UNITED STATES DEPARTMENT OF COMMERCE

NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION

In the Matter of:	)	
	)	
Robert C. Roberge &	)	Docket Number:
Anthony & Enzo, Inc.,	)	**NE1300388, F/V Princess Laura**
	)	
Respondents.	)	

INITIAL DECISION AND ORDER

Before: Susan L. Biro, Chief Administrative Law Judge, U.S. EPA[1]

Appearances:

For the Agency:
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[1] The Administrative Law Judges of the United States Environmental Protection Agency are authorized to hear cases pending before the National Oceanic and Atmospheric Administration pursuant to an Interagency Agreement effective for a period beginning September 8, 2011. *See* 5 U.S.C. § 3344; 5 C.F.R. § 930.208.

I. PROCEDURAL HISTORY

On March 25, 2013, the National Oceanic and Atmospheric Administration ("NOAA" or "the Agency") initiated this proceeding by issuing a Notice of Violation and Assessment of Administrative Penalty ("NOVA") to Robert C. Roberge and Anthony & Enzo, Inc. ("Respondents") in regard to the fishing vessel Princess Laura.[2] The NOVA alleges two violations, including as Count 1 that on or about January 29, 2013, Respondents jointly and severally violated Section 307(1)(A) of the Magnuson–Stevens Fishery Conservation Management Act, as amended, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. § 648.14(k)(6)[i](A),[3] by fishing with trawl gear containing a net liner which obstructs and constricts a net as described in 50 C.F.R. § 648.80(g)(2). NOVA at 1. For this violation, the Agency sought a total penalty of $30,000. NOVA at 4–5. Further, the NOVA indicated that the Agency had seized from Respondents 24,990 pounds of fish, with a net value of $19,453.14. NOVA at 2.

By letter dated April 9, 2013, Respondent Anthony & Enzo, Inc. ("AEI"), acting through counsel, requested a hearing on the NOVA. On June 4, 2013, Respondent Robert C. Roberge, acting through separate counsel, requested a hearing as well. After participating unsuccessfully in an alternative dispute resolution process, on June 27, 2013, the undersigned was designated to preside over this matter for the purposes of hearing.

On July 2, 2013, an Order was issued directing each party to submit its Preliminary Position on Issues and Procedures ("PPIP"). NOAA filed its PPIP on July 26, 2013, and another (amended) PPIP on July 29, 2013, to which AEI responded by filing a motion to strike and for default on August 5, 2013. By Order dated September 10, 2013, AEI's opposed motion was denied. In the interim, AEI submitted its PPIP on August 9, 2013, and then filed an amended PPIP on August 13, 2013.

On August 8, 2013, counsel for Mr. Roberge filed a motion for leave to withdraw her appearance. This motion was granted by Order dated August 9, 2013 and Mr. Roberge was granted an extension of time until August 23, 2013 to file his PPIP. Despite the extension granted, Mr. Roberge never filed his PPIP or otherwise responded to the PPIP order issued in this matter.

On August 23, 2013, AEI filed a motion for discovery by way of interrogatories, request for production of documents and depositions, which was opposed by NOAA. On December 13, 2013, an Order was issued granting in part, and denying in part, the discovery motion. On January 10, 2014, NOAA filed its response to this Order, and on January 16, 2014, NOAA filed

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[2] This is a companion case to *Jessie H. Drinkwater and F/V Princess Elena, Inc.*, NOAA Docket No. NE1202710 (hereinafter cited as "PEI"). While the named parties in the cases differ, they are nevertheless associated because the corporate respondents in each case are both wholly owned by Giuseppe DiMaio and the NOVAs allege violations of the same provisions of law.

[3] The NOVA erroneously omits the reference to subsection "i" from the regulatory citation for this provision.

a Second Amended PPIP, in which it identified two additional potential witnesses. NOAA filed an Amended Response to the Order on additional discovery on January 24, 2014.

On January 29, 2014, AEI filed a motion to compel production of documents NOAA withheld from under claim of privilege from its responses to the Order granting discovery. In response, an Order was issued directing NOAA to submit the withheld information to the Tribunal for *in camera* review on February 12, 2014. NOAA filed the information with the Tribunal on March 14, 2014. On April 3, 2014, a Second Order on Motion to Compel Production of Documents was issued, requiring NOAA to produce certain documents that had been previously withheld under claim of privilege.

On April 17, 2014, NOAA filed a Fourth Amended PPIP disclosing that on April 8, 2014, it had served an Amended NOVA on Respondents which omitted the violation previous set forth in Count 2.[4] On April 22, 2014, AEI filed an application requesting that a subpoena be issued to Mr. Roberge, directing him to appear at the hearing in this matter. The application was granted by Order issued the same day.

On April 23, 2014, NOAA filed a motion requesting additional discovery in the form of an order compelling Mr. Roberge to respond to a written request for admissions. Although no response to the motion was filed, by Order issued on April 29, 2014, the motion was denied. On April 24, 2014, AEI filed a Second Amended PPIP and a Prehearing Brief, followed up by the filing of certain financial records on May 1, 2014. On April 25, 2014, the Agency and AEI submitted their Joint Set of Stipulated Facts, Exhibits and Testimony.

The hearing in this matter was held on May 13–15, 2014, in Boston, Massachusetts.[5] Five Agency Exhibits ("AE") were offered and admitted into the record.[6] Tr. 9–10, 12, 310–311. The Agency also presented the testimony of five witnesses: Daniel D'Ambruoso, Douglas W. Christel, Jeremy Somplasky, Thomas Ciarametaro and Christopher McCarron. Tr. 13, 109, 129, 148, 175. Respondent AEI offered 14 exhibits ("RE") into evidence and presented the testimony of one witness, Giuseppe DiMaio.[7] Tr. 52–53, 56–57, 59–62, 81–83, 207–08, 212,

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[4] NOAA did not file the Amended NOVA until after hearing, upon requested of this Tribunal.

[5] The transcript of the hearing in this case was produced in three volumes, one for each day of hearing, with the pages of all three volumes sequentially numbered 1–384. Unfortunately, the header on each page of the transcript in this case erroneously bares the caption of the companion case. Citation herein to the transcript will be in the following form: "Tr. __."

[6] *See* AE Nos. 1–5. NOAA consecutively numbered the pages of its first three exhibits from 000001–000257. The pages of these exhibits will be cited herein without the leading zeros.

[7] *See* RE Nos. 1–6, 8–11, 13–16. AEI's exhibit 12 was initially admitted and later withdrawn. Tr. 277–79. AEI's exhibits 10–11, 13, and 16 containing financial information were admitted under seal. Tr. 263–65, 267, 375–77.

249, 253, 263–65, 267–68, 367, 374–77. Further offered and admitted into the evidence as Joint Exhibit 1 was the previously filed Joint Set of Stipulations dated April 25, 2014.[8] Tr. 9–10, 367. Respondent Robert C. Roberge failed to appear in person or through a representative at hearing. Tr. 8.

A copy of the transcript was provided to the parties by this Tribunal on June 9, 2014, along with a Post-Hearing Scheduling Order. Pursuant to that Order, the Agency's initial Post-Hearing Brief was submitted on August 8, 2014, and AEI's initial Post-Hearing Brief was filed on September 15, 2014. The Agency then filed a Reply Post-Hearing Brief on September 29, 2014, followed by the submission on October 14, 2014 of AEI's Reply Brief. With that last filing, the record in this matter closed.

II. APPLICABLE LAW

Congress enacted the Magnuson-Stevens Fishery Conservation and Management Act ("the Act") in 1976 "to take immediate action to conserve and manage the fishery resources found off the coasts of the United States, and the anadromous species and Continental Shelf fishery resources of the United States . . . ." Fishery Conservation and Management Act of 1976, Pub. L. No. 94-265, § 2(b)(1), 90 Stat. 331, 332.[9] The Act aims to "promote domestic commercial and recreational fishing under sound conservation and management principles . . . ." 16 U.S.C. § 1801(b)(3).

Consequently, it is unlawful "for any person[10]— to violate any provision of this Act or any regulation or permit issued pursuant to this Act." 16 U.S.C. § 1857(1)(A); AE 2.[11] Regulations promulgated under the Act that were in effect at the time of the Respondents' alleged 2013 violation state, in regard to gear requirements while fishing for "Northeast (NE) multispecies,"[12] that "[i]t is unlawful for any person, including any owner or operator of a vessel

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[8] Citations to the parties' Stipulations, Joint Exhibit 1, will be as follows: "Stip. __."

[9] The Act and its amendments have been codified at 16 U.S.C. § 1801 *et seq.*

[10] "Person" is very broadly defined to include "any individual (whether or not a citizen or national of the United States), any corporation, partnership, association, or other entity (whether or not organized or existing under the laws of any State), and any Federal, State, local, or foreign government or any entity of any such government." 16 U.S.C. § 1802(36) (2012).

[11] NOAA represented that the copies of the statute and regulations admitted into evidence as AE 2 and 3 are the same as those in effect at the time of the violation. Tr. 10.

[12] The term "Northeast (NE) multispecies" is defined as including atlantic cod, atlantic halibut, pollock, and redfish. 50 C.F.R. § 648.2.

issued a valid NE multispecies permit or letter under § 648.4(a)(1)(i)[13]. . . to . . . [o]bstruct or constrict a net as described in § 648.80(g)(1) or (2)." 50 C.F.R. § 648.14(k)(6)(i)(A); AE 3. Section 648.80(g) in turn details restrictions on gear and methods of fishing, including net obstruction and constriction:

> (1) . . . [A] fishing vessel subject to minimum mesh size restrictions[14] shall not use any device or material, including, but not limited to, nets, net strengtheners, ropes, lines, or chafing gear, on the top of a trawl net . . . . "The top of the trawl net" means the 50 percent of the net that (in a hypothetical situation) would not be in contact with the ocean bottom during a tow if the net were laid flat on the ocean floor. . . .[15]
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> (2) . . . [A] fishing vessel may not use any mesh configuration, mesh construction, or other means on or in the top of the net subject to minimum mesh size restrictions, as defined in paragraph (g)(1) of this section, if it obstructs the meshes of the net in any manner.

50 C.F.R. § 648.80(g)(1), (2); AE 1 at 180; AE 3.[16]

To prevail on its claim that Respondents violated the Act and regulations above, the Agency must prove facts constituting the violation by a preponderance of reliable, probative, substantial, and credible evidence. 5 U.S.C. § 556(d); *In re Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *16–*17 (ALJ, Aug. 17, 2001) (citing *Dep't of Labor v. Greenwich Collieries*, 512 U.S. 267 (1994); *Steadman v. SEC*, 450 U.S. 91, 100–103 (1981)); *see* 15 C.F.R. § 904.251(a)(2). This standard requires the Agency to demonstrate that the facts it seeks to establish are more likely true than not. *In re Fernandez*, NOAA Docket No. NE970052FM/V, 1999 NOAA LEXIS 9, at *8–*9 (ALJ, Aug. 23, 1999). To satisfy this burden

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[13] Section 648.4(a)(1)(i) delineates the eligibility of vessels to apply for limited access NE multispecies permits based upon, among other things, their prior history of having and utilizing such permits. 50 C.F.R. § 648.4(a)(1)(i).

[14] Bottom trawl gear operated pursuant to a NE Multispecies permit in the defined "Gulf of Maine" area must have, among other characteristics, 6-inch diamond mesh or 6.5-inch square mesh "applied throughout the body and extension of the net," and a 6.5-inch diamond or square mesh applied to the codend of the net. 50 C.F.R. § 648.80(a), (3)(i); Tr. 105. For vessels greater than 45 feet in length, a diamond mesh codend is the first 50 meshes counting from the terminus of the end or for a square mesh the first 100 bars from the terminus. 50 C.F.R. § 648.80 (a)(3)(i)(A).

[15] Trawl nets can be towed by a vessel through the water at various water levels including on the ocean floor. 50 C.F.R. § 648.2 (defining "trawl," "bottom-tending mobile gear," "midwater trawl gear," *etc.*).

[16] The regulation provides an exception for nets with mesh sized less than 3 inches which appears not to be relevant here. *See* 50 C.F.R. § 648.80(g)(1), (2), (5).

of proof, the Agency may rely upon either direct or circumstantial evidence. *In re Cuong Vo*, NOAA Docket No. SE010091FM, 2001 NOAA LEXIS 11, at *17 (Aug. 17, 2001).

However, violations of the Act are generally strict liability offenses. *Tommy Nguyen*, NOAA Docket No. SE0801361FM, 2012 NOAA LEXIS 2, at *17 (ALJ, Jan. 18, 2012) (quoting *Northern Wind, Inc. v. Daley*, 200 F.3d 13, 19 (1st Cir. 1999)). As such, no proof of intent to commit the violation is required, and arguments as to Respondent's state of mind "are irrelevant." *Timothy A. Whitney*, NOAA Docket No. 015–300,1991 NOAA LEXIS 33, at *10 (ALJ, July 3, 1991) (quoting *Accursio Alba*, NOAA Docket No. 914–027, 1982 NOAA LEXIS 29, at *7 (NOAA App., March 15, 1982)).

III. FACTUAL BACKGROUND

Respondent Anthony & Enzo, Inc. ("AEI") is an S corporation owned and operated by Giuseppe DiMaio, who is its sole officer, shareholder, and employee. Tr. 213, 321; AE 1 at 20. In 2003, at a cost of $1.7 million dollars, Mr. DiMaio built the commercial fishing vessel ("F/V") Princess Laura, U.S. Coast Guard Documentation No. 1149379, and it became AEI's major asset.[17] Stip. 2; Tr. 253–54; AE 1 at 1, 20, 31. The Princess Laura was a large western rig stern trawler which allowed its crew to stay out on the water and commercially fish for up to ten days. Tr. 166, 215; AE 1 at 31. The vessel was issued a 2012 Federal Fisheries Permit for the Northeast multi–species fisheries.[18] Stip. 3; AE 1 at 1, 15–18; Tr. 114–15. Its home port was in Gloucester, Massachusetts. Tr. 29; AE 1 at 15, 31.

Respondent Robert Roberge is a fisherman who worked on and off for AEI over a period of approximately four years. Tr. 286, 333–34. On January 29, 2013, the U.S. Coast Guard spotted the Princess Laura, captained by Mr. Roberge, as it was fishing in federal waters in the Gulf of Maine pursuant to its 2012 Northeast Federal Fishing Permit. Stip. 4; AE 1 at 1, 31. Upon embarking the vessel, the Coast Guard boarding team observed and photographed the vessel's fishing net being hauled in containing a net liner, in violation of applicable regulations. Tr. 31–32; Stip. 7; AE 1 at 4–6, 31–32, 75–77. The Coast Guard terminated the vessel's trip and instructed Capt. Roberge to return directly to port. Stip. 8; Tr. 228; AE 1 at 6, 32.

At approximately 23:00 EDT, on January 29, 2013, the Princess Laura moored at the Buyers and Sellers Exchange ("BASE") off–load facility in Gloucester, Massachusetts. Stip. 9; Tr. 29; AE 1 at 7. Promptly thereafter, officials from NOAA, the National Marine Fisheries Service ("NMFS"), as well as the Massachusetts Environmental Police, boarded the vessel. Stip. 10; Tr. 29; AE 1 at 8. Once aboard the F/V Princess Laura, NOAA Special Agent Daniel

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[17] At hearing, Mr. DiMaio indicated that he was the sole shareholder of three other closely held corporations as well, each of which also owns a single commercial fishing vessel, which are respectively named the Capt Joe, the Orion, and the Tyler. Tr. 305, 333–37, 339. The subject of the companion case are violations committed on the Capt Joe.

[18] The 2012 Fishing Year Permit in the record indicates that it is valid for most fish species from May 1, 2012, through April 30, 2013. AE 1 at 15–18.

D'Ambruoso took additional photographs of the ship's net and net liner. Tr. 35–37; AE 1 at 9, 74–149. In the morning of January 30, 2013, the NMFS monitored the offload from the ship of a total of 24,991 pounds of mixed groundfish species. Stips. 11, 12; Tr. 74; RE 3 at 14; AE 1 at 47–48, 51. In light of the net liner violation found, the NMFS Special Agents seized the proceeds of the vessel's sale of the fish landed ($19,453.14) as well as the net liner itself, and a spool of twine. Stip. 13; Tr. 39; AE 1 at 9–10, 162–63.

In furtherance of their investigation, on February 15, 2013, NOAA Special Agents D'Ambruoso and Ross Lane interviewed Mr. DiMaio concerning the recent boarding of his vessel. Stips. 14–16; Tr. 37–40, 228–29; AE 1 at 10, 167–70. Upon being presented with photographs of the ship's net taken by the Coast Guard, Mr. DiMaio conceded that they documented a net liner being used in the net, however Mr. DiMaio adamantly denied knowing or approving the use of the net liner. Tr. 40, 42, 229; AE 1 at 10–11, 168, 173. Further, he refused to voluntarily agree to abandon proceeds of trip. Tr. 38. Mr. DiMaio subsequently fired Capt. Roberge, although he rehired him in June of 2013 to serve as a crewmember on the vessel. Tr. 249, 257, 289, 291, 334; RE 5.

At some point after April 2013, AEI sold the F/V Princess Laura for approximately $700,000, less than the loan balance then remaining on the ship. Tr. 254, 279–80; RE 13.

On February 19, 2013, Special Agent D'Ambruoso issued Capt. Roberge and AEI each an Enforcement Action Report relating to the use of a net liner on the vessel on January 29, 2013.[19] Stip. 17, 18; AE 1 at 11–12, 176–79, 188–91, 201–03; RE 1, 2. To date, Mr. Roberge's operator license has not been suspended. Tr. 87–88.

At hearing, AEI stipulated that "on January 29 Captain Roberge employed a net liner during the tow that was observed by the Coast Guard." Tr. 7. However, AEI did not stipulate to liability for the violation, raising an issue regarding the application of *respondeat superior* thereto. Tr. 8.

IV. DEFAULT JUDGMENT AS TO RESPONDENT ROBERGE

The applicable Rules of Practice ("Rules") provide in pertinent part that: "[i]f, after proper service of notice, any party appears at the hearing and an opposing party fails to appear, the Judge is authorized . . . [to] find the facts as alleged in the NOVA . . . and enter a default judgment . . . ." 15 C.F.R. § 904.211(a). Further, "[t]he Judge may deem a failure of a party to appear after proper notice a waiver of any right to a hearing and consent to the making of a decision on the record." 15 C.F.R. § 904.211(d).

As to "proper service of notice," the Rules provide that the presiding officer in an administrative proceeding must "promptly serve on the parties notice of the time and place of hearing," which "will not be held less than 20 days after service of the notice of hearing . . . ."

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[19] NOAA also simultaneously issued an Enforcement Action Report charging interferance with an officer in the conduct of an investigation which was the subject of Count 2 in this action and subsequently withdrawn. Tr. 53–54; NOVA at 2; Am. NOVA at 1.

15 C.F.R. § 904.250(a). Consistent therewith, on February 6, 2014, the undersigned issued an Order Rescheduling Hearing notifying the parties that the hearing in this matter would begin at 9:00 a.m. on May 13, 2014, in the John W. McCormack Post Office and Court House, 5 Post Office Square, Courtroom 5, Boston Massachusetts. The Order explicitly warned that "failure to appear at the hearing, without good cause being shown, may result in default judgment being entered . . . ." *See In re Robert C. Roberge and Anthony & Enzo, Inc.*, NOAA Docket No. NE1300388 (Feb. 6, 2014) (Order Rescheduling Hearing). Mr. Roberge was sent the Hearing Order by regular mail and UPS.[20]

Furthermore, at the request of AEI, a subpoena was issued requiring Mr. Roberge's attendance at the hearing. AEI's counsel represented at hearing that he sent Mr. Roberge the subpoena by "certified and regular mail to his last address of record in this case."[21] Tr. 209–210; RE 15. Nevertheless, Mr. Roberge did not appear at hearing. Tr. 8, 209.

Having been properly served with the NOVA,[22] duly notified of the time and place of the hearing, and served effectively throughout this proceeding, Respondent Robert C. Roberge failed to appear and thereby waived his right to further contest the alleged violation. Therefore, the facts as alleged against him in the NOVA are found to be true and default judgment is hereby entered against him in accordance with 15 C.F.R. § 904.211(a)(2).[23]

V. <u>EVIDENCE OFFERED AT HEARING AS TO AEI's LIABILITY</u>

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[20] Testimony given at hearing suggested Mr. DiMaio also personally made Mr. Roberge aware of the upcoming hearing. Tr. 289.

[21] There is no evidence in the record that the subpoena was ever personally delivered to Mr. Roberge and, as such, effective service of it on him was never made. 15 C.F.R. § 904.245; Fed. Rule Civ. Proc. 45(b)(1); *Omikoshi Japanese Rest. v. Scottsdale Ins. Co.*, 2008 U.S. Dist. LEXIS 91615, at *2–*4 (E.D. La. Nov. 5, 2008) (personal delivery of subpoena required to effectuate service). At hearing, AEI did not seek enforcement of the subpoena as provided for by 15 C.F.R. § 904.245(d).

[22] RX 15 is an Affidavit dated July 25, 2013, indicating that Mr. Roberge was personally served with the NOVA on May 20, 2013. Further, as indicated above, Mr. Roberge entered an appearance in this action through his counsel's submission of a request for hearing on June 4, 2013.

[23] Entry of default judgment against Mr. Roberge does not preclude AEI from contesting its vicarious liability in this matter. *W. Heritage Ins. Co. v. Superior Court*, 132 Cal. Rptr. 3d 209, 221 (Ct. App. 2011); *Dade Cnty. v. Lambert*, 334 So. 2d 844, 847 (Fla. Dist. Ct. App. 1976); *See Rogers v. J.B. Hunt Transp.*, 649 N.W.2d 23 (Mich. 2002), *Matza v. Grant*, 17 Mass. L. Rep. 565 (Supp. Ct. 2004); *Leavitt v. Siems*, 2014 330 P.3d 1, 5 (Nev. 2014); *United Salt Corp. v. McKee*, 628 P.2d 310, 313 (N.M. 1981); *Balanta v. Stanlaine Taxi Corp.*, 307 A.D.2d 1017 (N.Y. App. Div. 2003); *Dickerson v. Maione*, 13 Pa. D. & C.4th 195 (Pa. C.P. 1991); *Stillwell v. City of Wheeling*, 558 S.E.2d 598, 606 (W. Va. 2001).

To establish liability for the fishing violation alleged, NOAA must prove by a preponderance of the evidence that: (1) AEI was a "person"; and (2) its vessel did "obstruct or constrict a net," *i.e.* use a net with any "mesh configuration, mesh construction, or other means on or in the top of the net . . . if it obstructs the meshes of the net in any manner." 16 U.S.C. § 1857(1)(A), 50 C.F.R. §§ 648.14(k)(6)(i)(A), 648.80(g)(2).

The undisputed evidence establishes that: (1) AEI is a corporation and was the owner of the fishing vessel Princess Laura on January 29, 2013 (Stip. 2; Tr. 213, 215; AE 1 at 19); (2) at AEI's request, the Princess Laura was issued a valid 2012 NE Multispecies permit (Stip. 3; AE 1 at 15–18); (3) on January 29, 2013, the Princess Laura, captained by Mr. Roberge, fished pursuant to that permit in federal waters in the Gulf of Maine (Stips. 2–4; AE 1 at 22; Tr. 114–15); and (4) "Captain Roberge employed a net liner during the tow that was observed by the Coast Guard" on January 29, 2013 (Tr. 7–8).

In further support of its case, the Agency offered testimony of its Policy Analyst Douglas Christel. Mr. Christel participated in drafting the regulations supporting the applicable Fisheries Management Plan. Tr. 112–14, 120. He testified that based upon how the vessel coded its trip in NOAA's Vessel Monitoring System, the vessel was subject to net mesh size restrictions on this trip of a 6½ inch cod end mesh, and the gear requirements set forth in 50 C.F.R. § 648.80(g), set forth above. Tr. 118–120. Respondent did not challenge this claim in this action.

As evidence that the net liner employed by Mr. Roberge "constricted or obstructed" the meshes on or in the top of the net "in any manner," NOAA offered the testimony at hearing of Lieutenant Jeremy Somplasky. Tr. 129. Lt. Somplasky is a United States Coast Guard Officer, who has been stationed in the Northeast Region since 2010, and who was assigned as the Executive Officer on the Coast Guard Cutter Grand Isle on the date relevant here. Tr. 129–30; AE 1 at 2. At hearing, Lt. Somplasky recalled that on January 29, 2013, he and three other Coast Guard Petty Officers boarded the Princess Laura while it was in United States waters and observed the haul back of its trawl net from various positions on the vessel. Tr. 133–34, 141; AE 1 at 3, 31–32; Stip. 6. In addition, he ordered one Coast Guard official, Petty Officer ("PO") Pease, to remain on the small boat and observe the haul back from that position. Tr. 133–34; AE 1 at 213. Lt. Somplasky testified that during the haul back process, he witnessed one of the vessel's crew members hanging over the rail and was subsequently informed by PO Peace that he saw crew members "hand–tending the net" and "cutting what appeared to be a bright green nylon line out of the cod end" as it was hauled in. Tr. 135, 137; AE 1 at 4, 213. As the net came aboard, Lt. Somplasky observed "bright green nylon lines tying in a green net liner inside of a predominantly yellow cod end," stating "[i]t was something that we noticed pretty immediately. The bright green nylon that was used to tie the net liner in was very, very apparent and appeared out of place," "[j]ust the color of it with how bright it was and how it didn't appear to be very tarnished." Tr. 138; AE 1 at 31, 75. Further, once the net was hauled on board, "the cod end was opened and released the net liner with all of the fish still inside of it into the fish pen." Tr. 137; AE 1 at 5–6, 31, 79.

After the haul back was complete, Lt. Somplasky saw a "spool of bright green nylon [twine] sitting right next to the fish pen on the right side of the vessel, which was the rail that

was being used." "[I]t appeared to be the same material that was used to tie the net liner to the cod end." Tr. 139; AE 1 at 78. Based upon his observations, and with the affirmation of Coast Guard District 1, Lt. Somplasky issued the vessel master, Capt. Roberge, a notice of violation for illegally fishing with a net liner, seized the catch on board, and terminated the vessel's voyage, remaining on board while the vessel returned to Gloucester. Tr. 139–40; AE 1 at 6, 32. Upon return, the Coast Guard Officers and F/V Princess Laura were met at the pier by NOAA Special Agent Daniel D'Ambruoso. Tr. 141; AE 1 at 32. The Coast Guard Officers then briefed Mr. D'Ambruoso who then "took custody of the case itself." Tr. 141; AE 1 at 32.

The credibility of Lt. Somplasky's testimony regarding his observations was buttressed at hearing by that of Petty Officer Thomas Ciarametaro. Tr. 148. PO Ciarametaro testified that during his time with the Coast Guard, he had conducted more than 120 boardings of vessels, 60 or more of which involved bottom trawlers such as the Princess Laura. Tr. 150–51. He was the Assistant Boarding Officer at the time of the Princess Laura boarding on January 29, 2013. Tr. 151–52; AE 1 at 2, 33. PO Ciarametaro testified that it is standard practice prior to boarding ships for the Coast Guard to notify them of its intent to board via VHF radio. Tr. 158–59. He recalled that as the small boat (G–1) was launched and began approaching the Princess Laura, he witnessed the crew begin the haul back procedure to retrieve its nets, stating "when we first initially launched the small boat, they weren't conducting a haul back or had crew members on deck. Once they realized that we were coming off the port quarter of their vessel did they scramble a team to start hauling back the net." Tr. 152–53, 162. Further, PO Ciarametaro averred that, despite having instructed the vessel to cease operations, come to a stop, and assist the boarding team embarking from the small boat, the Princess Laura continued moving, and in fact, as he was personally beginning to embark, the vessel turned to port, pushing the small boat off of its hull, and leaving him "a straggler hanging on the side of the fishing vessel's port side," above the water, as the small boat made another approach to offload the rest of the team. Tr. 153–54, 164–65; AE 1 at 2–3, 33. PO Ciarametaro testified that he was certain that these activities by the crew were intentional, and that the ship's master (Capt. Roberge) was aware of the Coast Guard's approach from at least 300 yards away, based upon him looking at the officers and having "plenty of visibility" from where he was on the vessel. Tr. 162, 168, 170. Further, PO Ciarametaro stated he personally made eye contact with Capt. Roberge when the small boat initially came alongside the vessel as the boarding team prepared to board the Princess Laura. Tr. 166, 168.

Despite the ship's efforts to put off the boarding, PO Ciarametaro said he was able to pull himself up and on deck, where he witnessed the crew continue the haul back in contradiction of the his prior instructions to cease operations. Tr. 154; AE 1 at 33. Upon seeing the crew ignore him, he testified:

> I yelled at the crew members on deck to stop what they were doing immediately. They all turned around and looked at me and ignored me. . . . One of the crew members started to cut material, light green material out of the net about halfway down to the cod end, which is the end of the trawl net, and there was another crew member pulling on an orange line that was consistent with a ready–to–slip device of what would be used as a net liner. . . . [T]his was a very quick operation . . . it was over a period of seconds.

Tr. 154–55. *See also* AE 1 at 4–5, 33 (investigative report). As such, once the net came on board, he started taking photographs of the entire operation. Tr. 155, 157–58; AE 1 at 4, 33. PO Ciarametaro testified that while on board he personally witnessed a string being pulled releasing the bottom of the cod end of the net, "and out came all the fish on deck inside a net liner. There was no fish on the outside of the liner, they were all inside the net liner." Tr. 157; AE 1 at 5–6, 33, 79–97. Describing the net in use, he stated "[t]his is not your typical bottom trawl net. The cod end is usually diamond or square configuration. This had a diamond configuration with another diamond configuration on the inside overlapping each other so it made the opening for smaller species to get out half the size." Tr. 157; AE 1 at 75, 130–34.

NOAA also offered the testimony at hearing of Daniel D'Ambruoso, a Special Agent employed by its Office of Law Enforcement for the past twelve years and presently assigned to the Boston, Massachusetts office. Tr. 14. Based upon his experience and training, Special Agent D'Ambruoso held himself out as "conversant in the Northeast regulations that govern the multispecies fishery" and net liners. Tr. 15. As general background information to this action, Special Agent D'Ambruoso explained that federal regulations establish the minimum required size of meshing which may be employed in commercial fishing nets. Tr. 101. At the time of the alleged violation, that minimum size was 6–1/2 inches on a vessel such as the Princess Laura whose dominant catch was redfish. Tr. 105, 119. Further, Special Agent D'Ambruoso testified that "[n]et liners are intended to catch juvenile fish and also catch excess fish," noting that once you place a net over a net you are significantly reducing mesh size, even if the meshes on the nets are the same size because the meshes will not line up exactly with each other. Tr. 58, 103. Describing how a lined trawl net works, he stated that:

> A fishing vessel is towing a net off the stern, the back of the vessel. A simplistic way to put it is, there's a big funnel that hangs in something that would look like a sock being towed in the ocean and the very tail end of the sock where your toes would be, that's considered the cod end . . . . That's where the fish are retained. That's where the cod end has to be a minimum mesh size so that juvenile small fish can escape, and the net liner is placed there to keep these small fish and juvenile fish from escaping or even to catch just more quantity of fish.

Tr. 24; s*ee also* Tr. 96, 100 (expounding upon this testimony during redirect examination).

In regard to this case, Special Agent D'Ambruoso testified that he was advised by the Coast Guard on January 29, 2013, that it had boarded the Princess Laura, documented the vessel fishing with a net liner, and ordered the vessel to port. Tr. 28–29; AE 1 at 7. In port, Special Agent D'Ambruoso boarded the vessel and was debriefed by Coast Guard officers on what had occurred, which included viewing a series of photographs taken of the cod end of the vessel's gear showing a green thin net liner in the yellow mesh material. Tr. 29–31; AE 1 at 8, 75–76. Special Agent D'Ambruoso recalled he then personally went around the ship photographing what he observed, which included a net liner in among the fish in the fish pen. Tr. 34–35; AE 1 at 9. Further, the Special Agent stated that he went to the effort of laying the net liner he found in the fish pen on top of the ship's net and determined that it was "the same shape and size" as the cod end of the net. Tr. 36, 90, 100–02; AE 1 at 9, 138. Moreover, he observed undersized

redfish, the dominant species of fish caught by the vessel, among its catch. Tr. 79, 93–94; AE 1 at 56.

Finally, in support of its case, the Agency offered at hearing the testimony of NOAA Special Agent Christopher McCarron. Tr. 175. Special Agent McCarron testified that he had been employed in the seafood industry since high school, first working for a seafood dealer, then on a fishing boat, all prior to studying Marine Fisheries in college, after which he joined the NMFS drafting regulations and responding to public inquires. Tr. 177–78. Thereafter, and for approximately 19 years prior to hearing, he had been employed by NOAA investigating complaints in the New England area. Tr. 176–77. As a result of his work, Special Agent McCarron stated he had developed a personal knowledge of net liners and their use. Tr. 181–82.

Special Agent McCarron recalled at hearing that prior to the violation alleged in this case, he had been involved in a separate investigation involving the treatment of an at–sea monitor aboard the F/V Capt Joe, another vessel owned by Mr. DiMaio. Tr. 178. As part of that investigation, he and Special Agent D'Ambruoso had interviewed a number of crew members of the Capt Joe, and during those interviews were told that the Capt Joe had used a net liner fifty percent of the time it was fishing. Tr. 43–44, 178–79. As a result, NOAA put together an operational plan in an effort to determine whether Mr. DiMaio's vessels were persistently using net liners.[24] Tr. 22, 178–79; RE 3. That plan came to fruition when he was notified by Special Agent D'Ambruoso that the Princess Laura had been boarded, caught using a net liner, and was being escorted back to port. Tr. 180; RE 3 at 14–16. Special Agent McCarron stated that he met the vessel in port, boarded it with Special Agent D'Ambruoso, and viewed the Coast Guard photographs "of the Princess Laura with what seemed pretty clear to me a net liner in the net." Tr. 181–82; AE 1 at 8. In support, during the hearing, Special Agent McCarron went through the series of photographs taken on the vessel at the time of the boarding, opining that they showed a yellow "cod end mesh net with [green single–bar twine] mesh inside of that, so a net within a net." Tr. 184; *see also* AE 1, Attach. 8, photographs 6, 7. Further, Special Agent McCarron stated he personally observed redfish inside the green net liner. Tr. 189; AE 1 at 9. Once the inside green net was emptied of fish by the lumpers, the Special Agents measured and compared the green mesh to the size of the yellow cod end that was in use on the Princess Laura, finding them similar in length and size, indicative of a liner not a gill–net. Tr. 89–90, 100–01, 186–89; AE 1 at 9, 127–28, 138–39.

[24] Special Agent D'Ambruoso testified that as part of NOAA's plan, he and Special Agent McCarron met and alerted Coast Guard personnel regarding the different styles of net liners used and the tactics employed by fisherman to hide their use of liners, including cutting an adhearing rope so as to quickly detach the liner from the cod end of the net. Tr. 23–25. Further, they identified particular areas in the ocean where they expected the vessels to be fishing for redfish with a liner. Tr. 26–27, 99. The Princess Laura was in fact boarded in that general area. Tr. 28, 141. However, the Special Agent's understanding was that the net liners were being used on the vessels when captained by Pasquale DiMaio, and they did not have advance knowledge of Capt. Roberge's use of net liners as well. Tr. 63–64.

Photographs of the net admitted into evidence at hearing confirm the accuracy of the testimony offered by NOAA's witnesses. Specifically, they reflect that the filled cod end net then in use was made of yellow thick double strand diamond shaped mesh netting. AE 1, Attach. 8, photographs 6, 7. Lining that net was a blue/green thin single strand diamond mesh net. *Id.* The diamond pattern of the inner net did not match up with the pattern of the meshes of the outer net and thus obstructed and constricted the meshes of the outer net. *Id.* Further, Agency records reflected that over 200 lbs of undersized or short fish were found on the vessel. AE 1 at 48, 52, 56–58, 60–71.

On its behalf at hearing, AEI offered the testimony of Mr. Giuseppe DiMaio.[25] Mr. DiMaio testified that he has been in the fishing industry most of his life, recalling that he began fishing at 14 years old in his native city of Palermo, Sicily. A couple of years after coming to America in 1973, he became a crew member on a small day boat, then moved up to bigger and bigger boats. Tr. 214–15, 217. In 1980, he bought his own medium sized wooden boat, the St. Peter III, a 70 foot eastern rig, which he captained. Tr. 218. From there, he said, "I got myself [in a] position to go [to the] next step," and bought the Italian Princess, a larger, steel, western rig, stern trawler, which he volunteered to be the first in the Northeast region to have a vessel monitoring system installed on it. Tr. 218, 241–42. In 2004, after undergoing surgery for a debilitating illness, Mr. DiMaio stated he ceased being able to captain his own vessels, and has since hired others to do so. Tr. 219, 250. The captains he hires, Mr. DiMaio explained, have a current operator's permit, and are either experienced, so "I don't need to tell him much," or if not, "I go through one week, I teach them everything between the vessel, the law, the regulation, the engine, everything [that] needs to be teaching. I will do it in a week." Tr. 220, 282–85. Particularly, he claims, he admonishes his captains against breaking the law, and teaches them regarding the regulations pertaining to the size of fish which may be lawfully caught and about net liners. Tr. 222; *see also* AE 1 at 169. He also trains the crew if necessary. Tr. 221. However, Mr. DiMaio asserted that once his training ends, "I have no control what they do, these people, out there. Only, like I say, what I tell them to do. If they don't do it, it's out of my – my control." Tr. 222–23.

Mr. DiMaio testified that AEI's vessel, the Princess Laura, was a trip boat, which went out on fishing trips for 5–10 days at a time. Tr. 215. While out at sea, the captain would report back to him as to the amount and type of the fish caught, and based on the price of the fish, he would decide whether to order the ship back to port, explaining that "we try to make a paycheck," "we have expenses [] we want to cover." Tr. 215–17. He recalled hiring Mr. Roberge to captain the vessel in January 2013, after he fired his cousin, Pasquale DiMaio, as its captain due to his violation of a fishing regulation.[26] Tr. 225–27. Mr. DiMaio averred at hearing

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[25] AEI also offered into evidence a proffer of Mr. Roberge's testimony had he appeared at hearing, drawn from conversations AEI's counsel had had with Mr. Roberge and his counsel, which was not admitted by the Tribunal. Tr. 210–12.

[26] Mr. DiMaio also asserted that he reported his cousin's violation to the Massachusetts Environmental Police. Tr. 225–26.

that prior to going out, Capt. Roberge did not tell him or anyone else affiliated with AEI that he intended to use a net liner while fishing, and neither he nor anyone else had a reason to anticipate that he would do so. Tr. 227; *see also* AE 1 at 169. It was only after Special Agent D'Ambruoso telephoned him advising him of the boarding that he learned that Capt. Roberge had used a net liner while fishing on the Princess Laura. Tr. 227–28. At that point, Mr. DiMaio stated, he spoke to Capt. Roberge, who "swear, swear, swear," "swear on his mother, on his father," that the net was not lined, but merely had a piece of a gillnet and twine in it. Tr. 228–29; AE 1 at 168.

In light of Capt. Roberge's denial of fishing with a liner, Mr. DiMaio testified that he asked to meet with Special Agent D'Ambruoso and to personally view the photographs taken on the ship, committing to the Agency that if the net was lined "I got to fire him." Tr. 229; AE 1 at 167–71. Eventually, he did meet with NOAA, and that "as soon as I saw the photo, he was gone," acknowledging NOAA "showed me the photo with the net liner." Tr. 229; AE 1 at 168, 170, 173. Mr. DiMaio described himself as "shock[ed]" by the photograph, because he specifically asked Capt. Roberge to "please, follow the rules right [and] [h]e said don't worry." Tr. 229–30. He concluded that after catching some pollock, Mr. Roberge had used the net liner to catch redfish, a fish from which Mr. DiMaio stated he made no money. Tr. 230–31, 234. Further, he noted the small undersized redfish was worth comparatively little and worse yet counted against his fishing quota or catch shares. Tr. 231–33, 235. Despite the admitted violative actions of his chosen captain, Mr. DiMaio sincerely and credibly expressed great frustration at hearing in regard to AEI being a party to this case, declaring, "I didn't do anything wrong." Tr. 255. "Don't com[e] after me, because I'm at home. I can't have control out there" over what is done by the captain and the crew. Tr. 255. Further, he stated that he fired Mr. Roberge as soon as he learned of the violation, and as such, felt he "shouldn't be here in this case if the law is right for everybody," and "this is no fair for the owner responsibility." Tr. 256–57. Mr. DiMaio opined that NOAA should sanction only Mr. Roberge, and do so not by imposing a monetary penalty but by withdrawing his operator's permit, thereby prohibiting him from being hired again as captain and given another opportunity to violate the law. Tr. 255–56. Because NOAA had not done this Mr. DiMaio suggested, Mr. Roberge continues to earn money fishing, while he and AEI are expending money defending this case. Tr. 257–58. Further, as a result of this case, Mr. DiMaio has since taken to routinely requiring crew members to sign a release and indemnification agreement, acknowledging to abide by the law and indemnify the vessel owner for any fine or penalty imposed as a result of the crew member knowingly participating in a violation. RE 5.

VI. DISCUSSION AND FINDING ON LIABILITY

In its Initial Post-Hearing Brief, AEI "concede[s] that on or about January 29, 2013, Robert Roberge, while fishing aboard the F/V Princess Laura, engaged in fishing with a net configuration that violated NOAA's regulations at 50 C.F.R. 648.80(g)."[27] PEI RIB at 3. *But*

[27] AEI appears to have mistakenly interchanged the first page of the initial Post-Hearing Brief it filed in this case with that simultaneously filed in the companion case. As a result, pages 2–15 of AEI's initial Post-Hearing brief ("RIB") *filed in this matter* address the facts and arguments

see PEI RIB at 5 n.2 ("AEI does not concede that a violation occurred."). However, it challenges NOAA's right to also hold it "strictly liable" for the violation based upon the theory of *respondeat superior*. PEI RIB at 5.

In support thereof, AEI makes a lengthy series of legal arguments. First, it acknowledges that if Respondent Roberge was an AEI employee, acting within the scope of his employment when he violated the law, then under a theory of respondeat superior AEI *could be* held vicariously liable for his actions. PEI RIB at 5 (citing *Corsair Corp., F/V CORSAIR*, 1998 WL 1277924 (NOAA 1998); *Blue Horizon, Inc.*, 6 O.R.W. 467 (NOAA 1991)). "However, because there is no evidence tending to suggest Mr. Roberge was an employee of AEI, the analysis can stop there. . . . AEI cannot be held responsible under a theory of *respondeat superior*, which was [the] only theory advanced by the Agency," Respondent asserts. PEI RIB at 6.

Alternatively, AEI poses, if this Tribunal should "find that the Agency is not bound by its original and only theory of recovery," because Mr. Roberge was an independent contractor, AEI may be held liable "if, and only if, the employer directed or took some affirmative part in the act from which the injury resulted."[28] PEI RIB at 6 (citing *Cubby, Inc. v. CompuServe, Inc.*, 776 F. Supp. 135 (S.D.N.Y. 1991)). AEI states the undisputed evidence of record is "that once the vessel left the dock, Mr. Roberge was not and could not be subject to any direction whatsoever from AEI as to the means he employed to catch fish." PEI RIB at 6.

Further, "the tort concept of respondeat superior is not the same as 'vicarious liability' or 'joint and several liability,'" AEI proclaims, and "[g]enerally, the test used to determine whether the doctrine applies is whether the vessel owner had, at the time of the violation, the right to control the actions of the wrongdoer." PEI RIB at 6 (quoting *Kenneth Shulterbrandt William Lewis*, 1993 WL 495728 (NOAA 1993)). As it had "no ability whatsoever to either observe or control the action of Roberge once the F/V Princess Laura left the dock," AEI suggests it cannot be held liable for his actions. PEI RIB at 6.

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related to the companion case, and the pages 2–15 of the initial Post-Hearing Brief in the companion case, address the facts and arguments applicable to this case. As a courtesy to Respondent, this Tribunal has considered here the relevant arguments in its initial Post-Hearing Brief actually filed in the companion case, which will be cited herein as "PEI RIB at __."

[28] The Agency's "original and only theory of recovery" in regard to AEI referred to here is the statement NOAA made in support of its objection to certain of AEI's discovery request, including its position on whether "the owner was aware of, or in any way participated in, authorized or condoned the alleged use of a net liner." *See In re Robert C. Roberge and Anthony & Enzo, Inc.*, NOAA Docket No. NE1300388 (Dec. 13, 2013) (Order on Respondent F/V Anthony & Enzo, Inc.'s Motion for Additional Discovery at 10–11 (AEI's Interrogatory No. 10)). In reply, the Agency stated that "it charged Respondent [AEI] pursuant to the doctrine of *respondeat superior* due to Respondent's ownership of the F/V Princess Laura and employment of the vessel operatorof the F/V Princess Laura during the USCG [U.S. Coast Guard] boarding at issue in this matter." *Id.*

Moreover, AEI argues that in all the other cases cited by NOAA, the vessel owner has only been held liable for a captain's violation where the owner stood to benefit economically from the violations. *Id.* However, AEI proclaims, "there is no evidence presented at trial tending to suggest AEI stood to benefit economically from Mr. Roberge's alleged misconduct. In fact, the exact opposite is true." PEI RIB at 6 (citing Fisheries off West Coast States; Pacific Coast Groundfish Fishery Management Plan; Trawl Rationalization Program; Chafing Gear Modifications, 79 Fed. Reg. 15296, 15300 (Mar. 19, 2014) (Proposed Rule) for the proposition that "under the trawl catch share program, vessels have substantial incentive to avoid the catch of small, unmarketable groundfish for which quota is required").

Next, AEI asserts that the test for determining whether someone is an employee or an independent contractor is whether the employer "maintains only 'general supervisory powers' or 'exhibits only 'incidental control' over the services performed." PEI RIB at 7 (citing *inter alia, Lazo v. Mak's Trading Co.*, 199 A.D.2d 165, 605 N.Y.S.2d 272 (1st Dept. 1993); *John Fernandez, III, [and] Dean V. Strickler*, 1999 NOAA LEXIS 9 [August 23, 1999])). AEI notes that a vessel owner was found not liable for a captain's violation of pulling gear out of water in contravention of the Coast Guard's order because: (1) he was not involved in the violation; (2) the doctrine of respondeat superior did not apply because the captain was acting "beyond the scope of his employment when he refused to obey the Coast Guard's instruction;" (3) the owner had an excellent reputation in the industry and had been very cooperative in areas of fishing safety and participation in fishing industry regulation committees; (4) had brought law enforcement's attention to instances where his captains had violated the law in the past; and (5) the captain's violative decision was made "on the spot" without input from the vessel owner. PEI RIB at 7 (citing *Fernandez* at *8, *12–*14). AEI asserts that the same factors absolving the vessel owner in *Fernandez* apply here. PEI RIB at 7.

In further support for its position, AEI declares that the common law tort notion of "respondeat superior is an unsuitable theory of liability in this regulatory context," particularly "NOAA's adoption of it in this case." PEI RIB at 7. "Agencies cannot impose sanctions on regulated entities such as AEI unless specifically authorized by statute," and "federal statutes regulating the fishing industry and establishing NOAA's penalty scheme, are completely silent on the issue of vicarious liability." PEI RIB at 7 (citing *inter alia*, 5 U.S.C. § 5). Also in variance with the "concept of strict liability imposed on an employer under a theory of respondeat superior," is the Agency's penalty policy, Respondent asserts, as it contains varying levels of penalty amounts based upon degrees of fault. *Id.*; *see also* RE 9 (NOAA's penalty policy). Such policy "is also at variance with the Agency's regulations on joint and several liability that appear to form the basis for the Agency's attempt to extend strict liability to the company for the action of an independent contractor retained by the company." *Id.* (citing 15 C.F.R. § 904.107). Respondent asserts that "[e]ven if Roberge were an employee of AEI, under any theory of vicarious liability, AEI is not a 'joint tortfeasor,'" defined as "one of two or more wrongdoers who contribute to the injury of another by their several acts," because AEI was a "passive owner," who "performed no act and took no part in any activity which contributed to the alleged violation." PEI RIB at 8, (citing *Elias v. Unisys Corp.*, 410 Mass. 479, 480–81, 573 N.E.2d 946 (1991)).

As its ultimate argument, AEI declares that the regulation NOAA relies upon for imposing vicarious liability upon owners, 15 C.F.R. § 904.107, is "unconstitutionally vague" and is being applied "in a manner that was not intended or authorized by the enabling legislation." PEI RIB at 8. "Surely, if Congress had intended to hold owners strictly liable for the actions of captains and crew members, Congress could have done so." *Id.* It notes "the void–for–vagueness doctrine requires sufficient definiteness in regulations so that ordinary people can understand what conduct is prohibited," and more importantly, "not encourage arbitrary and discriminatory enforcement." *Id.* at 9 (citing *Colander v. Lawson*, 461 U.S. 352, 358 (1983); *Smith v. Gouge*, 415 U.S. 566, 574 (1974)). "There is simply no way a reasonable person could infer exposure to strict liability" based upon regulation 15 C.F.R. § 904.107, and as such it suggests the regulation fails to "provide such minimal guidelines," and so permits "'policemen, prosecutors, and juries to pursue their personal predilections.'" *Id.* at 9 (quoting *Smith*, 415 U.S. at 575).

In a pithy response to these arguments, the Agency's Post-Hearing Reply Brief ("ARB") cites to this Tribunal's Order in the companion case, stating that this issue has already been ruled upon and that ruling is now the "law of the case." ARB at 2.

The ruling referenced by NOAA in its Reply Brief was this Tribunal's Order on the Respondent's Motion to Dismiss/Strike the Notice of Violation and Assessment issued on April 18, 2014 in *Jesse H. Drinkwater and F/V Princess Elena, Inc.*, F/V Capt Joe, NOAA Dkt. No, NE1202710, the companion case hereto.[29] That Order included an extensive discussion and analysis upholding the imposition of vicarious liability on vessel owners for the acts of their captains, addressing essentially all of the same arguments raised by AEI here. While perhaps technically not the law of this case, the same analysis supporting the application of vicarious liability is applicable here, and as such there is no reason to revisit the issue. *United States v. Mays*, No. 96–10253, 1997 U.S. App. LEXIS 32343, at *2 (9th Cir. Nov. 14, 1997) (under the law of the case doctrine, declined to exercise its discretion to revisit the issues decided previously in a companion case); *United States v. Miami Tribe of Oklahoma*, 200 Ct. Cl. 64, 67 (Ct. Cl. 1972) (interpreting law of the case to overrule prior holding in particular case before it to be consistent with ruling in companion case). As such, this Tribunal incorporates herein by reference the analysis and holding of that Order and the holding and discussion thereof in the Initial Decision issued simultaneously herewith in the companion case.

Further, this Tribunal finds the particular facts of this case support the imposition of vicarious liability on AEI for the violative acts of Mr. Roberge, including the following: (1) Mr. Roberge worked for Mr. DiMaio/AEI "off and on" for about four years (Tr. 285–86, 334); (2) when initially hired by Mr. DiMaio, Mr. Roberge was an "inexperienced captain," and so Mr. DiMaio/AEI assumed responsibility for teaching him "everything" he needed to know to properly perform his work as a ship's captain, including the legal requirements regarding the use

[29] The cases were never formally consolidated but the closely held corporate Respondents in both matters (AEI and PEI) are owned by the same person, Guiseppe DiMaio. Further, they were represented in these matters by the same counsel, Paul Muniz, alleged violations of the same regulatory provision, and the hearings were heard *in seriatium*, with some testimony from this case incorporated into the PEI case, which was heard second.

of nets (Tr. 219–223, 282–286); (3) AEI provided Mr. Roberge with everything he needed to perform his position as captain of the Princess Laura including the fishing permit, catch shares, ship, fuel, insurance, nets, string, computer system and crew (Tr. 222–223, 239–240, 248, 252, 338–39); (4) while Capt. Roberge was out on AEI's ship, Mr. DiMaio retained control of how long the ship stayed at sea and the authority to decide exactly when it would return to port (Tr. 216–17); (5) AEI and Capt. Roberge agreed to share the profits, if any, of their venture (Tr. 234, 245, 296, 300–01; RE 4); and (6) AEI paid unemployment insurance on behalf of Capt. Roberge (Tr. 246, 301; RE 4).

Furthermore, it is clear that the use of illegal net liners was not completely outside the scope of activity that AEI expected Capt. Roberge and the crew to engage in during the fishing trip. Mr. DiMaio stated he taught the captains regarding the regulations as to the size of the fish they may legally catch and "tell[s] them about the net liner," and "about anything to no breaking the law." Tr. 221–22. In addition, he specifically made Mr. Roberge promise to follow the rules regarding the manner of fishing. Tr. 230; *Restat. 2d of Agency*, § 230 ("An act, although forbidden by the employer, or done in a forbidden manner, still may be within the scope of employment…[Example,] P directs his salesman, in selling guns, never to insert a cartridge while exhibiting a gun. A, a salesman, does so. This act is within the scope of employment."); *Restat. 2d of Agency*, § 231 ("An act may be within the scope of employment although consciously criminal or tortious.").

In addition, Mr. Roberge's violation was "actuated, at least in part, by a purpose to serve the master," *Restat. 2d of Agency*, § 228 (describing the type of conduct of a servant that is within the scope of employment). Although the redfish Mr. Roberge was catching with the net liner at the time of boarding was not particularly valuable, it was a type of fish the corporation sold and thus it profited from the Captain's acquisition of it. Tr. 230, 296, 300, 332. Special Agent D'Ambruoso testified at hearing that net liners not only allow smaller fish to be caught but more fish, more quickly. Tr. 24, 58–59, 103.

As such, while I certainly empathize with the frustration expressed by Mr. DiMaio at AEI being held vicariously liable for the violations committed by Mr. Roberge while at sea, the facts of this case suggest the violation occurred within the scope of the captain's duties, and had the violation not been caught, both AEI and Mr. Roberge would have potentially financially benefitted from it. Therefore, consistent with the statute, regulation, and a long line of cases, both Respondent Robert Roberge and AEI are jointly and severally liable for the violation of the Act and regulation as alleged in Count 1 of the NOVA. *See* 15 C.F.R. 904.107 ; *Blue Horizon, Inc.*, 6 O.R.W. 467 (ALJ, June 20, 1991) (holding that the owners of a fishing vessel are jointly and severally liable for the acts of the crew if directly related to their duties).

VI. PENALTY

Any person who commits an act made unlawful by the Magnuson-Stevens Act "shall be liable to the United States for a civil penalty" not to exceed $140,000 per violation. 16 U.S.C. § 1858(a); 15 C.F.R. § 6.4(f)(14). When assessing a civil penalty under the Act, the presiding officer must account for "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." 16 U.S.C. § 1858(a). There is no

presumption in favor of the penalty proposed by the Agency. *See* 15 C.F.R. § 904.204(m); Regulations to Amend the Civil Procedures, 75 Fed. Reg. 35,631, 35,631 (June 23, 2010) (Final Rule). Rather, "the presiding Administrative Law Judge may assess a civil penalty *de novo*, 'taking into account all of the factors required by applicable law.'" *In re Pauline Marie Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *11 (ALJ, Sept. 27, 2012) (quoting 15 C.F.R. § 904.204(m)).

A. Nature, Circumstances, Extent, and Gravity of the violation

In its initial Post-Hearing Brief ("AIB"), the Agency states that it considered the Act and regulation cited above, as well its "Policy for the Assessment of Civil Administrative Penalties and Permit Sanctions" ("Penalty Policy"), which incorporates the relevant statutory provisions and "improves consistency at a national level, provides greater predictability for the regulated community and the public, and promotes transparency in enforcement." AIB at 12; RE 9. Based thereon, it concluded that a civil penalty of $30,000 plus the seizure of the proceeds from the sale of the fish aboard the vessel at the time of the violation in the amount of $19,452.14 "appropriately reflects the nature, circumstances, extent and gravity of the violation." AIB at 12–13.

In terms of the "nature" of the violation, NOAA asserts that the Fisheries Management Plan for the Northeast Multi–Species is the foundation and framework for the current management regime for the Northeast multi-species fisheries. AIB at 13 (citing Tr. 112). The regulations implemented consistent with the Plan prohibit the use of net liners to protect smaller juvenile fish. *Id.* (citing Tr. 79). Protection of juvenile fish is necessary to protect the sustainability of the fish population. *Id.* (citing Tr. 96–97); *see also* Agency's Reply Brief ("ARB") at 5.

As to the "circumstances" of the violation, the Agency refers in its brief to the facts supporting the underlying finding of liability. AIB at 13.

With regard to "extent," NOAA refers to Special Agent D'Ambruoso' s hearing testimony averring that the violation at issue here was discovered as a result of an Operations Plan its Office of Law Enforcement ("OLE") implemented after the "Capt Joe," another fishing vessel owned by Mr. DiMaio, was caught in the summer of 2012 using a net liner.[30] AIB 14 (citing Tr. 22, 20). In mid-December 2012, as part of NOAA's investigation into those violations, Special Agent D'Ambruoso interviewed a crewmember of the Capt Joe, who acknowledged the use of a net liner on the Capt Joe in the summer 2012, and alleged witnessing the use of net liners on the "Orion," another vessel owned by Mr. DiMaio. AIB at 14 (citing Tr. 19–20, 22, 49–50); Tr. 17. Based upon this information suggesting a persistent pattern of violations, NOAA OLE directed the Coast Guard to attempt to locate and board one of Mr. DiMaio's three vessels while it was out fishing, resulting in the January 2013 boarding of the Princess Laura at issue here. AIB at 14 (citing Tr. 19–20, 49–50); Tr. 22.

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[30] The violations referred to here are the subject of the companion case.

Finally, the Agency suggests in its Brief that the "gravity of the violation" in this case is high, noting that the use of the net liner was "harming future generations of fish" by catching and killing small, juvenile fish which would have otherwise escaped through the mesh to live to adulthood and spawn. AIB at 16 (citing Tr. 96–97). NOAA suggests that as such, Respondents' acts "entirely frustrate the purpose of regulating minimum mesh size for bottom trawl gear." ARB at 4.

Disputing the foregoing, AEI maintains that the Agency has failed to "justify the reasonableness and basis for the penalty it seeks." PEI RIB at 9. In support thereof, it first alleges that "gear violations" are generally treated as relatively minor "Level II" violations under the Agency's penalty policy, with a penalty range between $2,000 and $20,000 depending on the violator's degree of culpability. PEI RIB at 10; RE 9. "Inasmuch as NOAA only seeks to hold AEI responsible as owner of the vessel, and for no other reason, its culpability cannot get any lower." PEI RIB at 10. As such, the maximum penalty should be $2,000, Respondent claims. *Id.*

Second, AEI argues that there was no evidence introduced at hearing that the "alleged violation caused any harm to the resource, the regulatory scheme or program, or that it provided a significant competitive advantage over those operating legally." *Id.* In support it cites Special Agent D'Ambruoso's testimony that the stocks of redfish and pollock at the time of the violation were healthy and that neither of these fish were particularly valuable. Respondent AEI's Reply Brief ("RRB") at 3 (citing Tr. 74).[31] Further, Special Agent D'Ambruoso testified that it was "entirely possible that any potential harm to the resource could have been prevented had the Agency informed Mr. DiMaio in the Spring of 2012 that NOAA had received several complaints concerning the use of 'illegal trawl nets' onboard the F/V Princess Laura." PEI RIB at 12 (citing Tr. 68–69). Instead, Respondent charges, the Special Agent "wanted to catch someone in the act" "because the larger the investigation, the greater his compensation." *Id.* Moreover, as to the catch, AEI reminds this Tribunal that there were only 15 undersized fish caught on the trip. Further, that many of those fish would no longer be considered "undersized" based upon changes to regulations implemented by NOAA in July 2013 due to the healthy stocks of redfish and haddock. PEI RIB at 10, 12 (citing RE 4; RE 6 at 3 (indicating reduction in minimum redfish size from 9 to 7 inches)). To this AEI adds, Mr. Roberge was not cited for possession of undersized fish and there is no basis in the record to presume that all the undersized fish were caught as a result of the use of a net liner. PEI RIB at 10.

While recognizing the value of the prohibition on the use of net liners to protect vulnerable fish populations, this Tribunal is unpersuaded that in this particular case, the nature, circumstances and gravity of the violation was more than modest due to the rather limited number of undersized fish caught in the lined net and the healthy state of the stocks of the particular fish targeted as reflected by the change in the law as of July 2013 allowing the catch of smaller and potentially more redfish. Tr. 74–79, 105–06; RE 6. Specifically, the record evidences that only .8%, or approximately 200 pounds out of the total of almost 25,000 pounds

[31] In its Reply Brief AEI referes to these fish as being "targeted by Drinkwater," the captain in the PEI case, which the Tribunal takes as a scrivener's error and assumes AEI meant "Roberge," the captain in this case. RRB at 3.

of fish caught, were undersized or short. AE 1 at 48. Further, those undersized fish caught in January 2013 were redfish, and effective July 31, 2013, the minimum size for redfish was decreased from 9 inches to 7 inches, indicating that there were more than sufficient stocks of the fish at the time. AE 1 at 48; RE 6 at 3.

Further, in terms of the extent of issues raised by the Agency, it is noted that the Respondents here are charged with just one violation, and the other arguments raised by the Agency as to extent actually address culpability of the violation. On the other hand, AEI is only half–correct regarding the characterization of gear violations under the Penalty Policy as Level II violations. The Policy, in fact, allows for gear violations to be characterized as either Level II or a *higher* Level III violation "depending on: (1) the nature of the area; (2) how far into the area the vessel traveled; (3) how long the vessel was in the area; (4) the nature of the gear restriction; and (5) the type of gear used." RE 9 at 32 n. 11. Thus, this violation could fall within the penalty range of $5,000–$40,000 for a Level III violation. *Id.* at 25. Further, this Tribunal is singularly unimpressed by AEI's suggestion that NOAA bears any responsibility for any harm on the basis that it did not warn Mr. DiMaio of information it had previously received of a pattern and practice of violations on his various ships. First, the duty to know and follow the law falls squarely on Respondents. *In re O'Neil*, NOAA Docket No. SE9100737, 1995 NOAA LEXIS 20, at *7–*8 (ALJ, June 14, 1995). Second, Mr. DiMaio was made aware of NOAA's concern regarding the issue of net liners on his vessels as discussed further below. Tr. 64–65; AE 1 at 169.

B. <u>Culpability</u>

In terms of culpability, the Agency does not explicitly characterize Mr. Roberge's violation in its briefs, and characterizes AIE's conduct as "reckless," on the basis that it: (1) knew or should have known net liners were in use on the vessel; (2) had control over Mr. Roberge; and (3) stood to benefit from the illegal acts. AIB at 17; ARB at 2.

In support thereof, NOAA first cites Special Agent D'Ambruoso's testimony that in the Spring of 2012, he met with Mr. DiMaio to discuss photographs purportedly showing net liners on his other ship, the Capt Joe. AIB at 17 (citing Tr. 64–65); ARB at 2 (citing Tr. 64–65). Then in August 2012, the Capt Joe was twice boarded by the Coast Guard which documented that the vessel was contemporaneously fishing with a net liner. *Id.*; AE 1 at 169. Both these events occurred not long before the violation at issue here was found in January 2013 on the Princess Laura. As such, the Agency declares Mr. DiMaio should have been aware of the illegal practices on his ships and NOAA's on–going investigation into them, be prompted, if he was "a responsible owner to ascertain the veracity of the allegations relating to the use of the net liners on board his vessels. By not doing so, Mr. DiMaio acted in a reckless manner." AIB at 17.

Second, Mr. DiMaio had a practice of repeatedly hiring, firing and re–hiring vessel operators suspected of violating fisheries regulations, including fishing with net liners. AIB at 18 (citing Tr. 249, 287); ARB at 3. Mr. DiMaio admitted at hearing hiring back both his cousin Pasquale DiMaio and Mr. Roberge after they were found to have broken fisheries regulations. AIB at 18 (citing Tr. 225, 344, 288; AE 1 at 169; RE 5; ARB at 3–4). *See also* RE 5 (Crewmember Release and Indemnification Agreement evidencing that Mr. Roberge was re–hired after the violation in this case). The Agency suggests the rehiring of law breakers, or even

suspected law breakers, evidences recklessness in the control over the operations of the vessels. AIB at 19.

Third, the Agency notes that in commercial fishing, the vessel owner, the vessel operator and crew share, all the proceeds of the fishing trip, and the more fish caught the more money they all make. AIB at 20 (citing Tr. 296, 300). The use of illegally lined nets allows the vessel to "maximiz[e] the efficiency of the fishing trip" by catching more fish, both undersized and legal sized, than its competitors. ARB at 6. While acknowledging that redfish is not the most profitable catch, NOAA cites Mr. DiMaio' s testimony to the effect that if given the choice, he would prefer to have the vessel return filled with redfish, rather than no fish, noting that approximately half of the vessel catch on the subject trip (by weight) was redfish. AIB at 20 (citing Tr. 300); ARB at 6 (citing Tr. 300; citing AE 1 at 50).

AEI aggressively challenges NOAA's characterization of its conduct as "reckless," asserting that it took "reasonable precautions against the events constituting the violation," played no role in the violation itself, and "did not know" of the violation. PEI RIB at 11; RRB at 5. It notes in particular that Mr. DiMaio trained Mr. Roberge for several years before making him a captain, including advising him as to the regulatory requirements, and specifically directing him to not violate the law, and warned him and the crew, they would be fired for violations. PEI RIB at 11–12 (citing Tr. 167, 220); *see also,* Tr. 51–52 (noting Capt Joe crewmember advised NOAA agents that "I'd be fired by Joe if he finds out I have a net liner."). Further, Mr. DiMaio personally verified that Mr. Roberge had a valid operator's license before hiring him, and refused to hire him when he appeared to be having substance abuse issues. PEI RIB at 11 (citing Tr. 220, 286). Eventually, he started making the captain and crew sign a written acknowledgment regarding complying with the law and agreeing to indemnify him for violations. PEI RIB at 11 (citing Ex. 8[32]). Moreover, AEI claims that it made good on its threats to fire the captains for violations and even went so far as to report the violations to regulatory authorities. PEI RIB at 12 (citing Tr. 225). With regard to the hiring back of Mr. Roberge in particular for the instant trip, AEI characterizes it as an act of kind–heartedness on the part of Mr. DiMaio, based upon the belief that "people deserve a second chance," and upon Mr. Roberge's assurance that "he was clean." PEI RIB at 11 (citing Tr. 343–44). With regard to hiring Mr. Roberge yet again, after the instant trip where the liner violation was found, AEI states it hired him "only as a crew member and only after he promised to pay the fine in this case." PEI RIB at 11–12 (citing Tr. 349). Finally, AEI reiterates its arguments to the effect that a vessel owner has no control over the vessel or its captain once the boat leaves the dock. PEI RIB at 12 (citing Tr. 215–17, 223–24).

Further, in terms of economic benefit, AIE states that there was none from the violation because the proceeds of the catch were seized and, in fact, it incurred substantial expenses to land the seized fish which it has never recovered. RIB at 13 (citing Ex. 9[33]). Further, AEI argues that even if the catch was not seized, it generally does not financially benefit from the use

[32] These agreements actually appear in RE 5.

[33] The settlement statements appear in RE 4 but there are no settlement statements for the fishing trip at issue in this case. Tr. 247–48.

of a net liner as it results in small, unmarketable catch, which counts against its quota. PEI RIB at 13 (citing Tr. 232). In this case in particular, it notes that the redfish targeted by Mr. Roberge was particularly of little monetary value. *Id.*

In its Reply Brief, AEI raises the additional argument that "it would be patently unjust" for this Tribunal to allow NOAA to attempt to determine or raise the penalty imposed on it in this case based on its participation, authorization or condoning of the use of the net liner in that the Agency represented in its response to Interrogatories that such information was "not relevant," since the Agency had charged AEI "pursuant to the doctrine of respondeat superior." RRB at 5–6 (citing *See In re Robert C. Roberge and Anthony & Enzo, Inc.*, NOAA Docket No. NE1300388 (ALJ, Dec. 13, 2013) (Order on Respondent's Motion for Discovery)) . As such, it suggests the Agency "be estopped" from having it both ways.

This Tribunal finds that the appropriate characterization of Mr. Roberge's conduct in this case to be "intentional," warranting a commensurately high penalty. The evidence offered at hearing clearly indicates that Mr. Roberge and his crew were well aware that they were engaged in illegal activity. In particular, as noted above, they attempted to put off the Coast Guard boarding, ignored the Coast Guard's directive to stop activity, and attempted to cut the liner out of the net before it was pulled aboard. Tr. 155.

On the other hand, AEI's culpability or fault for the violations is minimal. This Tribunal found credible Mr. DiMaio's testimony to the extent he expressed frustration with the actions of Mr. Roberge. Nevertheless, it is hard to reconcile Mr. DiMaio's strongly expressed positive attitude towards compliance with the law and his asserted efforts to prevent illegal activity occurring on his ships, with the fact that there is evidence in the record suggesting that violations on his ships involving net liners were nevertheless, at least intermittently, if not persistently, recurring. Tr. 64–65. Thus, while AEI may not have been specifically aware of, or in any way participated in, authorized or condoned the alleged use of a net liner on the Princess Laura on January 29, 2013, as a result of the August 2012 boarding, it should have been aware that the measures previously undertaken to prevent such violations occurring were likely insufficient. However, the evidence suggests AEI did not take any additional preventative measures until after this subsequent blatant violation was found.

Further, the evidence offered at hearing regarding the understanding between Mr. Roberge and AEI regarding sharing the proceeds of the fishing voyage, suggests that AEI would have likely economically benefitted from the violation, had the vessel not been boarded and caught. RE 4. Specifically, Special Agent D'Ambruoso testified that use of a net liner increased the rate at which fish would be caught, potentially reducing the time and thus the cost of the ship remaining at sea, in terms of use of fuel, food, etc. Tr. 58–59, 96–99.

Based upon the foregoing, AEI's culpability for the violation would most appropriately be characterized as "negligent."

C. History of prior violation

Neither of the Agency's briefs claim AEI or Mr. Roberge has a history of violations. A number of administrative tribunals have found that the absence of prior offenses may support the

assessment of a lower penalty. *See, e.g.*, *In re Frenier*, NOAA Docket No. SE1103883, 2012 NOAA LEXIS 11, at *39 (ALJ, Sept. 27, 2012) ("[T]he absence of any prior or subsequent offenses can serve as a mitigating factor and support the assessment of a lower civil penalty under certain circumstances."); *In re Straub*, NOAA Docket No. SE1100711, 2012 NOAA LEXIS 1, at *24 (ALJ, Feb. 1, 2012) ("The absence of prior offenses . . . tends to favor a low civil monetary penalty."); *In re The Fishing Co. of Alaska*, NOAA Docket Nos. 316-030, 316-031, 316-032, 1996 NOAA LEXIS 11, at *43–*44 (ALJ, Apr. 17, 1996) ("In an industry that is so heavily regulated, this absence of prior violations by any of the Respondents has been taken into consideration as a mitigating factor in the penalty assessment."). In this case, Mr. DiMaio testified that has been in the fishing business all is his life, and Mr. Roberge had been commercially fishing for at least four years. The fact that Mr. DiMaio has no history of prior violations amidst a lengthy career in the industry weighs in his favor and was considered in my assessment of a monetary penalty.

D. Ability to pay

Respondents bear the burden of proving an inability to pay. 15 C.F.R. § 904.108(c) ("[I]f a respondent asserts that a civil penalty should be reduced because of an inability to pay, the respondent has the burden of proving such inability by providing verifiable, complete, and accurate financial information to NOAA.") As noted by the Agency in its initial brief, Mr. Roberge has not alleged inability to pay nor offered any evidence in the record to support a finding in regard thereto. AIB at 22. NOAA suggests, therefore, that this Tribunal must "work on the assumption that he can pay the penalty." *Id.* AIE does not appear to contest this suggestion.

However, AEI does claim an inability to pay, declaring that "the company is insolvent and has absolutely no ability to pay." PEI RIB at 14 (citing Exs. 12–13). In support thereof, it asserts that in 2013, it was "forced to sell the F/V Princess [Laura] to stop the losses it was incurring brought about by recent changes to the regulations and because it simply could not recover from the trip seized by NOAA." *Id.* The vessel's sale price, it says, was a fraction of its cost, "roughly the amount of the mortgage." PEI RIB at 14 (citing Tr. 251–52).

Moreover, AEI characterizes its tax returns for 2011 and 2012 as reflecting a "bleak financial status," with liabilities almost four times greater than assets, and significant yearly net operating losses, despite paying no compensation to officers or dividends to shareholders. PEI RIB 14 (citing Exs. 12–13). Further, AEI asserts, its sole owner, Mr. DiMaio, has no money to loan the company and "no sources of credit available to him or his companies." PEI RIB at 14 (citing Tr. 269). Mr. DiMaio is disabled, unable to work as a fishing captain, and supports his 84 year old mother, adult daughter and her two children. PEI RIB at 14 (citing Tr. 330).

In its briefs, NOAA takes the position that the financial information does not support a finding of inability to pay the penalty by AEI. AIB at 20. It states AEI "did not provide all of the information identified by NOAA as necessary to make a complete assessment of the Respondent's ability to pay," specifically certain personal and corporate financial forms it requires in regard thereto. AIB at 20; AE 4, 5. As such, NOAA asserts that Respondent AEI has failed to meet its obligation under 15 C.F.R. § 904.108(b), (d). AIB at 21–22.

The Agency further notes that Mr. DiMaio, AEI's president and sole shareholder, admitted at hearing that he uses his own money to pay corporate expenses as necessary, and contrary to his claim regarding AEI's inability to secure any loans, he could loan the company money to pay the violation. AIB at 21 (citing Tr. 323). Additionally, Mr. DiMaio admitted that after the Princess Laura was sold he bought another fish vessel, the Tyler, through funds acquired from the Zeus seafood company. AIB at 21 (citing Tr. 355–56).

In support of its claimed inability to pay, AEI proffered in this matter its U.S. Income Tax Returns for an S Corporation for the tax years from 2010 through 2012. RE 11. Those returns reflect ordinary business income losses of approximately $15,000 in the first year and $125,000 in the two more recent years. RE 11. They also declare no compensation was paid to Mr. DiMaio as an officer. RE 11. However, as of 2012, the corporation reflected a positive amount for shareholders' equity of close to $600,000, greater than such equity at the beginning of the year. In addition, the 2012 Depreciation and Amortization Report reflects AEI acquired in 2012 approximately $60,000 in equipment as well as a $10,000 "office addition." RX 11. In 2011, it purchased a 2011 Ford F250 vehicle for almost $50,000, as well as paying a loan origination fee of almost $5000. RX 11. In 2012, it seems to have also reduced its current liabilities "Due to Others" from over $100,000 to under $10,000. RX 11. It also reflected a sum in excess of $160,000 as being "due from affiliate" at the end of the year. *Id.* As such, it is found that AEI has not met its burden of proving by a preponderance of the evidence an inability to pay the comparatively modest penalty of $30,000 requested in this case.

E. Such other Matters as Justice May Require

Under this factor, in addition to reiterating several arguments otherwise raised in regard to the factors above,[34] AEI characterizes Mr. DiMaio as having been an "industry leader," the first "in the Northeast Region, and perhaps in the country, to voluntarily install surveillance equipment on his boat that would allow NOAA to track his vessel's movements twenty-four hours a day." PEI RIB at 15 (citing Tr. 241–42). Further it notes that in the past Mr. DiMaio had invited the Coast Guard aboard his vessel for cross-training, and that his vessel, the Italian Princess, was the first commercial fishing ship in the country to participate in the Coast Guard's voluntary safety inspection program. PEI RIB at 15 (citing Tr. 243). AEI also portrays Mr. DiMaio as being proactive regarding regulatory compliance, recalling that when he discovered his own cousin had engaged in regulatory violations he fired him as a captain and reported him to the Massachusetts Environmental Police. RRB at 5 (citing Tr. 225). To the extent that the rehiring of Mr. Roberge after this violation undermines this depiction, AEI explains that Mr. DiMaio hired Roberge back only as a crewmember and after he promised he would pay any fine assessed against him. RRB at 5 (citing Tr. 349).

AEI further points out that Special Agent D'Ambruoso admitted that Mr. DiMaio was very cooperative when interviewed after the violation and "in one instance candidly admitted that a net liner was used by the captain on a different vessel." RRB at 7 (citing Tr. 90).

[34] Both parties' post-hearing reply briefs reiterate arguments previously made in their initial briefs and make similar arguments under various headings. This Tribunal has done its best to parse the arguments as appropriate.

In addition, in mitigation, AEI asks this Tribunal to take in account that that due to his disability, at the time of this violation, Mr. DiMaio was incapable of going to sea and personally supervising the acts of his fishing captains, and so was dependent on their integrity and training to avoid violations. PEI RIB at 14–15; RRB at 5. It also states that NOAA admitted at hearing "that in cases where the blame can be placed solely on the captain, the owner [was] not charged," and that in this case it was not aware that the owner had any involvement in the violation. RRB at 7 (citing Tr. 87). Moreover, it also suggests this Tribunal look for guidance in determining an appropriate penalty to past decisions where the tribunal found both respondents liable for the violation, but because the corporate owner was defunct, due to suffering "fatally [] serious financial damage as a result of this episode," did not impose a penalty upon it. PEI RIB at 15 (quoting *James A. Green and R.G. Garza, Inc.*, NOAA Docket Nos. 235-156, 235-157, 7 O.R.W. 344 (Aug. 27, 1993)).

While not impressed by the relevance of some of the latter arguments under this factor, this Tribunal finds Mr. DiMaio's prior positive voluntary participation in industry regulation and his general cooperation when interacting with the NOAA agents in connection with this case to be mitigating factors. Nevertheless, it is noted that Mr. DiMaio refused to voluntarily abandon the proceeds of the catch, even though he acknowledged the violation. Tr. 38–39, 103–04. However, those proceeds of the vessel's catch in excess of $19,000, were seized, as was one of the vessel's nets and some twine.

Further, in regard to Capt. Roberge, it is noted that Lt. Somplasky's testimony confirmed his contemporaneous report that the vessel's "Master was extremely compliant throughout the boarding" Tr. 145; RE 2. He also gave Capt. Roberge the benefit of the doubt that he may not have heard the Coast Guard's direction to stop, as the justification for the crew continuing its haul back unabated, and also suggested that while the vessel did not create a lee to aid the Coast Guard efforts to board, it did not evade either. Tr. 132, 142, 147. Petty Officer Ciarametaro, on the other hand, gave a far less generous impression of Capt. Roberge's interactions with the Coast Guard in his testimony. In particular, he suggested that the vessel intentionally turned to delay the Coast Guard's boarding and that with Capt. Roberge's knowledge, his crew purposefully ignored his orders to cease their haul back. Tr. 156–57, 162, 169. Further, PO Ciarametaro was unequivocal in his testimony to the effect that he was certain that Capt. Roberge was aware of his approach from at least 300 yards away, based upon him looking at the officers and having "plenty of visibility" from where he was on the vessel, and specifically averred that Capt. Roberge made eye contact with him when the Cutter initially came alongside the vessel to embark. Tr. 162, 168, 170. While those differences could be matters of perception based upon years of experience, the fact that the end result of the vessel's actions taken upon encountering the Coast Guard was that PO Ciarametaro was left hanging off side of boat is undisputed. Tr. 164–65. While it is impossible to protect law enforcement officers from all dangers arising in connection with their official positions, this Tribunal cannot condone the activities of fishermen who intentionally or negligently put the safety of officers at risk. As such, it finds Mr. Roberge's conduct in regard to the boarding itself an aggravating penalty factor.

Upon considering the nature, circumstances, extent, and gravity of the violation; Respondents' degrees of culpability and lack of history of prior offenses; and such other matters as required by justice, this Tribunal finds it appropriate to impose on the Respondents, jointly

and severally, a civil penalty in the amount of $20,000 for the violation set forth in Count 1 of the NOVA. In reaching this penalty determination, this Tribunal considered that taking into account the nature, gravity, circumstances, and extent, the Agency's penalty policy characterizes a gear violation as either a Gravity Level II or III offense. RE 9 at 32. Taking into account the clear nature of the gear restriction and the type of gear used, *i.e.,* a net liner, that the vessel had already been out multiple days in the area when it was boarded, suggests that the higher gravity level range is more appropriate. *Id.* The penalty range for a Gravity Offence Level III is between a low of $5,000 for unintentional violations to a high of $40,000 for intentional violations. RE 9 at 25. Further, in light of the culpability of the two Respondents, intentional and negligent, respectively, and in light of the other mitigating and aggravating factors, a middle range penalty of $20,000 was deemed most appropriate.

ORDER

A total civil penalty of **$20,000** is hereby **ASSESSED** against Respondents, Robert C. Roberge and Anthony & Enzo, Inc., jointly and severally, for violating Section 307(1)(A) of the Magnuson-Stevens Fishery Conservation Management Act, 16 U.S.C. § 1857(1)(A), and 50 C.F.R. §648.14(k)(6)(i)(A).

Once this Initial Decision becomes final under the provisions of 15 CFR § 904.271(d), you will be contacted by NOAA with instructions as to how to pay the civil penalty imposed herein.

PLEASE TAKE NOTICE, that any petition for reconsideration of this Initial Decision must be filed with the undersigned within **20 days** after the Initial Decision is served. 15 C.F.R. § 904.272. Such petition must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. *Id.* Within **15 days** after a petition for reconsideration is filed, any other party to this proceeding may file an answer in support or in opposition. The undersigned will rule on any petition for reconsideration.

PLEASE TAKE FURTHER NOTICE, that any petition to have this Initial Decision reviewed by the NOAA Administrator must be filed with the Administrator within **30 days** after the date this Initial Decision is served and in accordance with the requirements set forth at 15 C.F.R. § 904.273. A copy of 15 C.F.R. §§ 904.271–273 is attached.

PLEASE TAKE FURTHER NOTICE, that this Initial Decision becomes effective as the final Agency action **60 days** after service, unless the undersigned grants a petition for reconsideration or the Administrator reviews the Initial Decision. 15 C.F.R. § 904.271(d).

PLEASE TAKE FURTHER NOTICE, that upon failure to pay the civil penalty to the Agency within **30 days** from the date on which this decision becomes final Agency action, the Agency may request the U.S. Department of Justice to recover the amount assessed, plus interest and costs, in any appropriate district court of the United States or may commence any other lawful action. 15 C.F.R. § 904.105(a), (b).

SO ORDERED.

Susan L. Biro
Chief Administrative Law Judge
U.S. Environmental Protection Agency

Dated: July 14, 2015
Washington, DC

TITLE 15 -- COMMERCE AND FOREIGN TRADE
SUBTITLE B -- REGULATIONS RELATING TO COMMERCE AND FOREIGN TRADE
CHAPTER IX -- NATIONAL OCEANIC AND ATMOSPHERIC ADMINISTRATION, DEPARTMENT OF COMMERCE
SUBCHAPTER A -- GENERAL REGULATIONS
PART 904 -- CIVIL PROCEDURES
SUBPART C -- HEARING AND APPEAL PROCEDURES
DECISION

15 CFR 904.271-273

§ 904.271 Initial decision.

(a) After expiration of the period provided in § 904.261 for the filing of reply briefs (unless the parties have waived briefs or presented proposed findings orally at the hearing), the Judge will render a written decision upon the record in the case, setting forth:

(1) Findings and conclusions, and the reasons or bases therefor, on all material issues of fact, law, or discretion presented on the record;

(2) An order as to the final disposition of the case, including any appropriate ruling, order, sanction, relief, or denial thereof;

(3) The date upon which the decision will become effective; and

(4) A statement of further right to appeal.

(b) If the parties have presented oral proposed findings at the hearing or have waived presentation of proposed findings, the Judge may at the termination of the hearing announce the decision, subject to later issuance of a written decision under paragraph (a) of this section. In such cases, the Judge may direct the prevailing party to prepare proposed findings, conclusions, and an order.

(c) The Judge will serve the written decision on each of the parties, the Assistant General Counsel for Enforcement and Litigation, and the Administrator by certified mail (return receipt requested), facsimile, electronic transmission or third party commercial carrier to an addressee's last known address or by personal delivery and upon request will promptly certify to the Administrator the record, including the original copy of the decision, as complete and accurate.

(d) An initial decision becomes effective as the final administrative decision of NOAA 60 days after service, unless:

(1) Otherwise provided by statute or regulations;

(2) The Judge grants a petition for reconsideration under § 904.272; or

(3) A petition for discretionary review is filed or the Administrator issues an order to review upon his/her own initiative under § 904.273.

§ 904.272 Petition for reconsideration.

Unless an order or initial decision of the Judge specifically provides otherwise, any party may file a petition for reconsideration of an order or initial decision issued by the Judge. Such petitions must state the matter claimed to have been erroneously decided, and the alleged errors and relief sought must be specified with particularity. Petitions must be filed within 20 days after the service of such order or initial decision. The filing of a petition for reconsideration shall operate as a stay of an order or initial decision or its effectiveness date unless specifically so ordered by the Judge. Within 15 days after the petition is filed, any party to the administrative proceeding may file an answer in support or in opposition.

§ 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.