IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
This Document Relates to ALL CASES	)	No. 3:89-cv-0095-HRH

O R D E R

Order on Lead Counsel's Sixteenth
Punitive Damages Application for an Order
Distributing Qualified Settlement Funds to Claimants
in Various Claim Categories and Their Attorneys

Introduction

This order on Lead Counsel's sixteenth application[1] for an order distributing Exxon Qualified Settlement Fund ("EQSF") proceeds is by and large dictated by the Joint Prosecution Agreements entered into by counsel for the Class Claimants and counsel for the Direct Action Plaintiffs, the Plan of Allocation which flowed from the Joint Prosecution Agreement, and 50 Plans of Distribution which flowed from the Plan of Allocation. The background and much of the reasoning underlying this order have been set out in this court's order of October 30, 2009,[2] by which Lead Counsel's seventh application for a distribution of recoveries was considered and decided.

[1]Docket No. 9639.

[2]Docket No. 9395.

Upon the request of Lead Counsel, the court's order on Lead Counsel's seventh application for a distribution of recoveries created or acknowledged the prior existence of reserve accounts maintained by the EQSF Administrator for purposes of having enough money to fund possible resolutions of disputed claims, while at the same time freeing up substantial sums of money for distribution to claimants as to whom there were no disputes. Such distribution took place as a result of Lead Counsel's eighth and succeeding applications for a distribution of recoveries.

In Lead Counsel's sixteenth application, Lead Counsel and the EQSF Administrator propose the vacating of the reserves and a final distribution of recoveries to claimants whose proposed distributions are not impaired[3] in any way. The sixteenth application for an order distributing Exxon Qualified Settlement Funds to claimants in various claim categories and their attorneys is supported by the declaration of EQSF Administrator Lynn Lincoln Sarko.[4] Objections have been filed. Attorney Coe, on behalf of unnamed individual cannery worker claimants represented by Mr. Coe or the Belli/-Scarlett Law Group, has objected to the sixteenth application for distribution.[5] Polar Equipment, Inc. (d/b/a Cook Inlet Processing, Inc.), and Nautilus Marine Enterprises, Inc., through their respec-

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[3]For example, complicated by liens, judgments, or unresolved disputes which require more time for resolution.

[4]Docket No. 9640.

[5]Docket No. 9653 (previously filed at Docket No. 9649).

tive counsel, have likewise opposed the sixteenth application.[6] The individual objection of cannery worker Richard A. McQuade has been received and filed by the court.[7] Lead counsel has replied to the objections,[8] and Lead Counsel and Mr. McQuade have jointly filed with the court a report delineating with particularity Mr. McQuade's distributive share of the cannery workers' allocation and his actual receipts from the EQSF.[9]

Cook Inlet <and> Nautilus Marine

Processor claimants, Polar Equipment, Inc., d/b/a Cook Inlet Processing, Inc., and Nautilus Marine Enterprises, Inc., object to Lead Counsel's sixteenth application for distribution of funds. By previous orders, the court has reserved $45.4 million to accommodate the possibility that Cook Inlet and Nautilus Marine would prevail on claims which those processors had made. Cook Inlet and Nautilus Marine contend that their claims have still not been finally resolved.

The most recent claims of Cook Inlet and Nautilus Marine were denied by order of July 28, 2010.[10] In that order, the long, convoluted history of proceedings concerning these two processors was reviewed and evaluated. The Cook Inlet and Nautilus Marine

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[6]Docket No. 9650.

[7]Docket No. 9652.

[8]Docket No. 9654.

[9]Docket No. 9655.

[10]Docket No. 9600.

claims had previously been denied by this court,[11] were the subject of an appeal to the Ninth Circuit Court, and were rejected by that court's affirmance of the district court decision.[12] Both this court and the court of appeals determined that Cook Inlet and Nautilus Marine were not entitled to any share of the punitive damages or interest recovered by other plaintiffs. Despite these rulings, and despite the fact that Cook Inlet and Nautilus Marine had agreed in the course of settling differences with other plaintiffs that they would make no further claims upon the other plaintiffs, Cook Inlet and Nautilus Marine nonetheless did so. Those demands led to the court's order of July 28, 2010. Cook Inlet and Nautilus Marine have appealed again. Those appeals are still pending. Neither of the processors sought a stay of the court's order of July 28, 2010.

For the reasons set out at length and in great detail in the court's July 28, 2010, order, the court concludes that the objections of Cook Inlet and Nautilus Marine with respect to the sixteenth application are utterly and completely without merit. The processors had completely and finally exhausted all reasonable possibilities for review of their claims at the point where the United States Supreme Court declined their petition for certiorari and the circuit court's mandate to this court was issued.[13] The appeals which are presently pending are barred by the Ninth Circuit

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[11]Order No. 317 (July 17, 2007), Docket No. 8622.

[12]Docket No. 9237. Cook Inlet and Nautilus marine petitioned the United States Supreme Court for certiorari, which was denied.

[13]Docket No. 9394.

Court's affirmance of this court's prior decision denying the processors' claims for participation in punitive damages distributions. Accordingly, the two reserves set up for Cook Inlet and Nautilus Marine in the amounts of $21,875,000.00 and $23,513,445.43 shall be vacated.

Cannery Workers

Attorneys Coe and Belli/Scarlett object to Lead Counsel's sixteenth application for distribution of funds.[14] The cannery workers observe that the planned distribution does not show any share for individual cannery workers. In reply, Lead Counsel acknowledges that the cannery workers will receive no further distribution. A further distribution is not possible because the EQSF Administrator has no funds allocated to cannery workers that have not already been distributed.

By its order on Lead Counsel's seventh application for distribution of recoveries, the court authorized a reserve of $1,547,593.26 "for purposes of addressing the fact that some cannery workers have received less than their final percentage shares."[15] In approving the $1.5 million reserve for cannery workers, the court (without saying so) hoped that the EQSF Administrator could somehow "pull a rabbit out of the hat" — that is, devise a means to at least partially accommodate those cannery workers who have been underpaid while other cannery workers have

[14]Docket No. 9653.

[15]Order re Lead Counsel's Seventh Application for a Distribution of Recoveries at 15, Docket No. 9395.

been overpaid. At the same time, however, the court did expressly observe that:

> The matrix shares were agreed to. They have been employed by the EQSF Administrator throughout the distribution process. It would be a huge waste of resources, let alone the occasion of great unfairness to all of those who have long relied upon the matrix shares, to which everyone agreed and which the court approved as fair, just, and reasonable, to reevaluate the Plan of Allocation at this time.[16]

In summing up with respect to the cannery workers' reserve, the court made it clear that the $1.5 million reserve for cannery workers was "for the potential benefit of cannery worker claimants."[17] The creation of this reserve was neither a promise nor any sort of commitment that the $1.5 million would in fact be available for distribution to cannery workers. Now that much of the final accounting has been completed, it is entirely clear from the Administrator's declaration[18] that the $1.5 million reserve is not available for allocation to the cannery workers claims category nor for distribution to the cannery workers because, as a claim category, the cannery workers remain over-allocated in the amount of $2,629,759.90.

As the court has explained in great detail in its order on Lead Counsel's seventh application for distribution of recoveries,[19] the cannery workers claims category has been over-allocated because

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[16]Id. at 16.

[17]Id. at 19 (emphasis added).

[18]Docket No. 9640.

[19]Order at 9-19, Docket No. 9395.

of the substantial recoveries achieved by some cannery workers outside the EQSF administrative processes. As explained in the earlier order, the fundamental problem confronting cannery workers, the Administrator, and the court flows from the cannery workers plan of distribution, which like other plans provides:

> In the Final Distribution to be conducted once all of the signatories' recoveries are collected, distributions to cannery workers will be adjusted to account for these "prepayments."[20]

The "prepayments" referred to are sources other than the EQSF such as Exxon's Crawford Payment Program. There are no further recoveries to be made. All of the Exxon recoveries have been collected and have been or will (upon the release of reserves that are no longer appropriate) be allocated pursuant to the Plan of Allocation and distributed according to the various plans of distribution. As observed above, we are at the point of final distribution to claimants whose distributions are not impaired. The time to take account of prepayments is now. At this point, the EQSF Administrator simply does not have any additional money to accommodate those cannery workers who have been underpaid.

No doubt some cannery workers are asking themselves, how could this happen? It has happened because in negotiating, proposing, and obtaining court approval for the plans of distribution, the above described final accounting was agreed upon and approved. The plans of distribution were determined to be fair and reasonable

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[20]Docket No. 9285-2, the Plan of Distribution of Allocations for the Cannery Workers Category, Section IC, p. 6.

when they were submitted. That conclusion was never challenged by an appeal, and it is now many years too late to have second thoughts about what claimants and their attorneys agreed to in the Plan of Allocation.

What in fact happened is very clear: in negotiating plans of distribution, none of the parties involved in the negotiations and submission of the proposed plans of distribution imagined that the $5 billion punitive damages award would be reduced as drastically as it has been. Rather than recovering $5 billion, All Plaintiffs have recovered slightly more than $500 million plus interest, which takes the punitive damages recovery up to a gross amount of about $1 billion. Had there been a significantly larger recovery of punitive damages (but not the full $5 billion), there would have been sufficient money deposited to the EQSF to accommodate the then known fact that some of the claim categories had been overpaid on the basis of recoveries which had been made up to that point.[21] All parties assumed the known risk that there might <u>not</u> be a punitive damages award large enough to make it possible for the EQSF Administrator to adjust allocations and equalize distributions when final distributions were made.

What has happened here is not an error or mistake on anyone's part. When the plans of distribution were negotiated, all of the claimants and their counsel had good reason to believe that they would achieve a very substantial punitive damages recovery, even if

[21]Indeed, the fact that cannery workers as a group have been overpaid means that each of the other 49 claim categories have been somewhat underpaid.

not the full $5 billion. At the same time, all claimants and their attorneys also knew that there would be ongoing litigation, that the punitive damages verdict would be challenged, and that the fund finally available for distribution would not be fixed until the last possible court review had become final. Everyone exercised their best efforts and best judgment in developing the plans of distribution. What has come to pass is purely and simply a consequence of developments that Lead Counsel and others endeavored long and hard to avoid. No one could know that the United States Supreme Court would rewrite the law of punitive damages for maritime cases.

It is painfully clear from Lead Counsel's sixteenth application for distribution of recoveries that the court's "hope" was probably futile. There is no possibility of any new money and the final allocations will not change the fact that the cannery workers claims category is overpaid. With one possible exception that the court would have the Administrator consider, there is no way to accommodate underpaid cannery workers without literally transferring some degree of unfairness to everyone else. The Administrator cannot take funds that are properly distributable to other claims categories and allocate those funds to the cannery workers claims category because the cannery workers claims category has already been substantially overpaid. The court will not countenance — and indeed, the objecting cannery workers do not even appear to suggest — that the court should revisit all of the 50 plans of distribution and the Plan of Allocation. To do that would be

grossly unfair to everyone and would be terrifically costly in both time and dollars.

The $1,547,593.26 set aside for potential payout to cannery worker claimants shall be vacated.

Other Funds Remaining for Distribution

The EQSF Administrator's calculations and Lead Counsel's application assume that the court will approve the stipulation of Lead Counsel and All Alaskan Seafoods, Inc. That approval was given by the court's order of October 15, 2010.[22]

By its order on Lead Counsel's seventh application for a distribution of recoveries, the court had created a further reserve of $4,6077,759.59 for potential processor claims over and above the Plan of Allocation. The Administrator reports that the processors, as a claim category, are no longer overpaid. Thus, and irrespective of whether of not the court would have favorably considered additional funding for an oversubscribed claim category (the court has refused to consider that for cannery workers), there is no longer any need for this reserve either. Accordingly, the $4,677,759.55 reserve for processor claimants shall also be vacated.

In his declaration in support of Lead Counsel's sixteenth application for distribution, the EQSF Administrator addresses the subjects of ongoing costs of administration and provides the court with a possible timeline for the ultimate conclusion of the administrative process. The Administrator will necessarily continue his

[22]Docket No. 9641.

work with the resolution of impaired claims, and in the end it may be that a modest amount of money will remain after the payment of all claims and costs of administration. In this regard, the Administrator anticipates that there will be some claimants who are in essence "lost" – claimants who have either been issued checks that were never negotiated or claimants who in the end cannot be located for purposes of making a distribution. In this regard, the Administrator has raised the possibility of a cy-pres remedy[23] with respect to any remaining funds after the payment of all claims and administrative costs. At such time as Lead Counsel and the Administrator deem it appropriate to finally terminate all administration of the EQSF, the court would have Lead Counsel and the Administrator consider the appropriateness and feasibility of employing any remaining funds for the purpose of ameliorating the shortages which some claimants in various claims categories (but in particular cannery workers) have suffered.

Conclusion

In consideration of the foregoing, it is ordered:

1. The court's Order in connection with approval of the Seventh and Eighth Applications for Distribution of Punitive Damages, requiring the EQSF to

[23]An equitable remedy, in the past most often employed where charitable gifts or bequests cannot be carried out in exactly the fashion contemplated by the donor. In recent times, the doctrine has been employed at the end of class action litigation for purposes of distributing unclaimed portions of a class action judgment where a meaningful, pro rata distribution is impractical. In such situations, the ultimate beneficiary is often a non-profit, charitable organization whose work indirectly benefits the class members and advances a public interest.

reserve the sum of $4,677,759.55 for potential payout to processors is vacated.

2. The court's Order in connection with approval of the Seventh and Eighth Applications for Distribution of Punitive Damages, requiring the EQSF to reserve the sum of $1,547,593.26 for potential payout to cannery workers is vacated.

3. The court's Order in connection with approval of the First Application for Distribution of Punitive Damages, requiring the EQSF to reserve the sum of $21,875,000.00 for potential payout to Cook Inlet and Nautilus Marine is vacated.

4. The court's Order in connection with approval of the Seventh and Eighth Applications for Distribution of Punitive Damages, requiring the EQSF to reserve the sum of $23,513,445.43 for potential payout to Cook Inlet and Nautilus Marine is vacated.

5. Lead Counsel and the Exxon Qualified Settlement Fund ("EQSF") Administrator are hereby authorized and directed to distribute some of the litigation proceeds held in the EQSF to the claimants listed on Exhibit A2-A3 to this Order. The total amount paid shall be the dollar allocations indicated in Exhibits A2-A3, less the appropriate deductions for attorney fees previously authorized by the Court.

Lead Counsel and the EQSF Administrator are authorized to make necessary corrections to the final percent shares and gross dollar allocations for the claimants listed in Exhibits A2-A3 to this Order, provided such changes do not reduce the resulting payment to any one claimant by more than five percent.

6. The EQSF Administrator shall authorize checks and direct deposits to be issued for the payments referred to in paragraph 5 above.

DATED at Anchorage, Alaska, this 10th day of November, 2010.

/s/ H. Russel Holland
United States District Judge