is appropriate. Indeed, 50 C.F.R. § 679.65(e), which was applicable during the charged period, provided that the caps would be calculated on the preseason guideline harvest level.⁴⁷ Much like Peter Pan's argument concerning the aggregate vs. individual caps, this argument must also be rejected as an attack upon the Agency's regulations. See 15 C.F.R. 904.200(b).

Fourth, Peter Pan attempted to blunt the force of the Agency's proposed penalty by arguing that if Seven Seas is required to be an affiliate of Peter Pan, Peter Pan should have received the benefit of Seven Seas' historical crab processing during the AFA qualifying years of 1995-1998 (1998 counted twice) in calculating the appropriate crab cap for Peter Pan. Peter Pan Post Hearing Memorandum at 33-34. Peter Pan also argued, based on its expert's calculations, that the "actual" amount of overage should have been reduced significantly. In this regard, Peter Pan asserts that the Agency should have included the historical processing of crab

⁴⁷ Peter Pan's expert, Mr. Steven Hughes, made various calculations that indicated Peter Pan would have been within its crab cap had the cap been based on actual harvest. However, because the actual harvest amount is irrelevant under the Agency's regulations, such calculations do little to absolve Respondents of liability. Such a fact, however, has relevance when determining the gravity of the offense as discussed below.

done by the M/V STELLAR SEA, and then calculated the overage based on actual crab landed rather than the GHL. Finally, Peter Pan argues that the Agency should have also removed the crab that was custom processed for another AFA entity (i.e., Trident Seafoods). *Id.* at 34-36.

Peter Pan's argument must be rejected as simply missing the point of regulatory enforcement actions. Agency rules were put into place to keep AFA processors from processing more than a particular amount of crab based on their historical participation in the crab fishery. Those seeking an AFA processor permit were required to list any affiliated entities on their AFA permit applications. Certainly, Peter Pan had very good reasons for not listing the M/V STELLAR SEA on its initial applications given its discussions and interactions with MARAD concerning the citizenship and endorsement status of that vessel. No record evidence indicates that Peter Pan attempted to hide or otherwise keep the M/V STELLAR SEA out of Agency view. Indeed, the record indicates that Peter Pan's counsel explicitly presented Peter Pan's theory of why the M/V STELLAR SEA should not be considered an affiliate of Peter Pan's during the Agency's investigation into the Peter Pan/Seven Seas relationship in 2001. Peter Pan's crab cap was determined without the benefit of the M/V STELLAR SEA's historic participation in the crab fishery, and Peter Pan and Seven Seas were required to ensure that they did not exceed the designated crab caps issued to Peter Pan during the charged period. This is not to say that the overall context and history of Peter Pan's attempts to comply with Agency regulations is irrelevant to determining the proper penalty in this case.⁴⁸

⁴⁸ While the Administrator indicated that such efforts at compliance were irrelevant for the fact of violation, the *Adak* decision must be read to indicate that such compliance efforts and conscious structuring of the business arrangements to comply with the regulations is relevant for assessment of an appropriate penalty for any such violations. See *In re Adak Fisheries, LLC, et al.*, 2009 WL 1034813 (April 1, 2009) (noting that "Respondents' purpose in establishing their business relationships is not relevant to the decision" but later stating in the penalty discussion that on remand the judge in that case should consider "[t]he fact that [respondents] did not succeed in achieving compliance does not increase their culpability" where Respondents attempted to comply with the law).

However, failure to adhere to the Agency's regulations is the central issue in this case. To claim now that Peter Pan, in light of that failure, should get the benefit of the M/V STELLAR SEAS' historical processing in recalculating its proper crab cap is flatly rejected. Respondents either complied or did not comply with (1) their obligations to list all affiliates in their AFA permit applications and (2) their subsequent obligation to comply with the crab caps issued by the Agency under the terms of Agency regulations. Peter Pan is wrong to assert that the Agency should have included the M/V STELLAR SEA as an affiliate of Peter Pan in the first place. Moreover, the Agency's failure to include the crab processed by the M/V STELLAR SEA in its crab cap is a direct and proximate result of business decisions made by Respondents.

Fifth, Peter Pan took issue with the Agency use of a penalty schedule for the Alaska region that explicitly deals with harvesting – not processing – violations. See Peter Pan's Post-Hearing Memorandum at 36. Peter Pan is correct that the Agency's penalty schedules effective during the charged period does not and should not apply to processing activities as discussed fully above.

Sixth, Peter Pan argued that the Agency presented no evidence of "ill-gotten gain" and that the Agency's efforts to recapture the difference of what Peter Pan paid the fishermen for the amount of crab overage and the price it sold the crab for represents no reasonable effort to account for Peter Pan's actual net profit. See Peter Pan Post Hearing Memorandum at 36-37. Indeed, Peter Pan's president testified that Peter Pan lost money on the company's transactions with Seven Seas in the 2004 and 2005 period. The undersigned need not and will not make a determination on this issue for purposes of setting the appropriate sanction in this case.

Agency counsel correctly countered that the Agency's enforcement policy has consistently sought to recapture the value of illegally harvested fish and/or the benefit received

by unlawful actors. See Agency Reply Brief at 22-23. Indeed, as articulated by the undersigned in an earlier decision, a penalty imposed should generally be enough to alter a respondent's economic calculus so that any such penalty is more than the cost of doing business. See In re Pesca Azetca, S.A. de C.V (F/V AZETCA 1), 2009 WL 3721029 (NOAA 2009), subsequently affirmed by the Administrator, 2010 WL 1676739.

Furthermore, in Adak, the Administrator spoke to this very issue and rejected respondent efforts in that case to account for accurate renderings of net profit. See In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (April 1, 2009) (noting that "the maximum penalty per violation was \$120,000 and that the penalty assessed in this case was \$42,000 per violation. Regardless of whether NOAA's counsel made a mathematical error in estimating profits made from processing crab on Adak, Respondents have not shown how such an error impacted the penalty assessed. Any error did not cause the penalty imposed to exceed the maximum authorized by law.") (emphasis added). However, the undersigned finds this statement, and the proposition for which it stands, to be legally problematic – in that the Administrator seems to be saying that so long as the penalty per violation does not exceed the statutory maximum, the Agency is free to establish a penalty amount without setting forth a proper factual and legal explanation. Upon further reflection, the Administrator should consider clarifying statements on this point to conform to 15 C.F.R. § 904.108(a) and 16 U.S.C. § 1858(a).

Aside from this problem, the general point is valid that the Agency has never been required to account for a respondent's costs in conducting its unlawful activity and write such amounts off the penalty to arrive at a net gain for penalty purposes. Therefore, the undersigned will not do so here.

Finally, with respect to the penalty, Peter Pan argued that that Magnuson Act's language concerning continuing violations limits the Agency from seeking a penalty in this case based on each delivery. See Peter Pan's Post Hearing Memorandum at 37-38, citing and discussing 16 U.S.C. § 1858(a). Peter Pan's argument must also be rejected given the Administrator's explicit consideration and rejection of this argument in Adak. See In re Adak Fisheries, LLC, et al., 2009 WL 1034813 (April 1, 2009) (noting that the statute "means that one continuing violation can result in a new chargeable offense each day the violation continues. It does not mean that multiple violations occurring on one day have to be collapsed into one charge.").

VIII. Order

WHEREFORE:

IT IS HEREBY ORDERED that a civil penalty in the total amount of **FOUR HUNDRED AND FIFTY THOUSAND DOLLARS** (\$450,000) is assessed, jointly and severally, against Peter Pan Seafoods, Inc. and Seven Seas Fishing Company.

PLEASE BE ADVISED that a failure to pay the penalty 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 and Order 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 D** 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.

IT IS SO ORDERED.

Done and dated this 26th day of September, 2011
at Alameda, CA.

A handwritten signature in black ink, appearing to read "Parlen L. McKenna", written over a horizontal line.

HON. Parlen L. McKenna
Administrative Law Judge
United States Coast Guard

ATTACHMENT A: LIST OF WITNESSES AND EXHIBITS

Agency Witnesses

1. Special Agent Brent Pristas (NOAA)
2. Special Agent in Charge Sherrie Tinsley Myers (NOAA)
3. Mr. Gerald Hellerman

Respondents' Witnesses

1. Mr. Steven Edward Hughes
2. Mr. Barry Dane Collier

Agency's Exhibits (Agency Exh. 1 through Agency Exh. 112).

1. Demonstrative exhibit for opening statement.
2. Senator Murray's statement on floor of Senate upon passage of AFA, Congressional Record (144 Cong. Rec. S. 12696 at 12707-708).
3. Peter Pan's AFA Processor Permit Application dated 12/22/99.
4. Peter Pan's AFA Processor Permit Application received by NMFS RAM in Jan 2003.
5. Email from Kent Lind dated 3/9/00 to distribution list regarding: Crab Processing Caps.
6. Wesley Loy, Anchorage Daily News, "Pollock Rules Draws Harvest of Objections", June 3, 1999, pg. F1.
7. Fair Fisheries Coalition Press Release dated March 9, 1999 (prepared by Sher and Blackwell).
8. North Pacific Management Council Memorandum from Chris Oliver, Deputy Director, to Processor Sideboard Committee and Agency Staff dated 7/16/99 re Appointment of Committee and Meeting Schedule.
9. Minutes of Peter Pan's Board of Directors Meeting, May 26, 2000.
10. Minutes of Peter Pan's Board of Directors Meeting, Nov. 22, 2000.
11. Minutes of Peter Pan's Board of Directors Meeting, June 1, 2001.
12. Minutes of Peter Pan's Board of Directors Meeting, Nov. 19, 2001.
13. Minutes of Peter Pan's Board of Directors Meeting, May 30, 2002.
14. Minutes of Peter Pan's Board of Directors Meeting, Nov. 26, 2002.
15. Minutes of Peter Pan's Board of Directors Meeting, May 27, 2004.
16. Seven Seas Federal Tax Filings 2002
17. Seven Seas Federal Tax Filings 2003
18. Seven Seas Federal Tax Filings 2004
19. Seven Seas Federal Tax Filings 2005
20. Seven Seas Federal Tax Filings 2006
21. Seven Seas Processing For Peter Pan for 2000 – 2005
22. Agreement For Advance of Funds dated March 19, 2002 between and among Peter Pan, Seven Seas, Stellar Seafoods, Inc. and Blue Wave Seafoods, Inc.
23. Advance of Funds Agreement dated Jan 1, 2007 between and among Peter Pan, Seven Seas, Stellar Seafoods, Inc. and Blue Wave Seafoods, Inc.
24. Requests for cash advances from Seven Seas to Peter Pan.

25. List of wire transfers from Peter Pan to Seven Seas (6/30/02 – 10/12/07).
26. List of wire transfers to Seven Seas (4/4/03 – 9/28/07).
27. Advance of Funds Loan Invoices from Peter Pan to Seven Seas.
28. MARAD letter to Mr. James P. Walsh, Esq. dated May 29, 2001 regarding: Request for Letter Ruling Under the American fisheries Act of 1998 Regarding the Use of Custom Processing Agreements Under the American Fisheries Act of 1998.
29. MARAD letter to Mr. Garry Greenwood dated October 15, 2001 regarding: Eligibility of the vessel STELLAR SEA, Official Number 626433, to be documented with a fishery endorsement.
30. Letter from J. Michael Cavanaugh of Holland & Knight, LLP to Mr. Stephen Marcucilli, President, First Hawaiian Leasing, Inc., dated April 11, 2001 regarding: M/V STELLAR SEA.
31. MARAD letter to Mr. Robert Baskerville dated Oct 2, 2003 regarding: Eligibility of F/VAJ, LLC to document the vessel AJ, Official No. 599164, with a fishery endorsement.
32. MARAD letter to Mr. Mark Weed dated Sept 13, 2007.
33. MARAD letter to Mr. William N. Myhre, Esq., dated Dec 21, 2007 regarding Temporary Eligibility of Stellar Seafoods, Inc, to document the vessel STELLAR SEA. Official No. 627433, with a fishery endorsement.
34. MARAD letter to Mr. William N. Myhre, Esq., dated June 9, 2008 regarding Temporary Eligibility of Stellar Seafoods, Inc, to document the vessel STELLAR SEA. Official No. 627433, with a fishery endorsement.
35. Seven Seas Consolidated Financial Statements from 2002 – 2006.
36. Letters from NMFS Restricted Access Management to Peter Pan regarding notification of annual crab caps.
37. Peter Pan Seafoods, Inc. Excess Marine Liabilities for 2004/2005 Policy No. M0606 (A).
38. Seven Seas Fishing Company Excess Marine Liabilities for the term of 2004/2005. Policy No. M0606 (B).
39. Peter Pan Seafoods, Inc. Excess Marine Liabilities for 2004/2005 Policy No. SE04LIA8629.
40. Seven Seas Fishing Company Excess Marine Liabilities for the 2004/2005 Policy No. SE04LIA8630/81.
41. Peter Pan Seafoods, Inc. Excess Marine Liabilities for 2004/2005 Policy No. 06175ML704(A).
42. Seven Seas Fishing Company Excess Marine Liabilities for 2004/2005 Policy No. 06175ML704(B).
43. Peter Pan Seafoods, Inc. Excess Marine Liabilities for 2004/2005 Policy No. SEA 04-14.
44. Seven Seas Fishing Company Excess Marine Liabilities for the term of 2004/2005 Policy No. SEA 04-13.
45. Peter Pan Seafoods, Inc. Marine Bumpershoot and Excess Liabilities policy for 2004/2005 SE04LIA 7614/81.
46. Seven Seas Fishing Company Bumpershoot and Excess Liabilities policy for 2004/2005 SE04LIA 7618/81.
47. Peter Pan Seafoods, Inc. Commercial Liability Policy for 2004/2005 Policy No. CLL420091500.
48. Seven Seas Fishing Company Commercial Liability Policy for 2004/2005 Policy No. CPP420091800.

49. Seven Seas Fishing Company Certificate of Entry for the American Steamship (the American Club) for 2004/2005.
50. Seven Seas Fishing Company Pollution Policy for 2004/2005 Policy No. OMH349283201.
51. Seven Seas Fishing Company Marine Package Policy for the term 2004/2005 Policy No. PH114570c.
52. Peter Pan Seafoods, Inc. Commercial Liability Umbrella Policy for 2004/2005 Policy No. 72ULP1358601.
53. Peter Pan Seafoods, Inc. Commercial Automobile Coverage for 2004/2005 Policy No. CA 420091600.
54. Seven Seas Commercial Property General Liability and Inland Marine Coverage for 2004/2005 Policy No. CPP 420091800.
55. Peter Pan Seafoods, Inc. Worker's Compensation policy for 2004/2005 Policy No. WCR1112145.
56. Seven Seas Fishing Company Worker's Compensation policy for 2004/2005 Policy No. WCR1112146.
57. Seven Seas Fishing Company Insurance Summary for 4-1-03 to 4-1-04.
58. Letter from Marsh, Inc. to Mr. Craig Stromberg dated 4-17-04 regarding Seven Seas Fishing Company insurance for 2004/2005.
59. Letter from Marsh, Inc. to Mr. Mark Weed dated 6-15-04 regarding Seven Seas Fishing Company's business package policy for 2004/2005.
60. Letter from Marsh, Inc. to Mr. Mark Weed dated 6-19-04 regarding Seven Seas Hull & Machinery/Cargo and Marine Policy for the term of April 2004/2005, and covering the vessels for Seven Seas.
61. Letter from Marsh, Inc. to Mr. Mark Weed dated 9-9-04 regarding Seven Seas' Hull & Machinery Policy for the 2004/2005.
62. Letter from Marsh, Inc. to Mr. Mark Weed dated 11-15-04 regarding Seven Seas' Protection and Indemnity Policy for 2004/2005.
63. Seven Seas Bank Statements Acct. #3859519.
64. Seven Seas General Ledger as of March 31, 2005.
65. Stellar Sea, Inc. Bank Statements Acct. No. 67418004.
66. Stellar Sea, Inc. General Ledger as of March 31, 2005.
67. Seven Seas Invoices to Golden Alaska for services of Karen Conrad.
68. Amended and Restated Charter Performance Guaranty Agreement from Peter Pan to Cypress Stellar Sea, LLC dated October 31, 2001.
69. Amended and Restated Charter Performance Guaranty Agreement from Nichiro Corporation to Cypress Stellar Sea, LLC dated October 31, 2001.
70. Expert Report of Mr. Gerald Hellerman dated September 10, 2010.
71. Memorandum from Mr. Steve Harwood to Mr. Jim Kaylor dated April 14, 2001.
72. Memorandum from Mr. Steve Harwood to Mr. Jim Kaylor, et al. dated May 2, 2001.
73. Cypress letter to First Hawaiian Leasing, Inc. dated August 21, 2001 regarding Further Revised Proposal to Purchase STELLAR SEA Transaction.
74. Memorandum from Mr. Dan Bernhard to Mr. Jim Kaylor and Steve Harwood, et al. dated September 5, 2001.
75. Email from Mr. Gary Greenwood to Mr. James Kaylor re Stellar Sea dated April 24, 2002.

76. Fuyo Credit Report, circa September 2003.
77. Consent to Action of directors of seven Seas Fishing Company dated July 9, 2002.
78. Agreement to Make Loan by and between F/V AJ, LLC and Nichiro Corporation dated 9/25/03.
79. Consent to Action by Peter Pan's Board of Directors dated Dec 17, 2003.
80. F/V AJ LLC Bank Statements, Acct.# 69966901.
81. List of wire transfers to F/V AJ, LLC (9/26/03 – 9/27/07).
82. **WITHDRAWN**
83. Shareholder Agreement by and between Mr. Gary Greenwood, Peter Pan and Nichiro Corporation dated May 18, 2001.
84. Seven Seas response to MARAD, October 2007 Question 13.
85. Email to Mr. Mark Weed from itosi@nichiro.co.jp dated 3/6/07 re Yukon Fish Coop Notes.
86. Email from Mr. Mark Adams to Schiffler and Maiers dated March 13, 2007 regarding Insurance Claim Assignment – Stellar Sea Fire.
87. USCG Vessel Documentation showing STELLAR SEA ownership by Icicle Vessel Holding, Inc.
88. Memorandum of Interview by Special Agent Pristas of Mr. Gary Greenwood dated 8/24/07.
89. Memorandum of Interview by Special Agent Pristas of Trident Seafoods dated 9/6/07.
90. Seven Seas Biannual Reports 2000, 2002, 2003 to the state of Alaska.
91. Stellar Seafoods, Inc. Federal Processing Permit Application, 2003 – 2005.
92. Stellar Seafoods, Inc. Biennial Reports 2000, 2002, 2004.
93. Penalty Calculation Notebook prepared by Special Agent Brent Pristas dated June 17, 2010.
94. NOAA Penalty schedule for exceeding a catch limit (Alaska Region).
95. 50 C.F.R. part 621, dated February 17th, 1982, "Seizure of Illegally Caught Fish."
96. 50 C.F.R., section 600.740, Enforcement Policy.
97. Bareboat Charter Party between Stellar Seafoods, Inc. and First Hawaiian Bank dated Sept. 25, 1992.
98. Amendment of Bareboat Charter Party dated 12/28/92.
99. Amendment No. 2 to Bareboat Charter Party dated 10/31/01.
100. Amended and Restated Custom Processing Agreement by and between Seven Seas and Peter Pan dated 10/31/01.
101. Amendment No. 3 to Bareboat Charter Party dated 9/30/02.
102. Amendment No. 1 to Amended and Restated Custom Processing Agreement dated 9/30/02.
103. Charterer Acknowledgement And Agreement by Stellar Seafoods, Inc. for the benefit of Cypress Stellar Sea LLC, Fuyo General Lease and Wilmington Trust Company dated 2/2004.
104. "Statement of Financial Condition" of Seven Seas dated. June 18, 2010.
105. Agreement to Toll Statute of Limitations.
106. Email string from Mr. Robert Baskerville to Mr. John Marquez dated September 24 -25, 2001.
107. **Duplicate exhibit with Agency Exh. 26 and not offered.**
108. Selected Portions of Deposition Transcripts.

109. "Draft for Public Review Analysis of AFA Processor Sideboard Limits for Groundfish Excessive Share Caps for BSAI Pollock Processing," prepared by Northern Economics, Inc. and North Pacific Fishery Management Council Staff, dated July 14, 2000.
110. Memorandum of Interview by Special Agent Brent Pristas of Cypress Financial Corporation, dated June 23, 2008 (4 pgs.).
111. Memorandum of Interview by Special Agent of James Kaylor, Cypress Financial Corporation, dated June 24, 2008 (3 pgs.).
112. Seven Seas Federal Tax Filings 2001.

Respondents' Exhibits (Resp. Exh. 1 through Resp. Exh. 83)

1. Minutes, 139th Plenary Session, North Pacific Fishery Management Council, June 9-14, 1999.
2. Organizational Chart for Nichiro Corporation, August 1999.
3. Summary of Ownership Interests of AFA Processors, August 1999.
4. Processor Sideboard Committee, Report to the Council, August 9-10, 1999.
5. Memo for North Pacific Fishery Management Council from Lisa Linderman, Alaska Regional Counsel, regarding Excessive Share and Processing "Sideboard" Limits under the American Fisheries Act, dated October 7, 1999.
6. Minutes, 140th Plenary Session, North Pacific Fishery Management Council, October 13-18, 1999.
7. Application for AFA Mothership and Inshore Processor Permit, 12/22/1999.
8. Fed. Reg. Vol. 65, No. 3, January 5, 2000.
9. Fed. Reg. Vol. 65, No. 19, January 28, 2000.
10. Emails regarding AFA Crab Cap Concerns, March 2000.
11. Email from Kent Lind regarding Crab Processing Caps, dated March 9, 2000.
12. Email from Kent Lind Re. Ownership Status of Stellar Sea, dated March 20, 2000.
13. Letter to Peter Pan from Steven Pennoyer, Regarding Processing Caps, March 24, 2000.
14. Memorandum from Stephen Meyer regarding all processors affected by crab processing caps, 3/24/2000.
15. Fed. Reg., Part II, 46 CFR 356, July 19, 2000.
16. Letter from Clarence Pautzke, North Pacific Fishery Management Council, dated July 24, 2000.
17. Memorandum from Special Agent Rohn R. Nelson re Stellar Sea, 7/31/2000.
18. Letter to PPSF from James Balsiger regarding Processing Caps, dated August 1, 2000.
19. Crab Processing Sideboard Caps Discussion Paper, August 7, 2000.
20. Fax to PPSF from Tracy Buck, regarding AFA Crab processing Cap Table, including table, dated 8/9/2000.
21. Minutes, 145th Plenary Sessions, North Pacific Management Council, September 8-11, 2000.
22. Letter to PPSF from James Balsiger regarding Processing Caps, dated January 11, 2001.
23. Letter to Frank Rue from James Balsiger, dated August 29, 2001.
24. Letter to Garry Greenwood from Murray Bloom, MARAD, regarding eligibility of Stellar Sea to be documented with fishery endorsement, October 15, 2001.

25. Cypress Charter Party Agreement with Stellar Seafoods, dated as of October 31, 2001, including Bareboat Charter Party and amendments.
26. Amended and Restated Custom Processing Agreement, 10/31/2001, with amendments.
27. Amended and Restated Charter Performance Guaranty Agreement, from Nichiro Corp. to Cypress Stellar Sea, LLC, October 31, 2001.
28. Amended and Restated Charter Performance Guaranty Agreement, from PPSF to Cypress Stellar Sea, LLC, October 31, 2001.
29. Charter Acknowledgment and Agreement.
30. Letter to Gary Greenwood from Murray Bloom, MARAD, regarding eligibility of Blue Wave to be documented with fishery endorsement, December 10, 2001.
31. Fed. Reg. Vol. 66, No. 242, December 17, 2001.
32. Letter to PPSF from Philip Smith, dated January 8, 2002.
33. Fed. Reg. Part II, 50 CFR 679, December 30, 2002.
34. Letter to PPSF from Philip Smith, dated January 2003.
35. PPSF Application for AFA Inshore Processor Permit, 1/24/03.
36. Letter to PPSF from Philip Smith, 8/6/2004.
37. Emails Regarding Peter Pan Crab Cap, dated August 17, 2004.
38. Letter to PPSF from Philip Smith, dated October 6, 2004 with Permit.
39. Fax to NMFS from PPSF, dated December 23, 2004, with AFA Inshore Processor Permit Application.
40. Letter to PPSF from Philip Smith regarding Processing Caps, dated January 6, 2005, with permit.
41. News Release: NOAA Fisheries Service Publishes Final Rule on Alaska Crab Rationalization, dated March 2, 2005.
42. Application for Crab Quota Share or Crab Processor Quota Share (PPSF), dated May 20, 2005.
43. NOAA Organizational Handbook, No. 61, Delegation of Authority, 2/28/2006.
44. Tolling Agreement, by and between NOAA, PPSF, Seven Seas, and Stellar Seas, effective December 30, 2008.
45. Tolling Agreement, by and between NOAA, PPSF, Seven Seas, and Stellar Seas, signed March 2009.
46. Calculation of Peter Pan Seafoods Entity Crab Processing Cap Overage, prepared by Brent Pristas, June 17, 2010.
47. Certificate of Documentation (RM Thorstenson), formerly the STELLAR SEA.
48. Abstract of Title (RM Thorstenson), formerly the STELLAR SEA
49. NOAA Organization Chart, effective 4/9/2010.
50. NOAA General Counsel Organization Chart, 2/1/2010.
51. NOAA Alaska Region Organizational Chart, 2/22/2010.
52. NOVA.
53. PPSF Response to NOVA.
54. Seven Seas Response to NOVA.
55. NOAA's PPIP.
56. PPSF PPIP.
57. Seven Seas PPIP.
58. NOAA's Responses to PPSF's First Set of Interrogatories
59. NOAA's Responses to PPSF's Second Set of Interrogatories.

60. Respondents PPSF and Seven Seas Statement of Undisputed Facts

61. NOT OFFERED

62. Expert Report of Steven Hughes, with Exhibits.

63. Transcript of deposition testimony of Steven Hughes, August 31, 2010.

64. Transcript of deposition testimony of James Balsiger, April 29, 2010.

65. Transcript of deposition testimony of Jessica Gharrett, March 12, 2010.

66. Transcript of deposition testimony of Philip Smith, September 9, 2010.

67. Transcript of deposition testimony of Gerald Hellerman, September 22, 2010.

68. Transcript of deposition testimony of Chris Oliver, March 15, 2010.

69. Transcript of deposition testimony of Brent Pristas, October 7, 2009.

70. Transcript of deposition testimony of Brent Pristas, July 23, 2010.

71. Transcript of deposition testimony of Sherry Tinsley-Myers, July 23, 2010.

72. Preface to NOAA Penalty Schedule.

73. 16 USC 1858. Civil Penalties and permit sanctions.

74. 50 CFR 679.2 (October 1, 2003).

75. 50 CFR 679.4 (October 1, 2003 ed.).

76. 50 CFR 679.43 (October 1, 2003 ed.).

77. 50 CFR 679.65 (October 1, 2003 ed.).

78. Copy of American Fisheries Act.

79. Federal Acquisition Act Regulations, Subpart 7.5 Inherently Governmental Functions, March 2005.

80. Definition of "control" from Black's Law Dictionary, Ninth Edition (2009).

81. Definition of "interest" from Black's Law Dictionary, Ninth Edition (2009).

82. Agreement for Advance of Funds, made as of March 19, 2002.

83. Letter from William N. Myhre to Murray A. Bloom, U.S. Maritime Administration, dated November 1, 2007 (**SUBJECT TO PROTECTIVE ORDER REGARDING CONFIDENTIAL INFORMATION**)

84. Investment Company Act of 1940

**ATTACHMENT B: RULINGS ON PROPOSED FINDINGS OF FACT AND
CONCLUSIONS OF LAW**

Agency's Proposed Findings of Fact and Conclusions of Law:⁴⁹

1. The AFA had two legislative purposes: (1) setting ownership standards, American ownership and control standards for all US fishing vessels throughout all US waters and (2) rationalizing the Bering Sea pollock fishery.

Lind: Pg. 7, lines 6 – 18: “Kent, if you could, if you would, tell -- give us your understanding of the chief purposes of the American Fisheries Act. A. There were two primary purposes. The first section of the Act -- or, you know, part of the Act dealt with setting ownership standards, American ownership and control standards for all US fishing vessels throughout all US, you know, waters. The second part of the Act dealt with rationalizing the Bering Sea pollock fishery. That is to say figuring out a way to reduce the number of vessels fishing there and to divide up the pollock quotas among the remaining participants.”

[*Lind: Pg. 24, line 10 – 20: “I was the lead person from the agency working on this emergency rule. It doesn't mean I wrote all of it, but I was the person responsible for putting it together and ushering it through the long review process that -- the National Fishery Service. Q. And other rules that were published subsequent to this that concerned the AFA, were you also the point of contact for those rules? A. I was the point of contact for most of them, yes.”]

RULING: ACCEPTED AND INCORPORATED.

2. In a rationalized fishery, the number of participants, boats or processing companies that have access to the resource is restricted; the fishery is regulated as a “limited entry fishery.”

Lind: Pg. 8, line 5 – 20: “Q. And if you would, what does the term rationalization mean? A. Rationalization in a fisheries context is -- an unrationalized fishery would be one in which there would be open access, any fishing company or boat could come fish. There would be too many boats. There would be a race for fish. It's uneconomical. There's a lot of economic waste. A rationalized fishery is one in which -- there's a variety of ways the fisheries could be rationalized, but the number of participants, boats or companies that can fish is restricted. And then oftentimes the overall quota for the fishery is divided up amongst the participants so they could each fish in a more rational manner.”

Lind: Pg. 11, line 18 to Pg. 12, line 21: “... what did the AFA legislation do to rationalize the pollock fishing in the Bering Sea? A. It did several things. First of all, it defined exactly who was allowed to fish for Pollock in the Bering Sea in three different sectors: The factory trawler off-shore fisheries; what they call the mothership fishery, which are large factory ships that float at sea; and the inshore fishery, which are the processing plants on land and the vessels that deliver to them. So it would define exactly who could fish for and process pollock. The second thing it did is it divided up the pollock quota, fishing quota between those three sectors. And then a fourth sector, called Community Development Quota Program, which is a quota that's set aside for the native communities in coastal Alaska. So they had their own separate quota to do with what they want with. And then in addition to dividing up the quota, it set some guidelines and standards for each individual sector of the fishery to form fisheries cooperatives, which are organizations through which the individual participants can divide up the quotas amongst themselves and fish as if each vessel had its own quota. They call them cooperatives because there's a law, 1934 Fisherman's Cooperative Act, something like that, that allows these companies to collaborate in cooperatives without violating the antitrust laws.”

Lind: Pg. 13, lines 14 – 21: “Q. Okay. So would it be fair to say that the AFA, in effect, created a limited entry fishery out of the Bering Sea pollock fishery and the AFA entities are the ones who can participate in

⁴⁹ The Agency “annotated” its proposed findings of fact by quoting at length from the depositions and other record items. The undersigned has retained the Agency's format for its proposed findings but reduced the font size in the interest of economizing space, as well as eliminating the Agency headings.

that limited fishery, and the non-AFA entities are the ones who did not get to participate in that limited entry fishery? Would that be a fair description? A. That would be a fair description, yes.”

RULING: ACCEPTED AND INCORPORATED AS MODIFIED.

3. In 2004, the BSAI Pollock fishery was the largest fishery (by volume) in the U.S.

Lind: Pg. 8, line 21 to Pg. 9, line 3: “Q. Okay. And the pollock fishery in the Bering Sea -- and it's often referred to as the BSAI fishery -- would you characterize that as a significant fishery? A. Yes. It's certainly the largest fishery in the United States, by far, in terms of volume, and one of the most -- one of the largest in the world.”

AE 2.

RULING: ACCEPTED AND INCORPORATED.

4. Non-AFA entities were concerned that with the economic and operational advantages that the AFA entities would acquire under the AFA, that AFA entities would have the financial and operational resources to encroach into other fisheries that the AFA entities had heretofore never concentrated on.

Lind: Pg. 13, line 22 to Pg. 15, line 22: “... did the rationalization of the pollock fishery in the Bering Sea, did that cause any concern for non-AFA entities? A. It caused a tremendous amount of concern. Would you like me to describe those concerns? Q. Yes, please. Yes. A. Prior to the AFA, prior to the rationalization of fishery, all of the major fisheries in Alaska would be conducted at the same time. The trawl fisheries would start on January 1st -- or January 20th, excuse me, and a fishing company fishing in Alaska would have to choose: Is it going to fish in the Bering Sea or the Gulf of Alaska, is it going to fish for Pollock or flatfish or cod or halibut, or what is it going to fish for is and where is it going to fish?

And what that meant was, fishing efforts -- the vessels would distribute themselves around Alaska, find their own niches. The fishermen thought that would be the most profitable for them. The Bering Sea pollock fishery is by far the largest fishery, with the largest vessels, the most horsepower, the biggest boats, the biggest processors.

By rationalizing the fishery, suddenly they no longer had to race for fish starting January 20th with each other, so they could go -- they could fish whenever, wherever they wanted on their pollock quota. They could bank it, fish it later in the year they wanted, and it would give them the flexibility to join -- fish in a lot of other fisheries and areas they hadn't previously done.

So the participants in -- fishermen that -- smaller scale fishermen and other fisheries were greatly concerned that by rationalizing the pollock fishery, all of these large vessels would flood over into their own fisheries.

In addition, the pollock industry prior to the American Fisheries Act, was designed -- it was a super-charged fishery, essentially, with many, many large vessels with huge horsepower to race for fish amongst each other.

Once the fishery was rationalized, there was a lot of surplus vessels that didn't need to have nearly so many vessels, even nearly such big ones, and so the surplus vessels alone, there was a lot of fear they would be moved to other fisheries, they wouldn't be needed for pollock anymore, and that would overcapitalize, make it worse for the other fishermen in the other fisheries. They wouldn't be able to compete.”

AE 7.

RULING: ACCEPTED AND INCORPORATED.

5. Other fisheries have been rationalized since the AFA rationalized the BSAI Pollock fishery. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 49, line 25 to Pg. 50, line 5: “... to your knowledge have other fisheries been subject to rationalization efforts since the passage of the American Fisheries Act? A. In Alaska the crab fishery has been rationalized. It's now a completely rationalized fishery.”

6. Fishery management programs that "rationalize" a fishery will generally need to consider the implementation of "sideboard" restrictions as a management tool to prevent freed up fishing and processing resources from detrimentally impacting other fisheries where the newly freed-up fishing and processing resources had not historically concentrated; for example, sideboard measures were implemented in the crab rationalization program. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 50, line 9 to Pg. 51, line, 3: "... to your knowledge would those other rationalization programs include sideboard provisions with sideboard limits? A. Well, I can't speak for every single one. But most definitely the crab fishery, I mean, it's -- it's a built-in effect of any rationalization program. A fishery that needs rationalization is one that's, by definition, overcapitalized, there's too many vessels, too many participants chasing too few fish. So by rationalization you end up with surplus capacity and surplus vessels.

And so sideboard measures is always going to be a concern -- or I should say spillover effects of rationalization programs is always going to be a concern and, generally speaking, that's always going to be an issue that the Agency or other governing bodies are going to have to deal with to prevent the rationalization of one fishery from spilling over to other fisheries."

8. Sideboards were restrictions placed on AFA entities to prevent pollock fishermen and pollock processors from expanding their participation in the other fisheries. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 16, lines 16 - 23: "Q. Okay. You used the term sideboards. Could you elaborate on that? A. Sideboards are what we called any kind of regulations or restrictions that prevented Pollock fishermen and pollock processors from expanding their participation in the other fisheries, either preventing them from fishing more in other fisheries or processing more seafood in other fisheries."

See also the Congressional Record: Senator Ted Stevens (Alaska) stated that the Senate committee "spent considerable time with the fishing industry from other fisheries that were concerned about the possible impacts ... upon their fisheries" and that this legislation "includes many safeguards for those other fisheries." 144 Cong. Rec. S.12696-03 at 12698 (October 20, 1998).

AE 2.

9. The implementation of sideboards restrictions on AFA entities was debated extensively in front of the North Pacific Fishery Management Council over the period from October, 1998 to December 30, 2002, when NMFS final rule published implementing the AFA. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED**

Lind: Pg. 16, line 16 - 24 - 25/: Pg. 17, line 1 - 10: "Q. And over what period of time, though, during the implementation of the AFA were these sideboard measures debated before the North Pacific Management Fishery Council? A. There was a wide variety of sideboard meshes dealing with both fishing and processing. And pretty much from the very passage of the AFA in 1998 up through until NMFS established final rules implementing the AFA, they were debated by the Council. So I would say over a period of at least two years multiple, ten-plus Council meetings in some form."

10. The AFA statute provides that "any entity in which 10 percent or more of the interest is owned or controlled by another individual or entity shall be considered to be the same entity as the other individual or entity for the purposes of this subparagraph." **RULING: REJECTED AS A FINDING OF FACT - ACCEPTED AND INCORPORATED AS A CONCLUSION OF LAW**

Sec 211(c)(2)(A) Effective January 1, 2000, the owners of the motherships eligible under section 208(d) and the shoreside processors eligible under section 208(f) that receive pollock from the directed pollock fishery under a fishery cooperative are hereby prohibited from processing, in the aggregate for each calendar year, more than the percentage of the total catch of each species of crab in directed fisheries under the jurisdiction of the North Pacific Council than facilities operated by such owners processed of each such species in the aggregate, on average, in 1995, 1996, 1997. For the purposes of this subparagraph, the term "facilities" means any processing plant, catcher/ processor, mothership, floating processor, or any other operation that processes fish. *Any entity in which 10 percent or more of the interest is owned or controlled by another individual or entity shall be considered to be the same entity as the other individual or entity for the purposes of this subparagraph.* [Italics added.]

11. In September 2000, the NPFMC, using the authority that Congress had given it under AFA section 213(c), changed the statutory qualifying years set out in AFA section 211(c)(2)(A) by adding 1998 and giving double weight to the amount of processing done by AFA entities in 1998. **RULING: ACCEPTED AND INCORPORATED**

66 Fed Reg 7327, 7329 (Jan 22, 2001): "... in September 2000 the Council recommended that the years used to calculate crab processing sideboard amounts be revised by adding 1998 and by giving it a double weight. This action was based, in part, on concerns expressed by some crab fishermen and AFA processors that too many non-AFA processors have left the crab fisheries since 1997 and that the 1995 through 1997 years did not accurately reflect the composition of the crab processing industry at the time of passage of the AFA. Some crab fishermen testified to the Council that AFA crab processing limits were restricting markets for crab fishermen and having a negative effect on exvessel[SIC] prices. By adding 1998 and by giving it a double weight relative to 1995 through 1997, the Council believes that the crab processing limits would more accurately reflect the status of the crab processing industry at the time of passage of the AFA and that such a change to supersede this provision of the AFA is warranted to mitigate adverse effects on markets for crab fishermen."

Oliver: Pg. 43, line 8 to Pg. 44, line 9: Q. Right. Okay. So what happened is that the plan went forward, and then the Secretary, the National Marine Fisheries Service, put their own regulation into the final package of regulations that was not reflected in the plan itself; isn't that correct? A. My -- again, I may not recall the exact sequence of events, because we had a number of amendments going on in parallel to the main package. But my recollection is that the council did vote a regulatory amendment package to the crab processing sideboards, and I think it was pursuant to this discussion paper that you have as Exhibit 6. And within that regulatory amendment package, they did certain things, such as add 1998 twice. Q. Well, there is no question about that. A. *They considered other aspects of the program within that same package, including doing away with the caps, including this whole entity versus aggregate level, there is a discussion of that issue in the document and a recognition that it was unlikely to be implementable. So when the council voted for its regulatory amendment, it voted for what it included, it didn't specifically vote item by item as to what not to include.* [Italics added]

12. Regulatory definitions. 50 CFR 679.2 (effective 1/29/03):

"AFA crab processing facility means a processing plant, catcher/processor, mothership, floating processor or any other operation that processes any FMP species of BSAI crab, and that is affiliated with an AFA entity that processes pollock harvested by a catcher vessel cooperative operating in the inshore or mothership sectors of the BS pollock fishery.

AFA entity means a group of affiliated individuals, corporations, or other business concerns that harvest or process pollock in the BS directed pollock fishery.

AFA inshore processor means a shoreside processor or stationary floating processor permitted to process BS pollock under § 679.4(1)(5).

Affiliation for the purpose of defining AFA entities means a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10-percent or greater interest in another, exerts control over another, or has the power to exert control over another; or a third individual, corporation, or other business concern directly or indirectly owns a 10 percent or greater interest in both, exerts control over both, or has the power to exert control over both.

(1) What is 10-percent or greater ownership? For the purpose of determining affiliation, 10-percent or greater ownership is deemed to exist if an individual, corporation, or other business concern directly or indirectly owns 10 percent or greater interest in a second corporation or other business concern.

(2) What is an indirect interest? An indirect interest is one that passes through one or more intermediate entities. An entity's percentage of indirect interest in a second entity is equal to the entity's percentage of direct interest in an intermediate entity multiplied by the intermediate entity's direct or indirect interest in the second entity.

(3) What is control? For the purpose of determining affiliation, control is deemed to exist if an individual, corporation, or other business concern has any of the following relationships or forms of control over another individual, corporation, or other business concern:

(i) Controls 10 percent or more of the voting stock of another corporation or business concern;

(ii) Has the authority to direct the business of the entity which owns the fishing vessel or processor. The authority to "direct the business of the entity" does not include the right to simply participate in the direction of the business activities of an entity

which owns a fishing vessel or processor;

(iii) Has the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor. Standard rights of minority shareholders to restrict the actions of the entity are not included in this definition of control provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially

all the assets, to enter into a different business, to contract with the major investors or their affiliates or to guarantee the obligations of majority investors or their affiliates;

(iv) Has the authority to direct the transfer, operation or manning of a fishing vessel or processor. The authority to "direct the transfer, operation, or manning" of a vessel or processor does not include the right to simply participate in such activities;

(v) Has the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor;

(vi) Absorbs all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor;

(vii) Has the responsibility to procure insurance on the fishing vessel or processor, or assumes any liability in excess of insurance coverage;

(viii) Has the authority to control a fishery cooperative through 10-percent or greater ownership or control over a majority of the vessels in the cooperative, has the authority to appoint, remove, or limit the actions of or replace the chief executive officer of the cooperative, or has the authority to appoint, remove, or limit the actions of a majority of the board of directors of the cooperative. In such instance, all members of the cooperative are considered affiliates of the individual, corporation, or other business concern that exerts control over the cooperative; and

(ix) Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor." **RULING: ACCEPTED AND INCORPORATED**

13. The definition of "affiliation", specifically the guidance as to what types of business actions and/or arrangements would constitute 10% or more control, was expanded under the final AFA rule (published December 30, 2002) from the definition of affiliation contained in earlier emergency rules that implemented the AFA.

RULING: ACCEPTED AND INCORPORATED

Lind: Pg. 45, line 13 to Pg. 46, line 6: "A. My understanding of the question is that why is this definition different from the first one and why did it change. Q. Right. A. The first definition was put out without any ability -- you know, with no comment period, no ability for industry to comment. And it became clear, during the implementation of the emergency rule during those two years, that the definition was not as expansive as it needed to be to provide clarity to the industry as to what exactly ownership control means, especially control, so -- and we got comments, I believe, from industry to that effect on the proposed rule. So this was the final version of the definition of control that was developed by the Agency to expand upon what that term meant and how it was going to be implemented by the National Fisheries Service."

14. AFA processors were required to list in their applications for an AFA shoreside cooperative processor permit "the percentage of ownership or control and describe the nature of the interest in each AFA crab facility that is affiliated with the AFA entity..." **RULING: ACCEPTED AND INCORPORATED**

50 CFR 679.4(I)(5)(iv)(E): "Application for permit. A completed application for an AFA inshore processor permit must contain:

(E) AFA crab facility ownership information. If the applicant is applying for a cooperative pollock processing endorsement, the AFA inshore processor application must list the name, type of facility,

ADF&G processor code, and list the percentage of ownership or control and describe the nature of the interest in each AFA crab facility that is affiliated with the AFA entity that owns or controls the AFA inshore processor.”

Lind: Pg. 23, lines 7 - 14: “...whose obligation was it to make this disclosure [of AFA crab facility affiliation information]? A. The company that was applying for the pollock processing permit. Q. Okay. And what would they use for guidance in making this kind of determination? A. They would use the regulations, the definitions and the regulations.”

Hughes [Peter Pan's expert witness] : Pg. 64, line 25 to Pg. 65, line 1 - ___: “... you took a look at the AFA regulations; correct? A Yes. Q All right. And your understanding, if you have one, from your review of those regulations, whose responsibility is it to list an affiliated AFA crab processor? MR. WALSH: Objection. Calls for a legal conclusion, if you're talking about this permit application. MR. WALKER: Well, I'm asking Mr. Hughes -- he reviewed the regulations. I'm asking for his opinion, if he has one. MR. WALSH: You can't ask him for a legal conclusion. You can certainly ask him for his understanding. MR. WALKER: Well, that's what I'm asking for. A. My understanding was that that was the responsibility of the individual companies.”

Smith: Pg. 67, line 21 to Pg. 68, line 1: Q. And in general terms -- and, again, I just want to talk about general terms now -- in general terms, whose responsibility is it to fill out the information on a -- on any application? To -- go ahead, if you understand my question. A. It is the applicant's.”

15. NMFS placed the obligation of identifying the affiliated crab processing entities on the AFA processors themselves because the AFA processors were best positioned to analyze their own intercompany business arrangements and apply the regulatory guidance. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 37, line 9 to Pg. 38, line 16: “Q. If you would, why did we put the onus on the companies to do that? A. There's really no way for -- I mean, these aren't small-scale fishermen who own a fishing boat. These are large corporate entities with many different affiliations and ownership connections that are constantly changing. There's just no practical way for the National Fisheries Service to track all of that. It's not something that the agency is set up for. It's much simpler and much more straightforward to have the industry tell us -- you know, and it's much more accurate for them to tell us who they own, you know, what processing facilities they have an ownership control interest in, and we use that information. I believe the regulations also set out that anytime there's a change in ownership or control, they had to submit an amended application, just like when you move, you submit a new, you know, driver's license, change of address form for the driver's license agency. So we put the onus on industry to do that because it's really the only practical way to do it. We would have just gotten it so wrong, there's -- these corporations are so complicated and it's not something we had the ability to disentangle and dissect and track. Q. And it's probably clear, but again I want to ask the question. What guidance could the companies use to make these determinations as to who is affiliated with them? A. They would use the regulations.”

Balsiger: Pg. 46, lines 2 - 20: Q. Therefore, you would have to make a determination as to be what would be affiliated or not, wouldn't you? MR. WALKER: I, again, object. I'm not sure -- that's what you said, Mr. Walsh; I'm not sure that's what the witness said. Q. Go ahead. You can answer the question. A. Of course, the regulations are set up such that there is a large application process that requires people who want to participate in the program to identify those relationships. And so once those relationships are identified and someone looks for a permit for a particular entity, then my staff, the program people, calculate the cap that would attribute to that. And . . . Q. But they in fact do more than that, don't they? They investigate whether there is accuracy or inaccuracy, don't they? A. I don't know that.

Balsiger: Pg. 67, line 22 to Pg. 68, line 12: Q. Wouldn't it have been better to resolve this issue before the caps were allocated? A. Well, the caps were allocated, as we mentioned earlier, based on that whole application process. Q. Right. A. And -- Q. But if there is an issue, wouldn't you want to resolve it in advance of the next season so you don't have -- so you get that resolved, rather than looking at it after the

fact? A. I think if there was a serious question, they would have. But it wasn't the role, as I understand it, of RAM Division to examine those relationships; it was, rather, to process the applications as they came in.

16. Peter Pan listed the BLUE WAVE as an affiliated crab processing entity on all of its applications for an AFA Processor Permit. **RULING: ACCEPTED AND INCORPORATED**

Hughes: Pg. 76, lines 7 - 14: "Do you have an understanding as to whether or not AFA entities can include more than one processing facility? A Well, I think we've been through that. The history here was that Blue Wave was identified as a Peter-Pan-affiliated processing facility. And in fact, you know, their history was included in the cap. So, you know, clearly that -- it was handled that way."

See also Peter Pan's AFA Processor Permit Applications dated Dec 1999 [AE 3] and Jan 2003 [AE 4].

17. Peter Pan did not list Stellar Sea, Inc (or the STELLAR SEA) as an affiliated crab processing entity on any of its applications for an AFA Processor Permit. **RULING: ACCEPTED AND INCORPORATED**

Hughes: Pg. 64, lines 2 - 16: [referencing Exhibit 5 to Hughes deposition, Peter Pan's 1998 AFA Processor Application] "Do you see the Stellar Sea listed on here anywhere in this application? A I don't see Stellar Sea, but you asked me about Seven Seas or Stellar Sea, and Seven Seas is in Block 1. Q And it goes on to talk about its percentage of ownership with Blue Wave; correct? A That's right. Q But there is no mention on this application of the Stellar Sea; correct? MR. WALSH: Well, I'll stipulate to that. There is no mention. Q (By Mr. Walker) Mr. Hughes, if you would, what's the date that this application was signed? It's the last page. A 12/22/99, by Mr. Collier."

Smith : Pg. 71, line 23 to Pg. 72, line 9: "Q. Do you see on there anywhere that the Stellar Sea or Stellar Sea Inc. is listed as an affiliated entity? A. No, sir. Q. Okay. To your knowledge, did -- do you recall ever receiving any communications from Peter Pan or even Seven Seas Fishing Company, to you or to RAM, stating that the Stellar Sea or Stellar Sea Inc. should be considered to be affiliated with Peter Pan? A. No, sir. I don't have any recollection of that."

18. The Agency Regulations implementing the crab processing sideboard limits

50 CFR 679.65:

"(a) What is the purpose of crab processing limits? The purpose of crab processing sideboard limits is to protect processors not eligible to participate in the directed pollock fishery from adverse effects as a result of the AFA and the formation of fishery cooperatives in the directed pollock fishery.

(b) To whom do the crab processing sideboard limits apply? The crab processing sideboard limits in this section apply to any AFA inshore or mothership entity that receives pollock harvested in the BSAI directed pollock fishery by a fishery cooperative established under Sec. 679.61 or Sec. 679.62

(c) How are crab processing sideboard percentages calculated? Upon receipt of an application for a cooperative processing endorsement from the owners of an AFA mothership or AFA inshore processor, the Regional Administrator will calculate a crab processing cap percentage for the associated AFA inshore or mothership entity. The crab processing cap percentage for each BSAI king or Tanner crab species will be equal to the percentage of the total catch of each BSAI king or Tanner crab species that the AFA crab facilities associated with the AFA inshore or mothership entity processed in the aggregate, on average, in 1995, 1996, 1997, and 1998 with 1998 given double-weight (counted twice).

(d) How will AFA entities be notified of their crab processing sideboard percentages? An AFA inshore or mothership entity's crab processing cap percentage for each BSAI king or Tanner crab species will be listed on each AFA mothership or AFA inshore processor permit that contains a cooperative pollock processing endorsement.

(e) How are crab processing sideboard percentages converted to poundage caps? Prior to the start of each BSAI king or Tanner crab fishery, NMFS will convert each AFA inshore or mothership entity's crab processing sideboard percentage to a poundage cap by multiplying the crab processing sideboard percentage by the pre-season guideline harvest level established for that crab fishery by ADF&G.

(f) How will crab processing sideboard poundage caps be announced? The Regional Administrator will notify each AFA inshore or mothership entity of its crab processing sideboard poundage cap through a letter to the owner of the AFA mothership or AFA inshore processor. The public will be notified of each entity's crab processing sideboard poundage cap through information bulletins published on the NMFS-Alaska Region world wide web home page (<http://www.fakr.noaa.gov>)”

19. Prior to setting the AFA processor percentages for each crab species (which the AFA processor would subsequently be using to multiply against the annual GHL of a crab species to establish that AFA entity's annual crab cap for a species), Lind sent the crab poundage numbers (for the years 95 – 97) to each AFA processor for the AFA processor to verify the numbers being used by NMFS to generate the crab species percentages. **RULING: ACCEPTED AND INCORPORATED**

AE 5.

Lind: Pg. 28, line 9 to Pg. 30, line 4: “Now, Kent, I'm going to show you what will be marked as exhibit 4 and I'll ask you if you can recognize this document. (Exhibit Number 4 marked.) A. This is an e-mail from myself to a variety of fishing industry representatives. It looks like all of the major AFA entities are included in the distribution list and some other industry people. And it is an e-mail announcing that NMFS had finalized its processing crab numbers in the aggregate and was providing a list of -- we had compiled -- all of the AFA entities had submitted their applications to process pollock and listed which crab processors they were affiliated with and which they were not.

And we compiled that list of AFA crab processors and the non-AFA, looked at how much crab had been processed from '95 to '97, which were the benchmark years in the Act and then, just through simple math, determined what the aggregate caps would be for each crab species and each crab fishery. And this was the announcement that we had done that, and we were providing the industry with the information. Q. Just to clarify, when you say this announces or kind of is giving them some preliminary information on the -- before the final rule came out, the aggregate cap, you're talking there and you explained it you, but I just want to make sure I've got it clear. This is basically saying this is the total and these are the individual caps that add up to that total? A. Yeah. The e-mail references an attachment which I don't have. But if I recall correctly, it was a list of processors divided into those two categories, AFA/non-AFA, based on the information the industry submitted, and then the percentages of each crab fishery that the AFA had harvested of the total -- or processed of the total. And it was an attempt -- or it was giving industry a heads up, this is the information we have, does it all look correct to you? And we got comments back and it was a -- you know, providing some preliminary information before we made the final recommendations.”

20. Lind's email reminded the AFA processors that the crab caps would be implemented on an individual entity basis. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 30, lines 8 – 14: “If you'll look down there and you'll see a paragraph which starts with the words remember, "Remember, of course." Do you see that? A. It says, "Remember, of course, that under the 2000 emergency rule regulations, the caps will apply individually to each entity rather than in the aggregate.”

AE 5.

21. Lind's email was sent to DaleSc@PeterPan.com, among other recipients. **RULING: ACCEPTED AND INCORPORATED.**

Lind: Pg. 30, lines 19 – 23: “Q. Also I asked you to look up at the addressees, the e-mail addressees, and you'll see one it's Daryl and capital S little C at ppfs.com. Do you know what PPSF stands for? A. I believe that's Peter Pan Seafoods.”

AE 5.

22. Once an AFA processor's crab cap percentage was set by NMFS for each crab species (which is determined as a percentage of the historical processing done by the AFA processor in the years 95 – 97 and 98 x 2), then the AFA crab processor simply had to multiply that percentage by the appropriate annual (yearly) Guideline Harvest Level (GHL) as set by the state of Alaska for a specific crab species in order to determine the AFA processor's yearly crab cap limit for that specific crab species. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 46, line 25 to Pg. 48, line 6: "... could you perhaps explain the process about how an individual AFA crab processing entity would go about calculating its AFA crab cap? A. They would have received a letter from NMFS that set out their percentage for each crab fishery. There are five different crab fisheries, and it would list a percentage of 15 percent of the Bering Sea king crab fishery, for example. Every time the -- every year when there would be a new crab fishery, the State of Alaska could announce its Guideline Harvest Level, which would be in pounds. And the agency would take the percentage, multiply it times the Guideline Harvest Level to determine what the individual cap would be. Q. And as we discussed before, would it be fair to say that's a simple mathematical -- A. Yeah. It's a percent times the Guideline Harvest Level. And the reason we did it that way is the quotas change every year. It's not a fixed quota from year to year, and the State oftentimes doesn't announce its quotas until right before the fisheries start. They go through a whole other process with the Board of the Fisheries to set their quota. And NMFS has no ability to know what the quotas will be in advance, necessarily, and so we set out permanent percentages. And every time there's a new fishery, they take their percentages and multiply them by the Guideline Harvest Level to find out what their sideboard cap is."

23. 50 CFR 679.7 (k)(8) Crab processing limits. "It is unlawful for an AFA entity that processes pollock harvested in the BSAI directed pollock fishery by an AFA inshore or AFA mothership catcher vessel cooperative to use an AFA crab facility to process crab in excess of the crab processing sideboard cap established for that AFA inshore or mothership entity under § 679.66[sic]. The owners and operators of the individual entities comprising the AFA inshore or mothership entity will be held jointly and severally liable for any overages of the AFA inshore or mothership entity's crab processing sideboard cap." **RULING: ACCEPTED AND INCORPORATED**

24. Rationalization of the BSAI pollock fishery was a long standing issue in Alaska for years preceding the passage of the AFA. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 9, line 4 to Pg. 10, line 2: "... approximately how long was the issue of rationalizing the Bering Sea pollock fishery? How long was that debated in the Alaska region? A. In the Alaska region, it was being debated before I arrived in 1994 in various ways. I would imagine it was probably debated from almost to the beginning of the Americanization of fishery in the late 1980s. I mean, it was a long-standing issue that finally came to fruition with the resolution by Congress -- Q. Okay. A. -- and the American Fisheries Act. Q. And could you give us a few examples of where this issue might be debated at? A. Well, certainly it was debated at the Council, at many, many Council meetings. Debated in Congress at various times. It was certainly out there in the public, the media in Alaska and Seattle, which functions almost as an outpost of the Alaskan fishing industry. Companies were buying full-page ads in the newspapers. It was on TV. It was a very, very big policy issue, you know, in that region for many years."

Hughes: Pg. 12, line 6 to Pg. 14, line 3: "Mr. Hughes, prior to receiving this assignment from Mr. Walsh, what was your experience and familiarity with the American Fisheries Act? A. Well, that would go back to the summer of 1998. And there was a number of meetings that were conducted with the help of Senator Stevens and the help of Slade Gordon to try to resolve a very, very longstanding dispute between sectors of the industry that had been going on through the North Pacific Fishery Management Council. And the focus of that was to provide for a more rationalized fishery for Bering Sea pollock. Q. Now, I just kind of want to clarify. Mr. Hughes, were you involved in any of these meetings with either Senator Stevens or Senator Gordon? A. Yes. Q. And what was the extent of that involvement? A. Well, we had a large group of industry people that attended preliminary meetings with them to try and identify differences between the segments of the industry that needed to be resolved in order to put together, you know, a rationalized fisheries plan. And I was one of, boy, I guess probably 30 or 40 people that were, you know, involved in that process. At the time, I was there on behalf of the United Catcher Boats Association. And the reason was that I was their technical director and I had founded that group and I had -- I think we had about 60

vessels that were involved in the pollock fishery that I represented. Q And how many of these meetings did you attend? A Boy, it's been a long time ago. I think there were a couple of meetings in Seattle, direct face-to-face meetings with both the senators. And then there was a whole series of meetings after that that occurred back in Washington, DC, where the -- you know, the legislation was actually being drafted. And there were teleconferences continually back and forth between Washington, DC, and the industry out here, and I was out here during that period and attended several of those sessions. Q I take from it that, that you didn't have the opportunity to attend any of those that were held personally in Washington, DC. A I did not go back to Washington, DC. I don't like Washington, DC. Q Mr. Hughes, at those meetings were there, to your knowledge, any representatives of Peter Pan Seafoods? A Not that I -- not that I remember, but, you know, I couldn't tell you "yes" or "no."

25. The Fair Fisheries Coalition was an organization composed of non-AFA fishermen, processors and coastal communities dedicated to lobbying for statutory and regulatory market protections for non-AFA entities during the development of AFA. **RULING: ACCEPTED AND INCORPORATED**

See AE 7. See also, AE 6.

26. The NPFMC created a crab processor sideboard committee to help it consider how to implement the statutorily mandated crab processor sideboards. **RULING: ACCEPTED AND INCORPORATED**

AE 8.

27. Collier was appointed by the NPFMC to the Crab Processor Sideboard Committee by the NPFMC. **RULING: ACCEPTED AND INCORPORATED**

AE. 8

Lind: Pg. 19, line 9 to Pg. 20, line 17: "I'll ask you if you can identify that document. (Exhibit Number 1 marked; Appointment to Crab Processor Sideboard Committee.) A. This is a memorandum from Chris Oliver, who is the deputy director of the Council, appointing a committee dealing with processor sideboards. It's dated July 16, 1999. And it establishes a committee of industry representatives to work on processing sideboard issues, make recommendations to the Council. Q. And if you know, what was the -- what was -- again, I think you said it in kind of summary form. But what was the role of this processor sideboard committee? A. Their role was to discuss the processor sideboard restrictions that -- the American Fisheries Act required that the Council come up with processing sideboard restrictions and set them out. And the committee was appointed to make specific representations to the Council regarding what direction the Council should go in terms of processor sideboard restrictions. Q. Sure, sure. And from your experience in working with both NMFS and the Council process, what -- was the Council required to accept any direction it was given from this committee, or was this just an advisory committee? A. This was an advisory committee. Q. Okay. And the document clearly speaks for itself. But just for the record, if you would, do you -- the first page lists a -- the members who were appointed to this processor sideboard committee. Do you see a member there from Peter Pan Seafood? A. Yes. Barry Collier, Peter Pan Seafoods."

28. Collier did not think that he attended a meeting of the Crab Processor Sideboard Committee. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 80, lines 14 – 21: "... back in 1999-2000, do you recall -- were you a member of the North Pacific Fishery Management Council's Processor Sideboard Committee? A You know, I think I was. I don't recall. Q Okay. So you don't recall anything about the committee? A You know, I think I was put on the

committee, asked to be on the committee by the chairman of the council, and I don't think I even attended a meeting."

29. The final AFA rule, published December 30, 2002, represented the culmination of several years of work by the Agency and NPFMC and involved significant public comment. **RULING: ACCEPTED AND INCORPORATED**

Lind: Pg. 43, line 10 to Pg. 44, line 13: "Would it be fair to say that the final rule represents a -- I don't know whether it would be correct to say a more complete process, but certainly a more thorough process as to the -- as to the development of the rule? A. Yeah, a much, much more thorough process. There were two things -- three things that were going on here. We got the fishery started with emergency rules, but there was no public comment, there was not very much analytical process.

While the fishery was up and running, the -- we came up with a proposed rule, had a comment period, lots of comments on all aspects of the rule. We did an environmental impact statement that had looked at the environmental and economic effects of the rule, lots of comments on the environmental impact statement.

The Council itself was looking at various aspects of the American Fisheries Act and making -- fine-tuning adjustments, amplifying parts of it, superseding parts of it. There were parts of the Act that were fairly -- elaborated very clearly, and the Council -- or the elaboration was delegated by Congress to the Council to flesh them out.

And so this is the sum culmination of all that process, that the Council, through the environmental impact -- beef-up process and through the -- you know, the comments on the proposed rule itself."

30. Peter Pan covered Seven Seas financial losses in 2000. **RULING: ACCEPTED AND INCORPORATED**

Mr. Greenwood reported that "the consolidated net income for PPSF and subsidiaries of \$1.763 million was a figure realized after covering losses at Seven Seas, accrual of red salmon fish price adjustment for last season and a loss carried over from the year before." May 26, 2000, Peter Pan Bd. of Dir. Mtng. AE 9.

Collier: Pg. 31, lines 4 - 14: "What does the -- does that -- covering losses at Seven Seas, what does that refer to? A It refers to -- I'm sure it refers to our guaranty. We guaranteed the charter. Q And if you would kind of elaborate on that. A We had a custom-processing agreement with a guaranty. Q And what did that guaranty cover? A It required us to create financial stability within Seven Seas on a yearly basis for having the privilege of having that vessel custom process for us on a priority basis."

Collier: Pg. 31, line 16 to Pg. 32, line 3: "... let's go to Page 3 of this document, which is -- the last three digits of the Bates stamp are 566. And again, it's the first bulleted paragraph. And there's a sentence in that paragraph that reads: "The income before tax of 1.6 million is also after a projected loss of 6.4 million by Seven Seas." Again, if you could just perhaps elaborate on what that means. A Well, this is during a very difficult time in the late '90s and early 2000 when the crab resource had collapsed, and Seven Seas could not retain its financial stability, and we were incurring -- they were incurring significant losses, and we were having to true up their costs each year as per the contracts."

Collier: Pg. 83, line 19 Pg. 84, line 3: "Q ... what does that term mean to you, "true-up"? A My nonlegal interpretation of the word "true-up" is that Peter Pan would make up for any deficits that Seven Seas had on an annual basis. Q Okay. Would that -- would that deficit be determined by the difference between the revenue -- Seven Seas' revenue and Seven Seas' expenses? A That would be -- that would be the result of Seven Seas' financial statement, yes."

31. As of June 1, 2001, Peter Pan made a \$3 million loss coverage payment to Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

"Mr. Collier explained that the consolidated net income for Seven Seas as of March/2001 was a loss of \$430,000 which is after receiving \$3 million from P.P.S.F and that the retained earnings decreased to

\$475,000 and also that the tying up of the Blue Wave contributed \$1.9 million profit wise.” Pg. 7 Bd. of Dir. Minutes (PPSF000548) June 1, 2001, Peter Pan Bd. of Dir. Mtng. AE 11.

Collier: Pg. 34, line 21 to Pg. 35, line 1: “...my interest, of course, lies in the reference to Seven Seas' loss coverage of 3 million. Do you know what that refers to? A Same comment as we talked about before. As per our guaranty, we had to true up the balance sheet of Seven Seas on a yearly basis.”

32. Greenwood, President of Seven Seas, claimed to have no knowledge of Seven Seas receiving \$3 million from Peter Pan as indicated in a Peter Pan Bd. of Dir. minutes dated June 1, 2001; Greenwood was not at the 6/1/01 Peter Pan Bd. of Dir. mtng. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 101, lines 8 – 17: “...you were president, Mr. Greenwood, were you not, of Seven Seas at June 1st, 2001? A. That's correct. Q. And this indicates that there's a loss coverage to Seven Seas of \$3 million, does it not? A. That's what it says here. I don't know -- Q. And you're indicating to me that you don't even know what this refers to? A. No, sir.”

33. Greenwood, when he was President and 100% owner of Seven Seas, and Weed, VP of Seven Seas, attended the Nov 19, 2001 Peter Pan Board of Director's meeting. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 104, lines 6 – 25: “it is the -- appears to be the minutes of a November 19th, 2001 board of directors meeting for Peter Pan Seafoods. Q. Okay. And the fact is, the document indicates, that you were in attendance, does it not? A. That's correct. Q. Also indicates that Mark Weed was in attendance, does it not? A. Yes. Q. At this time what -- were you president of Seven Seas Fishing Company? A. Yes. Q. Do you have any association, any response -- were you holding any position, being paid in any way, by Peter Pan Seafoods? A. No, sir. Q. How about Mr. Weed, to your knowledge? A. None. Q. What was Mr. Weed at this point? A. Vice president of Seven Seas. Nov 19, 2001, Peter Pan Bd. of Dir. Mtng. AE 12.

34. Greenwood, 100% Owner of Seven Seas, presented a Seven Seas financial report at the November 19, 2001, Peter Pan Board of Director's meeting. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 105, lines 5 - 12: “I'll direct your attention to page of this document, and again, that's Bates stamped PPSF000534, and you'll see a Roman numeral V that's that section title is Custom Processing Operations. Do you see that? A. Yes. Q. And if you would, read the very first paragraph underneath that. A. Mr. Greenwood reviewed the Seven Seas consolidated financial statement. He pointed out that Seven Seas now borrows from Peter Pan Seafoods. It no longer has a bank loan.” Nov 19, 2001, Peter Pan Bd. of Dir. Mtng. AE 12.

35. Greenwood, 100% owner of Seven Seas, reported that MARAD would require further separation of Peter Pan and Seven Seas at the November 19th, 2001, Peter Pan Board of Director's meeting. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 106, line 6 – 11: “Mr. Greenwood went on to review the status of AFA and MARAD considerations with regard to Seven Seas. He said that MARAD will require further separation of Seven Seas from PPSF, but that some details are still being worked out.” Nov 19, 2001, Peter Pan Bd. of Dir. Mtng.

AE 12, Pg. PPSF000534.

36. Seven Seas began borrowing exclusively from Peter Pan by 11/19/2001. **RULING: ACCEPTED AND INCORPORATED**

AE 12, Pg. PPSF000534; “At the at the November 19th, 2001, Peter Pan Board of Director's meeting “[Mr. Greenwood], 100% owner of Seven Seas, pointed out that Seven Seas now borrows from PPSF- it no longer has a bank loan.” Nov 19, 2001, Peter Pan Bd. of Dir. Mtng.

37. Although Seven Seas borrowed exclusively from Peter Pan by November 19, 2001, there was no written advance of funds agreement prior to March 19, 2002. **RULING: REJECTED AS A STATEMENT FROM COUNSEL WHICH IS NOT EVIDENCE**

Weed: Pg. 240, lines 16 - 19 "MR. WALSH: So since we didn't produce it and Seven Seas didn't produce it, perhaps there's a logical conclusion that a written document of that sort doesn't exist."

Weed: Pg. 241, lines 14 - 15 "MR. WALSH: I'm fairly confident there is no written document. I certainly haven't seen it."

38. Seven Seas began borrowing exclusively from Peter Pan because Seven Seas could not obtain operating funds elsewhere. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 72, lines 15 - 23: "... why did, from your experience as president of Seven Seas, why did Seven Seas not simply obtain a bank, a loan from a bank or financial institution, rather than go to Peter Pan for this advance of funds agreement? A. As I recall the conversations with lending institutions, banks, would not provide this kind of -- provide this level of funds without significant security, and we did not have sufficient security."

39. Peter Pan's cost reduction plan includes a line item for a reduction in Seven Seas salary by 60 [presumably \$60,000] and a line item for "attempt to sell" the BLUE WAVE. 5/30/02 Peter Pan Bd. of Dir. minutes. No Seven Seas personnel are at this meeting and Peter Pan has no ownership interest in Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 42, line 2 - 3: "Q Whose cost-reduction plan does that refer to? A Peter Pan Seafoods'." May 30, 2002, Peter Pan Bd. of Dir. Mtng. AE 13; (PPSF000527).

40. Weed presented a Seven Seas financial report at the November 26, 2002, Peter Pan Board of Director's meeting. At the time, Weed was 100% owner of Seven Seas; Peter Pan had no ownership interest in Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

AE 14; Nov 26, 2002, Peter Pan Bd. of Dir. Mtng.

41. In 2004, Seven Seas business was discussed at Peter Pan's Board of Director's meeting. No Seven Seas personnel are at this meeting and Peter Pan has no ownership interest in Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

"Mr. Koch asked whether there were any questions on Seven Seas. Mr. Suzuki asked the projected equity as of March 2005 compared to the \$864,000 loss in March 2004 and Mr. Koch answered that it would be at the same level." Peter Pan Bd. of Dir. Minutes. No Seven Seas personnel are at this meeting and Peter Pan has no ownership interest in Seven Seas. May 27, 2004, Peter Pan Bd. of Dir. Mtng. AE 15; (PPSF000516).

42. From 2000 to 2005, Seven Seas processed almost exclusively for Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

AE 21.

2000: 97% Seven Seas processing done for Peter Pan

2001: 100% Seven Seas processing done for Peter Pan

2002: 100% Seven Seas processing done for Peter Pan

2003: 100% Seven Seas processing done for Peter Pan

2004: 100% Seven Seas processing done for Peter Pan

2005: 92% Seven Seas processing done for Peter Pan

43. Peter Pan and Seven Seas entered into a \$5 million Advance of Funds Agreement in March 2002. **RULING: ACCEPTED AND INCOPORATED**

AE 22.

44. Koch, VP of Finance for Peter Pan in 2002, was not involved in the negotiation of the Advance of Funds Agreement. **RULING: ACCEPTED AND INCOPORATED**

Koch: Pg. 55, lines 9 – “12. A I mean I wasn't part of it, but I'm aware of it. Q Okay. So you weren't part of the negotiations to come up with the -- with this advance of funds? A Right. I would get a copy of this, yes. That's correct.”

45. The Advance of Funds Agreement guided Seven Seas borrowing from Peter Pan. **RULING: ACCEPTED AND INCOPORATED**

Weed: Pg. 135, lines 11 - 16: “What is the purpose of this document? It's my understanding that this was the document that guided the borrowing I did from Peter Pan Seafoods, or that Seven Seas did, I should say.”

46. Seven Seas paid for its operating expenses by borrowing from the Advance of Funds Agreement. **RULING: ACCEPTED AND INCOPORATED**

Scott: Pg. 50, lines 10 – 15: “... while you were employed by Seven Seas, how did Seven Seas pay for its operating expenses? A. How did it pay? Q. Yeah, pay for its operating expenses. A. It would get an advance from Peter Pan Seafoods ...”

Scott: Pg. 53 line 25 to Pg. 54, line 5: “I had a rule of thumb, if it was below 50,000, I asked for funds, and if it was above, I just waited until the next day. Q. And that was your rule of thumb about the 50,000? A. That was my rule of thumb.”

47. The terms of the Advance of Funds Agreement between Seven Seas and Peter Pan were not honored by the parties. **RULING: ACCEPTED AND INCOPORATED**

Significant terms in the Advance of Funds Agreement that were not followed:

48. Contrary to the terms of the Advance of Funds Agreement, Seven Seas used money borrowed under the Advance of Funds Agreement to make payments on the AJ Nichiro note. **RULING: ACCEPTED AND INCOPORATED**

“E. Lender. ... in order to insure that the Vessels are properly outfitted and maintained to perform the custom processing agreements, is willing to advance funds to Borrowers for operating expenses of the Vessels, on the terms and conditions hereof.”

Scott: Pg. 71, line 10 – 21: “Now, if you look at the first page of that exhibit [5], and it's got a Bates stamp down there of SSMAR-000451; do you see that? A. Yes, I do. Q. Okay. And let's just look at this kind of a little more closely. I notice there's a request for 60,000 for payroll; 153,000 for the AJ Nichiro note; 197,000 for the Stellar lease payment, remaining payment, and Nichiro note tax withholding deposit; and 33,000 for payroll tax deposits. Now, do you see what I just referred to? A. Yes, I do. Q. Okay. All right. Now, are those kind of the, if you will, typical things that you would request to use the money for? A. Yes.”

49. Under the terms of the Advance of Funds Agreement, unless extended in writing, the Advance of Funds Agreement terminated on December 31, 2002. **RULING: ACCEPTED AND INCOPORATED**

"Section 2.1 Advances. The Lender agrees, on the terms and conditions of this Agreement, to make advances to the Borrowers from time to time on business days during the period beginning on the date this Agreement is executed and ending on December 31, 2002 (the "Advance Period"). The Advance Period may be extended by the mutual written agreement of the parties hereto to extend, but unless so extended, shall terminate automatically without notice on its ending date." AE 22.

50. The Advance of Funds Agreement was not extended in writing until January 2007. **RULING: ACCEPTED AND INCOPORATED**

Weed: Pg. 139, lines 9 – 13: "Was there ever a written extension, Gary? A. It's Mark. Q. Mark. A. I don't remember an extension until the one we just referred to in 2007."

51. Under the terms of the Advance of Funds Agreement, each notice of borrowing shall specify the use for the funds to be borrowed, which shall be a use necessary to provide service under the custom processing agreements between the parties. **RULING: ACCEPTED AND INCOPORATED**

Section 2.2 Manner of Borrowing. Agent shall give Lender written notice of each borrowing (which notice may be made by electronic means). Each notice of borrowing shall specify the use for the funds to be borrowed, which shall be a use necessary to provide service under the custom processing agreements between the parties. AE 22.

52. The majority of fund requests from Seven Seas to Peter Pan did not specify the use for the funds to be borrowed. **RULING: ACCEPTED AND INCOPORATED**

Adams: Pg. 16, lines 5 – 9: "All right, and would it -- would it indicate what the money was going to be used for, or was it just basically we need a -- we need to borrow some funds, this much funds? A That's correct. It was purely the number."

Adams: Pg. 17, line 25 to Pg. 18, line 2: "Did you ever have to send a fund request back to Seven Seas for more specificity, anything of that nature? A No."

AE 24.

53. Seven Seas borrowing under the Advance of Funds Agreement covered practically every expense of operating the STELLAR SEA. **RULING: ACCEPTED AND INCOPORATED**

Greenwood: Pg. 79, lines 2 – 5: "Can you think of expenses that this would not have included or that you would not have used the advance of funds to pay for? A. Off the top of my head, no."

Weed: Pg. 108, line 23 to Pg. 109, line 1: "Are you telling me that under that agreement here, that Peter Pan was agreeing to cover all the costs for the vessel, operating costs for an entire year regardless of what it was going to be?"

Weed: Pg. 109, lines 9 - 10 . ".... I can't think of a cost off the top of my head that would not be covered"

54. Seven Seas used money borrowed under the Advance of Funds Agreement to pay accounts payable and taxes. **RULING: ACCEPTED AND INCOPORATED**

Weed: Pg. 151, line 16 to Pg. 152, line 24.

55. Seven Seas used money borrowed under the Advance of Funds Agreement for payroll expenses. **RULING: ACCEPTED AND INCOPORATED**

See also, Weed: Pg. 163, lines 21 – 24: “Where did the money for the payroll come from that went into that account? It would have come out of the 3859519 account.” [See also, Process of transferring funds from Peter Pan to Seven Seas, below.]

AE 24.

56. Seven Seas used money borrowed under the Advance of Funds Agreement to pay insurance premiums. **RULING: ACCEPTED AND INCOPORATED**

Weed: Pg. 154, line 22 to Pg. 155, line 2: “...we would get invoiced for insurance. A number of the policies were quarterly payments. It appears that there was a quarterly payment due, which I'm assuming would have been for the end of the year or something. We would have been getting money for a quarterly payment on insurance.”

AE 24.

57. Seven Seas used money borrowed from Peter Pan under the Advance of Funds Agreement to pay Peter Pan for services that Peter Pan rendered to Seven Seas. **RULING: ACCEPTED AND INCOPORATED**

Weed: Pg. 155, lines 11 - 16: “I note on here accounts payable is Peter Pan Seafoods. Just curious, I guess what I'm curious about is, it seems like you're borrowing money from Peter Pan to pay Peter Pan, it looks to me like. Well, Peter Pan must have provided us some service somewhere that we were getting charged for

AE 24.

58. Seven Seas used money borrowed under the Advance of Funds Agreement to pay for shipyard services. **RULING: ACCEPTED AND INCOPORATED**

Weed: Pg. 156, lines 1 – 11: shipyard services

AE 24.

59. Peter Pan never disapproved any Seven Seas request for funds. **RULING: ACCEPTED AND INCOPORATED**

Adams: Pg. 24, lines 7 – 10: “... you would be considered the approval authority for any advances that were submitted by Seven Seas to Peter Pan under this agreement? A Right.”

Roque : Pg. 12, lines 5 – 9: “Now, when you said you give it to Mark Adams to sign it, is that in every occasion you'd give it to him, or just the ones over 100,000? A Every occasion. He sees all the wire transfers every day.”

Adams: Pg. 17, lines 16 – 19: “Did you ever have any wires that you didn't approve that you thought that you had concerns about, problems with? A Not that I can recall.”

Adams: Pg. 18, line 3: “Did you ever have occasion to reject a request from Peter Pan, a fund request? A You mean from Seven Seas? Q I'm sorry, yes, sir. A No”

Adams: Pg. 20, line 2: “There was never any times that I disapproved.”

60. Peter Pan never questioned the amounts of funds that Seven Seas requested. **RULING: ACCEPTED AND INCORPORATED**

Scott: Pg. 76, lines 10 - 11: "Q. Did anyone at Peter Pan ever question the amounts? A. No, not really. Nothing specific comes up."

61. There were no limits on the amount of funds that could be requested under the Advance of Funds Agreement. **RULING: ACCEPTED AS TO THE PRACTICE OF THE PARTIES BUT REJECTED IN THAT THIS STATEMENT WAS CONTRARY TO THE WRITTEN AGREEMENT**

Scott: Pg. 75, lines 18 - 23: "Q. Now, was there ever any refusals to provide this money by Peter Pan? A. No, there was never any refusal. Q. Was there any types of limits on the amount that you could request? A. No, there was no limit."

62. The Advance of Funds Agreement provided that accrued interest on the advances shall be payable monthly, no later than the fifteenth day of the month following the month for which such interest has accrued. **RULING: ACCEPTED AND INCORPORATED**

"Section 2.3 Interest. Borrowers agree to pay interest on the unpaid principal of th advances at a per annum rate equal to the Tokyo-Mitsubishi Bank Prime Rate, varying as such rate shall vary. Accrued interest on the advances shall be payable monthly, no later than the fifteenth day of the month following the month for which such interest has accrued, except that interest shall be payable on demand after Default."

63. There was an unwritten \$200K limit on annual interest charged by Peter Pan to Seven Seas under Advance of Funds Agreement. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 83, lines 4 - 13: "We would cap it at 200,000 interest expense. Yes. Q And why was that done? A Well, we cap it every year at 200. Q No. I understand it's done. I'm asking you why it was done? A I don't know. That was just part of making them break even, too. I mean it's just -- we've done it. And I don't know where it came or who did it or what have you, but it's always been, that I was aware of, of 200,000."

Collier: Pg. 71, lines 2 - 15: "Q Mr. Collier, are you aware of any type of agreement that would have capped the interest -- the interest amount that Seven Seas Fishing Company would have paid for the funds it borrowed under this agreement? A I recall that during the difficult times when Seven Seas was having difficult times, we did put a cap on interest. Q And what was that cap? A I think we just picked an arbitrary number. Q And again, I'm not trying to play "gotcha." There's been some references we've seen throughout discovery that the number would be 200,000; does that sound correct? A It sounds correct, and I couldn't tell you how we even agreed upon that number."

Weed: Pg. 171, lines 19 - 22: "To the best of your knowledge, there wasn't a written contractual agreement? Well, I don't remember one. Maybe they know something I don't. I don't remember."

Greenwood: Pg. 85, line 24 to Pg. 86, line 3: "To the best of your recollection, was there ever an agreement as to -- that would limit the amount of interest that had to be paid under this loan on an annual basis? A. Not that I'm aware of."

Scott: Pg. 86, lines 2 - 15: "... how long was this \$200,000 limit on interest per fiscal year in place? A. Forever. Q. When you started working there, was it in place? A. Yes, it was. Q. And when you left, was it in place? A. Yes. Q. And you never saw a document that basically -- a written document that said -- that put -- that referred to this 200,000? That was a contract that says \$200,000 contract agreement, you never saw anything written to that effect? A. No. If I did, I don't remember."

64. According to Weed, the reason for the \$200K limit on interest was that Peter Pan "didn't want to charge me more interest if they were just having to pay me back later for operating expenses." **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 170, lines 15 – 25: “My recollection, it had something to do with the fact that they didn't want to charge me more interest if they were just having to pay me back later for operating expenses.”

65. Under the terms of the Advance of Funds Agreement, Seven Seas was required to repay Peter Pan all outstanding interest and principal at the time of settlement for each fishing season, but in no event later than ninety(90) days after the end of each calendar year. **RULING: ACCEPTED AND INCORPORATED.**

Section 2.4 Repayment. Borrowers shall repay to Lender all outstanding interest and principal at the time of settlement for each fishing season, but in no event later than ninety(90) days after the end of each calendar year. AE 22.

66. Seven Seas never paid off debt to Peter Pan at the end of fishing season or at end of year while Weed was President. **RULING: ACCEPTED AND INCORPORATED.**

Scott: Pg. 69, lines 21 – 25: “So basically from Seven Seas never paid off debt to Peter Pan at end of fishing season or end of year.”

Weed: Pg. 141, lines 18 - 22: “... did Seven Seas pay to Peter Pan all outstanding interest and principal at the end of each fishing season or in any event no later than 90 days after the end of each calendar year? I don't believe so.”

Weed: Pg. 143, lines 13 – 17: “Did Seven Seas ever pay after the end of the fishing season or at the end of the year the amount that was borrowed in full? No, I don't recall writing a check to pay the amount in full.”

67. Peter Pan had sole discretion to lend Seven Seas funds under this agreement. Thus provision in the Advance of Funds Agreement gave Peter Pan – Seven Seas' only source of operating funds – significant control over Seven Seas. **RULING: ACCEPTED AND INCORPORATED.**

Section 2.8 Discretion of Lender. Nothing in this Agreement shall obligate Lender to make any advances. All advances are at the sole discretion of Lender. AE 22.

68. Under the terms of the Advance of Funds Agreement, Seven Seas could not create, allow to be created or permit to exist any lien except those liens existing on the date of this Agreement and disclosed to and consented to by Peter Pan before the date of this Agreement. **RULING: ACCEPTED AND INCORPORATED.**

Section 6.2 No Liens. Borrowers shall not create, allow to be created or permit to exist any lien except those liens existing on the date of this Agreement and disclosed to and consented to by Lender before the date of this Agreement.

69. This provision gave Peter Pan consent authority over Seven Seas' ability to seek funding from a source other than Peter Pan if such funding would require the creation of a lien against any Seven Seas' assets as collateral. **RULING: ACCEPTED AND INCORPORATED.**

70. Under the terms of the Advance of Funds Agreement, if Seven Seas failed to pay for a period of ten days after the date when due any amount of principal or interest on the advances, it was in default of the agreement. **RULING: ACCEPTED AND INCORPORATED**

Section 8.1 Events of Default Defined. The occurrence of any of the following events shall constitute an "Event of Default. (a) Payment Default. Any Borrower shall fail to pay for a period of ten days after the date when due any amount of principal or interest on the advances or any other amount payable by it hereunder.

71. Seven Seas was in default of this provision after the first fishing season the agreement became effective because it never paid back its borrowings in full to Peter Pan (and in any event after 90 days after the calendar year 2002) and was continually in default from thereon. **RULING: ACCEPTED AND INCORPORATED**

AE 27, (see PPSF000388, March 31, 2003, debt of \$4.2 million)

Weed: Pg. 141, line 18 - 22: "... did Seven Seas pay to Peter Pan all outstanding interest and principal at the end of each fishing season or in any event no later than 90 days after the end of each calendar year? I don't believe so."

Weed: Pg. 143, line 13 - 17: "Did Seven Seas ever pay after the end of the fishing season or at the end of the year the amount that was borrowed in full? No, I don't recall writing a check to pay the amount in full."

72. According to the terms of the Advance of Funds Agreement, upon any default by Seven Seas, Peter Pan may declare all principal and interest due on such advances immediately due and payable. **RULING: ACCEPTED AND INCORPORATED**

Section 8.2 Consequences of Default. If any Event of Default shall occur and be continuing, then in any such case and at any time thereafter so long as any such Event of Default shall be continuing, Lender may at its option immediately terminate the Commitment and, if any advances shall have been made, Lender may at its option declare the principal of and the interest on such advances and all other sums payable by Borrowers hereunder to be immediately due and payable, whereupon the same shall become immediately due and payable without protest, presentment, notice or demand, all of which each Borrower expressly waives, and Lender shall have the immediate right to take any remedies available to it under law or equity.

73. Following Seven Seas' initial failure to pay in full its debt to Peter Pan, Peter Pan had the right to demand in full all debt due it from Seven Seas at any time. **RULING: ACCEPTED AND INCORPORATED**

AE 27, (see March 31, 2003 = 90 days after the calendar year)

74. Seven Seas was never in a position to pay off amount of indebtedness to Peter Pan while Greenwood was President of Seven Seas (2001 - 2002). **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 88, lines 2 - 6: "When you look at the amount of indebtedness shown by Exhibit 9, do you think Seven Seas was in a position to be able to pay off that type of indebtedness while you were president of Seven Seas? A. I don't believe so."

75. All extensions and amendments to the Advance of Funds Agreement were required to be in writing. **RULING: ACCEPTED AND INCORPORATED**

Section 9.8 Entire Agreement; Amendment. This Agreement, together with the Note, comprises the entire agreement of the parties and may not be amended or modified except by written agreement of Borrowers and Lender. No provision hereof may be waived except in writing and then only in the specific instance and for the specific purpose for which given.

76. The Advance of Funds Agreement, dated March 19, 2002 was never modified or amended in writing until January 2007 (after MARAD began making inquiries regarding the Advance of Funds Agreement). **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 139, lines 9 - 13: "Was there ever a written extension, Gary? A. It's Mark. Q. Mark. A. I don't remember an extension until the one we just referred to in 2007."

77. The Advance of Funds Master Note specifies a maximum balance of \$5 million. **RULING: ACCEPTED AND INCORPORATED**

Master Note for Multiple Revolving Advances. FOR VALUE RECEIVED, the undersigned Borrowers (Jointly and severally), hereby promise to pay to the order of Peter Pan Seafoods, Inc. ("Lender"), the unpaid principal balance of all advances evidenced by this Note in a maximum amount not to exceed Five Million US Dollars (\$ 5,000,000.00).

78. Adams, the Treasurer of Peter Pan, who was responsible for approving advances to Seven Seas under the Advance of Funds Agreement was unaware of any limit under this agreement. **RULING: ACCEPTED AND INCORPORATED**

Adams: Pg. 25, lines 13 – 15: "Was there any type of limit on the amount of debt that Seven Seas could accumulate under this agreement? A Not that I can recall."

79. The amount of funds borrowed by Seven Seas from Peter Pan routinely exceeded \$5 million. **RULING: ACCEPTED AND INCORPORATED**

AE 27.

80. Peter Pan never raised any concern to Weed over the Seven Seas' debt exceeding the \$5 million amount noted in Advance of Funds Agreement. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 174, line 21 to Pg. 175, line 3: "I take it from that what you're saying is in answer to my question that it was never raised as an issue to you, that the borrowing exceeded \$5 million? A. Was that an issue raised in Peter Pan internally? I don't know. Q. Right, I'm saying to you A. To me, no, they were not raised as issues to me, but they kept giving me money."

Adams: Pg. 26, lines 23 – 24: "... was there ever a concern about the – exceeding the \$5 million threshold limit that you're aware of? A Not that I'm aware of. No."

81. Weed demonstrated little concern to Scott over the amount of Seven Seas indebtedness to Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

Scott: Pg. 182, lines 16 – 23: "While you were working for Seven Seas during the span of your career, do you ever recall if Mark came to you and addressed any concerns about the, you know, the amount of indebtedness that the company had to Peter Pan? A. I think there was always an issue of let's try to pay this, but it's not like he was really -- you know, came to me with a great concern or anything."

82. There was no action taken by Peter Pan when the amount of borrowing under the Advance of Funds Agreement exceeded \$5 million. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 73, line 4 - 8: "Was there any -- are you aware of any talk when the -- or any action that was taken when the bala -- when the borrowing of Seven Seas Fishing Company exceeded \$5 million? A No."

83. Peter Pan placed no limits on the amount that could be borrowed by Seven Seas per request. **RULING: ACCEPTED AND INCORPORATED**

Adams: Pg. 17, lines 2 – 5: "... were there any guidelines as to how much, you know, the amount of funds that could be requested? Anything of that nature? A No."

84. Adams, Treasurer of Peter Pan, had no knowledge of any similar Advance of Funds Agreement with any other processor. **RULING: ACCEPTED AND INCORPORATED**

Adams: Pg. 18, lines 22 – 25: "Did Peter Pan to your knowledge have any advance of fund agreements with any other processing companies? A Not that I can recall right now."

85. Koch, VP of Finance for Peter Pan, was not aware of any concern at Peter Pan over the amount of debt owed by Seven Seas to Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 66, line 20 to Pg. 67, line 3: "...in your experience at Peter Pan, especially your position as the vice president of finance, was there ever any concern expressed by you or anyone else as to the amount of debt that was being accumulated by Seven Seas Fishing Company? A. Yeah. The debt, you know, of course, goes up and down depending upon what in time you're at in terms of what they're customing for you, salmon or crab. Again, it goes up and down, but not that I'm aware of."

86. Roque, the Peter Pan employee who processed the Advance of Funds Agreement requests from Seven Seas, was not aware of any concern at Peter Pan over the amount of debt held by Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

Roque: Pg. 26, lines 11 - 15: "While you've been doing this, Edward, do you ever recall anyone expressing to you any concern about the amount of the balance -- it's quite large, obviously -- the amount, the balance owed by Seven Seas? A. No.

[Roque: Pg. 10, lines 19 - 21: Q. And Edward, when was the year that you started with Peter Pan? A. 2000.]

87. A second Advance of Funds Agreement between Seven Seas and Peter Pan was subsequently entered into on Jan 1, 2007. **RULING: ACCEPTED AND INCORPORATED**

AE 23.

88. The copy of the Advance of Funds Agreement supplied by Seven Seas is unsigned. **RULING: REJECTED AS IRRELEVANT**

AE 23.

89. There is no proof that the Advance of Funds Agreement, dated Jan 1, 2007, was ever fully executed by the parties to the Agreement. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 214, line 18 - 24: "Q. I notice it's not signed by Peter Pan Seafoods or on behalf of Peter Pan Seafoods. Was this ever signed by anyone from Peter Pan Seafoods? A. I don't refer to this document frequently. I would have to go back and look. I would assume it would be but I don't know. I don't know the answer."

90. Peter Pan never called in Seven Seas' debt. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 148, lines 5-8: "... did Peter Pan ever say we want all the money, we want Seven Seas to pay us the money due under the advance of funds? I guess my answer is no..."

91. NMFS informed MARAD of the Advance of Funds Agreement in 2007. **RULING: ACCEPTED AND INCORPORATED**

MARAD Letter to Seven Seas dated Sept 13, 2007: "Due to recent information that we have obtained from NMFS, most notably an Advance of Funds Agreement..." AE 32.

92. MARAD was never notified by Seven Seas of the first Advance of Funds Agreement (dated March 19, 2002) by Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 236, lines 18 - 25: "Mark, was MARAD ever informed of the advance of funds that was assigned to it in March of 2002? A. Eventually. Q. When you say "eventually," when was that? A.

Well, during the MARAD, when MARAD was investigating us in, when did that start, 2006 or 2007? 2007.”

93. Seven Seas was in significant debt to Peter Pan from 2000 forward. **RULING: ACCEPTED AND INCORPORATED**

AE 27.

2001: Dec 31 Seven Seas debt to Peter Pan is \$4,463,256
2002: Dec 31 Seven Seas debt to Peter Pan is \$8,473,450
2003: Dec 31 Seven Seas debt to Peter Pan is \$7,157,946
2004: Dec 31 Seven Seas debt to Peter Pan is \$8,479,599
2005: Dec 31 Seven Seas debt to Peter Pan is \$8,632,150
2006: Mar 31 Seven Seas debt to Peter Pan is \$6,281,613
2007: Jan 26 Seven Seas debt to Peter Pan is \$10,307,778

94. Seven Seas' Custom Processing Agreements with Peter Pan ran from 1992 to 2001 and 2001 to 2008, respectively. **RULING: ACCEPTED AND INCORPORATED**

AE 97; AE 100.

95. Custom processing agreements that spanned years are uncommon in the processing industry. **RULING: ACCEPTED AND INCORPORATED**

Weed Pg. 119, lines 6 – 11. “Are you aware of any pieces of paper that would be signed by two parties that would deal with contract processing that are for a rate of more than six years? A. I'm not aware of any, no, but that doesn't mean they're not out there.”

TR: 535, line 1-2: “They [processing agreements] do not go on for years and years.”

96. According to Koch, VP of Finance for Peter Pan, Peter Pan had no other long term processing agreements with other companies. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 47, lines 18 – 23: “You've been in the process -- you've been working at Peter Pan now for ten years, I think? A Since '96. Q '96. So that's a lot longer. That's almost 20 years, isn't it? A About 20 years. It's getting up there. ... /: Pg. 48, line 12 – 16: outside of Seven Seas Fishing Company or any of its, you know, subsidiaries, do you recall any other agreements that went on for years between Peter Pan and any other processing company? A I don't.”

97. According to Greenwood: The Custom Processing Agreement was “in response to the American Seafoods Act and the separation of control of the vessel from Peter Pan Seafoods, or at least to clarify whether there was any control by Peter Pan Seafoods.” **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 53, line 21 to Pg. 54, line 5: “What was this -- again, you are correct that this is a restated custom processing agreement, amended and restated custom processing agreement, but more specifically, what was this agreement intended to accomplish? A. As I recall, it was in response to the American Seafoods Act and the separation of control of the vessel from Peter Pan Seafoods, or at least to clarify whether there was any control by Peter Pan Seafoods.”

98. According to Collier, the Custom Processing Agreement required Peter Pan to make Seven Seas break even (i.e., “true up”) on an annual basis. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 53, lines 7 – 23: “Let's turn to Page 3 of this document, and the last four digits on that Bates stamp would be 3089, and very top paragraph there, last sentence of the paragraph says: “If at the end of the year it is determined that a fishery or substitute has not met the minimum guaranteed fee income for the vessel, processor shall make up any shortfall by lump-sum payment.” Do you see that, Mr. Collier? A Yes, sir. Q Okay. Good. And what does that mean? A In my simple words it would be the true-up that we did on

a yearly basis. Q And what does that true-up cover; what kind of costs and expenses, in your mind? A The cost of operating the Stellar Sea under contract to Peter Pan -- under custom-processing agreement to Peter Pan."

99. Seven Seas, and specifically Stellar Sea Inc., was completely dependent for its economic viability on its long term contract with Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

AE 106: According to Robert Baskerville, a director of Seven Seas, "Without the contract processing agreement, the shares of Seven Seas wouldn't be worth much of anything."

Weed: Pg. 219, lines 9 – 12: "Well, yeah, there would not have been a lot of reason to have the STELLAR SEA if I didn't have a long-term contract with Peter Pan Seafoods. That is true. So I guess, yes, that's the case since 2001."

Scott: Pg. 76, lines 7 – 8: "If you didn't do any processing for any other company, then your sole source would have been through Peter Pan; is that correct? A. They were our major customer. Q. And again, if you didn't do any processing for someone else, you had no other source of funds? A. That's right."

100. Peter Pan would "break even" Seven Seas at the end of every fiscal year. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 114, line 24 to Pg. 115, line 1 - 3: "... what is the aggregate minimum payment, aggregate minimum guaranteed processing fee? The way the agreement has been interpreted over the years was that it was the costs of operation as I've identified in that budget."

Scott: Pg. 99, lines 7 – 14: "Q. Peter Pan would cover the loss of Seven Seas by contract? A. Hm-hmm. Q. Okay. So they had a contract to cover the loss of Seven Seas? A. If they didn't make money. Well, it's hard when you don't have all that many customers and if they didn't make any money, Peter Pan would cover that."

101. The loss coverage exceeded the amount that Peter Pan would have owed to Seven Seas for only processing services. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 90, line 25 to Pg. 91, line 5: "...this loss coverage would have been above and beyond any income you would have received for processing, correct? A. Was it above and beyond processing? Yes, but it was still a cost that was covered under our custom processing agreement."

102. Maintaining the "true up" arrangement under the Custom Processing Agreement between Seven Seas and Peter Pan was necessary in order for Cypress to agree to purchase the STELLAR SEA from FHB and charter the vessel back to Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

AE 73. [Handwritten notation to paragraph entitled "Contingencies": "...and provided that the guarantees of Nichiro and Peter Pan and the CPA [custom processing agreement] will be substantially the same in form as previously provided."]

103. Seven Seas' received annual loss reimbursements from Peter Pan since 1996. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 76, lines 2 - 8: "Q How often -- do you know how often Peter Pan had to true up Seven Seas Fishing Company? A Yearly it was required under contract. Q And again, what expenses were covered under this true-up provision? A Whatever Mr. Weed or Mr. Greenwood presented to us as his cost structure."

Koch: Pg. 13, lines 15 – 22: "... do you have any recollection between 1996 and perhaps 2001 when this actually occurred as to whether there was any loss coverage going on during those years? A Yeah. My

capacity after that was vice president of finance, but in my capacity we always broke them even. Q So that would have been during the entire time that I just mentioned, since you joined, basically, since 1996? A Yeah. [** Note however that later Koch states he does not remember if loss coverage occurred prior to 2001; Koch: Pg. 15, line 20 - 22: Q So do you ever recall before 2001, whether it occurred or not? A I don't recall."

104. Sometime prior to June 1, 2001, Seven Seas received \$3 million in loss reimbursement from Peter Pan.

RULING: ACCEPTED AND INCORPORATED

AE 11.

Koch: Pg. 13, lines 6 - 22: [Discussing the \$3 million dollar loss coverage reference in the 6/1/2001 Peter Pan Bd. of Dir. mtng Minutes; PPSF000543] "Q And Kirk, my question really is -- you'll see a phrase in there that it says -- refers to Seven Seas loss coverage of 3 million; do you see that? A Yes. Q Okay. Good. I'm just curious: Do you know what that's about? A To make them break even, I think. So Peter Pan is providing Seven Seas some types of funding so that -- as you said, to "break even"? A (Witness nods head positively.) Q Okay. Is that correct? You have to -- "yes" or "no"? You have to -- I guess just for the record -- A Yes. To break even."

105. According to Weed, in the FY ending in 2002, Seven Seas should have received \$1,739,921.50 in loss reimbursement from Peter Pan, although he was uncertain as to the exact amount received. **RULING:**

ACCEPTED AND INCORPORATED

AE 35, Pg. SSMAR000559.

Weed: Pg. 81, lines 9 - 25: "Now, getting back to our original question, if you would look on page 000559 and let me know when you have that page in front of you. A. Okay. Q. And you'll see on the document there's a list of topic headings, column heading on the left, very far left. If you look down to I believe the one that's next from the last, it says Seven Seas allocation, do you see that? A. Seven Seas allocation, yes. Q. Look over in the column that's headed Total. Do you see that? A. Yes. Q. And it says \$1,739,921.50. Do you see that? A. Correct. Q. Now, would that be the loss reimbursement? A. To be clear, that is the total for the STELLAR SEA."

Weed: Pg. 82, lines 17 - 24: A. "The \$1.7 million number represents the total loss attributed to the operations of the STELLAR SEA apparently through 3-29-2002, year ending 3-29-2002. Q. And would that be the amount of money you would expect to be reimbursed by Peter Pan, Seven Seas would expect to be reimbursed, when I say "you"? A. I would expect that...."

106. In the FY ending on March 26, 2004, Seven Seas received \$1,865,000 in loss reimbursement from Peter Pan.

RULING: ACCEPTED AND INCORPORATED

Seven Seas received \$1,865,000 in debt reduction from PPSF for YE 3/26/2004. AE 70, Attachment 39, pg. PPSF001188.

107. According to Seven Seas' book keeper, Linda Scott, in the FY ending on March 25, 2005, Seven Seas probably received \$1.768 million in loss reimbursement from Peter Pan. **RULING: ACCEPTED AND**

INCORPORATED

AE 35, Pg. SSMAR000565.

Scott: Pg. 106, line 23 to Pg. 108, line 2: "Linda, if you would, let's look at the next document, which is Bates stamped SSMAR-000565, and on the top of that you'll see the date -- I'll just give you the date -- is March 25th, 2005. Again, just have a -- and bear with me, I'm not an accountant -- is if you go down to the line that says Other, and you look at the column that says Grand Total; do you see that? A. Yes. Q. And there's a figure in there, it looks to me like 2,749,720. Do you see that? A. Yes. Q. Okay. What is Other? A. That might be the loss coverage. That's where I would put it. Q. Oh, I see. Okay. A. So if you added up

this total for Stellar is negative 1.1 and then the Seven Seas is positive 1.1, but sometimes I did get those backwards. Let's see, this is revenue minus -- well, because it goes here. It should come to about zero. Q. Now, Linda, before -- what you were just reading off of, what page was that on? Just, again, trying to make the record clear. You were talking about negative and positive 1.1. Was that page 056 -- A. I'm looking at page 0565 and -- oh, the Other, some of it's from the AJ. It comes over from there. Do you see the 975 in the very far right? Q. Yeah, under the column AJ? A. Yes. And that's the income from the AJ, and the 5,000 from the Blue Wave was I think that year that's from selling a plow or something, whatever it is that they sell, I mean, you know, it's a piece of equipment, and then the 1.768 is probably to cover the loss. So if you take 119 down at the very bottom, the loss was negative 1.1 and then there's -- it's off by 119, because of changes after the fact, because once they make the payment, they can't change it. I don't have a calculator, but that's basically what that's all about."

108. In the FY ending on March 31, 2006, Seven Seas received \$1,125 million in loss reimbursement from Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

AE 35, Pg. SSMAR00567.

Weed: Pg. 88, line 20 to Pg. 89, line 15: "A. The first document I'm looking at is the profit/loss by product for Seven Seas consolidated for the period ending March 31st, 2006. Q. Okay, and can you identify the second page as well? A. Second page, which is 568, is titled the March 2006 Seven Seas Fishing Company Consolidated Financial Statement. It includes a statement of operations from April in 2005 to March of 2006 and the balance sheet for that same period, the balance sheet as of March 31st, 2006. Q. Okay, and now if you just take a look at the first page, that's Bates stamped marked 000567, and if you look over at the right-hand column, go all the way down to the next to the last reference there, it says PPSF loss coverage? A. Uh-huh. Q. I believe that's going to be an easy one there. The column next to is 1.125 million. Do you see that? A. Yes. Q. And would that be the loss coverage, would that be where the loss coverage would be represented for Seven Seas group? A. Let's see. Yes, that would be the total."

Weed: Pg. 89, lines 1-17: "A. You're asking me if the 1.125 million, is that the loss that Peter Pan is covering, is that correct? Q. I guess what I'm asking is, what does that number represent? I guess I'm asking you to tell me, really. A. I'm trying to figure that out. So that's the loss. I'm looking, that appears to be the Peter Pan loss, although again I would like to emphasize the word "appears" without having time to actually study this further. Q. If that indeed is the Peter Pan loss, would that be what Seven Seas would expect to receive from Peter Pan as loss coverage? A. As loss coverage under our custom processing agreement, yes."

Scott: Pg., 110, line 13 to Pg.111, line 3: "Q. Okay. Let's go to the document marked 00567, and it's dated March 31st, 2006? A. Yes. Q. Okay. And I note just one item there. If you will, look on the column that's labeled Grand Total Seven Seas Group and the line that says PPSFLoss Coverage. Do you see that? A. No. Yes. Q. Okay, you see it now, and the figure there is \$1,125,000? A. Hm-hmm. Q. Is that the loss reimbursement for, what, 2005; would that be correct? A. Year ending 2006. March '05 to March '06. Q. And that is the loss coverage amount? A. Yes."

Weed: Pg. 90, Line 10 - 21 [Exhibit 11] "... just like we did with the previous exhibit [i.e., Ex.10], if you go down and look on the page that's Bates number 000569, you go down and you'll see Peter Pan's loss coverage? A. Uh-huh. Q. You'll see immediately to the right of that 1.2 million. Do you see that, Mark? A. Yes. Q. And again, that would be the amount that Seven Seas would expect to be reimbursed by Peter Pan as loss coverage? A. As loss coverage under our custom processing agreement, yes."

109. Koch, VP of Finance for Peter Pan, did not know where the obligation to "break Seven Seas even" came from. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 71, lines 5 - 10: "A Well, we would -- again, Seven Seas would put their financial information together and say, "This would be our loss," and then we would make them break even, and we would credit their account. Q All right. Just to make this easy, so did that obligation in your mind come from this

advance of funds agreement, to break them even? A I don't know. That was just what we did. I mean we break them even."

110. Peter Pan did not have any loss coverage arrangements with any other company. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 76, lines 9 – 12.: "Did Peter Pan Seafoods provide loss coverage or true-up -- a true-up provision to any other companies or -- that you know of? A No."

Koch: Pg. 69, lines 5 - 10: "Do you know if Peter Pan had this type of loss coverage arrangements with any other processing companies? A No. Q You don't know, or they don't? A I'm not aware of any."

111. Seven Seas' Consolidated Financial Statements were reviewed at most of Peter Pan's Bd. of Dir. meetings. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 37, lines 1- 11: "To your knowledge, were the consolidated financial statements of Seven Seas, were they often reviewed at the Peter Pan board meetings? A. Yes. Q. And how often did that occur? A. There was usually some mention of it at most meetings I believe."

112. Seven Seas' submission of its Consolidated Financial Statements to Peter Pan started sometime in the 1990s. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 40, line 22 to Pg. 41, line 7: "When did you first realize or have the understanding, that gee, we've got to prepare a consolidated report, financial statement and give it to Peter Pan? Was that 1985 or was it sometime thereafter? I'm just trying to establish a time frame. A. It was a long time. I don't remember specifically if it started when I got there or not, but it had to have been for somewhere in the early '90s on. I think certainly once we had the STELLAR SEA, but beyond that, I don't honestly remember."

113. Peter Pan supplied the format to be used by Seven Seas in submitting Seven Seas' Consolidated Financial Statements to Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 73, lines 16-18: "Peter Pan would have asked us to put our financial statements in a format for them. They gave us the format they wanted the numbers in."

114. Seven Seas prepared its Consolidated Financial Statements for Peter Pan on a quarterly basis. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 39, line 18 to Pg. 40, line 1: "Did someone request them from Peter Pan or was there an established schedule? A. We had -- we knew we were going to be responsible for providing quarterly statements usually except -- I think we might have provided them, but there weren't any issued for June. For other than June, we would provide quarterly financial statements. Q. These were quarterly financial statements? A. Yes."

[See also; Scott: Pg. 18, line 2 to Pg. 19, line 7; Pg. 21, lines 4 – 11]

Scott: Pg. 91, lines 5 – 20: "Q. And how often did you prepare these consolidated financial statements? A. Quarterly. Q. And with each statement, would you then send it to Nichiro? A. No. I would normally send them to Kirk. Q. Okay. And again, just for the record, you're talking about Kirk Koch, I think, K-O-C-H? A. Kirk Koch. Q. Kirk Koch, but it's spelled K-O-C-H? A. Yes, it is. Q. Okay. And he is with? A. He works for Peter Pan. Q. Okay. Do you know what position his position is? A. He's the financial vice president."

Scott: Pg. 91, line 21 to Pg. 92, line 3: "And how long did you do this of preparing these quarterly and sending them to either Mr. Koch or to Nichiro? A. I always gave them to Kirk. This was an exception to the rule. Q. I see. A. Each quarter from the time I started working there until I stopped working there."

Scott: Pg. 105, lines 7-8: "Was there a date certain that you had to have these in? A. They -- Kirk would tell Mark when they needed them."

115. Seven Seas' Consolidated Financial Statements were given to Kirk Koch, Peter Pan's VP of Finance.
RULING: ACCEPTED AND INCORPORATED

Weed: Pg. 73, line 25 to Pg. 74, line 15: "Mark, for these documents that relate to 2003, can you identify these documents for us? A. It appears to be an income statement and balance sheet for Seven Seas, consolidated. Q. And if you would, Mark, turn to the very last page. Its last three numbers are 563. Little notation down there, "3-26-04 cost sheet to NC." What does NC refer to? A. Nichiro Corporation. Q. And would it be correct to say that these documents would have been ones that were being prepared or were prepared for, again, pursuant to a board meeting of some type? A. What they used them for, I can't tell you. This would have been what I submitted to Kirk Koch."

Koch: Pg. 39, lines 3 - 7: "Would you agree with the statement that Seven Seas consolidated financial statements were prepared by Seven Seas and given to you for use in whatever capacity at Peter Pan board of directors meetings? A Yes."

116. Seven Seas' Consolidated Financial Statements were used by Koch and others to prepare reports for Peter Pan's Bd. of Dir. meetings. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 39, lines 15 - 25: "Basically they would give me the financial statements, and then I would put it in a packet to review at the board meeting. Q Would these packets be given -- would they be distributed to the various members of the board prior to the meeting for their review, or would you just use them for -- for your report? No. Basically there was a group that went to Tokyo for board meetings. Typically the vice presidents and the presidents, and then I would distribute to them, and then -- which was in English, of course."

Koch: Pg. 40, lines 19 - 24: "So you take these, and you prepare packets for these presidents and vice presidents and they -- and would distribute to them, and they would review the information and use it in what capacity they felt was appropriate in their reports? A That's correct."

Koch: Pg. 84, lines 8 - 19: "I would put it in the information bracket and review it because, again, if they had questions or what have you, I would do my best ability to answer them. Q Okay. All right. And would it be fair to say that you did this -- you know, during the period between 2001 and 2006, that you were responsible for kind of packaging these packets up? A Yeah. Since I've been -- I'm not sure exact date, but since I have been vice president of finance, yes, I would put it together and put it in the informational packet, and then we would go to the board meeting."

117. Peter Pan used Seven Seas' Consolidated Financial Statements to keep close track of Seven Seas' finances because Peter Pan was guarantying Seven Seas' "balance sheet." **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 52, lines 1 - 5: "since we had a significant contract with Seven Seas, we tried to keep a pretty -- close attention to their financial stability because we were -- at the end of the day, we had to guaranty their balance sheet."

118. Seven Seas' Consolidated Financial Statements reflect annual losses by Seven Seas in 2002 2003, 2004 and 2006. **RULING: ACCEPTED AND INCORPORATED.**

AE 35.

Weed: Pg. 221, line 25 to Pg. 222, line 17: [Fiscal year 2002] "Q. And if you look on Bates stamp page 559 of that exhibit, let me know when you have that in front of you. MR. HOBBS: Hold on one second here. MR. WALKER: Sure. Q. Mark, if you would, if you look at the, again, that column on the left,

basically and go down to see the profit/loss before tax/allocation, do you see that? A. Right. Q. It says a negative 1.858 million? A. Uh-huh. Q. So that would indicate, you correct me if I'm wrong, that would indicate that you did not have a profit for the year ending March 29, 2002. Would that be at least what that shows at that point? A. Yes, that would show that I didn't make a profit for that point."

Weed: Pg. 222, line 19 to Pg. 223, line 15: [Fiscal year 2003] "And same document, it's the same exhibit, Exhibit-6, Bates stamp last three digit 560, let me know when you have that one in front of you, that page. A. Okay. Q. If you look at in the left column there, go down, do you see operating profit, do you see that indicated there in the left-hand column, operating profit? A. Okay, yeah. Q. If you go over to the column it says total? A. Okay. Q. It would say, it says a negative, 380, I think \$380,000, correct? A. Correct. Q. That would be for the year ending March 28, 2003, correct? A. Okay. Q. That would indicate no profit for at least that fiscal year? A. Okay."

Weed: Pg. 223, line 16 to Pg. 224, line 8: [Fiscal year 2004] "Q. All right. Let's move to Exhibit-7. A. Uh-huh. Q. Let's look at Bates stamped page 563, the last three digits on that page would be 563. A. Okay. Q. And would you go down all the way to the very bottom in the left-hand column, you'll see profit/loss before taxes? A. Right. Q. And next to that, direct to the right you'll see a negative 16,039. Do you see that? A. Uh-huh. Q. That would indicate to me that you had a loss before taxes that year, well, the year ending March 26, 2004. A. Okay. Q. Okay, all right. That's all I have on that exhibit."

Weed: Pg. 225, lines 2 - 23: [Fiscal year 2006] "Q. Let's go to Exhibit-10. That was the year ending March 36, 2006 and look at the right-hand, left-hand column, the Bates stamp number is the last three digits of 567. Do you see that? A. No. Hold on. 567? Oh, okay, I'm on 567, sorry. Q. If we look at the left-hand column, go all the way down to profit/loss before taxes/allocation, do you see that? A. Right. Q. It has a negative 907,000 there? A. What? Q. I'm sorry, negative 907,000, do you see that? A. I see the 07. Q. That's a negative number, I believe. A. Right. Q. So that would indicate a loss? A. Well, I think you're looking at a format that's got a loss, it's showing that I had loss coverage from Peter Pan of 1,125,000 and it looks like I made \$217,000."

119. The insurance coordinator for Peter Pan also did the insurance procurement for Seven Seas' insurance policies.
RULING: ACCEPTED AND INCORPORATED AS MODIFIED.

Stromberg [Peter Pan's Insurance Coordinator 2003 and 2004] : Pg. 9, lines 6 - 17: "Peter Pan Seafoods and Seven Seas Fishing Company would actually go to the market together as a -- as two companies. We had two separate sets of insurance, but they were purchased from the same companies, whether -- so I'd work with either Gary Greenwood or I believe Mark Weed was President of the company at that time so I'd work with them, as well as with Barry Collier at Peter Pan Seafoods to purchase insurance for both companies. Q. Okay. Did -- to your knowledge did Seven Seas have an insurance coordinator? A. Seven Seas did not have an insurance coordinator, no."

120. Peter Pan, Seven Seas and Golden Alaska Seafoods purchased insurance as a group to save money on premiums. **RULING: ACCEPTED AND INCORPORATED**

"Stromberg: Pg. 13, lines 3 - 6: You take it to market -- by having the two companies together, you'd be able to save money on both companies, just like you would if you, you know, went as a group to buy insurance somewhere."

Maiers: Pg. 11, lines 6 - 18 [Peter Pan's Insurance Coordinator 2006 - present]: "A We market it together. Q Market it as a group? And what does that mean? A We get better rates as a group for certain placements, in the marine markets especially. Q Uh-huh. A So we approach the market as a combined group. Q I see. And when you say "group," who all is in that group? A Peter Pan Seafoods, Golden Alaska Seafoods, and Seven Seas. Q Okay. And is anyone else, or are those the three companies? A Those are the three."

[Peter Pan held a 25% interest in Golden Alaska Seafoods. See FOF# 160.]

121. Representatives of Peter Pan, Seven Seas and Golden Alaska Seafoods would meet together with Marsh Insurance brokers to discuss insurance strategy. **RULING: ACCEPTED AND INCORPORATED**

Stromberg: Pg. 12, lines 11 - 19: "... and who would those representatives have been, if you can recall, if the representatives were somewhat consistent? A. Well, the representatives would have been Mark Weed or Gary Greenwood. In this April 2003 I believe was Mark Weed, but -- so it would have been the President of Seven Seas Fishing Company and the President of Peter Pan Seafoods would have been there."

Stromberg: Pg. 13, lines 15 - 21: "... just again for clarification, I think it's somewhat clear, but I just want to make sure it's clear for the record, is in these annual meetings, would both the President of Seven Seas and the President of Peter Pan be at these annual -- including yourself, obviously, be at these meetings? A. That's correct."

Stromberg: Pg. 32, lines 10 - 14: A. "They were negotiated at the same meetings. The policies when negotiated with, the different insurers were negotiated on the terms of each company, but working together as a group, much like, you know, many families may go together to get an H.M.O. or something."

Maiers: Pg. 15, line 24 to Pg. 17, line 9: "How often would meetings that all these people would be together discussing insurance occur? MR. WALSH: Objection; uncertain as to time. Could you ask her what time period you're asking the question? MR. WALKER: Sure. During a, you know, routine year, calendar year. MR. WALSH: What year? Identify the year. MR. WALKER: Oh, okay. 2006. THE WITNES: Seven Seas: I don't recall specifically. Typically, we would hear before April 1st, which is our renewal date, that they have a strategy for our renewal. So we have at least one meeting there to discuss what they will do when they go to market, who they will approach, our strategy to reduce our premiums. From there we typically have another meeting where they present to us everything that they have found, and they ask for our review of the program to see if this is how we want to proceed with placing it. And there might be one other meeting in between there, if something else has come up. But typically those are the two most important ones, our renewal strategy meeting and the placement meeting to talk about their placement of insurance. Q (By Mr. Walker) Okay. And do those typically occur on similar dates, or are they -- can those dates move around, the placement date and the strategy meeting? A These are all flexible dates based on when everyone is available. Q Okay. And again, this would involve -- everyone that you named would -- all the representatives from the three companies, the marketing group, would be at these meetings? A Typically, yes."

Maiers: Pg. 5, lines 15 - 19: "Q Now, are they discussing everybody's insurance there, all three companies who are in the group, Seven Seas, Peter Pan, and Golden Alaska, at those meetings? A Yes. Sometimes. If they are in those meetings, yes, everybody is discussed."

122. Stromberg, Peter Pan's Insurance Coordinator, received insurance correspondence for Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

AE 58.

Stromberg: Pg. 11, lines 19 - 25: [Exhibit 1] "My question is, Craig, is that obviously the policy is a policy that covers Seven Seas Fishing Company and I was wondering if you could just explain why they're sending this to, apparently sending this to Peter Pan Seafoods? A. Oh. The -- the meeting actually that set these up was attended by Peter Pan Seafoods and Seven Seas Fishing Company. The binders were sent as in one box to Peter Pan Seafoods..."

Stromberg: Pg. 17, lines 11 - 16: [Exhibit 2] "Why -- why would you be the recipient of this cover letter? A. Well, in the two companies going to the market together in order to better the cost for each company, I was the contact point for both companies working with Mark Weed at Seven Seas Fishing Company, as well as Barry Collier at Peter Pan."

123. In addition to Stromberg, Dale Schiffler, VP of Operations for Peter Pan, was copied on Seven Seas insurance correspondence. **RULING: ACCEPTED AND INCORPORATED**

AE 59, AE60, AE 61, AE 62.

Stromberg: Pg. 18, line 3 - 15: [Exhibit 3] "... on the second page of this document, and it's Bates mark stamped, the last four digits are 2535, that you are a copy along with a Dale Schiffler. And I'm -- who is Dale Schiffler? A. Dale Schiffler would have been a Vice President at Peter Pan Seafoods. That's the gentleman's name I couldn't remember earlier. He would have been my direct supervisor. Q. Okay. And I -- again, and I'll just try to shorten this, if I can, is I guess the reason you're copied on this would be consistent with what we discussed with regard to Exhibit 2. Essentially you were the insurance coordinator or acted to help coordinate insurance policies for both Peter Pan and Seven Seas? A. That's correct."

124. Seven Seas and Peter Pan had several mutual insurance policies (see, Marine Insurance Policies for the period April 1, 2004 – April 1 2005) **RULING: ACCEPTED AND INCORPORATED**

AE 37 – 47.

125. Seven Seas, Peter Pan and Golden Alaska had some insurance policies written so that their policies covered exactly the same events, all three were named as assured or additional assureds on the policies and, in the event of a claim applicable to such a policy, "only one policy limit would apply, per policy terms and conditions, "as if a single policy was issued for the named assureds." **RULING: ACCEPTED AND INCORPORATED**

Ocean Marine Policy of Insurance, Policy No. M0606(A) [Peter Pan Seafoods, Inc. et al. per Endorsement No.1] and Ocean Marine Policy of Insurance [Seven Seas Fishing Company et al. per Endorsement No.1], Policy No. M0606(B): "In the event of a claim applicable to coverage provided under policy number M0606 (A) and/or policy number M0606 (B) and/or policy number M0606(C) only one policy limit of \$10,000,000 to apply, per policy terms and conditions, as if a single policy was issued for the named assureds." AE 37, AE 38.

Stromberg: Pg. 24, line 15 - 20 : "Q. Okay. And I guess just as a curiosity, I guess, would these -- the fact that one is (A) and one is (B) with the same policy number, would that be any indication that they were, if you will, negotiated at the same time? A. Yeah, I -- I believe they would be. I mean, they 'renegotiated with the same -- the same layers, yes."

Ocean Marine Policy of Insurance, Policy No: SE04LIA8629/81 [Peter Pan Seafoods, Inc. et al. per Endorsement No.1] and Ocean Marine Policy of Insurance [Seven Seas Fishing Company et al. per Endorsement No.1], Policy No. SE04LIA8630/81: "In the event of a claim applicable to coverage provided under policy number SE04LIA8629/81 and/or policy number SE04LIAS630/81 and/or policy number SE04LIA8631/81 only one policy limit of \$10,000,000 to apply, per policy terms and conditions, as if a single policy was issued for the named assureds." AE 39, AE 40.

Ocean Marine Policy of Insurance, Policy No: 06175ML704(A) [Peter Pan Seafoods, Inc. et al. per Endorsement No.1] and Ocean Marine Policy of Insurance [Seven Seas Fishing Company et al. per Endorsement No.1], Policy No. 06175ML704(B): "In the event of a claim applicable to coverage provided under policy number 06175ML 704(B) and/or policy number 06175ML 704(C) and/or policy number 06175ML 704(A) only one policy limit of \$20,000,000 to apply, per policy terms and conditions, as if a single policy was issued for the named assureds." AE 41, AE 42.

Ocean Marine Policy of Insurance, Policy No: SEA 04-14 [Peter Pan Seafoods, Inc. et al. per Endorsement No.1] and Ocean Marine Policy of Insurance [Seven Seas Fishing Company et al. per Endorsement No.1], Policy No. SEA-04-13: "In the event of a claim applicable to coverage provided under policy numbers SEA 04-12 SEA 04-13 and/or policy number SEA 04-14 only one policy limit of \$50,000,000 to apply, per policy terms and conditions, as if a single policy was issued for the named assureds." AE 43, AE44.

Ocean Marine Policy of Insurance, Policy No: SE04LIA 7614/81 [Peter Pan Seafoods, Inc. et al. per Endorsement No.1] and Ocean Marine Policy of Insurance [Seven Seas Fishing Company et al. per Endorsement No.1], Policy No. SE04LIA7618/81: "In the event of a claim applicable to coverage provided under policy number SE04LIA7614/S1 and/or policy number SE04LIA761S/SI and/or policy number SE04LIA7620/SI only one policy limit of \$ 9,000,000.00 to apply, per policy terms and conditions, as if a single policy was issued for the named assureds." AE 45, AE 46.

Stromberg 27, lines 3 – 5: "Do you know, by any chance, know who the third policy number was issued to? A. Yes, that would be Golden Alaska Seafoods."

126. Peter Pan was the listed "manager" of and Seven Seas as the member on Seven Seas' Protection and Indemnity Club insurance policy. **RULING: ACCEPTED AND INCORPORATED**

AE 49; American Steamship Owners Mutual Protection and Indemnity Association, Inc. [P&I Club], MEMBER, SEVEN SEAS FISHING COMPANY; PETER PAN SEAFOODS INC. (MANAGER)

Maiers: Pg. 30, lines 15 - 20: "Q Do you know what a -- what is a P&I club? A A P&I club is marine insurance covering workers comp for the employees on the vessel. It's marine comp insurance for anything other than land-based operations. In this case it's on the vessel the Stellar Sea and covering its employees."

Maiers: Pg. 32, lines 8 - 19: "The underwriters from the American Club would come into town to do a marketing meeting for Seven Seas. We would be in attendance just as part of our overall renewal meeting. Q When you say "we," who are you referring to? A The men we named earlier. Dale Schiffler, Mark Weed, Lou Fleming, and our Marsh representatives. Q And you don't know who this would refer to when it says "manager?" Would it refer to an individual? MR. WALSH: It's already asked and answered. THE WITNES Seven Seas: I don't know."

127. Seven Seas vehicles were insured under the Peter Pan's Automobile Insurance policy. **RULING: ACCEPTED AND INCORPORATED**

AE 53.

Stromberg: Pg. 14 line to Pg. 15, line 11: "...it appears that Seven Seas, some of Seven Seas' automobile policy is actually being covered by Peter Pan. Is that -- am I correct in that -- in that -- A. What happened -- Q. -- characterization? A. -- on this is there would be multiple vehicles between Peter Pan and Seven Seas. Seven Seas had one paid for vehicle that was used in Seattle and they had a couple more that were used at the docks. Basically the cost of this would be broken out to the different companies, so that Peter Pan would have a certain portion of this. If you actually had the billing statement, which is not included here, you would actually see that part of it was billed to Seven Seas straight from Marsh, part of it would be billed to Peter Pan Seafoods."

Stromberg: Pg. 43, line 16 to Pg. 44 line 11: "Craig, if you would, identify this policy for me. A. This is the Commercial Automobile Coverage for Peter Pan Seafoods for 2004/2005. Q. Okay. And second page, I note that it's listed -- it's named Schedule -- the page is entitled Schedule of Named Insured(s). Do you see that, Craig? A. Yes. Q. Okay. Great. And Seven Seas Fishing Company is indeed named as an insured, is it not? A. That's correct. Q. Okay. Great. And if you turn to the next page, Schedule of Covered Autos You Own, do you see that? A. Yes, sir. Q. Okay. And, again, I note that at least there's a -- there's some handwriting on here that indicates apparently indicates that two vessels -- two autos here are owned by Seven Seas. A. That's correct. Q. Okay. And, in fact, do you know if that is the case or was the case? A. I believe that was the case, yes."

128. Seven Seas paid its insurance premiums through funds obtained from the Advance of Funds Agreement. **RULING: ACCEPTED AND INCORPORATED**

AE 63 (June 4, 2004, NOAA 2247).

129. All funds requested under the Advance of Funds Agreement were transferred by wire to Seven Seas' bank account #3859519. **RULING: ACCEPTED AND INCORPORATED**

Scott: Pg. 55, lineS 7 – 11: "How would the money be transferred from Peter Pan over to the Seven Seas account or whatever? A. They would wire the money into the Seven Seas checking account."

Scott: Pg. 55, line 20 to Pg. 56, line 1: "... where do the wires go? You said to Seven Seas bank accounts? A. To the one account. Q. Okay. And who was that one account with? A. Seven Seas Fishing Company. Q. Right. And was that to a bank account for Seven Seas Fishing Company? A. That was the bank account for Seven Seas Fishing Company. Q. Okay. Did -- A. It was a Bank of America regular business account. Q. Okay. Now, I'm going to show you what we'll mark as Exhibit 2 and ask you -- MR. HOBBS: Three, Exhibit 3. Q. I'm sorry, Exhibit 3, you're right, Exhibit 3, and ask if you can identify that. (Exhibit 3 was marked.) Q. And, Linda, do you recognize these? A. Yes. This is the account." [AE 63]

130. Payment of Seven Seas and subsidiaries bills were all paid through Seven Seas Bank of America Account #3859519. **RULING: REJECTED AS MISCHARACTERIZING THE TESTIMONY**

Scott: Pg. 60, line 22 to Pg. 61, line 3: "So you look at the Seven Seas account and that basically -- all the money goes through, if you will, the Seven Seas account? A. Yes. Q. And that money then is distributed to the other Seven Seas subsidiaries? A. Yes."

131. Pursuant to accounting practice, at the end of the year, all debt accumulated by Seven Seas' subsidiaries was subsumed by/returned to Seven Seas. **RULING: REJECTED AS NOT IN CONFORMITY WITH THE TESTIMONY.**

Scott: Pg. 161 line 9 to Pg. 162, line 4: "Q. If you would, take a quick look on page 005492? A. (Witness complies.) Q. And the very first entry on that page, do you see that? A. More 7 or Anthony Fairless? Q. The one that says, move Seven -- A. Or move Seven, yes. Q. And it has an amount there of \$1,365,000. I was wondering if you -- what does the memo mean? Looks like move Seven S, which I would assume means move to Seven Seas? A. If it was the end of the year, it was for my-- see notes payable Seven Seas, it was just part of that whole intracompany reorganization of the -- just moving the intracompany transactions. Q. I see. So the debt, if you will, of \$1,365,000 is moved to the account of Seven Seas Fishing Company? A. Yes. The parent company has the debt and that Stellar gets to start fresh." AE 65 [Seven Seas General Ledger as of March 31, 2005.]

132. Seven Seas had negative taxable income for 2001 – 2003 and 2005 - 2006; in 2004 it had taxable income of approximately \$19,261. **RULING: ACCEPTED AND INCORPORATED.**

AE 16 – 20; AE 112.

2001: Seven Seas' taxable income for April 1, 2001 to March 29, 2002 is <1,832,305> *<negative number> AE 112.

2002: Seven Seas' taxable income for March 30, 2002 to March 28, 2003 is <447,782> *<negative number> AE 16.

2003: Seven Seas' taxable income for March 29, 2003, to March 26, 2004 is \$19,261. AE 17

2004 Seven Seas' taxable income for March 27, 2004, to March 25, 2005 is <162,725> *<negative number> AE 18.

2005 Seven Seas' taxable income for March 26, 2005, to March 31, 2006 is <70,571> *<negative number> AE 20.

133. In 1997, Barry Collier, President of Peter Pan, purchased 75% stock in Seven Seas from William Salitec, former President of Peter Pan, for \$75,015. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 19, line 16 to Pg. 20, line 1 - 4: "I'm going to ask you to turn to a particular page on it. It's Bates Stamp -- and that's that little thing in the corner there, that Peter Pan. And if you turn to Page 671, last three digits of 671, and there's a number 2 there. It says "Related Party Transactions." The second paragraph -- I'm going to -- it's a short paragraph, so I'm going to read it, and then we can kind of discuss it. It says: "In April of 1997, 4,500 shares of common stock were sold to the company's new president for \$75,000 -- \$75,015." Would that have been your purchase of the -- of the stock? A Sounds right."

134. When Collier purchased 75% of Seven Seas stock in 1997 from Salitec, the other stockholders in Seven Seas were Peter Pan (10%) and Nichiro (15%). **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 13, line 13 to Pg. 14, line 23: "A When I became president of Peter Pan Seafoods, I bought stock in Seven Seas. Q How did that -- how did that arrangement come about; were you offered that? That's what I wanted some more elaboration on. A Yes, I was offered that. Q And who offered that to you? A I recall it was William Salitec. Bill Salitec. Q And what was his position with Seven Seas Fishing Company at that time? A I would assume that he was president. Q Okay. And do you know -- did he tell you why -- why he was offering it to you, or was there any discussion of that? A No. Q And I think it's -- I mean I think the record is pretty clear that ultimately you did purchase the company from Mr. Salitec. Would that be a correct -- A No, that's not a correct statement. Q Okay. Yeah. You tell me what happened. A I purchased stock in Seven Seas Fishing Company; 75 percent stock. Q All right. And do you know who held the minority stock ownerships? A If I recall, it was 15 percent Peter Pan and 10 percent Nichiro or vice versa, 10, 15 percent. But I think it was 10 percent Nichiro and 15 percent Peter Pan."

135. In 1997, when Collier purchased 75% stock in Seven Seas from Salitec, there was certain transfer limitations attached to Collier's purchase. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 19, line 16 to Pg. 20, line 12.

136. Mr. Collier, 75% Owner of Seven Seas, did not know the purpose of the transfer restrictions. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 23, lines 21 - 25: "... do you know what these provisions -- what these transfer restrictions or limitations were intended to do? A No. And you don't know now, or you didn't know then? A Probably either."

137. In 2001, when Collier sold his 75% stock in Seven Seas to Gary Greenwood, there were also transfer restrictions attached to Greenwood's purchase. **RULING: ACCEPTED AND INCORPORATED**

AE 83; Paragraph 2: "Mr. Greenwood shall not transfer any shares to any person without first obtaining the written consent of other shareholders to such transfer."

138. Peter Pan and Nichiro remained the two other shareholders in Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

AE 83.

139. Greenwood made no capital contributions to Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 41, lines 6 - 9: "Q. Gary, in addition to the amount that you paid to purchase for your ownership interest in Seven Seas, did you make any capital contributions to Seven Seas? A. I don't believe so, no."

140. Greenwood, when preparing to sell Seven Seas, advised Collier of his intentions to sell Seven Seas to Weed. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 29, lines 7 – 13: "...do you recall if Mr. Greenwood ever discussed that he was -- the idea of selling his -- that interest to Mr. Mark Weed? A I recall him advising us that he was considering selling his stock to Mark Weed."

141. Greenwood sold his stock in Seven Seas to Weed for \$78,000. **RULING: ACCEPTED AND INCORPORATED.**

Weed: Pg. 58, lines 12 – 15: "I think I just stated that I have invested my own money in the company. Q. By the purchase of \$78,000? A. Correct."

142. Greenwood made no attempt to sale his interest in Seven Seas to anyone other than Weed. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 114, lines 3 – 7: "Q. Okay. Did you ever try to sell your stock to anyone other than Mark Weed, your interest in the company of Seven Seas Fishing Company? A. No."

143. The cash flow of Seven Seas was tight when Greenwood purchased the company and was the same when he later sold Seven Seas to Weed. **RULING: ACCEPTED AND INCORPORATED**

Greenwood: Pg. 88, line 25 to Pg. 89, line 1: "Q. Gary, you mentioned that when you sold it, the financial condition of Seven Seas was similar to when you bought it. So, again, I'm going to go back. To the best of your recollection, what was that financial condition when you bought it? A. That cash flow was tight. Q. And that the same, cash flow, was still tight when you sold it to Mark Weed? A. Yes."

144. There was little or no due diligence undertaken by Weed prior to purchasing Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 158, lines 11 - 23: "Weed did not know why there was a debt of over \$2 million prior to the signing of the Advance of Funs (i.e., March 2002)

Weed: Pg. 158, lines 2 – 10: When you bought the company, did you inquire what kind of debt was in place with Seven Seas? Yes. Well, did I make a specific question? I don't recall that I asked a specific question. I had access to the financial records if I wanted to look at them. Q. Did you look at them? I don't recall, but I assume I would have been aware of what they were."

Weed: Pg. 54, line 4 to Pg. 55 line 7: "Before purchasing it, did you have the company's financial statements reviewed by accountants, or anyone I suppose for that matter, just to say is this a good thing to do? A. No. Why? I don't understand why I would have. Q. Mark, what was your understanding or at the time of your purchase, did you believe Seven Seas had the ability to borrow money from anyone other than Peter Pan, did they have the financial wherewithal to be able to receive or enter into agreements to receive money from any other financial institution, bank, what-have-you? A. At that point, we hadn't -- it hadn't been looked at. Well, I shouldn't say that. Gary may have had some discussions on that with banks because I don't think the first, our first choice was doing it with through Peter Pan. But at that point, again we had -- it was my understanding at the time that that had been part of the review with the Maritime Administration. Again, I had not been involved in that side of thing. That would be Gary Greenwood, I had been under the impression, I knew there was a financial arrangement with Peter Pan and it -- I was under the impression that that had been, had been discussed with MARAD. Apparently from what I hear lately, that's not the case, but at that point in time, I had been under the impression that it had been part of it. Q. Well, Mark, I'm just talking about finances here. In other words, -- A. So am I. Q. -- you were about to buy a fairly significant company with significant assets, correct? Seven Seas had significant assets as far as a boat? A. Uh-huh. Q. Bareboat charter boat, it owned BLUE WAVE, it owned another boat.

I would say it had significant assets. Would you agree with me there? A. Yes. Q. And you were about to make what you've said was a fairly significant purchase in your lifetime? A. Right. Q. I think for most people, \$78,000 is a lot of money. A. Uh-huh. Q. So what I'm trying to find out now is, did you make any inquiry well, what if Peter Pan, you know, the contract for some reason goes away, did you make any inquiries as to the Seven Seas ability to receive finances to keep its operation going if in fact the contract with Peter Pan fell through? A. No."

145. Weed made no capital contributions to Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 58, lines 16 – 18: "Q. Did you make any capital contributions to the company? A. No."

146. Weed's salary from Seven Seas was his only source of income. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 70, lines 14 – 16: "... during the years when the STELLAR SEA was in operation, 100 percent of my salary was from Seven Seas Fishing Company."

147. Seven Seas had no demonstrable profit goal. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 178, lines 7 – 11: "Did you have any goals for Seven Seas, any profit goals, anything of that nature? A. No, I didn't have a goal we were trying to reach specifically other than what you've seen in the budgets." [The projected budgets of Seven Seas always showed an annual loss.]

Koch: Pg. 84, line 20 – 25/: Pg. 85, line 1 – 6: "...with your background in the -- you know, in finance, how would you describe -- from your -- you know, from the times you have reviewed Seven Seas consolidated financial statements, how would you describe their financial position during the period of 2001 through 2006? A Describe their financial position? Q Uh-huh. A Just a small business. Q Was it profitable? A No. We would make them break even for them to custom process salmon and crab for us."

148. Peter Pan's and Seven Seas' annual fiscal "bottom line" is connected; in a given year if Seven Seas losses less money, then Peter Pan spends less money to "true up" Seven Seas. **ACCEPTED AND INCORPORATED**

Collier: Pg. 77, lines 10 – 17: "When Seven Seas Fishing Company sold the Blue Wave, did Peter Pan receive any of those proceeds from the sale, if you know? A Did Peter Pan receive any of the proceeds? Q Uh-huh. A I believe it came to -- they didn't come to us. I believe that it affected the bottom line of Seven Seas. Thus our true-up was less that year."

Collier: Pg. 36, lines 15 - 20: "I mean it's probably all washed out with the true-up of how we had to balance out the financial sheets on a yearly basis. If they were saving money on the Blue Wave, then our true-up would be less during a disastrous year when they didn't have enough crab to process."

149. Seven Seas' charter of the STELLAR SEA was made possible only by the financial support of Peter Pan and Nichiro. **RULING: ACCEPTED AND INCORPORATED**

AE 68; Peter Pan GUARANTEE:

"In consideration of the execution and delivery by Charterer of the New Processing Agreement, Guarantor does hereby irrevocably, absolutely and unconditionally guarantee without offset or deduction that, upon Charterer's failure to perform those obligations of Charterer under the Charter which are specified herein, Guarantor shall indemnify Owner with respect to all costs and expenses of any nature whatsoever arising from Charterer's failure to perform such specified obligations under the Charter, in such manner as Owner determines to be appropriate. The sections of the Charter in regard to which such indemnification obligations shall apply are:....

(2) pursuant to Section 10.1 of the Charter, (A) to keep the Vessel insured at all times during the continuance of the Charter in amounts, with limits on deductibles and against at least such marine risks as are customarily insured against by corporations of established reputation engaged in businesses the same as, or similar to, the businesses of Charterer and similarly situated, and (B) to maintain all insurance required by the Subsidy Contract in addition to insurance coverages and to the limits of coverage described in Section 10 of the Charter;...

(3) pursuant to Section 10.2 of the Charter and without limiting the generality of Section 10.1 of the Charter, (A) to keep at its sole expense the Vessel fully insured with responsible underwriters and through responsible brokers, all in good standing and satisfactory to the Owner and Mortgagee fully and adequately protecting the Vessel and the Mortgagee's interest therein against all marine perils and disasters and all hazards, risks and liabilities in any way arising out of the ownership, operation or maintenance of said Vessel, during the continuance of the Charter by protection and indemnity insurance or its equivalent covering the risks included in Form SP23 (revised), and (B) to maintain said protection and indemnity insurance in an amount not less than \$10,000,000 for each accident or occurrence;

(7) pursuant to Section 16.1 of the Charter, at the expiration of the term (including any renewal term) or upon sooner termination of the Charter, (A) to return the Vessel (including Removable Equipment) to Owner free of all Liens and encumbrances other than any created by Owner, its agent or assigns, and in the same operating order, repair, condition and appearance as when received by Charterer....

(8) pursuant to Section 16.2 of the Charter to assure that when the Vessel is redelivered to Owner the Vessel shall be in all respects seaworthy and shall be in such condition as will enable Owner immediately to obtain a classification Certificate from Det Norske Veritas,....

Guarantor does hereby agree that, in the event that Charterer does not or is unable to perform in accordance with its obligations under the terms of the Charter, for any reason whatsoever (including, without limitation, the liquidation, dissolution, receivership, insolvency, bankruptcy, assignment for the benefit of creditors, reorganization, arrangement, composition or readjustment of, or other similar proceedings affecting the status, existence, assets or obligations of, Charterer, or the limitation of damages for the breach, or the disaffirmance of the New Processing Agreement or Charter in any such proceeding) it will indemnify Owner against any costs and expenses of any nature whatsoever, arising from Charterer's failure or delay in so performing."

150. Nichiro guaranteed Peter Pan's obligation under the M/V STELLAR SEA Charter Agreement. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED**

"In consideration of the execution and delivery by Charterer of the New Processing Agreement, (i) Guarantor does hereby irrevocably, absolutely and unconditionally guarantee without offset or deduction that Peter Pan will perform, punctually and faithfully, each and every applicable duty, agreement, covenant and obligation under, and in full accordance with Peter Pan's obligations under the New Processing Agreement, and that (ii) upon Charterer's failure to perform those obligations of Charterer under the Charter which are specified herein, Guarantor shall indemnify Owner and cause Peter Pan to indemnify Owner with respect to all costs and expenses of any nature whatsoever arising from Charterer's failure to perform such specified obligations under the Charter, in such manner as Owner and its assigns determine to be appropriate. ..."

151. Without the financial guarantees of Peter Pan and Nichiro, Seven Seas would not have been able to charter the STELLAR SEA from Cyprus. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 125, lines 8 - 11: "Without this guarantee, do you believe that Seven Seas would have been able to charter the vessel from Cypress? I don't believe so"

Weed: Pg. 124, line 24 to Pg. 125, line 7: "Q. What's the purpose of this guarantee? MR. HOBBS: Objection, calls for a legal interpretation. Q. Mark, you can go ahead and answer the question. A. My understanding, it was one of the conditions necessary from the owners of the vessel, which was Cypress Stellar Sea, before they would charter the vessel to Stellar Seafoods."

152. Koch, the Financial VP of Peter Pan in 2001, was not involved in negotiating Peter Pan's guarantee of Seven Seas' payment of \$175,000 quarterly lease payments to Cypress. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 49, line 7 – 24: "It's a guarantee of the performance of the lease. Q Okay. The lease -- I'm sorry. You'll have to be a little more specific for the record. A For the Stellar Sea, Cypress lease, we guaranteed -- Peter Pan guaranteed the performance of that. Q Do you know why they did this? MR. WALSH: Objection. Again, you haven't established that he negotiated the deal. Why? There's no foundation for asking that question. THE WITNESSeven Seas: I wasn't part of the deal. Q (By Mr. Walker) You weren't part of the deal? A I wasn't part of the deal. Q And it was never discussed at any of the meetings that you may have attended as the chief financial officer of Peter Pan? A No. I mean I was just aware of the agreement. I wasn't part of the agreement."

153. Because of the new vessel ownership requirements instituted by the passage of the AFA in 1998, all vessels which commercially fished or processed in U.S. waters had to be owned and controlled by a U.S. citizen to the extent of at least 75%. **RULING: ACCEPTED AND INCORPORATED**

AE 70, Attachment 15.

154. The vessel documentation requirements of the American Fisheries Act presented a number of problems for Peter Pan; among these problems was that (1) the First Hawaiian Bank, the owner of the STELLAR SEA prior to October 2001, did not meet the U.S. citizenship standards to be owner of the STELLAR SEA and requirement and (2) the guarantee of the Stellar Sea charter by Peter Pan and Nichiro that went directly to FHB would not be permitted. **RULING: ACCEPTED AND INCORPORATED**

AE 71.

Cypress report, dated April 14, 2001, pg. 5 -6: "The American Fisheries Act, passed in 1999, has presented a number of problems for the industry and for Peter Pan in particular. Compliance is required by October 1, 2001, and MARAD has asked that all firms affected present their plans for compliance by June 1, 2001. The Act sets forth new rules for the US flag fishing industry, including the prohibition of foreign "control", which goes beyond previous MARAD requirements. A consequence of this is that the Act prohibits any guarantees by non-US entities. This is being viewed by many as overriding various US treaties with other countries, and the legality of it is being questioned.

For Peter Pan and the Stellar Sea transaction, the problems created by the Act include:

- First Hawaiian will no longer permitted to be the beneficial owner.
- Given its current ownership, Seven Seas will be characterized as controlled by a foreign entity, and will not be permitted to enter into bareboat charters of US vessels, including the Stellar Sea.
- The guarantee of the *Stellar* Sea charter by Peter Pan and Nichiri [sp] will not permitted."

155. Greenwood, who was identified by Cypress as a Peter Pan representative, was intimately involved in the transaction whereby Cypress would purchase the STELLAR SEA. **RULING: ACCEPTED AND INCORPORATED**

AE 71.

"On April 13, I spent several hours in discussion with Tommy Laing, our inspector, I was given a detailed tour of the vessel, and I spent quite a long time in discussions with the following personnel from Seven Seas and Peter Pan:

Mark Weed, Vice President, Seven Seas
Ivar Reiten, Operations Manager, Seven Seas
Gary Greenwood, Corporate Advisor, Peter Pan.

Gary is a long time Peter Pan employee, who recently switched from his role as Senior VP to working 3 days a week as Corporate Advisor. The future of the Stellar Sea appeared to be his responsibility. Seeing the drift of my questions, Mark called Gary to have him join us on the vessel."

156. Greenwood outlined for Cypress Peter Pan's goals in the sale of the STELLAR SEA from FHB to Cypress. **RULING: ACCEPTED AND INCORPORATED**

AE 71.

"Gary Greenwood clearly outlined Peter Pan's goals:

- They would like to have access to the *Stellar Sea* long term.
- They would like to reduce the current charter cost for the vessel, to help with their cash flow and earnings.
- They would like to restructure the charter, replacing it with a custom processing agreement."

157. The STELLAR SEA was sold to Cypress Leasing because Cypress did meet the standard of being owned and controlled at least 75% by a U.S. citizen. **RULING: ACCEPTED AND INCORPORATED**

AE 71.

"I told Gary that Cypress would have no difficulty meeting the US control standards for ownership, and that we would be amenable to restructuring the charter, providing that we could see the custom processing agreement as a form of guarantee flowing from Peter Pan and Nichiri."

158. Cypress analysis of the Seven Seas – Peter Pan business relationship stated that "for all practical purposes [Seven Seas] is a part of Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

AE 71; "In order to comply with the MARAD constraints in the past, Seven Seas Fishing Company was set up with an unusual ownership. Barry Collier, the President of Peter Pan, personally owns 70% of the stock, and Peter Pan and Nichiri own the balance. Seven Seas has about 20 office employees and operates the Stellar Sea, the Blue Wave, and a tender vessel. Another similar entity operates the Golden Alaska, which processes another type of fish. Seven Seas is housed in the Peter Pan building, and for all practical purposes is a part of Peter Pan. It is operated on a break even basis, essentially as a cost center for Peter Pan." See, Cypress doc 2:

159. Cypress considered Peter Pan and Nichiro as the primary credit for the purchase of the STELLAR SEA from FHB. **RULING: ACCEPTED AND INCORPORATED**

AE 72.

160. Peter Pan controlled the negotiations on the renewal of Seven Seas' charter of the STELLAR SEA from Cypress (April 2002). **RULING: ACCEPTED AND INCORPORATED**

AE 75; "Jim, I think your suggested renewal package (\$175,000/qtr for six years with options at the end, of purchasing, extending the lease or returning the vessel) will work. I can't give you a definite answer because Mr. Collier, President of Peter Pan Seafoods, is out of the country and will not be able to deal with this issue until his return, the first of next week. I recognize this will put us beyond the "Extended Exercise Date", will it be OK if we notify you by 5:00 p.m., Pacific Daylight Time on April 30th? Best regards, Gary" [Greenwood was 100% owner of Seven Seas at this time.]

161. Cypress Leasing subsequently used (i.e., leveraged) its ownership in the vessel to obtain a non-recourse loan from Fuyo bank on the basis of Nichiro's guaranty of the lease payments and using the STELLAR SEA as collateral for the loan. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED**

AE 76; "A non-recourse loan is to be provided to the Lessor [Cypress] in exchange for its rights under the Charter Agreement backed by Nichiro's guaranty, the Lessor's rights under the processing agreement (which have been assigned to the Lessor by the Lessee) and the ship as collateral. Therefore, this is a transaction in which credit is effectively extended to Nichiro as shown in the diagram below."

162. Fuyo based its approval of the non-recourse loan to Cypress on the financial strength of Peter Pan and Nichiro. **RULING: ACCEPTED AND INCORPORATED**

AE 76.

"...the Lessee [Seven Seas] was regarded as effectively an affiliate of Peter Pan, and the Charter Agreement was entered into on condition of the guaranty of Peter Pan and Nichiro ("Original Guaranty")"... Pg 3

"Any and all loss resulting from Lessee's non-performance of its obligations under the Charter Agreement except for the payment obligation is guaranteed. (Guaranty of performance)

Any losses arising from the Lessee's non-performance of its obligations will be indemnified.

(1) There is no change in that the Charter Agreement is based on the guaranty by Peter Pan and Nichiro, as noted above."

163. Fuyo analysis of the Seven Seas – Peter Pan business relationship stated that Seven Seas "is practically the same entity as Peter Pan." **RULING: ACCEPTED AND INCORPORATED**

AE 76.

"The Lessee, established by Peter Pan to secure its own raw materials, is practically the same entity as Peter Pan. We were advised that the Lessee has been operated under the directions of Peter Pan and Nichiro and has never delayed payments." Pg 7

"About the Lessee, the effective credit receiver Peter Pan and the effective guarantor Nichiro." Pg. 8

"It is determined that the credit provided in this transaction is actually the credit to Peter Pan and the parent company, Nichiro." Pg. 10

"The Lessee is practically part of Peter Pan for material supply. We can expect it be continuously operated in compliance with Peter Pan's policy." Pg. 11

164. Peter Pan owns 25% of Golden Alaska Seafoods. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 13, line 7: "A We [Peter Pan] currently own 25 percent of Golden Alaska Seafoods."

165. Seven Seas and Golden Alaska (a Peter Pan subsidiary) were co-located in the same office prior to 2001. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 67, line 21 to Pg. 68, line 5: "Q. And would it be correct to say that for some period of time, Seven Seas was co-located with Golden Alaska? A. Yes. Q. What was that period of time? A. Again, I don't remember the exact dates. Off the top of my head, I would say '98 or something. But I honestly don't remember the exact dates we started, until somewhere up into the 2000, 2001 maybe range when we moved over."

166. Seven Seas obtained its own offices (across the hall from GSA) because of "restructuring" caused by MARAD's concerns over "control" issues. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 67, line 21 to Pg. 68, line 22: "Q. And when you say "when we moved over," if you could clarify that. A. We, meaning Seven Seas Fishing Company, moved out of the office address of suite 707 into the suite 720. Q. And why did you do that? A. Why did we do that? Q. Yes. A. As part of the restructuring under the AFA, it was -- again, I wasn't in the negotiation or the determination, but somewhere it had been determined that we should have a separate office. Q. Do you know why you should have a separate office? A. It was control issues of some sort, but I don't know the answer because I wasn't the one that negotiated it."

167. Greenwood had knowledge that the restructuring of Seven Seas that occurred in 2001 was because of concerns by MARAD about Peter Pan having too much control over Seven Seas. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED.**

Greenwood: Pg. 35, line 18 to Pg. 36, line 4: "Okay. And what was -- when you say, "to be in full compliance," obviously you -- what does that-- what do you mean by that? A. Well, it was a brand new act at that point in time. There was, as I recall, a number of operational questions, administrative questions. Q. What were those operational questions? A. Yes. The separation of the vessels, the separation of control, if I can use that word, from Peter Pan, so that Peter Pan is directly -- or is not involved at all in the operation of that vessel. It was that primary issue."

168. Karen Conrad was a director of Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

AE 77.

169. The Seven Seas Board of Directors annual meeting consisted of a lunch between Weed and Conrad and filling out a form. **RULING: ACCEPTED AND INCORPORATED**

Conrad : Pg. 12, line 13 to Pg. 13, line 4: "Okay. Were you on what they call the board of directors? A. I'm not even aware we had a board of directors. Q. Okay. So from that answer I would assume it would be correct to say that there, to your knowledge, there were never any meetings of the board of directors? A. Well, once a year Mark and I had to have a meeting and we ate lunch and I had to fill out the forms. I did the forms that said that we held a meeting on this day and he signed it. Q. And obviously there were, other than that form, there were no, if you will, to your knowledge, any minutes of board meetings, anything of that nature? A. No, not to my knowledge."

170. Karen Conrad, an officer and director of Seven Seas, also served as the human resources director of Golden Alaska Seafood (A Peter Pan subsidiary) and had 50% of her annual income paid by Golden Alaska Seafood. **RULING: ACCEPTED AND INCORPORATED**

Conrad : Pg. 30, line 25 to Pg. 31, line 8. "Did you have separate contracts, employment contracts with Golden Alaska Seafoods? A. Yes. Q. And then you had a separate one, an independent one with Seven Seas - A. Correct. Q. -- Fishing Company? Do you know how your salary was split between the two companies? A. 50-50"

171. Conrad had a phone that was directly connected from her Seven Seas office to the Golden Alaska Seafoods switchboard. **RULING: ACCEPTED AND INCORPORATED**

Conrad : Pg. 32, lines 5 – 9: "... did you have an office, I should say, at Golden Alaska? A. No. I had my office in Seven Seas office, but I had a phone that tapped into the Golden Alaska switchboard..."

Conrad : Pg. 41, lines 13 – 15: "Q.[And] that situation was from basically throughout your career with the two companies? 15 A. Yes"

172. Peter Pan personnel advised Weed of the opportunity to purchase F/V AJ. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 185, lines 14 – 23: "When did you first learn, Mark, that the F/V AJ was for sale, the fishing vessel AJ? A. Sometime in 2003. It must have been somewhere, oh, I guess the spring or summer of 2003. Q. How did you learn of that? A. I heard about it from Clyde Sterling, I believe. Q. Who is Clyde Sterling? A. Clyde Sterling was the vice-president of operations, I believe was his title with Peter Pan."

Collier: Pg. 78, lines 8 – 19: "... do you know who -- how Mark Weed became aware that the Fishing Vessel AJ was on the market, how he was aware that it was for sale? A The owner of the AJ mentioned to Peter Pan that they were in need of cash and wanted to sell it, and we put Mark Weed in touch with the owner, Walt Raber. Q And when you say "we," do you know who the individuals were involved in passing that, was that you? A I think I personally told Mark Weed."

173. Weed stated that the reason that Seven Seas purchased the F/V AJ was because it was an opportunity for Seven Seas to operate another vessel. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 186, lines 10 – 18: "It was an opportunity to get into some pollock processing their standpoint and the operation of a vessel from my standpoint. Q. So whose idea was it to purchase the SEVEN SEAS -- I mean, the AJ? I apologize. A. Pardon? Q. Whose idea was it to purchase the AJ? A. Clyde presented it to me as an idea to form a partnership to purchase the AJ."

174. The opportunity for Seven Seas to operate another vessel was an insignificant motivation for the purchase of the F/V AJ; The pollock quota and not the vessel was what Peter Pan and Weed were interested in acquiring. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 188, lines 1 – 3: "It wasn't the vessel we were concerned about as we were the pollock quota that came with the vessel."

Weed: Pg. 202, lines 19 – 24: "Part of our purchase of the vessel was that the boat, if you could separate the quota from the vessel, the vessel would go back to the original owner. There was some money involved. I don't remember who paid whom, but there was some money going back and forth there."

175. Peter Pan had been interested in purchasing an interest in a vessel with Pollack quota since 2002. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED.**

AE 13; Pg. 10, PPSF000528. 5/30/02 Peter Pan Bd. of Dir. meeting minutes note: "Consider Investment in Pollock vessel with quota."

176. Peter Pan personnel were involved in the negotiation for the purchase of the A/J. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED.**

Collier: Pg. 79, lines 6 – 12: "Q Were you in any way involved in negotiating the -- or you or anyone else from Peter Pan, for that matter, involved in the -- negotiating the purchase of the AJ from its original owners to Seven Seas Fishing Company? A We made the contact with -- between the owner, Walt Raber, and with Weed, and then we did the deal, negotiated the deal."

177. A condition of the loan from Nichiro was that the Pollock harvested pursuant to the F/V AJ's Pollock quota would be delivered to the Peter Pan Pollock Cooperative for 15 years. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED.**

AE 78.

Collier: Pg. 78, lines 5 – 10: "When Mark Weed purchased the Fishing Vessel AJ, what was his obligation to Peter Pan in regards to the Pollack quota? A His obligation was for us to give him financing assistance. He needed to transfer that quota from the previous co-op to the Peter Pan co-op."

178. Nichiro, Peter Pan's 100% owner, provided Weed the funds to purchase F/V AJ. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 190, lines 12 – 17: "Where did the funds come to purchase the AJ? A. My funds came from Nichiro. Q. Did Seven Seas use any of its own funds as part of the purchase of the AJ? A. No."

179. Seven Seas posted no security for the \$4.6 million borrowed to purchase the F/V AJ; Peter Pan did. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 190, lines 18 – 21: "The funds that came from Nichiro, how were they secured? A. The funds I have with Nichiro weren't secured. They were unsecured."

180. Peter Pan supplied security for Nichiro's loan to Seven Seas of \$4.6 million for the purchase of the F/V AJ. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 192, line 21 to Pg. 193, line 7: "... do you know that Peter Pan secured the purchase of the AJ with a guarantee of land that it owned apparently in Valdez, I think it was? A. Yes. Q. When did you know that? A. I knew that -- oh, I don't know exactly when it became evident. Somewhere during this process I was aware of where the money came from that I received from Nichiro. Q. Were you aware of that before or after you purchased the vessel? A. I was aware of it before.

181. The Advance of Funds Agreement was used to pay the F/V AJ note payments to Nichiro; Seven Seas' main Bank of America account #3859519, which was funded by wire transfers from Peter Pan to this account per advance of fund requests from Seven Seas. **RULING: ACCEPTED AND INCORPORATED**

AE 81.

Weed: Pg. 193, line 8 to Pg. 195, line 21 "(Exhibit-27 marked.) Q. 27 is all one document. Mark, do you recognize the front, the very first page on Exhibit-27? A. The front page, apparently it's a list of wire transfers from F/V AJ, LLC. Q. And if I proffer to you that this information was submitted to MARAD as a part of information submitted to them, and I take it it is, do you have any question as to its accuracy? A. No. I would have sent it believing it was accurate. Q. Now, if you look at the next page of this document, could you tell me what these next few pages are? A. They appear to be bank statements for F/VAJ. I assume they're all the same company's bank statements. Q. I think they are. A. Okay. I was stating that without having looked at them all. That was my only point. Q. Sure. Basically I want to do kind of the same thing we did earlier. Let's use at random here it's number 4. Number 4, it's like 161,000 dated December 27th, 2004. It's on the first page. A. Uh-huh. Q. First page, I'm just talking about the first page. MR. HOBBS: Fourth entry down? MR. WALKER: Right. Q. The column says Reference On Bank Statement? A. Number 4 reference, oh, that reference, okay. Q. All right. Do you see number 4? A. Yes. Q. It's 161,508? A. Uh-huh. Q. It's dated December 27, 2004? A. Uh-huh. Q. Let's go on the bank statements now and see if we could find that one. A. Okay. Q. Do you see that number 4 on there? A. Yes. Q. It says 161,508? A. Uh-huh. Q. If you go above that, we see the money was transferred in it looks like the same day, December 27, from account number 3859519, correct? A. Correct. Q. Basically it's the same process as we went through earlier? A. Right. Q. Money comes in from -- A. That's -- the 3859519 is the Seven Seas general account. Q. That's used to pay the expenses,

for example, as it is in this case, of the AJ lease payment? A. Uh-huh. Q. Or actually not lease payment, excuse me. A. It's the purchase or note payment. Q. Note payment to Nichiro? A. Correct."

182. Weed's \$4.6 million debt to Nichiro (Peter Pan's 100% owner) arising from the purchase of the F/V AJ was in addition to any existing debt that Seven Seas owed to Peter Pan under the Advance of Funds Agreement. **RULING: ACCEPTED AND INCORPORATED**

Adams: Pg. 35, line 23 to Pg. 36, line 2: "... was that 4.6 million ever reflected in the invoices under the advance of funds loan? I would assume it is not? A To the best of my recollection, it is not. That's correct."

183. Peter Pan paid the expenses accrued by the BLUE WAVE, a subsidiary of Seven Seas, even when the vessel was idle during the 2001 fishing season and doing no processing for Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

AE 10. "Mr. Collier made some general comments regarding vessel charter arrangements for the 2001 season and indicated that there will be no charter for the Blue Wave due to Seven Seas taking the vessel out of service as a cost-saving measure." Pg. 4 Bd. of Dir. Minutes (PPSF000561). Nov 22, 2000, Peter Pan Bd. of Dir. Mtng.

Weed: Pg. 47, line 21 to Pg. 48, line 10: "Q. I'm probably going around in a circle, and I apologize, I'm thick. How did Peter Pan, how did it affect Peter Pan's bottom line if the BLUE WAVE was tied up? A. They were responsible, meaning Peter Pan had responsibility through our custom processing agreement if I recall correctly for the operation of at least the tying up of the BLUE WAVE. Q. So even if it was being tied up, that was still an operational cost? A. It's an operational cost because the capacity was still available for them. They didn't exercise the right to use it, so it was tied up."

Greenwood: Pg. 112, line 7 to Pg. 113, line 13: "Q. Did you receive any payments from Peter Pan that helped you control the financial cost of this vessel [BLUE WAVE] when you were president of Seven Seas? A. Yes. Q. Why was that? A. Why did Peter Pan give us money? Q. Yes. A. Or loan us money to cover the costs of that vessel? Q. That wasn't in use, yes. A. Because the anticipation always was that the vessel may not be used this year, but it's going to be used in subsequent years, and when that vessel was used in conjunction with STELLAR SEA, it was a very valuable part of Peter Pan's operation. Q. Sure. But you just said also that you were looking for -- you looked for other customers -- A. Yes. Q. -- for this vessel? A. Yeah. Q. And so you were looking for other customers for this vessel while Peter Pan was paying to have -- it sounds like to me -- correct me on my understanding is wrong -- sounds to me like you were looking for other customers for this vessel while you were also receiving payments from Peter Pan to -- so that the vessel could remain tied up? A. Yes. Q. Was that appropriate? I mean, was that okay with Peter Pan? A. Apparently. They gave us money. Or advanced us money, probably a better way of putting it."

184. The cost to tie up the B/W was approximately \$500,000 annually. **RULING: ACCEPTED AND INCORPORATED**

AE 10. Peter Pan Bd. of Dir. Mtng. (PPSF000534) 11/19/2000, pg. 6 "Greenwood said the cost to tie up the B/W was approximately \$500,000 annually."

185. Peter Pan would pay all costs of tying up the BLUE WAVE in order to "break even" Seven Seas at the end of the fiscal year. **RULING: ACCEPTED AND INCORPORATED**

Collier: Pg. 76, line 24 to Pg. 77, line 8: "... why did -- or did Peter Pan Seafoods pay to Seven Seas funds to keep the Blue Wave, if you will, tied to the dock? I know it didn't do it all of the time, but it certainly did it for some of the time, correct? A When the Blue Wave was idled, when the owners of Seven Seas tied the Blue Wave up, costs were incurred on the Blue Wave to keep it tied to the dock, which were costs incurred by Seven Seas, which were triggered to be trued up by Peter Pan on an annual basis."

Koch: Pg. 76, line 25 to Pg. 77, line 8: "Q Are you aware that Peter Pan was actually paying funds to Seven Seas for the service of -- for the services of Blue Wave even though during some of those periods the Blue Wave was, as I used the term, "inactive"? A Well, we break them even. Q Okay. And that includes Blue Wave then? You break also the Blue Wave even? I mean in other words, it gets -- it's part -- A Well, it's part of Seven Seas. So we break them even."

186. Weed discussed sale of B/W with Clyde Sterling, Peter Pan VP and/or Barry Collier, Peter Pan President.
RULING: ACCEPTED AND INCORPORATED

Weed: Pg. 205 , line 17 to Pg. 206, line 3: "Q. Did you discuss the idea of selling the BLUE WAVE with anyone at Peter Pan or Nichiro? A. I don't remember talking to Nichiro, but it would have been discussed with Peter Pan, yes. Q. And who would you have discussed that with? A. I don't remember specific discussions but they would have been more than likely with Clyde Sterling, who is the vice-president in charge of all their production operations, although it could have been Barry, although most of my day-to-day dealings would have been more with Clyde Sterling than they would have been with Barry."

Weed: Pg. 205 , line 13 to Pg. 206, line 8: "Do you recall what kind of things you discussed with Clyde Sterling or Barry Collier in regard to the sale of the BLUE WAVE? A. I remember there were issues on the Nichiro side that they were concerned about the name of the vessel and in that they had marketed the name of BLUE WAVE as part of their marketing of the product off that vessel and they didn't want it confusing their image in Japan with the new owners of the vessel. So one of the criteria was that. There was also issues with, part of the contract, if I recall right, there was a covenant that they weren't supposed to operate on the south Peninsula, which was for their benefit and my benefit. I'm sure it was understood it was not just their benefit, not having a competitor. It was my benefit that I was also getting fish on the Peninsula and the more fish that Peter Pan got was the more fish I got. So I had interests in that also. But other than just I'm sure I discussed back and forth as we were negotiating back and forth on terms with Signature that there were discussions, yes."

187. The proceeds from the sale of the B/W went to Peter Pan to pay down some of Seven Seas' accumulated debt.
RULING: ACCEPTED AND INCORPORATED

Weed: Pg. 206, lines 4 - 7: "Q. How were the proceeds from the sale of the BLUE WAVE used? A. They were used to pay down my loan balance with Peter Pan."

Weed: Pg. 208, lines 9 - 16: "Q. Mark, how were the funds disbursed? In other words, was a check, once you made the sale and you were getting a check, was that made out to Seven Seas or was it sent directly to Peter Pan to reduce your amount of debt that you had? A. My recollection is that it came to Seven Seas, although I don't -- I don't know. I don't believe Peter Pan required it to come to them."

188. Koch, VP of Finance for Peter Pan, was unaware that the proceeds resulting from the sale of the BLUE WAVE was paid by Seven Seas to Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

Koch: Pg. 78, lines 3 - 7: "Do you know if Peter Pan received any of the proceeds from Seven Seas as a result of Seven Seas selling the Blue Wave? A. Not that I'm aware of. Again, at the end of the day, we break them even."

189. Peter Pan paid for the expenses for repairs to STELLAR SEA after it suffered a severe fire in 2006.
RULING: ACCEPTED AND INCORPORATED

AE 86.

Scott: Pg. 117, lines 7 - 16: "Because to pay for the fire expenses, there were increased expenses we had to request increased funding. Q. In other words, because of the fire, you had to request increased funding from Peter Pan Seafoods? A. Yes, we did. Q. Okay. To your knowledge, did you have money to pay for the repairs yourself? A. No. As I said before, we didn't have any money."

Maiers: Pg. 46, lines 11 - 18: "Obviously there was a fire aboard the Stellar Sea, correct? A Yes. Q And what does this email -- what's its relationship to that fire? A It says that it assigns all insurance proceeds from the claim to Peter Pan because Peter Pan financed the repair work."

190. Nichiro and/or Peter Pan contacted Weed and offered Nichiro owned notes to Seven Seas; Nichiro could not apparently hold the notes under U.S. law; Seven Seas purchased notes from Nichiro. AE 85. **RULING: ACCEPTED AND INCORPORATED.**

Weed: Pg. 211, line 25 to Pg. 212, line 18: [Referencing Exhibit 29 of Weed deposition] "Q. Sure. I note on here when you wrote to Mr. Ito, you noted that Nichiro couldn't hold the mortgages so the notes were sold to Seven Seas. Explain that to me. A. It's my understanding of the law, again, I'm on the record a number of times saying I'm not a lawyer, it's my understanding that foreign entities are not allowed to have mortgages on vessels. How it came to get mortgages on vessels, I don't know, but for whatever the reason was, there was some issue that they were going to have to do something with them. So they transferred them to me for a fee and I ended up so they didn't lapse. Q. Who proposed to you to sell these to you or did you offer? How did you find out about them? A. I don't remember if it was Barry Collier, it might have been Barry Collier, it might have been Steve Ito, I don't remember which one did it. Most of my dealings on it were with Steve Ito."

191. HELLERMAN, AN INDIVIDUAL WITH OVER 40 YEARS OF EXPERIENCE IN ISSUES RELATING TO FINANCIAL CONTROL AND CORPORATE STRUCTURES, IS OF THE OPINION THAT PETER PAN EXERTED 10% OR MORE CONTROL OVER SEVEN SEAS. **RULING: REJECTED AS FINDING OF FACT SINCE IT IS OPINION TESTIMONY**

AE 70.

192. On May 29, 2001, MARAD, in approving Seven Seas' custom processing agreement with Peter Pan, informed Seven Seas that MARAD must be notified if Peter Pan or Nichiro supplied any funding to Seven Seas beyond the guarantee of fees that was contained in the Custom Processing Agreement. **RULING: ACCEPTED AND INCORPORATED**

Letter to James Walsh, dated May 29, 2001, regarding: "Letter Ruling Under the American Fisheries Act of 1998 Regarding the Use of Custom Processing Agreements Under the American Fisheries Act of 1998: "This approval is based on the assumption that the Non-Citizen processor is not involved in the financing of the vessel in any way other than by allowing the vessel owner to use the Custom Processing Agreement as security to obtain financing for the vessel. *If the Non-Citizen processor was to become otherwise involved in the financing of the vessel a review of the relevant agreements by MARAD would be required in order to ensure that there is not impermissible transfer of control.*" [Italics Added.]

193. Weed, as 100% owner of the F/V AJ and 100% owner of Seven Seas, was also advised by MARAD as of October 2, 2003, to review MARAD's revised regulations (published on Feb 4, 2003) which amended its reporting requirements for vessel "citizenship" affidavits. **RULING: ACCEPTED AND INCORPORATED**

AE 31.

"...you should be aware that we have amended our regulations at 46 C.F.R. Part 356 to make various changes and to incorporate amendments to the American Fisheries Act that were enacted on July 24, 2001, as part of the Supplemental Appropriations Act, 2001, Section 2202, PL 10720. A final rule was published in the *Federal Register* on February 4, 2003, 68 *Fed. Reg.* 5564. You may obtain a copy of the final rule from the *Federal Register*, from MARAD's web site at <http://www.marad.dot.gov/afa.html>, or from the Department of Transportation's docket management system at <http://dms.dot.gov> by searching for the docket number 11984. Please review the final rule to make sure that you are familiar with the changes to the Affidavit

Confidential Commercial, Financial and Proprietary Business Information of U.S. Citizenship, the new requirements to hold a preferred mortgage on a fishing industry vessel, and the other amendments to the regulations.”

194. MARAD’s revised regulations published on Feb 4, 2003, required that loans to applicants from foreign owned entities must be reported in the applicant’s affidavits for vessel citizenship. **RULING: ACCEPTED AND INCORPORATED**

46 C.F.R. Part 356.13(a)(5) requires that the following documents must be submitted to the Citizenship Approval Officer in support of a request for a determination of U.S. Citizenship: “Any loan agreements or other financing documents applicable to a Fishing Industry Vessel where the lender has not been approved by MARAD to hold a Preferred Mortgage on Fishing Industry Vessels, excepting financing documents that are exempted from review pursuant to Sec. 356.19(d) and loan documents that have received general approval from the Citizenship Approval Officer pursuant to Sec. 356.21 for use with an approved Mortgage Trustee.”

195. Peter Pan is a foreign owned entity. **RULING: ACCEPTED AND INCORPORATED**

Nichiro owns 100% of Peter Pan.

[See above proposed finding of fact #87 and #88: MARAD was not notified of the first Advance of funds Agreement (dated March 19, 2002) until 2007.]

196. On Dec 21, 2007, after reviewing the Advance of Funds Agreement, MARAD found “the level of non-citizen participation reflected in the unsecured lending is evidence which suggests the possible existence of impermissible non-citizen control over the fishing industry vessel STELLAR SEA.” **RULING: ACCEPTED AND INCORPORATED**

AE. 33.

MARAD informs Seven Seas that “based on the review of information previously unknown to MARAD” [Advance of Funds Agreement] we are unable to provide an unqualified finding the Seven Seas remains eligible to document the vessel STELLAR SEA. Specifically the Advance of Funds Agreement extended by Peter Pan Seafoods, Inc. to Seven Seas Fishing Company, and Stellar Seafoods, Inc. (collectively "Stellar") as of March 19, 2002, the level of non-citizen participation reflected in the unsecured lending is evidence which suggests the possible existence of impermissible non-citizen control over the fishing industry vessel STELLAR SEA.”

197. On June 8, 2008, MARAD required Seven Seas to enter into a debt restructuring agreement with Peter Pan. **RULING: ACCEPTED AND INCORPORATED**

AE 34

198. Seven Seas did not renew its charter of the STELLAR SEA (which expired on September 30, 2008). **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 179, lines 23 – 25: “Q. Is it correct that Stellar Seafoods no longer charters the STELLAR SEA? A. That's correct.”

AE 87.

199. By end of February 2009, Seven Seas has only one employee – Weed. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 221, lines 4 - 12: "Q. Okay, and she [Linda Scott] left, what, 2007 I think it was, something like that? A. Oh, no, she left, she was my last official employee to leave, which I believe was either at the end of January or the end of February, I think the end of last year."

200. On March 1, 2009, Weed began working for Golden Alaska Seafoods. **RULING: ACCEPTED AND INCORPORATED**

Weed: Pg. 71, lines 6 - 10: "... when did you actually start work for Golden Alaska? A. I was working part-time for then starting March 1st I believe of last year. I think it was March 1st."

201. Peter Pan holds a 25% interest in Golden Alaska Seafoods. **RULING: ACCEPTED AND INCORPORATED**

202. Exceeding a processing quota and exceeding a harvesting quota both involve a violator who either obtains or seeks to obtain the economic benefit derived from harvesting or processing more pounds than their assigned limitation allows. **RULING: ACCEPTED AND INCORPORATED.**

TR 783, line 10 to TR 784 line 16; TR 798, lines 6 - 12.

203. In the Alaska region there are a "couple of hundred" seizures, forfeitures or abandonments of harvested product or the fair market value thereof every year. **RULING: ACCEPTED AND INCORPORATED**

TR 792, line 17.

204. It is NOAA's Enforcement Policy that "forfeiture of the illegal catch ... is considered in most cases as only the initial step in remedying a violation by removing the ill-gotten gains of the offense." **RULING: ACCEPTED AND INCORPORATED**

AE 96; 50 CFR 600.740(b).

205. This has been NOAA's Enforcement Policy for the past 29 years. **RULING: ACCEPTED AND INCORPORATED**

AE 95.

206. Forfeiture is authorized under the MSFCMA: "any fish (or the fair market value thereof) taken or retained, in any manner, in connection with or as a result of the commission of any act prohibited by section 307... shall be subject to forfeiture." **RULING: ACCEPTED AND INCORPORATED. HOWEVER IS SUCH ACTION IS CLEARLY WITHIN THE DISCRETION OF THE ADMINISTRATOR.**

16 USC 1860(a).

207. NOAA may increase a penalty for commercial violators, to make a penalty more than a cost of doing business. @ ." **RULING: ACCEPTED AND INCORPORATED.**

15 CFR 904.108(b).

208. Respondents' violations occurred over a 14 month period." **RULING: ACCEPTED AND INCORPORATED WITH THE ADDITIONAL FACT THAT THE VIOLATIONS OCCURRED OVER A SIX DAY PERIOD.**

209. Respondents' violations occurred 12 months after the promulgation of the final AFA rule on December 30, 2002. ." **RULING: ACCEPTED AND INCORPORATED.**

210. The purchase price of the 4,164,357 pounds of crab (i.e., the price paid by the processor/buyer to the crab harvester/seller) is estimated at \$8,620,000.00. AE 93. ." **RULING: ACCEPTED AND INCORPORATED.**

211. The value of this crab after processing is estimated at \$12,850,000.00. AE 93. **RULING: ACCEPTED AND INCORPORATED.**

212. The revenue (i.e., processed product price minus the raw crab purchase price) that accrued to Peter Pan from the sale of the 4,164,357 pounds of crab is estimated to be \$4,230,000.00. AE 93. **RULING: ACCEPTED AND INCORPORATED AS TO THE MATHEMATICAL COMPUTATION. HOWEVER, IT IS NOT ACCEPTED TO THE EXTENT THAT AGENCY COUNSEL ATTEMPTS TO IMPLY THAT PETER PAN MADE A PROFIT ON THESE TRANSACTIONS. THE UNDERSIGNED MAKES NO FINDING ON THAT ISSUE SINCE IT IS NOT RELEVANT TO MY DECISION HEREIN.**

-- ULTIMATE FINDINGS OF FACT and CONCLUSIONS OF LAW --

1. Peter Pan filed AFA Cooperative Processing Applications in January 2000 and January 2003, listing the Peter Pan King Cove plant and M/V BLUE WAVE as affiliated crab processing entities. AE 3, AE 4. **RULING: ACCEPTED AND INCORPORATED.**

2. Seven Seas, Stellar Seafoods and/or the M/V STELLAR SEA were not listed as an affiliated crab processing entity on any of Peter Pan's AFA applications. AE 3, AE 4. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED HEREIN.**

3. The January 5, 2000 Emergency AFA rule established that AFA crab caps will be applied on an individual AFA entity basis and sets out a 10% control definition. **RULING: ACCEPTED AND INCORPORATED.**

4. NMFS annually informed Peter Pan of its individual entity AFA crab processor caps (2000 - 2005). AE 36. **RULING: ACCEPTED AND INCORPORATED.**

5. Peter Pan's crab cap percentage for Opilio and Red King crab remained the same during 2000 - 2005 (i.e., for Opilio, 10.083%; for Red King Crab, 15.827%). AE 36. **RULING: ACCEPTED AND INCORPORATED.**

6. The regulations at 50 CFR 679.65(c) stated that the annual AFA crab cap was determined "by multiplying the crab processing sideboard [a.k.a., cap] percentage by the pre-season guideline harvest level established for that crab fishery by ADF&G." **RULING: ACCEPTED AND INCORPORATED.**

7. The final AFA rule, effective on January 30, 2003, again stated that AFA crab caps would be applied on an individual AFA entity basis. **RULING: ACCEPTED AND INCORPORATED.**

8. Peter Pan's AFA entity processing crab cap (for the Peter Pan AFA entity as identified by Peter Pan in its AFA applications) is:

In 2004, for Opilio, 10.083% x the 2004 GHF for Opilio of 19,269,000 pounds = a processing cap of 1,942,893 pounds of Opilio; for Red King Crab, 15.827% x 2004 GHF of 14,267,000 pounds = a processing cap of 2,258,038 pounds of Red King Crab.

In 2005, for Opilio, 10.083% x 2005 GHF for Opilio = a processing cap of 19,362,000 pounds of Opilio. (Peter Pan did not exceed its 2005 processing cap for Red King Crab.) AE 93. **RULING: ACCEPTED AND INCORPORATED.**

9. From January 1, 2004, through March 30, 2005, Peter Pan exerted 10% or more control over Seven Seas and its subsidiary company Seven Seas (operator of the M/V STELLAR SEA). **RULING: ACCEPTED AND INCORPORATED.**

10. During the period January 1, 2004, through March 30, 2005, per Sec 211(c)(2)(A), Seven Seas and Peter Pan were affiliated for AFA purposes and are considered to be one AFA entity under Section 211(C)(2)(A). **RULING: ACCEPTED AND INCORPORATED.**

11. During the period January 1, 2004, through March 30, 2005, Peter Pan and Seven Seas received 45 deliveries of crab after the Peter Pan crab cap had been reached. AE 93. **RULING: ACCEPTED AND INCORPORATED.**

12. Peter Pan and Seven Seas processed a combined total of:

In 2004 -- 1,769,731 pounds of Opilio and 235,001 pounds of Red King Crab over Peter Pan's AFA entity crab cap; and,

In 2005 -- 2,159,625 pounds of Opilio over Peter Pan's AFA entity crab cap.
AE 93. **RULING: ACCEPTED AND INCORPORATED.**

13. This resulted in a total crab processing overage for the Peter Pan AFA entity (i.e., including both Peter Pan and Seven Seas) of 4,164,357 pounds of crab. AE 93. **RULING: ACCEPTED AND INCORPORATED.**

14. The revenue accrued by the processing 4,164,357 pounds of crab in excess of Peter Pan AFA individual entity crab cap is \$4,232,048.00. AE 93. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED – GROSS REVENUE – NOT ACCEPTED AS INDICATIVE OF NET PROFIT REVENUES OR THE FACT THAT THIS NUMBER EQUATES TO THE AMOUNT OF ANY ILL-GOTTEN GAIN.**

15. Respondents' processing of the 4,164,357 pounds of crab in excess of their crab cap took away a significant processing opportunity from every other processor who "played by the rules." **RULING: REJECTED – AGENCY COUNSEL PRESUMES THIS IS THE CASE BUT FAILED TO SUBMIT RECORD EVIDENCE TO SUPPORT SUCH A CLAIM.**

16. Respondents' processing of the 4,164,357 pounds of crab in excess of their crab cap was directly contrary to Congress' intent to preserve market opportunities for non-AFA processors. **RULING: ACCEPTED AND INCORPORATED AS MODIFIED.**

17. The final AFA rule, effective on Jan 30, 2003, expanded the description of what constitutes 10% control for AFA affiliation purposes from the previous AFA Emergency Rules. **RULING: ACCEPTED AND INCORPORATED.**

18. Respondents' violations occurred 12 months after the promulgation of the final AFA rule on December 30, 2002. **RULING: ACCEPTED AND INCORPORATED.**

19. As participants in a highly regulated industry, Respondents were obliged to keep abreast of the regulations that govern their business. **RULING: ACCEPTED AND INCORPORATED.**

20. Respondents' displayed a careless and cavalier attitude toward complying with NOAA's and MARAD's regulatory requirements. **RULING: REJECTED FOR THE REASONS STATED HEREIN.**

21. An appropriate penalty for this violation is of \$4,457,048. **RULING: REJECTED FOR THE REASONS STATED HEREIN. INDEED, THE UNDERSIGNED SPECIFICALLY FINDS THAT THE PROPOSED SANCTION IS UNREASONABLY HIGH FOR A REGULATORY COMPLIANCE CASE. FINALLY, THE ADMINISTRATOR SHOULD REJECT AGENCY COUNSEL'S PROPOSED USE OF THE AGENCY PENALTY SCHEDULE CONCERNING HARVESTING VIOLATIONS FOR A REGULATORY COMPLIANCE CASE. THE ADMINISTRATOR SHOULD ALSO REJECT AGENCY COUNSEL'S PROPOSAL TO RECOUP THE VALUE OF THE PROCESSED CRAB AS PART OF THE PENALTY IN THESE PARTICULAR CIRCUMSTANCES.**

Respondents' Proposed Findings of Fact and Conclusions of Law:

I. PROPOSED FINDINGS OF FACT⁵⁰

A. The American Fisheries Act

1. The central issue in this case is whether Peter Pan Seafoods, Inc. (PPSF), Seven Seas Fishing Company (Seven Seas), and its subsidiary, Stellar Seafoods, Inc., are liable to the National Oceanic and Atmospheric Administration (NOAA) for a civil penalty for violating a provision of the American Fisheries Act (AFA) intended to protect processing firms that did not benefit from the pollock fishery management advantages found in the AFA. PPSF and Seven Seas deny any liability for a civil penalty. A hearing on the matter was held in Seattle, Washington from October 26 to November 1, 2009. **RULING: ACCEPTED AND INCORPORATED IN PART AND DENIED IN PART – THE “CENTRAL ISSUE” IN THIS CASE IS CLEARLY ARTICULATED IN THE DECISION AND ORDER AND IS IN NO WAY LIMITED BY PETER PAN’S PROPOSED FINDING OF FACT.**

2. Congress enacted the AFA in 1998, Public Law 105-277, Div. C. Title II, 112 Stat. 2681, and the relevant provisions of the AFA that govern this case are the following:

Amendments to the Vessel Documentation Act (now codified at 46 U.S.C. § 12113(c))

SEC.202. STANDARD FOR FISHERY ENDORSEMENT

(c) Ownership requirements for entities—

(1) *In general.*—A vessel owned by an entity is eligible for a fishery endorsement only if at least 75 percent of the interest in that entity is owned and controlled by citizens of the United States and in the aggregate, is owned and controlled by citizens of the United States.

(2) *Determining 75 percent interest.*—In determining whether at least 75 percent of the interest in the entity is owned and controlled by citizens of the United States in paragraph (1), the Secretary [of Transportation] shall apply section 50501(d) of this title, except for this purpose the terms ‘control’ or ‘controlled’—

(A) include the right to –

(i) direct the business of the entity;

(ii) limit the actions of or replace the chief executive officer, a majority of the board of directors, any general partner, or any person serving in a management capacity of the entity; or

(iii) direct the transfer, operation, or manning of a vessel with a fishery endorsement; but

(B) do not include the right to simply participate in the activities under subparagraph (A),[non-germane text omitted].

* * *

Penalty Under Vessel Documentation Act (now codified at 46 U.S.C. § 12151(c))

⁵⁰ Peter Pan’s Proposed Findings of Fact and Conclusions of Law reads more like a closing brief in many areas with argument liberally sprinkled in with proposed findings.

(c) *Engaging in fishing after falsifying eligibility.*—In addition to other penalties under this section, the owner of a documented vessel for which a fishery endorsement has been issued is liable to the Government for a civil penalty of not more than \$100,000 for each day the vessel engages in fishing (as defined in section 3 of the Magnuson-Stevens Fishery Conservation and Management Act (16 U.S.C. 1802) within the exclusive economic zone, if the owner or the representative or agent of the owner knowingly falsified or concealed a material fact, or knowingly made a false statement or representation, about the eligibility of the vessel under section 12113(c) or (d) of this title in applying for or applying to renew the fishery endorsement.

Non-codified provisions of the AFA

SEC. 203. ENFORCEMENT OF STANDARD

(a) *Effective Date.* The amendment made by Section 202 [set forth above] shall take effect on October 1, 2001.

(b) *Regulations.* Final regulations to implement this subtitle shall be published in the Federal Register by April 1, 2000. Letter rulings and other interim interpretations about the effect of this subtitle and amendments made by this subtitle on specific vessels may not be issued prior to the publication of such final regulations. The regulations to implement this subtitle shall prohibit impermissible transfers of ownership or control, specify any transactions which require prior approval, and to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives.

(c) *Vessels Measuring 100 Feet and Greater.* (1) The Administrator of the Maritime Administration shall administer section [12113(c)] of title 46, United States Code, as amended by this subtitle, with respect to vessels 100 feet or greater in registered length. The owner of each such vessel shall file a statement of citizenship setting forth all relevant facts regarding vessel ownership and control with the Administrator of the Maritime Administration on an annual basis to demonstrate compliance with such section. Regulations to implement this subsection shall conform to the extent practicable with the regulations establishing the form of citizenship affidavit set forth in part 335 of title 35, Code of Federal Regulations, as in effect on September 25, 1997, except that the form of statement under this paragraph shall be written in a manner to allow the owner of each such vessel to satisfy any annual renewal requirements for a certificate of documentation for such vessel and to comply with this subsection and section [12113(c)] of title 46, United States Code, as amended by this Act, and shall not be required to be notarized.

(2) After October 1, 2001, transfers of ownership and control of vessels subject to section [12113(c)] of title 46, United States Code, as amended by this Act, which are 100 feet or greater in registered length, shall be rigorously scrutinized for violations of such section, with particular attention given to leases, charters, mortgages, financing, and simile arrangements, to the control of persons not eligible to own a vessel with a fishery endorsement under section [12113(c)] of title 45, United States Code, as amended by this Act, over the management, sales, financing, or other operations of an entity, and to contracts involving the purchase over extended periods of time of all, or substantially all, of the living marine resources harvested by a fishing vessel.

* * *

(e) *Endorsement Revoked.* The Secretary of Transportation shall revoke the fishery endorsement of any vessel subject to section [12113(c)] of title 46, United States Code, as amended by this Act, whose owner does not comply with such subsection.

* * *

SEC. 210. FISHERY COOPERATIVE LIMITATIONS

* * *

(g) *Penalties.* The violation of the requirements of this subtitle [Subtitle II of the AFA; Bering Sea Pollock Fishery] or any regulation or permit issued pursuant to this subtitle shall be considered the commission of an act prohibited by section 307 of the Magnuson-Stevens Act (16 U.S.C. 1857), and sections 308, 309, 310, and 311 of such Act (16 U.S.C. 1858, 1859, 1860, and 1861) shall apply to any such violation in the same manner as to the commission of an act prohibited by section 307 of such Act (16 U.S.C. 1857). In addition to the civil penalties and permit sanctions applicable to prohibited acts under section 308 of such Act (16 U.S.C. 1858), any person found by the Secretary, after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, to have violated a requirement of this section shall be subject to forfeiture to the Secretary of Commerce for any fish harvested or processed during the commission of such act.

* * *

SEC. 211. PROTECTIONS FOR OTHER FISHERIES; CONSERVATION MEASURES.

(a) *General.* The North Pacific Council shall recommend for approval by the Secretary such conservation and management measures as it determines necessary to protect other fisheries under its jurisdiction and the participants in those fisheries, including processors, from adverse impacts caused by this Act or fishery cooperatives in the directed pollock fishery.

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(c)(2)(A) Effective January 1, 2000, the owners of motherships eligible under section 208(d) and the shoreside processors eligible under Section 208(f) that receive pollock from the directed pollock fishery under a fishery cooperative are hereby prohibited from processing, in the aggregate for each calendar year, more than the percentage of total catch of each species of crab in the directed fisheries under the jurisdiction of the North Pacific Council than facilities operated by such owners processed of each such species in the aggregate, on average, in 1995, 1996, and 1997. For purposes of this subparagraph the term "facilities" means any processing plant, catcher/processor, mothership, floating processor, or other operation that processes fish. Any entity in which 10 percent or more of the interest is owned or controlled by another individual or entity shall be considered to be the same entity as the other individual or entity for purposes of this subparagraph.

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SEC. 213. DURATION.

(c) The North Pacific Council may recommend and the Secretary may approve conservation and management measures in accordance with the Magnuson-Stevens Act—

(1) that supersede the provisions of this subtitle, except for section 206 and 208, for conservation purposes or to mitigate adverse effects in fisheries or on owners or fewer than three vessels in the directed pollock fishery caused by this title or fishery cooperatives in the directed pollock fishery, provided such measures take into account all factors affecting the fisheries and are imposed fairly and equitably to the extent practicable among and within the sectors in the directed pollock fishery;

RULING: ACCEPTED AND INCORPORATED – THE RELEVANT STATUTORY AND REGULATORY PROVISIONS ARE THOROUGHLY DISCUSSED IN THIS DECISION AND ORDER AND PETER PAN'S PROPOSED FINDING OF FACT IN NO WAY LIMITS SUCH PRESENTATION.

* * *

3. The AFA was enacted to set new citizen ownership and control provisions for vessels documented under U.S. law and eligibility to operate in the fisheries of the United States, which includes the area known as the Exclusive Economic Zone managed pursuant to the Magnuson-Stevens Fishery Conservation and Management Act ("Magnuson-Stevens Act"), 16 U.S.C. § 1801 et seq. See, Vessel Documentation Act, 46 U.S.C. § 12113(b)(1) (a vessel for which a fishery endorsement is issued may engage in the fisheries); Magnuson-Stevens Act, 16 U.S.C. § 1802(48) (defining a vessel of the United States as a vessel documented under Chapter 121 of Title 4, United States Code, incorporating the Vessel Documentation Act by reference); *Meyers v. F/V American Triumph*, 260 F.3d 1067, 1069 (9th Cir. 2001). A certificate of documentation with a fishery endorsement from the United States Coast Guard issued to a vessel is considered "conclusive evidence" of that vessel's right to engage in the fisheries regulated under the Magnuson-Stevens Act. 46 U.S.C. § 12134(2). **RULING: ACCEPTED IN PART AND INCORPORATED**

– THE RELEVANT STATUTORY AND REGULATORY PROVISIONS ARE THOROUGHLY DISCUSSED IN THIS DECISION AND ORDER AND PETER PAN’S PROPOSED FINDING OF FACT IN NO WAY LIMITS SUCH PRESENTATION. RESPONDENT’S LAST SENTENCE REGARDING THE CERTIFICATE OF DOCUMENTATION BEING “CONSIDERED ‘CONCLUSIVE EVIDENCE’ OF THAT VESSEL’S RIGHT TO ENGAGE IN THE FISHERIES REGULATED UNDER THE MAGNUSON-STEVENS ACT...” IS REJECTED TO THE EXTENT THAT IT ASSERTS THAT SUCH A “FACT” SOMEHOW PREVENTS NOAA FROM BRINGING CHARGES AND PREVAILING IN THIS MATTER.

4. Another purpose of the AFA was to “rationalize the North Pacific Pollock Fishery by providing exclusive rights to certain companies and vessels” to engage in the Bering Sea and Aleutian Islands pollock fishery in Alaska. *Sea Hawk Seafoods, Inc. v. Locke*, 568 F.3d 757, 761 (9th Cir. 2009). **RULING: ACCEPTED AND INCORPORATED.**

5. In order to protect the interests of companies that were not given such exclusive rights, Congress also included provisions in the AFA which would place limits on the AFA-beneficiary companies, such as Section 211 that provided for certain “crab processing caps” that apply to AFA-beneficiary processing entities. **RULING: ACCEPTED AND INCORPORATED.**

6. The AFA text listed the AFA-beneficiary entities by listing the name of the vessel that benefited, and specified that certain other vessels would be eligible to engage in the BSAI pollock fishery if they met certain tonnage harvest conditions in certain years. AFA, Section 208(a), (b), (c), (d), and (e). The AFA also identified certain AFA-beneficiary shoreside processors eligible to engage in processing pollock caught by vessels operating in the BSAI pollock fishery, i.e. a company that processed more than 2,000 metric tons round weight of pollock during 1996 and 1997. AFA, Section 208(f). These AFA-beneficiary processing companies (and their processing facilities) are referred to as “AFA-Processors”. Companies that did not so qualify are referred to as “Non-AFA Processors.” **RULING: ACCEPTED AND INCORPORATED.**

7. The crab processing cap regulations issued under the AFA and applicable to this case were superseded and expired on April 1, 2005 when NOAA began to implement the Crab Rationalization Plan. Resp. Exhs. R41, R42. **RULING: ACCEPTED AND INCORPORATED.**

B. Implementation of the AFA by the U.S. Maritime Administration

8. The AFA required the U.S. Maritime Administration (“MARAD”) to develop final regulations for fishing industry vessels over 100 feet in register length, including regulations to prohibit impermissible transfers of ownership or control, specify any transactions which do not require prior approval of an implementing agency, identify transactions which do not require prior agency approval, and to the extent practicable, minimize disruptions to the commercial fishing industry, to the traditional financing arrangements of such industry, and to the opportunity to form fishery cooperatives. AFA, Section 203(a) and (b). **RULING: ACCEPTED AND INCORPORATED.**

9. MARAD issued its final regulations implementing the AFA on July 19, 2000. 65 Fed. Reg. 44860-44890 (Jul. 19, 2000) (amending 46 C.F.R. Part 356). Under those regulations, all vessel owners were to come into compliance with the new AFA requirements by October 31, 2001 in order to obtain a fishery endorsement. Resp. Exh. R15. The MARAD regulations govern the “control” relationships between and among the owner of the STELLAR SEA, Cypress Stellar Sea LLC (Cypress), a California limited liability company, Seven Seas, as charterer of the vessel, and PPSF, which uses the vessel to custom process crab it purchased from fishermen in Alaska. Before the STELLAR SEA could be issued its certificate of documentation, i.e. after October 31, 2001, with a fishery endorsement, MARAD was required to determine that the ownership and operation of the vessel would satisfy the restrictions on “control” set forth in the provisions of the AFA that amended the Vessel Documentation Act. **RULING: ACCEPTED IN PART AND INCORPORATED. THE FACT OF MARAD ISSUING FINAL REGULATIONS (WHICH SPEAK FOR THEMSELVES) IS ACCEPTED. THE PROPOSED FINDING OF FACT RELATING TO ALLEGED “CONTROL” RELATIONSHIPS BETWEEN AND AMONG THE OWNER OF THE M/V STELLAR SEA, RESPONDENTS AND CYPRESS IS REJECTED TO THE EXTENT INCONSISTENT WITH THE DISCUSSION IN THIS DECISION AND ORDER.**

C. Implementation of the AFA by NOAA and the North Pacific Council

10. In April 1999, the North Pacific Fishery Management Council (North Pacific Council) formed an industry committee, among other things, to make recommendations on the development and implementation of crab processing limits with respect to AFA pollock processors. This committee met and presented its recommendations to the Council at its October 1999 Council meeting. Resp. Exhs. R2, R3, R4 and R6. **RULING: ACCEPTED AND INCORPORATED.**

11. On January 5, 2000, NOAA issued an Emergency Interim Rule, which by law expired on June 27, 2000, to provide for the issuance of AFA permits for the BSAI pollock fishery and to implement sideboard restrictions (for example, crab processing caps) to protect other Alaska fisheries from negative impacts as a result of fishery cooperatives formed under the AFA. 65 Fed. Reg. 380-390 (Jan. 5, 2000); Resp. Exh. R8. The Emergency Interim Rule primarily laid out the AFA permit process but included the following definition (as an amendment to 50 C.F.R. § 679.2):

AFA crab facility means a processing plant, catcher/processor, mothership, floating processor or other operation that processes Bering Sea or Aleutian Island king or tanner crab in which any individual, corporation, or other entity that is part of an AFA entity either directly or indirectly owns a 10 percent or greater interest, or exercises a 10 percent or greater control.

(1) *Indirect ownership standard.* For purposes of this definition, an indirect ownership interest is one that passes through one or more intermediate entities. An entity's percentage of indirect interest is equal to that entity's percentage of direct interest in an intermediate entity multiplied by the intermediate entity's percentage of direct, or indirect, interest in the crab processing facility.

(2) *10 percent control standard.* Also for purposes of this definition, an entity that is deemed to control 10 percent or greater control of a crab processing facility if the entity controls another entity that directly or indirectly owns a 10 percent or greater interest in the crab processing facility.

(i) The term "control" includes:

(A) Ownership of more than 50 percent of the entity;

(B) The right to direct the business of the entity;

(C) The right to limit the actions of or replace the chief executive officer, a majority of the board of directors, any general partner, or any person serving in a management capacity of the entity; or

(D) The right to direct the operation or manning of the crab processing facility.

(ii) The term "control" does not include the right to simply participate in the above actions.

RULING: ACCEPTED AND INCORPORATED.

12. In the Federal Register Notice, NMFS stated that the purpose of this definition was "to implement the crab processing restrictions contained in subsection 211(c)(2)(A) of the AFA." 65 Fed. Reg. at 383. **RULING: ACCEPTED AND INCORPORATED.**

13. On January 28, 2000, NOAA issued another Emergency Interim Rule, which also expired six months later on July 20, 2000, with regard to the manner in which crab processing caps were determined and allocated. 65 Fed. Reg. 4520-4544 (Jan. 28, 2000); Resp. Exh. R9. The following relevant provision was included in that rulemaking:

§ 679.64 AFA Inshore processor and AFA mothership crab processing sideboard limits

(a) *Applicability.* The crab processing limits in this section apply to any AFA inshore or mothership entity that receives pollock harvested in the BSAI directed pollock fishery by a fishery cooperative established under § 679.60 or § 679.61.

(b) *Calculation of crab processing sideboard limits.* Upon receipt of an application for a cooperative processing endorsement from the owners of an AFA mothership or AFA processor, the Regional Administrator will calculate a crab processing cap percentage for the associated AFA inshore or mothership entity. The crab processing cap percentage for each BSAI king or tanner crab species will be equal to the percentage of the total catch of each BSAI king or tanner crab species that the AFA crab facilities associated with the AFA inshore or mothership entity processed in the aggregate, on average, in 1995, 1996, and 1997.

(c) *Notification of crab processing sideboard percentage limits.* An AFA inshore or mothership entity's crab processing cap percentage for each BSAI king or tanner crab species will be listed in each AFA mothership or AFA inshore processor permit that contains a cooperative pollock processing endorsement.

(d) *Conversion of crab processing sideboard percentages and notification of crab processing sideboard poundage caps.* Prior to the start of each BSAI king or tanner crab fishery, NMFS will convert each AFA inshore or mothership entity's crab processing sideboard percentage to a poundage cap by multiplying the crab processing sideboard percentage by the pre-season guideline harvest level established for that crab fishery by ADF&G. The Regional Administrator will notify each AFA inshore or mothership entity of its crab processing sideboard poundage cap through a letter to the owner of the AFA mothership or AFA inshore processor and by publishing the crab processing caps on the NMFS-Alaska Region World Wide Web home page (<http://www.fakr.noaa.gov>).

(e) *Overages.* In the event that the actual harvest of a BSAI crab species exceeds the pre-season Guideline harvest level (GHL) announced for that species, an AFA inshore or mothership entity may exceed its crab processing cap without penalty up to an amount equal to the AFA inshore or mothership entity's crab processing percentage multiplied by the final official harvest amount of that crab species as determined by ADF&G and announced by NMFS on the NMFS-Alaska Region world wide web home page (<http://www.fakr.noaa.gov>).

RULING: ACCEPTED AND INCORPORATED.

14. In the Federal Register Notice, NMFS stated that the purpose of these interim rules was to implement the actions by the North Pacific Council taken in December 1999 so that AFA regulations would be in place by the start of the 2000 fisheries season. 65 Fed. Reg. at 4521. The regulations included provisions to implement the limits on crab processing set forth in Section 211(c)(2)(A) of the AFA. 65 Fed. Reg. at 4529. NMFS also noted that "[a]t its October 1999 meeting, the Council recommended that NMFS implement these crab processing sideboards through processing caps that would be managed in the aggregate through inseason crab processing closures for AFA entities." *Id.* However, NMFS stated that, instead of following this recommendation, it would be implementing the crab processing sideboard management program on an entity-by-entity basis in this emergency interim rule. 65 Fed. Reg. at 4530. The agency also stated that it was "requiring that the owners of an AFA mothership or AFA inshore processor wishing to process pollock harvested by a pollock cooperative identify on their permit application all individuals, corporations, or other entities that directly or indirectly own or control a 10-percent or greater interest in the AFA mothership and/or inshore processor (collectively the AFA inshore or mothership entity), and any other crab processors in which such entities have a 10 percent or greater interest (the associated AFA crab facilities)." *Id.* **RULING: ACCEPTED AND INCORPORATED.**

15. The January 28 interim rule also stated that assigned crab processing caps will apply to all crab processed by the associated AFA crab processing facilities including any "custom processing" activity. Under the interim rule, any custom processing done at an AFA crab processing facility will be charged against the associated AFA inshore or mothership entity's crab processing cap. 65 Fed. Reg. at 4530. **RULING: ACCEPTED AND INCORPORATED.**

16. NOAA extended both emergency interim rules for another six months. 65 Fed. Reg. 3917-39110 (Jun. 23, 2000). Both rules expired at the end of this additional six month period and were not renewed. **RULING: ACCEPTED AND INCORPORATED.**

17. On December 17, 2001, NOAA published a proposed rule to implement the major portions of the AFA. 66 Fed. Reg. 65028-65069 (Dec. 17, 2001); Resp. Exh. R31. None of the provisions of the proposed rule were made immediately effective. The steps taken by NOAA and the North Pacific Council to implement the AFA were summarized at 66 Fed. Reg. 65029-65031 and are incorporated herein by reference. **RULING: ACCEPTED AND INCORPORATED.**

18. It was not until December 30, 2002 that NOAA's final AFA implementing regulations were published. 67 Fed. Reg. 79692-79739 (Dec. 30, 2002); Resp. Exh. R33. The regulatory provisions effective as of that date and applicable in this case, among other provisions of law, include the following:

50 C.F.R. § 679.2 (Definitions)

AFA crab processing facility means a processing plant, catcher/processor, mothership, floating processor or any other operation that processes any FMP species of BSAI crab, and that is affiliated with an AFA entity that processes pollock harvested by a catcher vessel cooperative operating in the inshore or mothership sectors of the BSAI pollock fishery.

* * *

Affiliation for the purpose of defining AFA entities means a relationship between two or more individuals, corporations, or other business concerns in which one concern directly or indirectly owns a 10-percent or greater interest in another, exerts control over another, or has the power to exert control over another; or a third individual, corporation, or other business concern directly or indirectly owns a 10 percent or greater interest in both, exerts control over both, or has the power to exert control over both.

(1) *What is 10-percent or greater ownership?* For the purpose of determining affiliation, 10-percent or greater ownership is deemed to exist if an individual, corporation, or other business concern directly or indirectly owns 10 percent or greater interest in a second corporation or other business concern.

(2) *What is indirect interest?* An indirect interest is the one that passes through one or more intermediate entities. An entity's percentage of indirect interest in a second entity is equal to the entity's percentage of direct interest in an intermediate entity multiplied by the intermediate entity's direct or indirect interest in the second entity.

(3) *What is control?* For the purposes of determining affiliation, control is deemed to exist if an individual, corporation or other business concern has any of the following relationships or forms of control over another individual, corporation, or other business concern:

(i) Controls 10 percent or more of the voting stock of another corporation or business concern;

(ii) Has the authority to direct the business of the entity which owns the fishing vessel or processor. The authority to "direct the business of the entity" does not include the right to simply participate in the direction of business activities of an entity which owns a fishing vessel or processor;

(iii) Has the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor. Standard rights of minority shareholders to restrict the actions of the entity are not included in the definition of control provided they are unrelated to day-to-day business activities. These rights include provisions to require the consent of the minority shareholder to sell all or substantially all the assets, to enter into a different business, to contract with major investors or their affiliates or to guarantee the obligations of majority investors or their affiliates;

(iv) Has the authority to direct the transfer, operation or manning of a fishing vessel or processor. The authority to "direct the transfer, operation, or manning" does not include the right to simply participate in such activities;

(v) Has the authority to control the management or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor;

(vi) Absorbs all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor;

(vii) Has the responsibility to procure insurance on the fishing vessel or processor, or assume any liability in excess of insurance coverage;

(viii) Has the authority to control a fishery cooperative through 10-percent or greater control over a majority of the vessels in the cooperative, has authority to appoint, remove, or limit the actions of or replace the chief executive officer of the cooperative, or has the authority to appoint, remove, or limit the actions of a majority

of the board of directors of the cooperative. In such instances, all members of the cooperative are considered affiliates of the individual corporation, or other business concern, that exerts control over the cooperative; and

(ix) Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor.

* * *

50 C.F.R. § 679.4 (Permits)

* * *

(l) *AFA permits*—(1)(i) *Applicability*. In addition to any other permit and licensing requirements set out in this part, any vessel used to engage in directed fishing for any non-CDQ allocation of pollock in the BSAI and any shoreside processor, stationary floating processor, or mothership that receives pollock harvested in a non-CDQ directed pollock fishery in the BSAI must have a valid AFA permit onboard the vessel or at the facility location at all times while non-CDQ pollock is being harvested or processed...

(ii) *Duration*—(A) *Expiration of interim AFA permits*. All interim AFA vessel and processor permits issued prior to December 1, 2000, will expire on December 31, 2002, unless extended or reissued by NMFS. (B) *Duration of final AFA permits*. Except as provided in paragraphs (l)(5)(v)(B)(3) and (l)(6)(iii) of this section, AFA vessel and processor permits issued under this subparagraph (l) are valid indefinitely unless suspended or revoked.

(iii) *Application for permit*. NMFS will issue AFA vessel and processor permits to the current owner(s) of a qualifying AFA vessel or processor if the owner(s) submits to the Regional Administrator a completed AFA permit application that is subsequently approved.

* * *

(8) *Application evaluations and appeals*—(i) *Initial evaluation*. The Regional Administrator will evaluate an application for an AFA fishing or processing permit submitted in accordance with paragraph (1) of this section and compare all claims in the application with the information in the official AFA record. Claims in the application that are consistent with the information in the official AFA record will be accepted by the

Regional Administrator. Inconsistent claims in the application, unless supported by evidence, will not be accepted. An applicant who submits claims based on inconsistent information or fails to submit the information specified in the application for an AFA permit will be provided a single 60-day evidentiary period to submit the specified information, submit evidence to verify the applicant's inconsistent claims, or submit a revised application with claims consistent with information in the official AFA record. An applicant who submits claims that are inconsistent with information in the official AFA record has the burden of proving that the submitted claims are correct.

(ii) *Additional information and evidence*. The Regional Administrator will evaluate the additional information or evidence to support an applicant's claims submitted within the 60-day evidentiary period. If the Regional Administrator determines that the additional information or evidence meets the applicant's burden of proving that the inconsistent claims in his or her application are correct, the official AFA record will be amended and the information will be used in determining whether the applicant is eligible for an AFA permit. However, if the Regional Administrator determines that the additional information or evidence does not meet the applicant's burden of proving that the inconsistent claims in his or her application is correct, the applicant will be notified by an initial administrative determination that the applicant does not meet the burden of proof to change the information in the official AFA record.

(iii) *Sixty-day evidentiary period*. The Regional Administrator will specify by letter a 60-day evidentiary period during which an applicant may provide additional information or evidence to support the claims made in his or her application, or to submit a revised application with claims consistent with information in the official AFA record, if the Regional Administrator determines that the applicant did not meet the burden of proving that the information on the application is correct through evidence supplied with the application. Also, an applicant who fails to submit the required information will have 60 days to provide that information. An applicant will be

limited to one 60-day evidential period. Additional information or evidence, or a revised application, received after the 60-day evidentiary period specified in the letter has expired will not be considered for purposes of the initial administrative determination.

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50 C.F.R. § 697.7 (Prohibitions)

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(k) *Prohibitions specific to the AFA.*

(8) *Crab processing limits.* It is unlawful for an AFA entity that processes pollock harvested in the BSAI directed pollock fishery by an AFA inshore or AFA mothership catcher vessel cooperative to use an AFA crab facility to process crab in excess of the crab processing sideboard cap established for that AFA inshore or mothership entity under § 679.66 [Should be .65]. The owners and operators of the individual entities comprising the AFA inshore or mothership entity will be held jointly and severally liable for any overage of the AFA inshore or mothership entity's crab processing sideboard cap.

Subpart F—American Fisheries Act Management Measures

50 C.F.R. § 679.60 (Authority and related regulations)

Regulations under this subpart were developed by the National Marine Fisheries Service and the North Pacific Fishery Management Council to implement the American Fisheries Act (AFA) [Div. C., Title II, Public Law 105-277, 112 Stat. 2681 (1998)]. Additional regulations in this part that implement specific provisions of the AFA are set out at §§ 679.2 Definitions, 679.4 Permits, 679.5 Recordkeeping and Reporting, 679.7 Prohibitions, 679.20 General limitations, 679.21 Prohibited species bycatch management, 679.28 Equipment and operational requirements for Catch Weight Measurement, 679.31 CDQ reserves, and 679.50 Groundfish observer requirements. Regulations developed by the Department of Transportation to implement provisions of the AFA are found at 50 [should be 46]CFR Part 356.

* * *

50 C.F.R. § 679.65 (Crab processing sideboard limits)

(a) *What is the purpose of crab processing limits?* The purpose of crab processing sideboard limits is to protect processors not eligible to participate in the directed pollock fishery from adverse effects as a result of the AFA and the formation of fishery cooperatives in the directed pollock fishery.

(b) *To whom do the crab processing sideboard limits apply?* The crab processing sideboard limits in this section apply to any AFA inshore or mothership entity that receives pollock harvested in the BSAI directed pollock fishery by a fishery cooperative established under § 679.61 or § 679.62.

(c) *How are crab processing sideboard percentages calculated?* Upon receipt of an application for a cooperative processing endorsement from the owners of an AFA mothership or AFA inshore processor, the Regional Administrator will calculate a crab processing cap percentage for the associated AFA inshore or mothership entity. The crab processing cap percentages for each BSAI king or tanner crab species will be equal to the percentage of the total catch of each BSAI king or tanner crab species that the AFA crab facilities associated with the AFA inshore or mothership entity processed in the aggregate, on the average, in 1995, 1996, 1997, and 1998, with 1998 given double-weight (counted twice).

(d) *How will AFA entities be notified of their crab processing sideboard percentages?* An AFA inshore or mothership entity's crab processing sideboard percentages for each BSAI king or tanner crab species will be listed on each AFA mothership or AFA inshore processor permit that contains a cooperative pollock processing endorsement.

(e) *How are crab processing percentages converted to poundage caps?* Prior to the start of each BSAI king or tanner crab fishery, NMFS will convert each AFA inshore or mothership entity's crab processing sideboard percentage to a poundage cap by multiplying the crab processing sideboard percentage by the pre-season guideline harvest level established for that crab fishery by ADF&G [Alaska Department of Fish and Game].

(f) *How will be crab processing sideboard poundage caps be announced?* The Regional Administrator will notify each AFA inshore or mothership entity of its crab processing sideboard poundage cap through a letter to the owner of the AFA mothership or AFA inshore processor. The public will be notified of each entity's crab processing sideboard poundage cap through information bulletins published on the NMFS-Alaska Region World Wide Web home page (<http://www.fakr.noaa.gov>).

RULING: ACCEPTED AND INCORPORATED.

19. These final AFA regulations applied during the alleged period of violation in this case, i.e. January 1, 2004 to March 31, 2005. Copies of the regulations from the October 1, 2003 edition of the Code of Federal Regulations are found in Resp. Exhs. R74-R77. **RULING: ACCEPTED AND INCORPORATED.**

D. The Parties to This Proceeding

20. This civil penalty proceeding is brought by NOAA on behalf of the National Marine Fisheries Service (NMFS) under section 308(a) of the Magnuson-Stevens Act, 16 U.S.C. § 1858. The regulations at issue in this proceeding implement federal fishery management plans for king and tanner crab in Alaska and for pollock in the Bering Sea and Aleutian Islands. Pursuant to an approved delegation, authority under the Magnuson-Stevens Act to make determinations, approve or disapprove recommendations, and take other actions authorized in regulations (noted above) that implement these fishery management plans has been delegated to the Regional Administrator, NMFS-Alaska Region. Resp. Exh. R43. The determination of crab processing caps and attendant regulatory questions, including but not limited to the meaning of "control" and related issues, is the duty and responsibility of the NMFS Regional Administrator and is carried out during the AFA permit application process set forth in the agency's regulations. **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART TO THE EXTENT THIS PROPOSED FINDING OF FACT IS PROPOSING THAT THE AGENCY IS LIMITED IN ITS ENFORCEMENT ACTIONS CONCERNING "REGULATORY QUESTIONS".**

21. Respondent PPSF is a fish processing company organized under the laws of the State of Washington with operations in the State of Alaska. Resp. Exh. R60 (at 10). PPSF receives pollock from a pollock fishery cooperative and is therefore an "AFA processor" within the meaning of the AFA. *Id.* In 2004 and 2005, PPSF had a contract with Seven Seas for custom processing services onboard the floating processing vessel STELLAR SEA, which Seven Seas chartered from its owner. Resp. Exh. R26. All king and tanner crab processed on the STELLAR SEA for PPSF during this period of time was owned by PPSF after purchase from fishing vessels in Alaska. Resp. Exh. R60 (at 10). PPSF is not a U.S. citizen corporation within the meaning of the AFA or the Vessel Documentation Act. *Id.* PPSF is a wholly owned subsidiary of Maruha-Nichiro Holdings, Inc., a successor to Nichiro Corporation. *Id.* **RULING: ACCEPTED AND INCORPORATED.**

22. The STELLAR SEA is a floating processing "facility" or processor that custom processed Alaska king and tanner crab for PPSF during the alleged period of violation. The owner of the processor during this period was Cypress. Resp. Exh. R25. Neither PPSF nor Seven Seas Fishing Company owned or controlled any interest in Cypress during the period at issue in this proceeding. Resp. Exh. R60 (at p. 11); Tr. at 507:11-20 (October 27, 2010), 565:1-4, 10-13. Cypress has not been charged with any civil penalty by NOAA in connection with the commission of the alleged prohibited acts that are the subject of this proceeding. *See generally*, Resp. Exhs. R52 (NOVA) and R60 (at p. 11, ¶3). The citizenship of Cypress was reviewed and approved by MARAD under the AFA and other applicable maritime laws. Resp. Exh. R60 (at p. 11, ¶3). Neither MARAD nor the U.S. Coast Guard has ever requested that the fishery endorsement for the STELLAR SEA or Cypress be revoked and the vessel was properly documented during the period at issue in this proceeding. *Id.* Cypress was, at all relevant times, determined to be a U.S. citizen within the meaning of the AFA and the Vessel Documentation Act by MARAD. *Id.* **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART TO THE EXTENT THIS PROPOSED FINDING OF FACT IS ASSERTING THAT THE AGENCY MUST SHOW SOME**

OWNERSHIP INTEREST BY PETER PAN IN CYPRESS OR THE ACTUAL PROCESSING VESSEL – THE M/V STELLAR SEA. FURTHERMORE, AS EXPLAINED IN THIS DECISION AND ORDER, THIS CASE IS NOT ABOUT WHAT MARAD DETERMINED BUT RATHER RESPONDENTS’ COMPLIANCE WITH THE AFA AND ASSOCIATED AGENCY REGULATIONS.

23. The STELLAR SEA has never been used to process pollock. Tr. at 1061:23-25 (October 29, 2010). NMFS has never determined that the STELLAR SEA is an AFA crab facility or an AFA processor. Tr. at 564:2-21 (October 27, 2010); Tr. at 965:6-966:10 (October 29, 2010). **RULING: ACCEPTED AND INCORPORATED.**

24. Seven Seas is a company organized under the laws of the State of Washington. Resp. Exh. R60 (at 11). During the period at issue in this proceeding, Seven Seas had a bareboat charter contract with the owner of the STELLAR SEA, Cypress, to operate the STELLAR SEA in various fisheries in Alaska, including the king and tanner crab fisheries but not the pollock fishery. *Id.*; Resp. Exhs. R25, R29. PPSF was Seven Seas’ primary customer, but not the only one as Seven Seas custom processed crab for other companies, including Trident Seafoods, Inc. Resp. Exh. 60 (at p. 11, ¶4); Tr. at 1084:18-1085:10 (October 29, 2010). During the period at issue in this proceeding, PPSF did not own stock in Seven Seas or otherwise have an ownership interest in that company. Resp. Exh. R60 (at p. 11, ¶4). Seven Seas was, at all relevant times, determined to be a U.S. citizen by MARAD. *Id.* In addition, Seven Seas, through its wholly owned subsidiary, Blue Wave Seafoods, Inc., owned the processing vessel BLUE WAVE. *Id.* **RULING: ACCEPTED AND INCORPORATED.**

25. On October 29, 2010, NOAA and Seven Seas entered into a Settlement Agreement by which Seven Seas waived its right to participate in the proceeding and NOAA would first seek to recover the civil penalties assessed, if any, first from PPSF before proceeding against Seven Seas to collect. *See* Tr. at 998:18-1000:4 (October 29, 2010). **RULING: ACCEPTED AND INCORPORATED.**

E. The Administrative Record: Issuance of Crab Processing Caps to PPSF

26. By application notarized and dated December 22, 1999, PPSF filed with NMFS an Application for an AFA Mothership & Inshore Processor Permit. Resp. Exh. R7. The application identified two facilities to be covered by the AFA permit being sought: (a) a shoreside processing plant at King Cove, Alaska; and (b) the floating processor BLUE WAVE, owned by Seven Seas through its subsidiary, Blue Wave Seafoods, Inc. In its application, PPSF disclosed that it owned the King Cove facility, held a 10 percent stock ownership interest in Seven Seas, and was affiliated with Nichiro Corporation. Resp. Exh. R7. **RULING: ACCEPTED AND INCORPORATED.**

27. On March 24, 2000, the NMFS Regional Administrator for Alaska informed PPSF by letter of its processing cap percentages for king and tanner crab, identifying two processing facilities as the basis for the cap: King Cove (F-0142) and Blue Wave Seafoods, Inc. (BLUE WAVE) (F-1636). Resp. Exh. R13. This letter also enclosed a memorandum from the head of NMFS Enforcement in Alaska indicating that: “So long as the aggregate amount of crab processed by AFA entities does not exceed 15,328,630 lbs. round weight, or 58.15 percent of the final official harvest amount of Opilio tanner crab as determined by ADF&G, whichever is greater, then no enforcement action will be taken against any individual AFA entity for processing crab in excess of the crab processing sideboard established for that individual AFA entity”. Resp. Exh. R14. **RULING: ACCEPTED AND INCORPORATED.**

28. Beginning in late March 2000, NMFS conducted an investigation into the relationship between PPSF and the STELLAR SEA because other industry participants believed that PPSF had a 10 percent ownership interest in the vessel and had complained that that vessel’s crab history was not included in the PPSF cap. Resp. Exh. 60 (at p. 15, ¶8). Following the investigation, Rohn Nelson, a NMFS investigator assigned to the case, authored a memorandum (dated July 31, 2000) that concluded as follows:

On July 27, 2000, I conducted a telephonic conference with Kent Lind and ASAC Hansen, outlining the findings of this investigation. All concurred that given the corporate make up and the relationship [sic] the entities, the F/V STELLAR SEA was not required to be listed as a facility under the Peter Pan / Nichiro Entity

by definition of the ownership and 10% control standard. Kent Lind will modify the definitions of 679.2 based on the findings of this investigation.

Based on the above information, I request that this case be closed as unfounded.

See, Resp. Exhs. R10, R11, R12, and R17. **RULING: ACCEPTED IN PART AND INCORPORATED. REJECTED IN PART TO THE EXTENT THAT "OTHER INDUSTRY PARTICIPANTS" CONCERN EXCLUDED "CONTROL ISSUES" IN ADDITION TO AN "OWNERSHIP INTEREST".**

29. By letter dated August 1, 2000 from the NMFS Regional Administrator for Alaska Region (James Balsiger), the agency informed PPSF of its crab processing cap percentages and listed two facilities in the letter: King Cove and BLUE WAVE. Resp. Exh. R18. **RULING: ACCEPTED AND INCORPORATED.**

30. By facsimile transmittal dated August 8, 2000, NMFS provided a "corrected table" with respect to PPSF's king crab processing crab cap. The table included references to the two facilities listed in the August 1 letter, above, and identified Stellar Seafoods, Inc. (F1604) as "NON-AFA." Resp. Exh. R20. **RULING: ACCEPTED AND INCORPORATED.**

31. The staffs of the North Pacific Council and the Alaska Department of Fish and Game published a Discussion Paper entitled "Crab Processing Sideboard Caps" dated August 7, 2000. Appendix 2 to that paper listed Blue Wave Seafoods, Inc. and PPSF-King Cove as "AFA" and Stellar Seafoods, Inc. as "Non-AFA." Resp. Exh. R19. **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED TO THE EXTENT THAT THIS PROPOSED FINDING OF FACT ASSERTS THAT THE CITED DISCUSSION PAPER REPRESENTS A FINAL AGENCY DETERMINATION ON SEVEN SEAS' STATUS AND/OR AFFILIATION WITH PETER PAN UNDER THE AFA AND ASSOCIATED REGULATIONS.**

32. By letter dated January 11, 2001, NMFS informed PPSF of its crab processing cap percentages for that year, which included new calculations based on adding crab processing history for 1998 and giving it double weight. Resp. Exh. R22. The crab processing history related solely to crab processed at the PPSF King Cove facility and on board the processing vessel BLUE WAVE. Tr. at 965:6-966:10 (October 29, 2010). The letter also included the same notice as in the March 24, 2000 letter that no enforcement action would be taken against any individual entity unless the aggregate cap was exceeded, plus a table summarizing the crab processing history for PPSF facilities, broken down by species. *See also*, Resp. Exh. R14. **RULING: ACCEPTED AND INCORPORATED.**

33. On August 29, 2001, James Balsiger, as NMFS Regional Administrator, wrote to the Commissioner of the Alaska Department of Fish and Game requesting a written determination as to whether public release of AFA crab processing cap percentages would violate state confidentiality laws. Resp. Exh. R23. Attached to that letter was a spreadsheet containing NMFS's calculations of the aggregate historical processing percentage of AFA processors for various crab species. NMFS calculated that, in the red crab fishery, the relative percentages were 78.62% for AFA processors and 23.38% for non-AFA processors. *Id.* In the tanner crab fishery, the relative percentages were 65.33% for AFA processors and 34.67% for non-AFA processors. *Id.* The spreadsheet indicates that, for PPSF, the historical processing percentages included King Cove and the BLUE WAVE, but not the STELLAR SEA. *Id.* The letter also contained a sentence that reads, in part, "...Peter Pan has two processors under its control although a third processor may be included in the Peter Pan entity under a revision of the entity rules." *Id.* There is no evidence in the record that the Regional Administrator ever determined that any "third processor" would be included in the Peter Pan entity, including after the final NOAA AFA regulations were issued at the end of 2002. Tr. at 966:15-968:5 (October 29, 2010). **RULING: ACCEPTED AND INCORPORATED.**

34. In 2002 and 2003, NMFS sent notices to PPSF of the same crab processing cap percentages as calculated by NMFS in 2001. Resp. Exhs. R32, R34. **RULING: ACCEPTED AND INCORPORATED.**

35. By application received by NMFS on January 29, 2003, PPSF informed NMFS that PPSF and Nichiro Corporation had divested themselves of all interest in Seven Seas. Resp. Exh. R35. **RULING: ACCEPTED AND INCORPORATED.**

36. In August 2004, NMFS informed PPSF that, as a result of the divestiture of its interest in Seven Seas, the parent of Blue Wave Seafoods, Inc., the owner of the BLUE WAVE, PPSF's crab processing caps were being reduced to eliminate the crab processing history of the BLUE WAVE. PPSF was given notice of its right to appeal the decision. Resp. Exh. R36. **RULING: ACCEPTED AND INCORPORATED.**

37. PPSF appealed the decision in accordance with the AFA permit regulations. By letter dated October 6, 2004, the Program Director for Restricted Access Management ("RAM"), NMFS, sustained the appeal and reinstated PPSF's prior crab processing caps and included the crab processing history of the BLUE WAVE in the calculation of PPSF's crab processing cap. Resp. Exh. R38. **RULING: ACCEPTED AND INCORPORATED.**

38. From January 1, 2004 to April 1, 2005, NMFS treated the STELLAR SEA and its owner as a non-AFA processor and never assigned to the vessel, or its owner (Cypress), or its charterer (Seven Seas), a crab processing cap. The STELLAR SEA is not named in the AFA as an AFA-beneficiary entity, was never issued an AFA permit by NMFS, and was never assigned a crab processing cap. The STELLAR SEA was never used to process pollock. Tr. at 1061:23-25 (October 29, 2010). In this proceeding, NOAA has not charged Cypress with any violation of law, including with respect to violating the AFA permit requirement, even though the agency essentially alleges that the STELLAR SEA was an AFA entity affiliated with PPSF. *See generally*, Resp. Exh. R52 (NOVA). **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART TO THE EXTENT THAT PETER PAN CHARACTERIZES THE AGENCY ALLEGATION REGARDING THE M/V STELLAR SEA'S AFFILIATION WITH PETER PAN AND THEIR RELATIONSHIP WITH CYPRESS.**

F. Citizenship and Control Review of the STELLAR SEA by MARAD

39. Final regulations with respect to the issuance of fishery endorsements for U.S. flag vessels of 100 feet or greater, which apply to the STELLAR SEA, were issued by the U.S. Maritime Administration on July 19, 2000. These regulations included the new U.S. citizenship requirements set forth in the AFA. Resp. Exh. R15. **RULING: ACCEPTED AND INCORPORATED.**

40. In 2001, the then-owner of the STELLAR SEA, First Hawaiian Bank, sought approval of MARAD to transfer ownership of the vessel to Cypress Stellar Sea LLC. The transfer required approval by the Maritime Subsidy Board of the U.S. MARAD and review of the proposed arrangements under the Shipping Act of 1916, federal maritime subsidy laws, and the AFA. Resp. Exh. R60 (at 10). MARAD also reviewed the charter arrangements between the owner of the STELLAR SEA and Seven Seas as well as the custom processing agreement between PPSF and Seven Seas, and other related business transaction documents. Resp. Exhs. R24, R60 (at 10). **RULING: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART TO THE EXTENT THAT THIS PROPOSED FINDING OF FACT CONFLICTS WITH THE FINDINGS IN THIS DECISION AND ORDER.**

41. By letter dated October 15, 2001, MARAD determined that an impermissible level of control under the AFA and the Shipping Act of 1916 would not be transferred to Stellar Seafoods, Inc., the wholly owned subsidiary of Seven Seas, by reason of the overall arrangements, so long as the following changes to the arrangements were made:

(a) PPSF and Nichiro Corporation would be required to sell their interests in Seven Seas and no officer, director, employee or significant shareholder of PPSF or a related company could serve as a director of Seven Seas or be an employee of Seven Seas or Stellar Seafoods, Inc.

(b) Seven Seas and Stellar Seafoods, Inc. must have separate office space from PPSF and provide for their own administrative services and office equipment.

(c) The Charter Performance Guaranty Agreements between PPSF and Cypress (as owner) and Nichiro Corporation and Cypress must be modified to provide only a limited guaranty in which PPSF and

Nichiro agree to indemnify Cypress for specific expenses if Stellar Seafoods, Inc. fails to perform under certain provisions of the charter.

See Resp. Exhs. R24, R30. **RULING: ACCEPTED AND INCORPORATED.**

42. A certificate of documentation, with a fishery endorsement, was issued by the U.S. Coast Guard, on or about November 1 or 2, 2001 or shortly thereafter, to Cypress Stellar Sea LLC as the new owner of the STELLAR SEA. Resp. Exhs. R47, R48. **RULING: ACCEPTED AND INCORPORATED.**

43. The certificate of documentation for the STELLAR SEA has never been revoked by the U.S. Coast Guard. Resp. Exhs. R47, R48. **RULING: ACCEPTED AND INCORPORATED.**

44. In 2007, MARAD conducted an investigation into the relationship between Seven Seas and PPSF, in order to verify compliance with U.S. citizenship rules under the Vessel Documentation Act. Agency Exh. 32. **RULING: ACCEPTED AND INCORPORATED.**

45. On June 9, 2008, MARAD sent a letter to Mr. William Myhre, counsel for Seven Seas, stating that the agency has “determined that Stellar Seafoods, Inc. continues to qualify as a United States citizen within the meaning of 46 U.S.C. § 50501 and is eligible to document the vessel herein identified with a fishery endorsement.” Agency Exh. 34; Tr. at 1277:5-1278:1 (November 1, 2010). **RULING: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART TO THE EXTENT THAT THIS PROPOSED FINDING EXPRESSES OR IMPLIES THAT MARAD MADE THIS DETERMINATION WITHOUT REQUIRING A RESTRUCTURING OF THE DEBT SEVEN SEAS OWED TO PETER PAN.**

46. No witnesses from MARAD testified at the hearing to further explain any of this correspondence or to be cross-examined by PPSF. Under MARAD regulations, 49 C.F.R. Part 9, employees of MARAD may not testify in any legal proceeding, including this administrative proceeding, where an agency of the United States is a party unless the “attorney representing the United States requests it.” 49 C.F.R. § 9.7(a). Counsel for NOAA did not request that a witness from MARAD testify in this proceeding. **RULING: ACCEPTED AND INCORPORATED.**

G. Business Relationships Between and PPSF, Seven Seas, and Cypress

47. PPSF and Seven Seas, throughout the relevant time period were corporations organized and existing under the laws of the State of Washington. No evidence was presented by NOAA to support its allegation that Seven Seas was not a viable, independently functioning corporate entity during the period in question. To the contrary, evidence was presented that Seven Seas was not a “sham” corporation, as alleged by the agency at the hearing. See e.g., Tr. at 1249:24-1250:5, 1259:19-23 (November 1, 2010) (PPSF did not have power to direct who Seven Seas could hire or fire); 1250:9-19 (Seven Seas and not PPSF procured insurance for the STELLAR SEA); 1254:22-1255:2 (PPSF had no control over who Seven Seas hired to run the STELLAR SEA); 1259:24-1260:2 (PPSF did not have power to direct who was put on board of directors of Seven Seas); 1260:15-16 (Seven Seas not a sham corporation). **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED TO THE EXTENT THAT THIS PROPOSED FINDING STATES OR IMPLIES THAT SEVEN SEAS WAS A VIABLE BUSINESS ENTITY ABSENT PETER PAN’S CONTINUED FINANCIAL SUPPORT THROUGH THE ISSUANCE OF CREDIT.**

48. Cypress, a California limited liability company, is the 100 percent owner of the STELLAR SEA. Tr. at 1236:8-10 (November 1, 2010); Resp. Exh. R60 (at p. 10-11, ¶3). Cypress is not a party to these proceedings and has not been charged with any violation of the AFA or the Magnuson-Stevens Act in connection with acts or omissions alleged by NOAA in these proceedings. See generally, Resp. Exh. 52 (NOVA). No one from Cypress appeared at the hearing to testify. Neither PPSF nor Seven Seas held any interest in Cypress or in the vessel itself. Tr. at 507:11-20, 565:1-16 (October 27, 2010); Tr. at 1236:1-12 (November 1, 2010). NOAA presented no evidence that PPSF or Seven Seas owned or controlled 10 percent or more of the interest in Cypress or in the processor STELLAR SEA. **RULING: ACCEPTED AND INCORPORATED.**

49. Seven Seas had a contractual relationship with Cypress, and the previous owner of the STELLAR SEA, First Hawaiian Bank, to operate the vessel pursuant to a bareboat charter agreement. Resp. Exhs. R25, R27. The charter agreement was in effect during the alleged period of violation and expired in 2008, when the vessel was returned to Cypress and sold by its owner. Resp. Exh. R48; Tr. at 1288:0-1289:19 (November 1, 2010). Seven Seas was responsible for hiring the crew and paying for its operations, in addition to paying Cypress regular charter payments each quarter. See Tr. at 1254:22-24 (November 1, 2010); Resp. Exh. R25 (at Secs. 3, 6). The charter agreement was negotiated in an arms-length transaction between Seven Seas and Cypress. In 2001, because of the AFA, MARAD also participated in the final drafting of the charter agreement and required that certain provisions be included in the agreement to prevent any improper control by PPSF over the STELLAR SEA, its owner, or its charterer. Resp. Exh. R30; Tr. at 1225:12-21 (November 1, 2010). **RULING: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART CONCERNING THE "ARMS-LENGTH" TRANSACTION BETWEEN SEVEN SEAS AND CYPRESS FOR WHICH THERE IS NO RECORD EVIDENCE TO ESTABLISH SUCH FACT AND ALSO THE EXTENT OF MARAD'S ALLEGED PARTICIPATING IN THE FINAL DRAFTING OF THE CHARTER AGREEMENT.**

50. Seven Seas, through its subsidiary, Stellar Seafoods, Inc., provided custom processing services to PPSF, using the STELLAR SEA, during the alleged period of violation, to receive crab purchased by PPSF from fisherman, process that fish, and then deliver it for shipping to PPSF's customer for the finished product. Resp. Exh. R26; Tr. at 1223:5-1224:6 (November 1, 2010). Seven Seas was never the owner of any fish custom processed for PPSF. Tr. at 1255:12-19. Seven Seas also provided custom processing services to other fish processing firms in Alaska, but PPSF had a the right of first refusal to use the STELLAR SEA. Tr. at 1227:1-1228:22 (November 1, 2010). PPSF and Seven Seas would set an initial, preseason price for the custom processing. Tr. at 1226:13-25 (November 1, 2010). At the end of the season, they would adjust the price depending on how many pounds of fish PPSF purchased and Seven Seas processed. *Id.* Typically, PPSF paid Seven Seas more than the industry standard because Seven Seas' costs were high and the resource return at the time was low. Tr. at 1227:1-13 (November 1, 2010). PPSF also paid more to Seven Seas because it was more costly to operate a floating processor than a shoreside facility. *Id.* PPSF also paid a premium to have priority to use the processing capacity onboard the STELLAR SEA. Tr. at 1228:23-1229:7 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART TO THE EXTENT THAT THIS PROPOSED FINDING ATTEMPTS TO DEEMPHASIZE THE AMOUNT OF PROCESSING SEVEN SEAS DID FOR PETER PAN AS A PERCENTAGE OF ITS OVERALL PROCESSING DURING THE CHARGED PERIOD.**

51. PPSF, Sevens Seas, and Cypress Stellar Sea, LLC entered into the following contracts with respect to the STELLAR SEA that were in effect during the period January 1, 2004 to April 1, 2005:

a. Bareboat Charter Agreement between Stellar Seafoods, Inc. (a wholly owned subsidiary of Seven Seas) and Cypress Stellar Sea, LLC, including the Agreement Regarding the Extension of the Charter Term, dated September 30, 2002, extending the original charter term to September 30, 2008 and Amendment No. 3 to Bareboat Charter Party, dated September 30, 2002. Resp. Exh. R25.

b. Amended and Restated Custom Processing Agreement between PPSF and Stellar Seafoods, Inc. dated October 31, 2001, including Amendment No. 1 to Amended and Restated Custom Processing Agreement. Resp. Exh. R26.

c. Charter Acknowledgment and Agreement dated February 2, 2004, including Exhibit A (Bareboat Charter Party dated as of September 25, 1992 between Stellar Seafoods, Inc., as Charterer, and First Hawaiian Bank, as Owner; Amendment of Charter Party, dated December 28, 1992; Amendment No. 2 to Bareboat Charter Party dated October 31, 2001; and Amendment No. 3 to Bareboat Charter Party dated September 30, 2002). Resp. Exh. R29.

d. Amended and Restated Charter Performance Guaranty Agreement between PPSF and Cypress Stellar Sea, LLC dated October 31, 2001. Resp. Exh. R28.

e. Amended and Restated Charter Performance Guaranty Agreement between Nichiro Corporation (PPSF's previous parent corporation) and Cypress Stellar Sea, LLC dated October 31, 2001. Resp. Exh. R27. **RULING: ACCEPTED AND INCORPORATED.**

52. All of these agreements expired when the STELLAR SEA was returned to Cypress by Seven Seas and sold to Icicle Seafoods, Inc. Agency Exh. 87; Tr. at 1288:9-1289:19 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

53. PPSF and Seven Seas (and its subsidiaries) entered into an Agreement for Advance of Funds dated March 19, 2002 to provide operating funds to Sevens Seas "in advance of the time processing fees are due." Resp. Exh. R82. The Agreement was later amended in 2007. Agency Exh. 23. According to Mr Barry Collier, PPSF is still owed approximately \$4.5 million under the agreement. Tr. at 1249:3-15 (November 1, 2010). Mr. Collier further stated that, when he believes the assets (primarily the fishing permit of the fishing vessel AJ, retained cash, and the equity investment of owner Mark Weed) of Seven Seas will appreciate to the requisite amount sufficient to retire this debt, PPSF plans to enforce the terms of the Advance of Funds Agreement against Seven Seas. Tr. at 1260:17-24; 1279:22-1280:13 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

54. In a letter dated December 10, 2001, MARAD informed Seven Seas that financing agreements did not have to be reviewed, for purposes of determining citizenship, until April 1, 2003. Resp. Exh. R30. In 2008, MARAD did review the Advance of Funds Agreement pursuant to their AFA regulations and policies but never made a determination that the agreement gave PPSF improper control over Seven Seas under those regulations and policies. Agency Exhs. 33, 34. **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART TO THE EXTENT THIS PROPOSED FINDING EXPRESSES OR IMPLIES THAT MARAD DID NOT REQUIRE A RESTRUCTURING OF THE DEBT SEVEN SEAS OWED PETER PAN UNDER THE ADVANCE OF FUNDS AGREEMENT IN ORDER TO APPROVE THE CONTINUED DOCUMENTATION OF THE M/V STELLAR SEA.**

H. Alleged Control of Seven Seas by PPSF

55. NOAA, in its NOVA, alleged that (a) "PETER Pan's exertion of 10% or more control over SEVEN SEAS requires that all crab processed by the M/V STELLAR SEA (managed and operated by Stellar Seafoods, Inc., a 100% subsidiary of Seven Seas) be allocated against PETER PAN's AFA crab cap"; and (b) "During the period January 2004 – March 2005, PETER PAN controlled the operations of SEVEN SEAS to an extent greater than 10 percent." Resp. Exh. R52 (at page 6). **RULING: ACCEPTED AND INCORPORATED.**

56. NOAA does not allege that PPSF or Seven Seas owned or controlled 10 percent or greater of the interest in Cypress, the owner of the STELLAR SEA, or owned or controlled any interest in the vessel itself. See generally, Ex. R52 (NOVA). The hearing record supports the conclusion that, during the period January 2004 to March 2005, PPSF held no ownership interest whatever in Seven Seas, Cypress, or the STELLAR SEA. See e.g., Tr. at 1236:1-3 (November 1, 2010) (no ownership interest in Cypress); 1230:5-15 (MARAD suggested that PPSF divest its stock in Seven Seas); 1236:4-12 (Cypress purchased 100% of the Stellar Sea). In fact, this factual conclusion is not disputed by NOAA. **RULING: ACCEPTED AND INCORPORATED.**

57. During the period at issue, PPSF and Seven Seas operated as separately functioning corporations. **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART. THIS PROPOSED FINDING IS ACCEPTED TO THE EXTENT THAT PETER PAN AND SEVEN SEAS WERE SEPARATE CORPORATIONS DURING THE CHARGED PERIOD THAT OBSERVED APPROPRIATE CORPORATE FORMALITIES BUT REJECTED TO THE EXTENT THAT IT EXPRESSES OR IMPLIES THAT PETER PAN DID NOT OR COULD NOT EXERT UNLAWFUL CONTROL OVER SEVEN SEAS DURING THE CHARGED PERIOD.**

58. Until about 2000, Barry Collier, President of PPSF, held 75 percent of the stock in Seven Seas, PPSF held 10 percent of the stock, and Nichiro Corporation held 15 of the stock. Tr. at 1238:9-22 (November 1, 2010). On October 31, 2001, Mr. Gary Greenwood purchased the 75 percent stock ownership interest from Barry Collier for the price of \$75,000 to \$77,000, which he paid in cash. Tr. at 496:2-5, 506:23-507:4 (October 27, 2010); 1230:16-23 (November 1, 2010). This equity investment was carried on the books of Seven Seas as paid-in equity capital. Tr. at 1230:24-1231:2 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

59. Because of the directives of MARAD, PPSF and Nichiro Corporation divested themselves of their stock in Seven Seas, effective as of October 31, 2001. Resp. Exh. R30; Tr. at 1230:5-18; 1236:21-1237:12;

1267:13-25 (November 1, 2010). A shareholder agreement that had been in place between and among Gary Greenwood, PPSF, and Nichiro Corporation expired on that date and ceased to have any effect. Agency Exh. 83. **RULING: ACCEPTED AND INCORPORATED.**

60. Later, Mr. Greenwood sold his 100 percent stock ownership interest in Seven Seas to Mr. Mark Weed, the current president of Seven Seas, for \$78,000 cash. Mr. Mark Weed was the owner of all the stock in Seven Seas between January 2004 and March 2005. Tr. at 373:5-24 (October 27, 2010). **RULING: ACCEPTED AND INCORPORATED.**

61. Based on the record presented at the hearing, Seven Seas hired and fired its own employees, managed its own books, filed its own taxes, purchased its own insurance, and entered into contracts on its own behalf. Tr. at 1249:24-1250:5, 1259:19-23 (November 1, 2010) (Seven Seas hired own employees and PPSF did not have power to direct who Seven Seas could hire or fire); 1250:9-19 (Seven Seas and not PPSF procured insurance for the Stellar Sea); 1254:22-1255:2 (PPSF had no control over who Seven Seas hired to run the Stellar Sea); 1259:24-1260:2 (PPSF did not have power to direct who was put on board of directors of Seven Seas); 1260:3-4 (Seven Seas filed own income taxes). NOAA presented no evidence that Mark Weed was ever directed by PPSF to take any particular corporate action that was not his own independent decision. NOAA did present copies of Seven Seas federal tax returns from 2002 to 2006, which are evidence that Seven Seas functioned separately as an independent corporation. See Agency Exhs. 16-20. **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART. THIS PROPOSED FINDING IS REJECTED TO THE EXTENT THAT THIS PROPOSED FINDING EXPRESSES OR IMPLIES THAT PETER PAN DID NOT EXERT UNLAWFUL CONTROL OVER SEVEN SEAS DURING THE CHARGED PERIOD.**

62. NOAA presented copies of various insurance contracts and evidence that PPSF and Seven Seas “went to the market together” to purchase insurance. Agency Exhs. 37-62. However, NOAA failed to present any evidence that PPSF was responsible for procuring insurance on the STELLAR SEA or assumed any liability in excess of insurance coverage. Rather, Seven Seas procured its own insurance and was responsible for insuring the STELLAR SEA. Tr. at 1250:14-19; 1260:5-6 (November 1, 2010). PPSF did not procure insurance for the STELLAR SEA. Tr. at 1250:9-13 (November 1, 2010). In several policies, each was named as an “additional assured” in order to cover any risks to each company or their interests when doing business together, such as when PPSF’s processed crab was onboard the STELLAR SEA. See e.g., Tr. at 1250:24-1251:16 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

63. NOAA also provided lending records and deposition testimony with respect to payments and advances under the Advance of Funds Agreement. Agency Exhs. 22-27. Such routine business transactions pursuant to a lending agreement do not create any control by PPSF over 10 percent or more of the interest in Sevens Seas. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

64. NOAA also presented various minutes of PPSF wherein that company’s relationship with Seven Seas was discussed. Agency Exhs. 9-15. These documents are not evidence of PPSF’s ownership or control of 10 percent or more of the interest in Seven Sea. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

65. Pursuant to the Advance of Funds Agreement, PPSF provided funds to Seven Seas for its operations. Tr. at 1248:4-16 (November 1, 2010). At one time the loan amount reached approximately \$9.5 million. Agency Exh. 27. At the hearing, Mr. Barry Collier testified, however, that the current loan balance was approximately \$4.5 million. Tr. at 1249:6-15 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

66. The Advance of Funds Agreement does not contain a provision that gives PPSF a security interest in any of the assets of Sevens Seas or the STELLAR SEA. Tr. at 1249:16-19 (November 1, 2010); Resp. Exh. at R82. Nor does it give PPSF any security interest in any stock in Seven Seas. *Id.* at 1249:20-23. The Agreement does, however, contain a provision stating that PPSF has a security interest in the fish products on board the vessel that are owned by PPSF. Resp. Exh. R82 (Art. 3, at p. 3); Tr. at 1250:6-8 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

67. The Advance of Funds Agreement contains a provision that reads: "Lender [PPSF] shall be granted no rights whatsoever to control the operation, management or processing activities of the Vessels, except as specifically provided for in 46 CFR Sec. 356.43." Resp. Exh. R82 (Art. 6, at 5). **RULING: ACCEPTED AND INCORPORATED.**

68. The Advance of Funds Agreement also contains a provision that states as follows: "No failure by Lender to exercise, and no delay in exercising any right, power or remedy hereunder shall operate as a waiver thereof." Resp. Exh. R82 (Art. 9.1, at 6). **RULING: ACCEPTED AND INCORPORATED.**

69. Mr. Barry Collier, at the hearing, testified that he considers the Advance of Funds Agreement enforceable against Seven Seas to recover any funds owned PPSF and that he plans to enforce the Advance of Funds Agreement when the overall asset value of Seven Seas increases. Tr. at 1260:17-24 (November 1, 2010). The primary asset is a pollock fishing permit associated with the F/V AJ, owned by Seven Seas, that may be worth millions of dollars. *Id.* at 1280:7-13. **RULING: ACCEPTED AND INCORPORATED.**

70. Seven Seas purchased the F/V AJ some time prior to 2004. Tr. at 1245:12-1247:25 (November 1, 2010). The purchase of the F/V AJ also included its pollock quota. Tr. at 1246:17-21 (November 1, 2010). In exchange for help with financing the F/V AJ, Seven Seas agreed to transfer the pollock quota it received with the F/V AJ to PPSF. Tr. at 1245:5-13 (November 1, 2010). The financing transaction between Seven Seas and PPSF for the F/V AJ was reviewed and approved by MARAD. Tr. at 1247:22-1248:3 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

71. NOAA failed to present any evidence that the relationship between PPSF and Seven Seas met any of the following indicia of control that are set forth in NOAA's AFA regulations at 50 CFR 679.2:

- a. Controls 10 percent or more of the voting stock in another corporation or business concern. 50 CFR 679.2(i). NOAA's alleged expert, Mr. Hellerman, admitted that this indicia of control did not apply in this case. Tr. at 863:4-15 (October 28, 2010). PPSF did not own any interest in Cypress. Tr. at 1236:1-3. Moreover, PPSF did not control 10 percent or more of the voting stock in Seven Seas and in fact sold all of its shares in Seven Seas as directed by MARAD in 2001. Resp. Exh. R35; Tr. at 1230:5-18 (November 1, 2010).
- b. Has the authority to direct the business of the entity which owns the fishing vessel or processor. 50 CFR 679.2(ii). The authority to "direct the business of the entity" does not include the right to simply participate in the direction of the business activities of an entity which owns a fishing vessel or processor. Mr. Hellerman admitted that this indicia of control did not apply. Tr. at 863:16-18 (October 28, 2010). NOAA presented evidence that either PPSF or Seven Seas had any ability at any time to direct the business of Cypress, which owned the STELLAR SEA.
- c. Has the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person serving in a management capacity of an entity that holds 10 percent or greater interest in a fishing vessel or processor. 50 CFR 679.2(iii). Mr. Hellerman admitted that this indicia of control did not apply to this case. Tr. at 863:19-22 (October 28, 2010). PPSF maintained no interest in Cypress, the entity that owned 100% of the interest in the STELLAR SEA, in any way. Tr. at 1236:1-12 (November 1, 2010). Nor did PPSF have any power to tell Seven Seas who to hire or put on its board of directors. Tr. at 1259:19-1260:2 (November 1, 2010).
- d. Has the authority to direct the transfer, operation or manning of a fishing vessel or processor. The authority to "direct the transfer, operation or manning" of a vessel or processor does not include the right to simply participate in such activities. 50 CFR 679.2(iv). Mr. Hellerman admitted that this indicia of control did not apply to this case. Tr. at 864:9-11 (October 28, 2010). PPSF did not have any authority to direct the

operation of the STELLAR SEA under this provision. Tr. at 1254:13-1255:2 (November 1, 2010).

- e. Has the authority to control the management of or to be a controlling factor in the entity that holds 10 percent or greater interest in a fishing vessel or processor. 50 CFR 679.2(v). Mr. Hellerman admitted that this indicia of control did not apply to this case. Tr. at 864:12-19 (October 28, 2010). In fact, neither PPSF nor Seven Seas had any authority to control the management of Cypress, the entity that owned 100% of the interest in the STELLAR SEA, in any way. Tr. at 1236:1-12 (November 1, 2010). Nor did PPSF have the authority to control the management of Seven Seas. *See e.g.*, Tr. at 1254:22-1255:2 (November 1, 2010) (PPSF had no control over who Seven Seas hired to run the STELLAR SEA); 1259:19-23 (Seven Seas hired own employees and PPSF never told it who to hire); 1259:24-1260:2 (PPSF had no power to tell Seven Seas who to appoint to its board of directors); 1260:3-4 (Seven Seas filed own income tax statements).
- f. Absorbs all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor. 50 CFR 679.2(vi). Mr. Hellerman testified that he relied on this indicia of control because PPSF loaned money to Seven Seas to cover its costs. Tr. at 864:19-865:1 (October 28, 2010). However, Cypress, and not Seven Seas, owned the STELLAR SEA and NOAA presented no evidence that PPSF absorbed all the costs and business risks associated with Cypress' ownership of the STELLAR SEA. Tr. at 1235:21-1236:12 (November 1, 2010). Moreover, NOAA also failed to present any evidence that PPSF absorbed "all" of the costs and business risks of Seven Seas. Rather, Mr. Collier testified that the Advance of Funds Agreement between PPSF and Seven Seas was entered into in the normal course of business and approved by all the parties – MARAD, Cypress, Seven Seas, and PPSF. Tr. at 1297:7-13 (November 1, 2010). He also testified that PPSF intended to collect on Seven Seas' debt to it. Tr. at 1260:17-24 (November 1, 2010).
- g. Has the responsibility to procure insurance on the fishing vessel or processor, or to assume any liability in excess of insurance coverage. 50 CFR 679.2(vii). Mr. Hellerman testified this indicia could be applicable because PPSF and Seven Seas jointly purchased insurance as a buying group to "get better rates." Tr. at 865:2-17 (October 28, 2010). However, NOAA presented no evidence that PPSF had any "responsibility" to procure insurance on the STELLAR SEA or to "assume" any responsibility in excess of the insurance. Rather, PPSF did not procure any insurance for the STELLAR SEA. Tr. at 1250:9-13 (November 1, 2010). Seven Seas procured insurance for the vessel. *Id.* at 1250:14-19.
- h. Has the authority to control a fishery cooperative through 10-percent or greater ownership or control over a majority of the vessels in the cooperative.... 50 CFR 679.2(viii). Mr. Hellerman admitted that this indicia of control did not apply to this case. Tr. at 865:22-24 (October 28, 2010).
- i. Has the ability through any other means whatsoever to control the entity that holds 10 percent or greater interest in a fishing vessel or processor. 50 CFR 679.2(ix). Mr. Hellerman testified that he concluded that the totality of the agreements and the way the companies operate together indicated that PPSF controlled Seven Seas. Tr. at 865:25-866:6 (October 28, 2010). NOAA, however, presented no evidence that PPSF controlled Cypress, the entity that that owned 100% of the interest in the STELLAR SEA, in any way. Tr. at 1235:21-1236:12 (November 1, 2010). Seven Seas did not own any interest in the STELLAR SEA. Tr. at 1260:12-14 (November 1, 2010). Nor did NOAA present any evidence that PPSF had the ability to control Seven Seas. Mr. Hellerman applied his own definition of control and not any under the AFA or regulations promulgated by the agency. Tr. at 1007:6-10 (October 29, 2010). He "ignored" the statute in this case with respect to the issue of "the interest." Tr. at 1011:5-8 (October 29, 2010). Contrary to his

deposition testimony, however, he testified at the hearing that PPSF's control was "at least 80 percent" or "in excess of 80 percent." Tr. at 888:7-14 (October 28, 2010). Mr. Hellerman testified that under the Advance of Funds Agreement, PPSF had the right to inspect the books of Seven Seas. Tr. at 866:7-17 (October 28, 2010). However, the right to inspect the books under a loan agreement does not constitute control, especially where PPSF has no right to tell Seven Seas who to appoint to its board of directors, who to hire, or who to run its operations. Tr. at 1254:22-1255:2 (November 1, 2010) (PPSF had no control over who Seven Seas hired to run the STELLAR SEA); 1259:19-23 (Seven Seas hired own employees and PPSF never told it who to hire); 1259:24-1260:2 (PPSF had no power to tell Seven Seas who to appoint to its board of directors). Nor did PPSF have any ability to control Seven Seas under the Advance of Funds Agreement where it retained no security interest in either the STELLAR SEA or Seven Seas. Tr. at 1249:16-23 (November 1, 2010).

RULING: ACCEPTED AS TO 71 (a) THROUGH (e), and (h) THROUGH (g) and REJECTED as to 71(f) and (i) FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.

72. Mr. Hellerman is not a credible witness. He has a contract with NOAA valued at \$525,000 depending on how much NOAA uses his services. Tr. at 992:14-993:12 (October 29, 2010). The agency does not need to use Mr. Hellerman if it does not like his services. *Id.* at 993:13-20. He also has limited experience in the fishing industry and admitted that he was not an expert in pollock rights. Tr. at 883:6-9 (October 28, 2010).

RULING: ACCEPTED IN PART AND INCORPORATED AND REJECTED IN PART. REJECTED AS TO THE ASSERTION THAT MR. HELLERMAN WAS NOT CREDIBLE AND TO THE EXTENT THAT PETER PAN TAKES ISSUE WITH MR. HELLERMAN'S EXPERIENCE - MR. HELLERMAN WAS NOT PROFFERED AS AN EXPERT IN THE FISHING INDUSTRY OR IN POLLOCK RIGHTS. MR. HELLERMAN'S NOAA CONTRACT ISSUES ARE REJECTED AND UNFOUNDED.

73. Further, no employee of the agency's RAM Division, or the Regional Administrator himself, testified at the hearing in person or by deposition testimony that they endorsed Mr. Hellerman's interpretation and application of the AFA regulations. To the contrary, agency officials testified that they had no knowledge of Mr. Hellerman, whom NOAA General Counsel offered as an "expert" on the interpretation of corporate control under the AFA regulations and application of that interpretation to the facts of this case. Tr. at 968:14-21 (October 29, 2010) (Balsiger Dep. 88:17-25), 975:19-976:3 (Smith Dep. 56:22-57:4), 977:11-14 (Gharrett Dep. 40:19-20). Mr. Hellerman, besides not being a licensed attorney (and therefore not qualified to give legal opinions), clearly does not speak for the agency and is forbidden by Federal Acquisition Regulations from performing any inherently governmental function, including interpreting and applying regulations. *See* Tr. at 969:13-22 (October 29, 2010), 990:15-16, and 992:2-10; Resp. Exhs. R77, R79 (Federal Acquisition Regulation, §7.502 (May 2005)). **RULING: REJECTED AS IRRELEVANT AND FOR THE REASONS GIVEN IN AN EARLIER ORDER (October 22, 2010) REGARDING THE ADMISSION OF MR. HELLERMAN AS AN EXPERT.**

74. Mr. Hellerman also failed to identify the amount of control arguably exerted by PPSF over Seven Seas. At the hearing, he testified that control could be derived from a business relationship or a creditor relationship. However, he failed to identify how PPSF could exert control over Seven Seas through the Advance of Funds Agreement when it specifically did not include a security interest in Seven Seas. Tr. at 1249:16-23 (November 1, 2010). He also could not definitively state the amount of control PPSF had over Seven Seas. He testified at the hearing that it had "at least 80 percent" and "in excess of 80 percent." Tr. at 888:7-14 (October 28, 2010). However, he could not distinguish that level of control from a controlling interest, i.e., 51 percent of the voting stock, which would presumably mean control based on his deposition testimony. Tr. at 1015:5-19 (October 29, 2010). **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER. INDEED, THE QUESTION IS NOT HOW MUCH CONTROL AT OR IN EXCESS OF 10 PERCENT PETER PAN HAD OVER SEVEN SEAS. BUT RATHER, DID PETER PAN, BECAUSE OF THE LARGE AMOUNT OF DEBT SEVEN SEAS OWED TO PETER PAN, AND PETER PAN'S GUARENTEES OF CHARTER PAYMENTS AND REVENUE STEAMS, CONSTITUTE A VIOLATION OF THE AFA AND THE NOAA REGULATIONS.**

I. The Proposed Penalty

75. Under NOAA's Civil Penalty regulations, as amended, the administrative law judge is directed to enter findings and conclusions in this matter, to include the "appropriate ruling, order, sanction, relief, or denial thereof." 50 C.F.R. § 904.271(a)(1). **RULING: ACCEPTED AND INCORPORATED.**

76. As of June 23, 2010, NOAA regulations were amended to eliminate any presumption in favor of the penalty assessed in the NOVA. 75 Fed. Reg. 35631-32. The relevant provision, as amended, now reads: "Assess a civil penalty or impose a permit sanction, condition, revocation, or denial of permit application, taking into account all the factors required by applicable law;..." 50 C.F.R. § 904.204(m). **RULING: ACCEPTED AND INCORPORATED.**

77. As this is a Magnuson-Stevens Act penalty procedure, the relevant civil penalty assessment provision of that Act is as follows:

(a) ASSESSMENT OF PENALTY—Any person found by the Secretary [of Commerce], after notice and an opportunity for a hearing in accordance with section 554 of title 5, United States Code, to have committed an act prohibited by section 307 shall be liable to the United States for a civil penalty. The amount of the civil penalty shall not exceed \$100,000 for each violation. Each day of a continuing violation shall constitute a separate offense. The amount of such civil penalty shall be assessed by the Secretary, or his designee, by written notice. In determining the amount of such penalty, the Secretary shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. In assessing such penalty the Secretary may also consider any information provided by the violator relating to the ability of the violator to pay, *Provided*, That the information is served on the Secretary at least 30 days prior to an administrative hearing.

16 U.S.C. § 1858(a). **RULING: ACCEPTED AND INCORPORATED.**

78. Congress raised the penalty from \$25,000 to \$100,000 per incident in the 1990 Amendments to the Magnuson-Stevens Act. The House Report, however, cautioned that fines of this magnitude should be pursued only in "cases of significant and severe offenses or serious repeat offenses." H.R. Rep. No. 393, 101st Cong., 2d Sess. 230-31 (1989). **RULING: ACCEPTED AND INCORPORATED.**

79. Under the Federal Civil Penalties Inflation Act, Pub. L. 101-410, the amount of the maximum civil penalty per violation is now \$140,000. 15 C.F.R. § 6.4(e)(10); 73 Fed. Reg. 75321-22 (Dec. 11, 2008). **RULING: ACCEPTED AND INCORPORATED.**

80. In this case, PPSF has not asserted that it is unable to pay a fine. **RULING: ACCEPTED AND INCORPORATED.**

81. NOAA Civil Penalty Regulations set forth essentially the same factors contained in the Magnuson-Stevens Act, with one very significant difference. 50 C.F.R. § 904.108(a). The civil penalty provision of the Magnuson-Stevens Act is mandatory with respect to considering the listed factors to be used in assessing a penalty. NOAA regulations, in contrast, states that the "[f]actors to be taken into account in assessing a civil penalty, depending on the statute in question, may include..." *Id.* **RULING: ACCEPTED AND INCORPORATED.**

82. NOAA has the burden of proving that the penalty assessed against PPSF and Seven Seas, jointly and severally, in the NOVA (\$4,457,048.00) is reasonable, taking into account the factors that must be considered in assessing such penalty. NOAA claims that the penalty is based on 45 separate violations, representing separate "deliveries" of crab to the STELLAR SEA by fisherman who sold the crab to PPSF. Resp. Exh. R52 (NOVA, Table 1). These deliveries continued over a number of days in 2004 and 2005, with many of the deliveries occurring on the same day. *Id.* **RULING: ACCEPTED AND INCORPORATED.**

83. NOAA's calculation of the penalty is based on the value of the crab after processing (approximately \$12.85 million), minus the price paid to the fisherman (approximately \$8.62 million). Resp. Exh. R46 at p. 3. (Calculation of PPSF Entity Crab Processing Cap Coverage by Brent Pristas, NOAA Enforcement Agent, June 17, 2010). NOAA alleges that non-AFA processors lost the market opportunity to processing 4,164,357

pounds of crab which, according to NOAA's method of calculation, was worth \$4,232,048.00. *Id.* NOAA presented no evidence that any processor did in fact lose the opportunity to process the crab processed by the STELLAR SEA. The final penalty was arrived at by calculating each violation incident (or delivery) at a penalty amount of \$99,045.51 then adding \$5,000 per violation to arrive at the total penalty of \$4,457,048.00. *Id.*
RULING: ACCEPTED AND INCORPORATED.

84. NOAA's penalty schedule does not apply in this case. The penalty schedule on which NOAA bases the penalty calculation is for fishing activities. *See* Agency Exh. 94-96. However, fishing is not processing and the penalty schedule provides no guidance here. **RULING: ACCEPTED AND INCORPORATED IN PART AND REJECTED IN PART. THE ASSERTION BY RESPONDENT'S THAT NOAA'S PENALTY SCHEDULE DOES NOT APPLY IN THIS CASE IS ACCEPTED. THE FACT THAT SUCH SCHEDULE PROVIDES NO GUIDANCE IS REJECTED.**

85. NOAA alleges that the assessed penalty is primarily based on the agency's calculation of "ill-gotten gain." However, NOAA did not make any determination of ill-gotten gain, but only identified the amount of money that was the difference between the price PPSF sold the crab for and the price PPSF purchased the crab for. Tr. at 558:10-559:1 (October 27, 2010); Tr. at 1107:2-1108:23 (October 29, 2010). In fact, PPSF lost \$1.4 million to \$1.5 million on the crab processed from the STELLAR SEA in 2004 and 2005. Tr. at 1257:4-1258:5 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

86. NOAA presented no evidence of the "reasonableness" of the penalty in this case. Tr. at 811:22-812:3 (October 28, 2010). At the hearing, NOAA presented two witnesses, Brent Pristas and Sherrie Tinsley-Myers, in support of the proposed penalty amount, assuming that liability for a penalty is determined. Both were NMFS Enforcement Agents. Tr. at 539:4-8 (October 27, 2010); Tr. at 768:19-24 (October 28, 2010). Neither witness testified that all the mandatory factors for determining a penalty set forth in the Magnuson-Stevens Act had been considered in this case. Tr. at 576:21-24 (October 27, 2010) (Pristas was not there to give any evidence with respect to how the penalty satisfied the agency's penalty schedule or statutory penalty requirements); Tr. at 796:17-20 (October 28, 2010) (Myers did not look at specifics of this case and what went into setting the penalty). **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

87. PPSF presented Mr. Steven Hughes as an expert in the valuation of fishing and processing activity. Tr. at 1030:23-1031:25 (October 29, 2010). **RULING: ACCEPTED AND INCORPORATED.**

88. In 2004 and 2005, the State of Alaska set a Guideline Harvest Level ("GHL") for crab. Tr. at 1025:20-1026:5 (October 29, 2010). The GHL could have been adjusted based on the actual catch for the season. Tr. at 1026:16-1027:6 (October 29, 2010). If, for example, the Alaska Department of Fish and Game felt that the GHL was too low and the catch rates were high, it would allow the season to exceed the GHL. *Id.* At that time, there was no total allowable catch that the fishing industry was not allowed to exceed. *Id.* at 1027:7-12. **RULING: ACCEPTED AND INCORPORATED.**

89. Mr. Hughes calculated that there was a total industry shortfall between the GHL and the actual landings for Bristol Bay Red King crab for the 2004 season in an amount of approximately 315,000 pounds. Tr. at 1066:9-1067:14 (October 29, 2010); Resp. Exh. R62 at 7-8 (Key Data Set 1). He calculated that for tanner crab (i.e., snow crab), the actual landings for the industry exceeded the GHL by approximately 2.6 million pounds in 2004 and 3.4 million pounds in 2005. *Id.* at 1067:15-1068:2; Resp. Exh. R62 at 7-8 (Key Data Set 1). **RULING: ACCEPTED AND INCORPORATED.**

90. In 2004, PPSF's cap for Bristol Bay Red King crab was 2.258 million pounds. Tr. at 1068:10-17; Resp. Exh. R62 at 8 (Key Data Set 2). For tanner crab, PPSF's cap in 2004 was 1,942,893 pounds in 2004 and 1,952,270 pounds in 2005. *Id.* at 1068:18-23; Resp. Exh. R62 at 8 (Key Data Set 2). For tanner crab, where the actual landings exceeded the GHL in 2004 and 2005, PPSF's cap would have increased by 269,0899 pounds to a cap of 2,212,792 pounds in 2004 and by an additional 347,873 pounds to a cap of 2,300,000 pounds for 2005 if based on actual landings for those years. *Id.* at 1069:2-8; Resp. Exh. R62 at 8 (Key Data Set 2). **RULING: ACCEPTED AND INCORPORATED.**

91. PPSF did not exceed its cap for Bristol Bay Red King crab or tanner crab in 2004 based on GHIL exclusive of any STELLAR SEA history or STELLAR SEA purchases. Tr. at 1073:8-16 (October 29, 2010); Resp. Exh. R62 at 9 (Key Data Set 3). PPSF exceeded its cap for tanner crab in 2005 by a de minimis amount (45,828 pounds) based on GHIL exclusive of any STELLAR SEA history or STELLAR SEA purchases. *Id.* at 1073:17-20; Resp. Exh. R62 at 9 (Key Data Set 3). And, PPSF did not exceed its tanner crab cap by any amounts in 2004 or 2005 based on actual landings exclusive of any STELLAR SEA history or STELLAR SEA purchases. Resp. Exh. R62 at 10 (Key Data Set 3). **RULING: REJECTED FOR THE REASONS DISCUSSED IN THIS DECISION AND ORDER.**

92. If NOAA had deemed the STELLAR SEA to be an AFA processor because of its affiliation with PPSF, then it would have been given its own cap and its history would have been included with PPSF. Tr. at 1081:8-19 (October 29, 2010). Thus, PPSF's cap would have been higher for both Bristol Bay Red King crab and tanner crab. *Id.*; see also Resp. Exh. R62 at 11 (Key Data Set 5). If the PPSF and STELLAR SEA purchases were combined relative to the combined cap, then the overage for Bristol Bay Red King crab in 2004 based on GHIL is only 158,668 pounds. Tr. at 1082:2-8 (October 29, 2010); Resp. Exh. R62 at 12 (Key Data Set 6). The overage is 872,850 pounds in 2004 and 1,278,092 pounds in 2005 for tanner crab for PPSF and the STELLAR SEA combined relative to the combined cap and based on GHIL. Tr. at 1082:2-17; Resp. Exh. R62 at 12 (Key Data Set 6). Based on actual landings, the overage for combined PPSF and STELLAR SEA tanner crab purchases under a combined cap decreases even further to approximately 481,000 pounds in 2004 and 773,000 pounds for 2005. *Id.* **RULING: REJECTED FOR THE REASONS DISCUSSED IN THIS DECISION AND ORDER.**

93. The STELLAR SEA custom processed 316,640 pounds of Bristol Bay Red King crab in 2004 for Trident Seafoods. It also custom processed 224,946 pounds of tanner crab in 2004 and 336,621 pounds of tanner crab in 2005 for Trident Seafoods. Resp. Exh. R62 at 13 (Key Data Set 7). PPSF or the STELLAR SEA purchased this crab under their fish tickets but the crab was owned by Trident Seafoods. *Id.*; see also Tr. at 1084:18-1085:1 (October 29, 2010). Because this crab was owned by Trident Seafoods, it could not have been processed by another non-AFA processor. Tr. at 1085:2-10 (October 29, 2010). Thus, there was no harm to any non-AFA processors from the amount of crab the STELLAR SEA custom processed for Trident Seafoods because a non-AFA processor could not have purchased the crab that the STELLAR SEA processed on behalf of Trident Seafoods because Trident Seafoods owned the crab. Tr. at 1089:14-23 (October 29, 2010). **RULING: REJECTED FOR THE REASONS DISCUSSED IN THIS DECISION AND ORDER. MR. HUGHES TESTIFIED AT THE HEARING THAT THERE IS NO WAY TO KNOW WHETHER A NON-AFA PROCESSOR COULD HAVE PROCESSED THE TRIDENT CRAB.**

94. The STELLAR SEA was never identified as an AFA processor and NMFS never included it in PPSF's cap. Tr. at 965:6-966:10 (October 29, 2010); 1095:12-17 (October 29, 2010); see also Resp. Exhs. R19, R22. And, NMFS, the North Pacific Fishery Council, and the Alaska Department of Fish and Game specifically identified the STELLAR SEA as a non-AFA processor. Tr. at 1095:12-17 (October 29, 2010); see also Resp. Exh. R19. If the STELLAR SEA had been identified as an AFA processor through its affiliation with PPSF it would have been assigned its own cap, which would have been added to PPSF's cap. Tr. at 1095:18-22, 1096:3-17 (October 29, 2010). **RULING: ACCEPTED AND INCORPORATED.**

95. NOAA unnecessarily calculated the amount of penalty based on \$4.2 million in revenue it attributed to PPSF. Tr. at 1107:2-1108:23 (October 29, 2010). The calculation of the penalty did not take into account any economic gain, economic benefit, or net profit that was attributable to PPSF. *Id.* NOAA did not take into account any processing costs, custom processing charges, labor costs, transportation, materials, shipping fees, marketing, taxes or operational overhead related to the crab processed by the STELLAR SEA. *Id.* Agent Pristas admitted that he did not know whether PPSF had realized any profit from the NOAA calculated overages. Tr. at 583:16-584:18 (October 27, 2010). NOAA made no determination of ill gotten gains. NOAA only identified the amount of money that was the difference between the amount the crab product was sold for and the amount the crab was purchased for. Tr. at 583:20-24 (October 27, 2010). In fact, PPSF lost \$1.4 million to \$1.5 million on the crab processed from the STELLAR SEA in 2004 and 2005. Tr. at 1257:4-1258:5 (November 1, 2010). **RULING: ACCEPTED AND INCORPORATED.**

96. There were not 45 separate occurrences of overages as alleged by NOAA. Tr. at 1110:2-17 (October 29, 2010). Assuming any overage is calculated based on a recalculated cap for PPSF that included the crab

processing history of the STELLAR SEA, an overage occurred for Bristol Bay Red King crab only on the final day of the Bristol Bay Red King crab season on October 25, 2004 and for tanner crab on two days in 2004, on February 2 and 3, and three days in 2005, on January 30, 31, and February 1. *Id.* Agent Pristas testified that the violation, if any, continued from 2000 to 2005 because the agency alleged an overage during those years. Tr. at 581:6-14 (October 27, 2010). **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

97. NOAA did not present any evidence that any particular company lost any market opportunity or was available to process the crab that was processed on the STELLAR SEA at a competitive price. **RULING: ACCEPTED AND INCORPORATED IN PART. REJECTED TO THE EXTENT THAT THIS PROPOSED FINDING IS INCONSISTENT WITH THIS DECISION AND ORDER.**

98. NOAA also did not present any evidence with respect to the amount of the aggregate AFA-beneficiary crab processing caps for 2004 and 2005 or whether such aggregate caps were exceeded. Tr. at 1086:1-14 (October 29, 2010). **RULING: ACCEPTED AND INCORPORATED IN PART. REJECTED TO THE EXTENT THAT THIS PROPOSED FINDING IS INCONSISTENT WITH THIS DECISION AND ORDER.**

99. The caps under either GHIL or actual landings represent an allocation issue. Tr. at 1081:18-25 (October 29, 2010). There is no conservation issue and no harm to the resource. *Id.*; NOAA did not present any evidence of harm to the resource related to processing. Tr. at 811:15-21 (October 28, 2010). **RULING: ACCEPTED AND INCORPORATED.**

J. Tolling Agreements

100. NOAA, PPSF, and Seven Seas entered into a Tolling Agreement dated December 29, 2008 covering the allegations set forth in the NOVA in this case to March 31, 2009. Resp. Exh. R44. A second Tolling Agreement was entered into by the parties on or about March 30, 2009 extending the tolling period to June 30, 2009. Resp. Exh. R45. The NOVA was validly served on PPSF and Seven Seas on June 18, 2009. **RULING: ACCEPTED AND INCORPORATED.**

II. PROPOSED CONCLUSIONS OF LAW

A. NOAA Has Failed to Meet its Burden of Proof for a Penalty

101. The civil penalty provisions of the Magnuson-Stevens Act, 16 U.S.C. § 1858(a), incorporate the formal adjudicatory hearing requirements of the Administrative Procedure Act (APA). Pursuant to 5 U.S.C. § 556(d), NOAA, as the "proponent of a rule or order," bears the burden of proof in this proceeding with respect to proving a violation of a statute or regulation as well as the appropriateness of any penalty. *Rice v. Nat'l Trans. Safety Bd.*, 745 F.2d 1037, 1039 (6th Cir. 1984) (FAA has burden of proof in prosecuting violation of its rules). The Supreme Court has ruled that the burden of proof under the APA means the "burden of persuasion" not the burden of production, meaning that "if the evidence is evenly balanced, the party that bears the burden of persuasion must lose." *Director, Office of Worker's Comp. Programs, Dept. of Labor v. Greenwich Collieries*, 512 U.S. 267, 272 (1994). **RULING: ACCEPTED AND INCORPORATED.**

102. In this formal adjudicatory hearing, the standard of proof is a preponderance of the evidence. *Steadman v. SEC*, 450 U.S. 91 (1981). To prevail, therefore, NOAA must establish that it is more likely than not that PPSF and Seven Seas violated the agency's regulations with respect to the crab processing caps under the AFA. **RULING: ACCEPTED AND INCORPORATED.**

103. As discussed further below, NOAA's own administrative record with respect to the issuance of PPSF's crab processing caps demonstrates that those in the agency with program responsibility to decide the regulatory questions at hand, or make the related governmental-function policy decisions, support the conclusion that PPSF did not own or control 10 percent or more of the interest in Seven Seas, Cypress or the STELLAR SEA. NOAA did not present any testimony at the hearing to demonstrate that the determinations made in the

administrative record with respect to PPSF's crab processing caps should be disturbed by this court. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

104. Second, even if this court were willing to overlook the agency's final decisions on PPSF's crab processing caps in those years at this late date, the agency's own regulations, fairly read, indicate that PPSF had to have owned or controlled 10 percent or more of the interest in Cypress, or the processor STELLAR SEA itself, in order to be "affiliated" with that processing facility. It would not be sufficient that PPSF owned or controlled 10 percent or more of the interest in Seven Seas, which did not own or control any interest in Cypress or the vessel itself. *See, Alaska Excursion Cruises, Inc. v. United States*, 608 F.Supp. 1084 (D.D.C. 1985) (bareboat charter agreement does not make charterer de facto owner of the vessel). **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

105. Finally, even if the court reached the issue of the alleged control of PPSF over Seven Seas, the conclusion would have to be that PPSF did not have any legal right or ability to control "an interest" in Seven Seas, which can only be interpreted to mean an ownership interest. Simple business dealings, based on contractual relationships, do not amount to control over such "an interest" without legal authority to act as the owner (such as by voting stock or having enforceable authority to direct the business of the company) or evidence that Seven Seas, in some specific way, followed the directives of PPSF contrary to its own corporate interest. Finally, based on the precedent in the DHL case, no actual control by PPSF over Sevens Sea can be found based on the record before the court. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

106. Prior to the hearing, PPSF and Seven Seas filed a motion seeking summary adjudication of the case based on the theory that the only official administrative record with regard to PPSF's crab processing cap supported the conclusion that any crab custom processed for PPSF by Seven Seas on the STELLAR SEA was not considered a violation of PPSF's crab processing cap. The point made by PPSF is that NOAA's theory of violation, i.e. that crab processed on the STELLAR SEA for PPSF should count against PPSF's crab processing cap, is not consistent with the agency formal, final record of decision with respect to the processing caps. The administrative record indicates that the NMFS did not consider the STELLAR SEA as "affiliated" with PPSF under the agency's AFA regulations and the final AFA permits to PPSF's crab processing caps that were based solely on the crab processing history of PPSF's King Cove plant and the BLUE WAVE, which was affiliated with PPSF because of its ownership in the vessel. The STELLAR SEA has always been treated as a "non-AFA processor." **RULING: ACCEPTED AS INDICATING THAT PETER PAN AND SEVEN SEAS FILED SUCH A MOTION BUT REJECTED TO THE EXTENT THIS PROPOSED FINDING STATES OR IMPLIES THAT SUCH MOTION WAS LEGALLY SUFFICIENT TO BE GRANTED.**

107. In this proceeding, NOAA does not allege that PPSF or Seven Seas committed any fraud or failed to make any material disclosure with respect to their relationship as to use of the STELLAR SEA. In fact, in the run-up to implementation of the AFA, an agency document dated August 1999 (Resp. Exh. R2) contains an organizational chart for Nichiro Corporation that indicates PPSF's relationship with the King Cove Plant, the BLUE WAVE, and the STELLAR SEA. PPSF also disclosed its ownership interest in Seven Seas in its original AFA permit application in 1999. Resp. Exh. R7. In July 2000, the North Pacific Council released a report that contained an organization chart showing that First Hawaiian Bank owns "100 percent" of the STELLAR SEA, which is chartered by Seven Seas. Resp. Exh. R16. **RULING: ACCEPTED AND INCORPORATED.**

108. More particularly, because of complaints by other industry members, a NMFS enforcement agent conducted an investigation into the question of the relationships between and among PPSF, Seven Seas and the STELLAR SEA in early 2000. Resp. Exhs. R10, R11 and R12. Individuals with the NMFS RAM Division, those responsible for issuing AFA permits and crab processing caps, were listed on emails relating to the investigation. Resp. Exh. R17. At the conclusion of the investigation, the agency (Mr. Rohn Nelson and others) concluded that the "F/V STELLAR SEA was not required to be listed as a facility under the Peter Pan/Nichiro Entity by definition of the ownership and 10% control standard." *Id.* Thus, the administrative record shows that the agency was fully aware of the relationship between and among the owner of the STELLAR SEA, PPSF and Seven Seas from 2000 on and continued to treat the STELLAR SEA as a "non-AFA processor" not subject to any processing caps and as not affiliated with PPSF. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

109. Pursuant to 50 C.F.R. § 904.210, a Motion for Summary Adjudication requires that a joint request be made by all the parties. NOAA refused to waive this requirement. As a result, the motion was denied. However, now that all evidence has been presented and the hearing is concluded, this issue is ripe for consideration. **RULING: ACCEPTED AND INCORPORATED.**

110. Federal courts follow the precedent that an established administrative procedure or decision is entitled to a presumption of administrative regularity that will not be disturbed by a court absent clear evidence to the contrary. *Wilson v. Hodel*, 758 F.2d 1369, 1374 (10th Cir. 1985). The issuance of an AFA permit that included crab processing caps would be such an agency action in light of the agency's AFA permit procedure regulations. Typically, someone challenging such an agency action has the burden of overcoming this presumption by presenting evidence of a "clear error in judgment." *Citizens to Preserve Overton Park v. Volpe*, 401 U.S. 402, 416 (1971). Moreover, courts do not allow a final administrative record to be supplemented unless it is so inadequate that it will frustrate judicial review. *See e.g., Bar MK Ranches v. Yuetter*, 994 F.2d 735, 739-740 (10th Cir. 1993); *Rybacek v. EPA*, 904 F.2d 1276, 1296 n.25 (9th Cir. 1990) (denying motion to supplement where "original record [] adequately explains the basis of [the agency's] decision and demonstrates that the [agency] considered the relevant factors"). As the Supreme Court has stated:

Simple fairness to those who are engaged in the tasks of administration, and to litigants, requires a general rule that courts should not topple over administrative decisions unless the administrative body not only has erred but erred against objection made at the time appropriate under its practice.

United States v. L. C. Tucker Truck Lines, Inc., 344 U.S. 33, 37 (1952); *see also Wilson*, 758 F.2d at 1372-1373; *McCrary v. Gutierrez*, 495 F.Supp.2d 1038, 1041 (N.D. Cal. 2007) ("[I]n the absence of clear evidence to the contrary, courts presume that [public officials] have properly discharged their official duties") (internal quotations omitted). Typically, this presumption is used as a defense by government agencies. However, logically, it should apply against the agency as an affirmative defense by a regulated party. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

111. In this case, the authorized officials of NMFS, the RAM Division, acting for the Regional Administrator, routinely issued AFA permits and crab processing caps to PPSF that did not include the processing history of the STELLAR SEA and did not issue any such permits or caps to Stellar Seafoods, Inc. with respect to the STELLAR SEA. Moreover, NOAA has presented no evidence that either the RAM Division or the Regional Administrator has ever, in accordance with regular procedure, made any decision otherwise. Decision-making authority on such questions, such as the determination of "control" or "affiliation" under the AFA regulations, resides with the Regional Administrator, not the General Counsel of NOAA. Resp. Exh. R43; 50 C.F.R. § 679.65. And, in addition, counsel for NOAA has not presented "clear evidence" overcoming the presumption of administrative regularity that attaches to the agency's earlier determinations with respect to PPSF's crab processing cap. In fact, NOAA has only offered the "opinion" testimony of a long-time, highly paid outside consultant whose testimony is suspect for that reason, is legal opinion, and is not reliable as representing how the agency would apply its own regulations to the facts of this case. The agency cannot be allowed to impeach its own decisions based on an outside consultant who is neither a lawyer nor an agency employee. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

112. The NMFS AFA regulations in effect during the alleged violation period (R77; 50 C.F.R. § 679.65) make clear that the Regional Administrator of NMFS is to "calculate a crab processing cap" for each AFA entity and notify that entity of their percentage cap by listing it on that entity's annual AFA permit. Resp. Exh. R75; 50 C.F.R. § 679.4(I) (AFA permit regulations). That process begins with the filing of an application with the RAM Division. 50 C.F.R. § 679.4(I)(1)(iii). The regular procedures followed by the RAM Division then transpire as follows:

The Regional Administrator will evaluate an application for an AFA fishing or processing permit submitted in accordance with paragraph (1) of this section and compare all claims in the application with the information in the official AFA record. Claims in the application that are consistent with the AFA record will be accepted by the Regional Administrator. Inconsistent claims in the application, unless supported by evidence, will not be accepted. An applicant who submits claims based on inconsistent information or fails to submit the information specified in the application for an AFA permit will be provided a single 60-day evidentiary period to

submit the specified information, submit a revised application with claims consistent with the information in the official AFA record. An applicant who submits claims that are inconsistent with information in the official AFA record has the burden of proving that the submitted claims are correct.

50 C.F.R. § 679.4(l)(8)(i), page 642; Resp. Exh. R75. *See generally, Alaska Trojan Partnership v. Gutierrez*, 425 F.3d 620 (9th Cir. 2005) (general discussion of the administrative process for issuing crab permits). **RULING: ACCEPTED AND INCORPORATED.**

113. The Regional Administrator then makes an initial administrative decision (IAD) and sends it to the applicant, within 60 days, if the Regional Administrator determines that the information or evidence submitted by the applicant fails to support the applicant's claims and is insufficient to rebut the presumption that the official AFA record is correct. 50 C.F.R. § 679.4(l). In turn, this IAD may be appealed to the Regional Administrator in accordance with the appellate procedures set forth in 50 C.F.R. § 679.43; Resp. Exh. R76. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER TO THE EXTENT THIS PROPOSED CONCLUSION SEEKS TO ABSOLVE RESPONDENTS FROM LIABILITY.**

114. By formal delegation of authority from the Secretary of Commerce and the Administrator of NOAA, as well as the agency's own AFA regulations, the Regional Administrator of NMFS is the authorized official for deciding all questions relating to the interpretation and application of those regulations to PPSF and Seven Seas. Resp. Exh. R43; 50 C.F.R. § 679.65. As set forth above, the AFA regulations specify a particular administrative process for making such decisions under the regulations and the related fishery management plan. Authority to make such decisions does not reside with the Office of General Counsel. Only the Regional Administrator may make policy and discretionary decisions relating to this authority. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER TO THE EXTENT THIS PROPOSED CONCLUSION SEEKS TO ABSOLVE RESPONDENTS FROM LIABILITY.**

115. The logic of the principle of primary jurisdiction also supports PPSF's position. This doctrine seeks to ensure that an administrative agency possessed of both expertise and authority delegated by Congress should pass on an issue within their authority before it is considered by the courts. 4 K. Davis, *Administrative Law Treatise* § 22:1 at 81(1983); *Baltimore & O.R.R. v. United States*, 215 U.S. 481, 496 (1910). The logic of that doctrine applies equally to this proceeding as well. *See also, Far East Conference v. U.S.*, 342 U.S. 570, 574-5 (1952); *Mississippi Power & Light Co. v. United Gas Pipeline Co.*, 532 F.2d 412, 417 (5th Cir. 1976).

NMFS officials are delegated decision-making authority given to the Secretary of Commerce. Resp. Exh. R43. These officials should exercise their authority on issues relating to application of regulations rather than have this administrative court make those decisions in the first instance. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER TO THE EXTENT THIS PROPOSED CONCLUSION SEEKS TO ABSOLVE RESPONDENTS FROM LIABILITY.**

116. Courts apply the principle of primary jurisdiction to require the agency itself first pass on questions of discretion and policy-making. *United States v. General Dynamics Corp.*, supra. If NOAA were seeking to enforce a ruling by the RAM Division, reached pursuant to its regular administrative procedures, then administrative review of that decision would have been appropriate and timely in this penalty proceeding. But that has not occurred here. NOAA counsel is seeking to present a case that is not the decision of the RAM Division or any agency official. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER TO THE EXTENT THIS PROPOSED CONCLUSION SEEKS TO ABSOLVE RESPONDENTS FROM LIABILITY.**

117. The four factors that generally support application of the doctrine of primary jurisdiction are: (1) the need to resolve an issue that (2) has been placed by Congress within the jurisdiction of an administrative body having regulatory authority (3) pursuant to a statute that subjects an industry or activity to a comprehensive regulatory scheme that (4) requires expertise or uniformity in administration. *United States v. General Dynamics Corp.*, 828 F.2d 1356, 1362-63 (9th Cir. 1987). Thus, by the same rationale, an administrative law judge in an enforcement proceeding should not be interpreting and applying the AFA regulations to the facts in this case in the first instance, but instead should be reviewing the agency's final decisions for purposes of determining a civil penalty, based on the formal administrative record. Otherwise, the administrative law judge would be exercising the

agency's discretionary powers, for example in applying the meaning of the statutory words "interest" and "control" to the facts of this case, rather than simply reviewing what the agency did and then deciding whether a civil penalty is warranted. If this principle is not applied in the circumstances that exist here, the danger of widely varying interpretations by different administrative law judges is considerable. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER TO THE EXTENT THIS PROPOSED CONCLUSION SEEKS TO ABSOLVE RESPONDENTS FROM LIABILITY.**

118. The essential facts in the agency's administrative record of implementation of the AFA and issuance of AFA permits by the RAM Division, which are part of the "official AFA record," are the following:

a. The North Pacific Council investigated the relationships between and among various crab processors for purposes of implementing the AFA crab processing caps. Resp. Exhs. R1, R2, R3, and R4.

b. PPSF applied for an AFA permit in 1999 and identified the processing facilities with which it was affiliated as the King Cove Plant and the BLUE WAVE, a vessel owned by a subsidiary of Seven Seas Fishing Company, in which PPSF has a stock ownership interest. Resp. Exh. R7. Seven Seas Fishing Company was listed as "affiliated" for this purpose. *Id.*

c. NMFS was advised in early 2000 by third parties of a concern that the STELLAR SEA should be included in PPSF's crab processing cap. Resp. Exh. R10. Mr. Lind sent an email to PPSF questioning this issue on March 20, 2010. Resp. Exh. R12.

d. By letter dated March 24, 2000, NMFS notified PPSF of its crab processing cap percentages, identifying the relevant processing facilities as King Cove and the BLUE WAVE. Resp. Exh. R13. NMFS did not include STELLAR SEA in PPSF's crab processing cap. *Id.*

e. On July 24, 2000, the Executive Director of the North Pacific Council released a document that contained an analysis of AFA Sideboard Limits, with an Organization Chart showing the relationship between PPSF and the STELLAR SEA. The ownership (100%) of the STELLAR SEA is shown as First Hawaiian Bank. Resp. Exh. R16.

f. On July 31, 2000, Mr. Rohn Nelson, a NMFS Investigator, prepared an Investigation Report on the STELLAR SEA, concluding, after consultation with Kent Kind and the chief NMFS investigator in Alaska, Mr. Hansen, that "given the corporate make up and the relationship of the entities, the F/V STELLAR SEA was not required to be listed as a facility under the Peter Pan/Nichiro Entity by definition of ownership and 10% control standard." Resp. Exh. R17. Copies of related emails indicate that the NMFS RAM Division was aware of this investigation. *See* Resp. Exh. R17 (emails sent to Phil Smith and Jessica Gharrett regarding investigation).

g. On August 1, 2000, a letter from James Balsiger, NMFS Regional Administrator, reaffirms PPSF's crab processing cap, identifying the King Cove and BLUE WAVE processing facilities. Resp. Exh. R18.

h. On August 7, 2000, a Discussion Paper on Crab Processing Sideboard Caps is issued by the North Pacific Fishery Management Council and the Alaska Department of Fish and Game, listing Stellar Seafoods, Inc. as a non-AFA processor and PPSF-King Cove and Blue Wave Seafoods, Inc. as AFA processors. Resp. Exh. R19.

i. By Facsimile Message, dated August 9, 2000, the RAM Division sent a corrected table listing AFA and non-AFA processors to PPSF. PPSF King Cove and Blue Wave Seafoods, Inc. are listed as AFA processors and Stellar Seafoods, Inc. is listed as non-AFA processor. Resp. Exh. R20.

j. On January 21, 2001, the RAM Division sent PPSF notice of its crab processing caps for the year, listing only the PPSF-King Cove and BLUE WAVE processing facilities. Resp. Exh. R22.

k. On August 29, 2001, James Balsiger sent a letter to the Alaska Department of Fish and Game, with a list of AFA processors, including PPSF-King Cove and the BLUE WAVE (but not the STELLAR SEA), indicating, inter alia, that PPSF might have a third processor included in its "entity." Resp. Exh. R23.

l. The U.S. Maritime Administration informed Gary Greenwood, then-President of Seven Seas Fishing Company, that (a) PPSF and Nichiro must sell their ownership interest in Seven Seas; (b) no PPSF employee can be on the board of Seven Seas; (c) Seven Seas must move to separate offices and provide for its own administrative services and office equipment; and (d) the Performance Guaranty by PPSF and Nichiro must be rewritten to provide only a limited guarantee. Resp. Exh. R24. All directives of the Maritime Administration were complied with by Seven Seas. As of October 31, 2001, PPSF no longer had any interest in Seven Seas. With these changes, the U.S. Maritime Administration concluded that PPSF had no improper control over Seven Seas within the meaning of the AFA and the Vessel Documentation Act.

m. On December 17, 2001, NMFS issued a proposed rule implementing various provisions of the AFA, including with respect to crab processing caps. Resp. Exh. R31.

n. On January 8, 2002, the NMFS RAM Division issued crab processing caps to PPSF, unchanged from prior years. Resp. Exh. R32.

o. On December 30, 2002, NMFS issued a final rule implementing various provisions of the American Fisheries Act, including with respect to crab processing caps. Resp. Exh. R33.

p. In January 2003, the NMFS RAM Division issued crab processing caps to PPSF, unchanged from prior years. Resp. Exh. R34.

q. On January 29, 2003, PPSF filed a revised AFA Inshore Processor Permit, listing Seven Seas Fishing Company and stating that "[a]s of October 29, 2001 Peter Pan Seafoods, and Nichiro Corporation divested themselves of all interest in Seven Seas." Resp. Exh. R35.

r. On October 6, 2004, the RAM Division sent a letter to PPSF indicating that the history of the BLUE WAVE was being dropped from PPSF crab processing caps because of the notice of divestiture of interest in Seven Seas. Resp. Exh. R36.

s. An email (August 2004) from Dale Schwarzmilller, PPSF, indicated that Phil Smith of the NMFS RAM Division would allow PPSF to provide its interpretation of the regulations before any final decision. Resp. Exh. R37.

t. In a letter dated October 6, 2004, the RAM Division reconsidered and determined that it was appropriate to include the history of the BLUE WAVE in the PPSF crab processing caps and that PPSF remained "affiliated" with the processing capacity of Blue Wave Seafoods, Inc. Resp. Exh. R38. PPSF's crab processing caps remained the same as in 2000-2003.

u. PPSF filed its application for a 2005 AFA Inshore Processing Permit by facsimile dated December 23, 2004. Resp. Exh. R39.

v. By letter dated January 6, 2005, the NMFS RAM Division issued PPSF its crab processing caps for 2005, which remained the same. Resp. Exh. R40.

RULING: ACCEPTED AND INCORPORATED WITH RESPECT TO FACTUAL STATEMENTS CONTAINED BUT REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER TO THE EXTENT THIS PROPOSED CONCLUSION SEEKS TO ABSOLVE RESPONDENTS FROM LIABILITY.

119. As noted above, no employee of the RAM Division, or the Regional Administrator himself, testified at the hearing in person or by deposition testimony that they endorsed the interpretation and application of the AFA regulations alleged in the NOVA or the alleged “expert” testimony of Gerald Hellerman, a private consultant who did testify at the hearing. In fact, the NOAA program officials stated that they are never involved in signing off on the contents of a NOVA. Tr. at 460:18-23 (October 27, 2010) (Balsiger Dep. 74:10-18); 461:5-10 (Gharrett Dep. 21:10-14). They also stated they had no knowledge of Mr. Hellerman, whom NOAA General Counsel seeks to offer as an “expert” on the interpretation of corporate control under the AFA regulations and application of that interpretation to the facts of this case. Tr. at 968:14-21 (October 29, 2010) (Balsiger Dep. 88:17-25); 975:19-976:3 (Smith Dep. 56:22-57:4); 977:11-14 (Gharrett Dep. 40:19-20). Mr. Hellerman, besides not being a licensed attorney (and therefore not qualified to give legal opinions), clearly does not speak for the agency and is forbidden by Federal Acquisition Regulations from performing any inherently governmental function, including interpreting and applying regulations. See Federal Acquisition Regulation, §7.502 (May 2005); R77. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

120. While a court may give “substantial deference to an agency’s interpretation of its own regulations,” there is no case law giving deference to a non-employee consultant’s interpretation of agency regulations. *Thomas Jefferson Univ. v. Shalala*, 512 U.S. 504, 511 (1994). The opinion of a consultant interpreting the agency regulations does not provide admissible evidence and usurps the role of the agency. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

121. I therefore find that NOAA has failed to meet its burden of proving that PPSF and Seven Seas have violated the AFA crab cap violations because the formal administrative record does not support the conclusion that the STELLAR SEA is an AFA crab processing facility subject to any crab processing caps. Furthermore, NOAA has not proved that NOAA program officials with the requisite authority agreeing with its theory of violation. Finally, the administrative record with respect to PPSF’s crab processing caps is final and cannot be challenged by the agency in this proceeding because there is no compelling reason to reopen the administrative record with new evidence and new interpretations of law not supported by the agency’s authoritative program officials. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

122. Deference to the agency’s only decision of record (i.e., that PPSF’s crab processing cap does not include the STELLAR SEA) also avoids the problem of entrapment by estoppel. *U.S. v. Hedges*, 912 F.2d 1397, 1405 (11th Cir. 1990) (entrapment by estoppel applies when an official tells a defendant that certain conduct is legal and the defendant believes that official). As the Ninth Circuit decision in *United States v. Lazy FC Ranch* illustrates, the “estoppel doctrine is applicable to the United States where justice and fair play require it.” 481 F.2d 985, 988 (9th Cir. 1973). The evidence shows that NOAA program officials did more than simply rely on PPSF’s statements in its AFA permit applications. Several entities (the North Pacific Council, the Alaska Department of Fish and Game and NMFS itself) treated the STELLAR SEA as a non-AFA processor after studying the question. NOAA did the same after conducting an investigation in 2000. Evidence documenting these facts is part of the “official AFA record” in this case. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

B. Based on AFA Section 211 and the Agency’s Own Regulations, NOAA’s Enforcement Case Focuses on the Wrong Entity

123. NOAA’s only allegation in this case is that PPSF “exerted 10% or more control over SEVEN SEAS. Resp. Exh. R52 (NOVA at ¶ 9, p. 6). However, Section 211 of the AFA focuses its “affiliation” text on the facilities that process fish and the obligations of “owners.” In this case, unlike with respect to the BLUE WAVE, neither PPSF nor Seven Seas owned or controlled any interest in the STELLAR SEA or its owner, Cypress. Therefore, NOAA has failed to establish that the relationship between PPSF and Seven Seas amounted to “affiliation” with the processing facility STELLAR SEA (or its owner) under Section 211 of the AFA and NOAA’s final AFA implementing regulations issued at the end of 2002. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

124. First, the STELLAR SEA has never been designated as an “AFA crab facility.” In its Emergency Interim Rule issued on January 5, 2000, NOAA defined an “AFA crab facility” as a processing plant, catcher processor, mothership, floating processor or other operation that processes Bering Sea or Aleutian Island king or

tanner crab in which any individual, corporation, or other entity that is part of an AFA entity either directly or indirectly owns a 10 percent or greater interest, or exercises a 10 percent or greater control. Resp. Exh. R8. The regulation could be read as meaning ownership or control either with respect to the vessel itself or the owner of the vessel, but it would be too vague to extend its meaning to the entity picked by the owner to operate the vessel on its behalf. In fact, this is exactly the interpretation applied by Mr. Rohn Nelson in his July 2000 investigative report. It is further confirmed by the agency's regulations where it states that "control" does not include the right (presumably a contractual right) to simply participate in the business of the vessel. Finally, NOAA permit regulations address the obligation of the "owner" of the processing facility or vessel to obtain an AFA permit, not some other entity. All in all, the proper focus of the regulation is ownership and control of 10 percent or more of the owner of the STELLAR SEA or the vessel itself. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

125. Second, a fair reading of NOAA's final AFA regulations issued in 2002 does not change this conclusion. The definition of "affiliation" that appears in those regulations for the first time, based on a full reading of its provisions, including the text answering the questions posed thereunder, also focuses on the "entity that holds a 10 percent or greater interest in a fishing vessel or processor." 50 C.F.R. § 679.2 (What is control?: (3)(i) "controls 10 percent or more of the voting stock of another corporation"; (ii) "does not include the right simply to participate in the direction of the business activities of an entity which owns a fishing vessel or processor"; (iii) "of an entity that holds 10 percent or greater interest in a fishing vessel or processor"; (v) "has the authority to control the management or to be a controlling factor in the entity that holds a 10 percent or greater interest in a fishing vessel or processor"; and (ix) "has the ability through any other means whatsoever to control the entity that holds a 10 percent or greater interest in a fishing vessel or processor." **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

126. Third, the definition of the term "interest" in Black's Law Dictionary, 9th ed. (West 2009) at p885 is: "a legal share in something; all or part of a legal or equitable claim." The plain reading of this term points to the conclusion that Congress intended the agency to focus on ownership of a processing facility or control over that ownership interest through a contractual obligation or perhaps simply by allowing the ownership interest (stocks, voting rights) to be controlled by someone else through default or total deference. In this case, the entire ownership interest in the STELLAR SEA is held by Cypress, a fact that is not contested by NOAA. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

127. Fourth, the fact that Seven Seas, through a subsidiary, chartered the STELLAR SEA does not make Seven Seas a vehicle through which PPSF held a 10 percent or greater interest in Cypress or the vessel itself. Such an argument is simply too attenuated in light of the meaning of the term "interest" and not consistent with an overall reading of the AFA and the agency's AFA regulations. In addition, PPSF cited the Federal District Court decision in *Alaska Excursion Cruises, Inc. v. United States*, 608 F. Supp. 1084 (D. D.C. 1985). In that case, the court concluded that the bareboat charterer of a vessel subject to the Shipping Act of 1916, similar to the charter agreement in the present case, was not the de facto owner of the vessel where, among other things, the charterer retained exclusive possession and control for the vessel and was responsible for paying the vessel's documentation, maintenance and repair costs, taxes, and insurance but the owner of the vessel retained certain ownership rights, including receiving all tax benefits from ownership. *Id.* at 1086, 1089-1090. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

C. PPSF Did Not Own or Control 10 Percent or More of the Interest in Seven Seas

1. *The term "interest" is defined by its plain meaning and means an "ownership interest."*

128. The statutory language in the AFA identifies the standard by which it must be determined by which one entity owns or controls another entity as the "interest" in the another entity. The term is not defined in the AFA and NOAA did not define this important term in its regulations. The former head of NMFS's Alaska RAM Division, Mr. Phil Smith, stated that he assumed that the agency would define the term in the regulations because he considered it "fraught with differing interpretations." Tr. at 478:13-4793 (October 27, 2010). He stated, under oath, that he had "virtually no understanding" of the term. *Id.* Mr. Smith's Division was responsible for issuing AFA

processing permits and crab processing caps and applying and interpreting the agency's regulations in doing so. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

129. Absent a definition of "the interest" set forth in the statute or regulations, the plain meaning of the term must be applied. The term "the interest" has long been part of the citizenship restrictions on ownership of vessels in the Shipping Act of 1916. *See*, 46 U.S.C. § 50501(d) (which was incorporated into the Vessel Documentation Act rules on fishing vessel documentation by Section 201 of the AFA, 46 U.S.C. § 12113(c)(2)). That provision contains four factors to be considered in determining whether 75 percent of the interest in an entity is actually controlled by U.S. citizens. The first factor deals with the ownership of stock in the corporation and requires a consideration of whether that ownership is free from any trust or fiduciary obligation in favor of another who is not a citizen. The second factor concerns whether voting power is vested in U.S. citizens. The third factor calls for an examination of whether there is a "contract or understanding" by which more than 25 percent of the voting power in the corporation may be exercised, directly or indirectly, by a non-U.S. citizen. Lastly, that statutory provision calls for an inquiry as to whether there is any other means "by which control of more than 25 percent of any interest in the corporation is given to or permitted to be exercised by a person not a citizen of the United States." **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

130. The plain meaning of the term "the interest" is defined as "a legal share in something; all or part of a legal or equitable claim." Black's Law Dictionary, 9th ed. at p. 885 (West 2009). NOAA, however, failed to identify or provide any evidence as to the agency's definition of the term "the interest" and the "interest" in Seven Seas that PPSF allegedly controlled. Rather, NOAA relied on the conclusory testimony of Gerald Hellerman, an independent expert who did not work for the agency or have the authority to interpret the statute and regulations on behalf of the agency. He used his own definition of control and was unclear as to what interest in Seven Seas was subject to PPSF's control, testifying it might be a business interest or even a creditor's interest. His opinion, however, was based on the theory that PPSF's ability to withhold funds under the Advance of Funds Agreement gave it the ability to control up to 80 percent of Seven Seas, without PPSF owning a single share of stock in Seven Seas. Yet, withholding funds would have meant substantial financial and business risks to PPSF, which relied on Seven Seas to meet its processing demands for its fishermen. Tr. at 1017:0-1020:14 (November 1, 2010). **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

131. Moreover, Mr. Hellerman's testimony is devoid of any probative value. He lacks the credibility and qualifications to offer an opinion on the agency's interpretation of its own statute and regulations. Nor is he qualified to offer a legal opinion as to the interpretation of the contracts on which he relied for his conclusion. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

132. Absent a definition of the term "the interest" in the statute or promulgated by the agency, the plain meaning of the term must apply. For the reasons described above, the meaning attributed to the term "the interest" must therefore be defined as a legal share in an entity or an ownership interest. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

2. PPSF did not own or control 10 percent or greater interest in Seven Seas.

133. The only question here is whether PPSF owned or controlled any interest in Cypress, the sole owner of the processing vessel, the STELLAR SEA. As discussed above, it is undisputed that neither PPSF nor Seven Seas owned any interest in Cypress. Nevertheless, even if the focus was on the relationship between PPSF and Seven Seas, there could be no finding of any ownership or control by PPSF over Seven Seas. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

134. The evidence is not contradicted that PPSF did not own any interest in Seven Seas. In 2001, MARAD directed PPSF to divest all of its shares in Seven Seas. Thus, in 2004 to 2005, Mr. Mark Weed was vested with 100 percent of the stock in Seven Seas and NOAA presented no evidence to rebut this fact. Resp. Exh. R24 (MARAD letter directing divestiture). PPSF, nor anyone associated with PPSF, owned any stock in that company during the charge period and no evidence was put forward by NOAA to find any "trust or other fiduciary obligation" was given by Mr. Weed to any other individual. **RULING: ACCEPTED AND INCORPORATED.**

135. NOAA has alleged that by virtue of common business relationships between PPSF and Seven Seas, PPSF “controlled” Seven Seas. However, the evidence presented shows that PPSF did not control any “interest” in Seven Seas based on the following factors: **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

a. Since Mr. Weed possessed all the voting stock, Mr. Weed also possessed 100 percent of the voting power in Seven Seas. NOAA, again, presented no evidence supporting any other conclusion and NOAA identified no contract or understanding that specifically gave PPSF any voting power in Seven Seas. PPSF had no stock ownership in Seven Seas, no associated person on that company’s board or serving as an officer, and Seven Seas conducted its own separate business through the time at issue in this case, filing its own taxes, hiring its own employees, and managing the STELLAR SEA on its own. NOAA presented no probative evidence of a written, oral or implied agreement by Mr. Mark Weed ceding his company’s independent authority and corporate power to anyone at PPSF. Mr. Weed also paid \$78,000 for his stock.

b. NOAA identified no specific means by which “control of more than 10 percent of any interest in Seven Seas has been given to PPSF.” As discussed below, PPSF also did not possess de facto control over any interest in Seven Seas and NOAA failed to prove this allegation and certainly failed to prove Mr. Hellerman’s conclusion that PPSF controlled 80 percent of Seven Seas.

c. The regulations specifically exclude participation in the business activities of an entity from the definition of control. *See e.g.*, 50 C.F.R 679.2(3)(ii) and (iv). The agency focused on transactions that are not at all unusual in the business world and which, under the AFA, are not to be factored into the calculation of control where they involve simply the right to participate in the business of another entity. After complying with MARAD’s directions to divest itself of all stock ownership in Seven Seas in October, 2001, PPSF did not even possess the rights of a minority stockholder during the charge period. Tr. at 1236:21–1237:12 (November 1, 2010), 1247:11-21.

136. The agency failed to define “control” in these proceedings and I find Mr. Hellerman made up his own definition, based in part on the Investment Company Act, 15 U.S.C. 80a-1 *et seq.* But that statute, if it were to be applied here, states that “[a]ny person who does not so own more than 25 percentum of the voting securities of that company shall be presumed to not control such company.” 15 U.S.C. 18a-2(a)(9). Using the definition contained in Black’s Law Dictionary, 9th ed., can also lead to uncertainty for that reference contains at least four different definitions of the word “control.” The definition for a noun seems most appropriate by defining “control” as the direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities, by contract, or otherwise; the power or authority to manage, direct, or oversee. Resp. Exh. R80. There are three definitions when “control” is used as a verb: (1) to exercise power or influence over; (2) to regulate or govern; or (3) to have a controlling interest. In the end, the term remains a bit vague. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

137. The agency’s regulations did set forth a number of provisions that gave examples of what would constitute control, and these are set forth above in Finding of Fact No. 71. Based on those provisions (50 C.F.R. § 679.2; Para. 3: *what is control?*), the following conclusions can be drawn:

a. Did PPSF control 10 percent or more of the voting stock in another entity? No. The evidence adduced at the hearing indicates that PPSF divested its voting stock in Seven Seas in October 2001. Therefore, in 2004 and 2005, PPSF did not control 10 percent or more of the voting stock in Seven Seas. PPSF never owned any voting securities or other interest in Cypress.

b. Did PPSF have the authority to direct the business of the entity that owns the fishing vessel or processor? No. No evidence was presented that can lead to the finding in this case that PPSF had any authority to tell Cypress what to do in any business matter. The evidence indicates that Cypress conducted an arms-length negotiation with regard to the purchase of the vessel and related transaction documents. In fact, because Seven Seas was required to assign its right, title and interest in the Custom Processing Agreement with PPSF to Cypress, Cypress had the legal right to enforce that agreement against PPSF. Resp. Exh. R25 (Amendment #2 to Bareboat Charter Agreement, para. 4). Even if Seven Seas was

the focus of this regulation, NOAA presented no evidence that PPSF had the authority to direct, rather than simply participate in, the business of Seven Seas during the period 2004 to 2005.

c. Did PPSF have the authority in the ordinary course of business to limit the actions of or to replace the chief executive officer, a majority of the board of directors, any general partner or any person service in a management capacity of an entity that holds a 10 percent or greater interest in a fishing vessel or processor? No, as just stated, no evidence presented by the agency supports the conclusion that PPSF had any such authority with respect to either Cypress, or Seven Seas (assuming that this provision applies to Seven Seas, which it does not).

d. Did PPSF have the authority to direct the transfer, operation or manning of a fishing vessel or processor? Under the Custom Processing Agreement, PPSF had the ability to consult with Seven Seas as to when and where to have the vessel available to process fish or crab for PPSF, but this was simply the right to participate in this activity. Testimony of Barry Collier, R26 (Para. 2). PPSF had no legal authority to manage the vessel's operations or manning, as that authority, under the Charter Agreement, resided exclusively with Seven Seas. R25 (Sec. 6.1, 7.1).

e. Did PPSF have the authority to control the management or to be a controlling factor in the entity that holds a 10 percent interest in a fishing vessel or processor? Once again, there is no evidence that PPSF had any such authority with respect to Cypress. This provision does not apply to the relationship between PPSF and Seven Seas.

f. Did PPSF absorb all the costs and normal business risks associated with ownership and operation of a fishing vessel or processor? Here again, the answer is no because NOAA has not presented evidence that PPSF absorbed all the risks to which Cypress was exposed in its ownership the STELLAR SEA, or even tried to define what all the risks were. For certain, the testimony of Barry Collier makes clear that Seven Seas remains liable (at risk) to PPSF for the amount still due under the Advance of Funds Agreement. Tr. at 1260:17-24 (November 1, 2010), 1279:22-1280:13.

g. Did PPSF have the responsibility to procure insurance on the fishing vessel or processor, or assume any liability in excess of insurance coverage? Under the Charter Agreement, the responsibility to procure insurance on the STELLAR SEA legally rests with Seven Seas. R25 (Section 10). As a practice, PPSF and Seven Seas went to the insurance market together, but Seven Seas purchased its own insurance, including that for the STELLAR SEA. Tr. at 1250:9-10 (November 1, 2010), 1260:5-6. No evidence was presented by NOAA that PPSF assumed any liability in excess of the insurance on the vessel.

h. This provision deals with fishery cooperatives and therefore does not apply to this case.

i. Did PPSF have the ability through other means whatsoever to control the entity that holds a 10 percent or greater interest in a fishing vessel or processor? PPSF was not shown, by probative evidence presented by NOAA, to have the ability, by any means whatsoever, to control Cypress to any degree.

RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.

138. None of the documents that form the relationship between Seven Seas and PPSF provide any legal right or authority for PPSF to control the corporate functions of Seven Seas. NOAA has identified no provision that gives PPSF legal control over any interest in Seven Seas of any kind. For example, the Advance of Funds Agreement does not contain a provision giving PPSF control over any stock in Seven Seas, or the right to vote the stock, in the event of breach. Resp. Exh. R82. Thus, PPSF held no legal right under that Agreement that allowed it to own or control 10 percent or more of the interest in Seven Seas in the event of breach. Control over an interest in another corporation cannot emanate from a simple loan agreement, part of a business transaction between two separately operating companies, or make one company legally subservient to another where the only remedy is to seek contract damages. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

139. In sum, NOAA failed to identify any provision in any legal instrument through which PPSF could obtain ownership or control of 10 percent or more of a legal share, or legal or equitable claim to such a share, in Seven Seas. Nor has NOAA presented evidence of any oral agreement or implied understanding by which Seven Seas transferred to PPSF any corporate powers or authority than can be said to be ownership or control of 10 percent or more of the interest in Seven Seas. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER. THIS DECISION AND ORDER DISCUSSED THE NEED FOR SUCH LEGAL AUTHORITY FOR CERTAIN OF THE AGENCY'S REGULATORY DEFINITIONS OF CONTROL, WHICH IS NOT REQUIRED FOR ALL SUCH DEFINITIONS.**

D. NOAA Failed to Prove PPSF Had Actual Control Over Seven Seas

140. Even if the relevant question is whether PPSF had actual control over Seven Seas, and not Cypress as the owner of the STELLAR SEA, NOAA's arguments also fail in this regard. NOAA failed to present evidence in support of its argument that Seven Seas was a sham corporation by virtue of its business relationship with PPSF. In *Chan v. Society Expeditions, Inc.* the Ninth Circuit examined the question as to whether the operator of a vessel was also liable to injured passengers as the owner of the vessel, under the theory that the corporate veil of the operator should be pierced. 123 F.3d 1287 (9th Cir. 1997). The applicable rule applied in that case is that "disregard of corporate separateness 'requires that the controlling corporate entity exercise total domination of the subservient corporation, to the extent that the subservient corporation manifests no separate corporate interests of its own.'" *Id.* at 1294. The Court then found that, aside from common ownership between the owner and the operator of the vessel, "no other evidence presented at trial demonstrated a shared corporate existence or common scheme to perpetrate fraud on third parties." *Id.* **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER THOUGH THE UNDERSIGNED SPECIFICALLY FINDS THAT SEVEN SEAS WAS NOT A "SHAM" CORPORATION.**

141. NOAA, however, presented no legal theory or factual evidence on which to base the allegation made at the hearing that Seven Seas was a "sham" corporation that was totally, or near totally, controlled by PPSF. NOAA contends that the business relationships between PPSF and Seven Seas, in particular the fact that Seven Seas owes PPSF money under a loan agreement, gives PPSF actual control over Seven Seas. However, the agreement is devoid of any legal right for PPSF to have a say in the operation of Seven Seas in the event of default. Resp. Exh. R82. In particular, the agreement specifically contains a representation and warranty that states that PPSF "shall be granted no right whatsoever to control the operation, management or processing activities of the STELLAR SEA, except as specifically provided for in MARAD's regulations. *Id.* (Sec. 6.1). PPSF retained no security interest in Seven Seas or the STELLAR SEA by virtue of this agreement. Tr. at 1249:16-23; Resp. Exh. R82. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER THOUGH THE UNDERSIGNED SPECIFICALLY FINDS THAT SEVEN SEAS WAS NOT A "SHAM" CORPORATION.**

142. In addition, uncontested evidence shows that Seven Seas was not a sham corporation and that PPSF did not possess any right to control it. PPSF did not own any interest in Seven Seas or the STELLAR SEA in 2004 and 2005. Tr. at 5-6:23-507:4 (October 27, 2010); 1230:5-18 (November 1, 2010), 1236:21-1237:12. In addition, during this time, PPSF had no control over who Seven Seas hired to run the STELLAR SEA Tr. at 1254:22-1255:2 (November 1, 2010). Seven Seas hired its own employees and PPSF never told it who to hire. Tr. at 1259:19-23 (November 1, 2010). PPSF had no power to tell Seven Seas who to appoint to its board of directors. Tr. at 1259:24-1260:2 (November 1, 2010). Further, Seven Seas prepared its own tax returns and procured its own insurance. Tr. at 1250:9-19, 1260:3-4 (November 1, 2010). In this case, NOAA never presented any evidence to meet the standard of actual control therefore Seven Seas cannot be deemed to have been subservient to PPSF. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER THOUGH THE UNDERSIGNED SPECIFICALLY FINDS THAT SEVEN SEAS WAS NOT A "SHAM" CORPORATION.**

E. The Rulings in The Matter of Adak Fisheries LLC Are Not Controlling in this Case.

143. The decision in *In the Matter of Adak Fisheries LLC* does not apply to this case. Docket No. AK035039 (October 29, 2010). First, any decision by the ALJ must be based on substantial evidence in this case's record, not some other record not before the ALJ. Thus, the instant case is based on an entirely different hearing record than that in *Adak*. The facts of this case are not substantially similar to the *Adak* case, which involved a shoreside processing plant not subject to regulatory oversight under the AFA by MARAD, among other significant

factual differences. In addition, the relationships between the parties are distinguishable from those in *Adak*. Here, the processing facility, the STELLAR SEA, was owned and controlled in the entirety by Cypress, an independent third-party not related at all to PPSF or Seven Seas. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

144. Second, the respondents in the *Adak* case did not present the same defenses as put forward by PPSF and the administrative record here is controlling. PPSF has presented a defense based on the final, formal record in which the agency routinely treated the STELLAR SEA as a non-AFA entity not subject to PPSF's, nor any, crab processing cap. No evidence was presented by NOAA that PPSF was fraudulent or materially misled the agency with respect to the relationship of the STELLAR SEA to either PPSF or Seven Seas. To the contrary, PPSF disclosed its relationship and the agency conducted an investigation before concluding that STELLAR SEA should not be included in PPSF's cap. Resp. Exhs. R60 (at p.15, ¶8), R10-12, R17. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

145. Third, PPSF and Seven Seas acted under the direction of MARAD, which under the AFA, is a regulatory body charged with determining "control." Unlike *Adak*, here PPSF and Seven Seas responded to MARAD's concerns about control and PPSF divested all of its interest in Seven Seas, which MARAD condoned, well before the charge period. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

146. Because the facts of the case are entirely distinguishable from *Adak*, the decision in *Adak* does not serve as precedent to the conclusions otherwise outlined above. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

F. No Liability for a Penalty is Appropriate.

147. As stated above, the agency failed to prove that PPSF owned or controlled any interest in Cypress or Seven Seas. Accordingly, no penalty is appropriate. Should a penalty be assessed, the agency's determination of a penalty is arbitrary and capricious and any penalty should be based on a combined cap for PPSF and the STELLAR SEA determined by actual harvest levels. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

1. The Assessed Penalty is Arbitrary and Capricious.

148. Moreover, the \$4,457,048 penalty assessed by the agency in the NOVA, if any should be assessed, is arbitrary and capricious. Under the Administrative Procedure Act, an agency's decision may be disregarded if it is "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law." 5 U.S.C. § 706(2)(A); *Or. Envtl. Council v. Kunzman*, 817 F.2d 484, 492 (9th Cir. 1987). A reviewing court must determine whether the agency articulated "a rational connection between the facts found and the choice made," *Pub. Citizen v. DOT*, 316 F.3d 1002, 1020 (9th Cir. 2003), and must carefully review the record to "ensure that agency decisions are founded on a reasoned evaluation of the relevant factors." *Id.* The agency failed to prove that the penalty was reasonable under the statute. **RULING: ACCEPTED AND INCORPORATED TO THE EXTENT CONSISTENT WITH THIS DECISION AND ORDER.**

149. The Magnuson-Stevens Act, 16 U.S.C. § 1858(a), mandates that the Secretary of Commerce (i.e. NOAA) shall take into account the nature, circumstances, extent, and gravity of the prohibited acts committed and, with respect to the violator, the degree of culpability, any history of prior offenses, and such other matters as justice may require. Unlike the agency's civil penalty regulations (15 C.F.R. § 904.108(a)), which use the term "may" when describing what factors are to be taken into account, the Magnuson-Stevens Act mandates that each factor be considered because it uses the term "shall." **RULING: ACCEPTED AND INCORPORATED.**

150. NOAA's two agency witnesses presented on the subject of the recommended penalty did not testify as to how the agency weighed and evaluated each of the statutorily listed penalty amount factors. They specifically declined to testify on the subject of the reasonableness of the specific penalty and NOAA offered no evidence no evidence to establish that the agency considered all the relevant statutory factors in assessing the

penalty in the NOVA in this case. All that was presented was a series of arithmetic calculations and data compilations by Mr. Brent Pristas and general observations about agency penalty practices with respect to fishing, not processing, by Ms. Sherri Tinsley-Meyers. Neither Mr. Pristas or Ms Tinsley-Meyers was involved in setting the penalty. Neither addressed in any detail why the penalty should be considered reasonable based on the relevant Magnuson-Stevens Act statutory factors. The agency's own penalty schedule requires consideration of many of the same factors as in the Magnuson-Stevens Act and these also were not considered in setting the penalty in this case. *See* Resp. Exh. R72. **RULING: ACCEPTED TO EXTENT THAT IT IS CONSISTENT WITH THIS DECISION AND ORDER.**

151. The assessed penalty is also arbitrary and capricious because it is based on an irrelevant penalty schedule. The penalty schedule used by NOAA is its penalty schedule for violations based on fishing activities. *See* Agency Exhs. NOAA94, NOAA95, NOAA96. Violations for fishing activities are distinguishable from processing violations and NOAA's penalty schedules or policy pronouncements about the determination of penalties with respect to fishing activities do not provide guidance in this case. **RULING: ACCEPTED TO EXTENT THAT IT IS CONSISTENT WITH THIS DECISION AND ORDER.**

152. Moreover, NOAA failed to provide any evidence of ill gotten gains. NOAA argued that the penalty was intended to recapture any "ill-gotten gain" PPSF realized by processing over its caps. However, NOAA offered no witness to show that any non-AFA processor was in a position to process the crab, even if PPSF's caps and the aggregate caps were in fact exceeded. Damage will not be presumed without any evidentiary showing of causation and injury in fact. Mr. Hughes testified, base on his experience in serving as an expert in fish business valuation cases, that Mr. Pristas's calculations in Resp. Exh. R46 set forth revenue and not economic benefit and not net profit. Furthermore, Mr. Collier testified at the hearing that PPSF in fact lost approximately \$1.4 million to \$1.5 million on these particular crab transaction. **RULING: ACCEPTED TO EXTENT THAT IT IS CONSISTENT WITH THIS DECISION AND ORDER.**

153. Lastly, the penalty is excessive because it does not taken into account that any violation must be deemed a continuing violation based on a per day calculation rather than per delivery. The civil penalty provisions of the Magnuson-Stevens Act state that the amount of a civil penalty shall not exceed a certain amount, which now has been increased to \$140,000, per violation. 16 U.S.C. § 1858(a). That provision also states that "[e]ach day of a continuing violation shall constitute a separate offense." Black's Law Dictionary, 9th ed., defines continuing as "uninterrupted; persisting." Mr. Pristas testified that, in NOAA's view, the PPSF of its crab processing caps have continued since the year 2000. Absent a defined term, the ordinary meaning is presumed to apply. Given that the regulations call for a single volume amount to present the threshold over which an entity may not venture, the violation occurs with the first pound over the cap. In other words, if a processing cap is exceeded on day one and that same cap is continuously violated for the next several days, the text of 16 U.S.C. § 1858(a) would require that the penalty be limited to per day violation penalty amounts as a "continuing violation." **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

154. Although NOAA alleged that there were 45 separate violations based on 45 separate deliveries, any overage, based on actual harvests and a combined PPSF/Seven Seas cap, occurred only on at most 6 days: the final day in the 2004 Bristol Bay Red Kin crab season, two days in the 2004 tanner crab season, and three days in the 2005 tanner crab season. **RULING: ACCEPTED AND INCORPORATED AS A FACT BUT REJECTED AS RELEVANT FOR THE FINDING OF 45 SEPARATE VIOLATIONS.**

155. Accordingly, the penalty amount assessed in the NOVA is arbitrary and capricious, as a matter of substance. **RULING: ACCEPTED TO EXTENT THAT IT IS CONSISTENT WITH THIS DECISION AND ORDER.**

2. *Any Penalty Should be Based on the Aggregate rather than Individual Caps.*

156. A proper calculation of whether the cap was exceeded by PPSF must include an analysis of whether the crab processed for each species exceeded the average aggregate amount processed by all AFA processors during the period 1995, 1996, 1997, and 1998, with double counting for 1998. 50 C.F.R. § 679.65(c). The qualifying period change--adding 1998 and counting it twice--was a modification to the actual text of Section 211(c)(2)(A) of the AFA that was accomplished by following to the letter the guidance in the AFA for regulatory

supersession of this provision of the AFA. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER.**

157. NOAA failed to show, however, in the administrative record that the same procedure was followed superseding the statutory standard requiring aggregate cap processing caps as the test for injury to non-AFA processors, not individual caps. Unless it was shown that, taken together, all individual AFA crab processing caps exceed the relevant aggregate caps, injury to non-AFA processors did not occur. The regulations adopted by NOAA that deviate from the plain meaning of Section 211 of the AFA, without a formal vote by the North Pacific Council of recommendation, cannot be enforced. Moreover, without evidence that, for 2004 and 2005, the relevant aggregate crab processing caps for all AFA-processors was exceeded, PPSF and Seven Seas are not liable for a civil penalty. NOAA failed therefore to prove that the aggregate processing cap was exceeded. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

158. NOAA presented no evidence as to the total aggregate AFA crab processing caps for the Alaska king and tanner crab for 2004 and 2005, or as to whether these aggregate caps were exceeded. Mr. Steve Hughes stated that he could not obtain that aggregate and individual crab cap information without approval by NOAA, which was not given. Tr. at 1086:1-14 (October 29, 2010). Lacking such evidence, no penalty against PPSF and Seven Seas can be legally pursued. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

3. *Any Penalty Should Also Take into Account the Actual Harvest.*

159. The AFA crab processing cap, under Section 211, should also be based on the "total catch of each species of crab" harvested during the qualifying period discussed above. On issuing its second emergency interim regulations, NOAA stated the following:

§ 679.64(e) *Overages*. In the event that the actual harvest of a BSAI crab species exceeds the Guideline harvest level (GHL) announced for that species, an AFA inshore or mothership entity may exceed its crab processing cap without penalty up to an amount equal to the AFA inshore or mothership entity's crab processing percentage multiplied by the final official harvest amount of that crab species as determined by ADF&G and announced by NMFS on the NMFS-Alaska Region world wide web home page (<http://www.fakr.noaa.gov>). Resp. Exh. R9 (65 Fed. Reg. 4544). **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

160. However, this provision was not included in the agency's final AFA regulations and no explanation for this omission was provided. Furthermore, there was no discussion of any related North Pacific Council recommendation for superseding the plain terms of the AFA (i.e. that the caps are based on "total catch"). This was either an inadvertent mistake or a purposeful attempt by NOAA (without a Council recommendation) to change the text of the AFA without notice and opportunity for comment, contrary to Congressional intent and contrary to the principles of statutory interpretation just discussed. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

161. Therefore, whether PPSF exceeded any crab processing cap in 2004 or 2005 must be based on the total harvest, not the GHL, for any penalty to be calculated and assessed. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

4. *Any Penalty Should be Based on a Combined Crab Processing Caps for PPSF and Seven Seas.*

162. NOAA's penalty calculations are based solely on PPSF's original crab processing caps, calculated without incorporating the processing history of the STELLAR SEA for the qualifying period. If PPSF did in fact control an interest in Seven Seas and should have included the STELLAR SEA when applying for its processing cap, then any penalty calculation should be based on a combined processing cap for PPSF and the STELLAR SEA. **RULING: REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

163. If the two entities should have been combined for purposes of the cap, then that would have enlarged the overall cap percentage of all AFA processors as well PPSF's caps. Non-AFA entities would not be injured, therefore, except by exceeding this combined amount (or over the larger combined amount for PPSF and Seven Seas together). **REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

5. *The Calculation of PPSF's Crab Caps and Actual Harvest.*

164. A penalty, if any, calculated based on the actual amounts processed and a combined PPSF/STELLAR SEA cap, would result in a higher cap and a substantially lower degree of overage than that calculated by the agency. The hypothetical recalculated overage occurred only for the 2004 and 2005 tanner crab seasons, amounting to only 481,081 pounds and 773,140 pounds, respectively. However, in those years, Seven Seas used the STELLAR SEA to custom process tanner crab for Trident Seafood Company, another AFA processor in the following amounts: 224,946 pounds in 2004 and 336,621 pounds in 2005. If these Trident amounts are subtracted from the hypothetical, estimated cap overages just mentioned, they would be reduced even further on theory that the Trident crab would not have been processed by a non-AFA entity and therefore does not represent any lost opportunity or damage to such processors. **REJECTED FOR THE REASONS GIVEN IN THIS DECISION AND ORDER**

ATTACHMENT C: PROCEDURES GOVERNING ADMINISTRATIVE REVIEW

49 C.F.R. § 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.

Certificate of Service

I hereby certify that I have served the preceding **Initial Decision and Order (AK0401011)** upon the following parties and limited participants (or designated representatives) in this proceeding by the methods indicated below:

(Certified Mail, Return Receipt Requested)
Garland M. Walker, Esq.
Susan Auer, Esq.
National Oceanic and Atmospheric Administration
Office of General Counsel - Alaska
709 West 9th Street, Room 909A
Juneau, AK 99802-1109

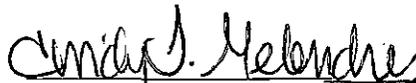
(Certified Mail, Return Receipt Requested)
James P. Walsh, Esq.
Gwen Fänger, Esq.
Davis Wright Tremaine LLP
505 Montgomery Street, Suite 800
San Francisco, CA 94111

(Certified Mail, Return Receipt Requested)
J. Timothy Hobbs, Esq.
K&L Gates LLP
925 4th Ave., Suite 2900
Seattle, WA 98104

(Certified Mail, Return Receipt Requested)
Administrator
National Oceanic and Atmospheric Administration
Department of Commerce
Room 5128
14th Street and Constitution Avenue, N.W.
Washington, D.C. 20230

ALJ Docketing Center (by facsimile)
United States Coast Guard
40 South Gay Street
Baltimore, MD 21202-4022
Comm: (410) 962-7434
Fax No. (410) 962-1746

Done and dated on this 26th day of September 2011 at
Alameda, California.



Cindy J. Melendres
Paralegal Specialist to the
Hon. Parlen L. McKenna