

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 04-035182 & 04-035183

In re: the EXXON VALDEZ

GRANT BAKER, et al., as representatives of
the Mandatory Punitive Damages Class,
Plaintiffs-Appellees-Cross-Appellants,

v.

EXXON MOBIL CORPORATION, et al.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the District of Alaska

**BRIEF OF DEFENDANTS-APPELLANTS ADDRESSING
APPELLATE COSTS AND POST-JUDGMENT INTEREST**

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INTRODUCTION

This case is on remand from the U.S. Supreme Court, which established and applied to this case a new federal maritime-law standard for measuring punitive damages. Punishment in a case of this nature, the Court held, must be measured against the amount of compensatory damages, taken by the Court to be \$507.5 million in this case. *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008) (“[W]e take for granted the District Court’s calculation of the total relevant compensatory damages at \$507.5 million. A punitive-to-compensatory ratio of 1:1 thus yields maximum punitive damages in that amount.” (citation omitted)). On that basis, the Court “vacate[d] the judgment and remand[ed] the case to the Court of Appeals to remit the award accordingly.” *Id.*

The Court’s judgment awarded petitioners Exxon Mobil Corp. and Exxon Shipping Company (collectively “Exxon”) their full costs under Supreme Court Rule 43.2. Jdgmt., *Exxon Shipping Co. v. Baker*, No. 07-219 (U.S.) (issued August 11, 2008) (“*Exxon* Jdgmt.”). The Court’s judgment did not, however, take a position on interest under Supreme Court Rule 42.1. Prior to formal issuance of the judgment, the parties briefed the interest question, and the Court – in a very unusual step – delayed issuance of the judgment for nearly a month to evaluate the parties’ submissions. Rather than address the issue explicitly, the Supreme Court remanded the case to this Court “to address the parties’ contentions about

respondents' entitlement to interest on the award remaining." *Id.*

Following the Supreme Court's ruling and a joint request of the parties, this Court directed entry of judgment on the underlying punitive damages award in the amount of \$507.5 million. Remand Order, Sept. 10, 2008. Even before that order, Exxon paid the bulk of its obligation into the Settlement Fund.¹ The Court stayed its mandate, however, to allow the parties to submit briefs addressing disputed questions about what the mandate should provide with respect to costs and interest.

Those questions are:

(a) Whether the mandate should award appellate costs to Exxon, the party which succeeded on appeal in obtaining entry of a punitive damages award almost 90% less than the initial judgment against Exxon; and

(b) Whether the mandate should include interest on the new, remitted judgment dating to the original, now-vacated judgment.

For the reasons elaborated below, Exxon submits that the answer to (a) is yes:

Exxon should be awarded the costs of its appeal to this Court, just as it was awarded costs by the Supreme Court. And the answer to (b) is no: interest should not be allowed to run back to the date of the original judgment, and certainly not at a rate that would grossly inflate the value of an award actually payable in 1996.

¹ Exxon paid \$383,349,750.00, which represents the judgment, less an agreed offset of \$54,150,250 reflecting cede-backs to which this Court has held Exxon was entitled, and a \$70 million withhold for disputed costs.

I. EXXON SHOULD BE AWARDED ITS APPELLATE COSTS

A. A Party That Prevails On Appeal Is Presumptively Entitled To Costs Under Appellate Rule 39

It has been settled for more than 500 years that a prevailing party in an action at law may recover its costs as a matter of course. “As early as 1487 English law had codified the common law practice ‘that if a judgment be affirmed on writ of error, the writ be discontinued, or if the party suing it be nonsuited then *the defendant in error was to have his costs.*’” *Baez v. Department of Justice*, 684 F.2d 999, 1002 (D.C. Cir. 1982) (en banc) (citation omitted). The American legal system has followed the same rule from its inception. *See id.*; *In re Costs in Civil Cases*, 30 F. Cas. 1058, 1059 (C.C.N.Y. 1852). Against that historical backdrop, the modern presumption that the prevailing party will recover its costs is “very powerful indeed.” *Baez*, 684 F.2d at 1004; *see Delta Airlines, Inc. v. August*, 450 U.S. 346, 352 (1981) (costs liability is “a normal incident of defeat”); *Ass’n of Mexican-American Educators v. California*, 231 F.3d 572, 593 (9th Cir. 2000) (en banc) (“costs are to be awarded as a matter of course in the ordinary case”).

The longstanding common-law rule on cost recovery is now codified in the procedural rules governing practice in federal trial and appellate courts. *See Fed. R. Civ. P. 54(d)*; *Fed. R. App. P. 39*. Under Civil Rule 54(d), as under other cost- and fee-shifting provisions, the party who initiates the civil proceeding is awarded costs as the “prevailing party” so long as it obtains a significant benefit, even if the

defendant succeeded on most (or the most central) issues. *See, e.g., K-2 Ski Co. v. Head Ski Co.*, 506 F.2d 471, 477 (9th Cir. 1974) (Rule 54(d)); *Tex. State Teachers Ass'n v. Garland Indep. Sch. Dist.*, 489 U.S. 782, 791-92 (1989) (fee-shifting statute); *Park v. Anaheim Union High Sch. Dist.*, 464 F.3d 1025, 1035-37 (9th Cir. 2006) (fee-shifting statute).

Appellate Rule 39 – which was promulgated in 1968 and codified preexisting practice in the federal circuits, *see* Moore's Fed. Prac. § 339App.100 (3d ed. 1998) – largely tracks Civil Rule 54(d) in structure and language, and reflects the same “very powerful” presumption “favoring costs award to prevailing parties.” *Baez*, 684 F.2d at 1004. Under Appellate Rule 39, when the ruling below is affirmed or reversed, costs are automatically awarded to the prevailing party unless the appellate court provides otherwise. *See* Fed. R. App. P. 39(a)(2)&(3). Appellate Rule 39 also includes a provision expressly addressing “mixed” outcomes on appeal, where it is not necessarily obvious which party has “prevailed.” Sub-paragraph (a)(4) of Appellate Rule 39 provides that when a judgment is “affirmed in part, reversed in part, modified, or vacated,” appellate costs “are taxed only as the court orders.” This provision effectively gives the appellate court that rendered the “mixed” judgment authority to determine which party prevailed for purposes of costs liability. And as under Civil Rule 54(d), so long as the appellant obtains a significant benefit from the appeal, it can be deemed

the prevailing party, even if it is not successful on all issues. *See* Wright et al., Fed. Prac. & Proc. § 3985, at 213 (Supp. 2008) (citing cases).

Appellate Rule 39 recognizes two distinct categories of costs incurred on appeal. The first are costs actually incurred in the appellate court, including, for example, any docketing fees and the costs of printing briefs and appendices. Such costs are reflected in the bill of costs filed in the appellate court under Rule 39(d), in accordance with that court's official form.

The second category of costs addressed by Rule 39 are costs that are related to the appeal but are actually incurred in the district court, and therefore are taxable there, rather than in the appellate court. These costs are identified in Rule 39(e):

(e) Costs on Appeal Taxable in the District Court. The following costs on appeal are taxable in the district court for the benefit of the party entitled to costs under this rule:

- (1) the preparation and transmission of the reporter's record;
- (2) the reporter's transcript, if needed to determine the appeal;
- (3) premiums paid for a supersedeas bond or other bond to preserve rights pending appeal; and
- (4) the fee for filing the notice of appeal.

Fed. R. App. P. 39(e). Consistent with the basic structure of Rule 39(a), costs taxable in the district court are automatic in the case of a straight affirmance or reversal, unless the court of appeals orders otherwise. But that is not the case for a modified judgment or other "mixed" result. In that situation, courts have construed

Rule 39(a)(4) together with Rule 39(e) as allowing appellate costs taxable in the district court to be actually awarded there only as authorized by the appellate court's mandate. *See Reeder-Simco GMC, Inc. v. Volvo GM Heavy Truck Corp.*, 497 F.3d 805, 808 (8th Cir. 2007); *Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1340-41 (11th Cir. 1997); *Rio Properties, Inc. v. Stewart Annoyances, Ltd.*, 2004 WL 2984292, at *2-*3 (D. Nev. 2004); *see also Newhouse v. Robert's Ilima Tours, Inc.*, 708 F.2d 436, 442 (9th Cir. 1983) (dictum). Under these precedents, when an appealing defendant successfully obtains a vacatur of a damages judgment and remittitur to a significantly lower amount, as here, Rule 39(e) costs can be taxed by the district court in favor of the successful defendant only if the appellate court's mandate expressly provides for taxation of such costs.

B. Exxon Should Be Awarded Its Appellate Costs, Including The Costs Of The Letters Of Credit Plaintiffs Needlessly Demanded To Stay Execution Of The Judgment Pending Appeal

Applying the foregoing principles, this Court should treat Exxon as the prevailing party and should specify in its mandate that Exxon is entitled to its appellate costs, including all costs taxable in the district court under Rule 39(e). A bill for appellate costs taxable in this Court, following the official form, has been filed contemporaneously with this brief and copy is attached hereto as Exhibit A. A detailed bill of Rule 39(e) costs will be filed in the district court if such costs are

authorized in this Court's mandate. The most significant item of such costs, however, will be the cost of the letters of credit ("LOCs") plaintiffs forced Exxon to obtain as a condition of staying execution of the original \$5 billion judgment (and subsequent \$4 billion and \$4.5 billion judgments) during appeal. Exxon estimates its LOC costs at approximately \$60.6 million, as set forth in the declaration of William M. Colton, Exxon's Assistant Treasurer ("Colton Decl.") ¶ 3, attached hereto as Exhibit B.

Exxon should be awarded its appellate costs because Exxon is without any doubt the party that prevailed in this appeal. The initial punitive damages judgment defended by plaintiffs all the way through the Supreme Court proceedings was \$5 billion. Exxon ultimately obtained a vacatur of that judgment and a remittitur to an award of only \$507.5 million – just over 10% of the original judgment. Not only did Exxon prevail in obtaining an award only a small fraction of the original award; Exxon also defeated plaintiffs' cross-appeal to this Court urging restoration of the \$5 billion award, and their cross-petition to the Supreme Court seeking the same result. The usual cost-shifting rule plainly applies when a plaintiff unsuccessfully "defen[ds] . . . an unreasonably large damages award," which is "ultimately modified on appeal." *Republic Tobacco, Inc. v. N. Atlantic Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007).

Indeed, the Supreme Court itself has already recognized that Exxon

prevailed for purposes of cost-shifting principles, awarding Exxon its full costs in the Supreme Court under that Court's Rule 42.1. *Exxon Jdgmt.*, at 1. The general rule is that "when the Supreme Court reverses a circuit court order . . . and awards costs for the Supreme Court litigation to the now prevailing appellant," the appellate court awards costs under Rule 39 "to the now successful appellant for appeals on both the circuit and Supreme Court levels, as well as for costs incurred in the district court." *Furman v. Cirrito*, 782 F.2d 353, 355 (2d Cir. 1986). That general rule obtains here even though the Court did not accept Exxon's arguments for complete reversal of the punitive damages verdict or for a new trial. Just as a plaintiff in district court litigation need not win every argument to be deemed the prevailing party entitled to full costs under Civil Rule 54, an appellant likewise need not win every argument it advances on appeal to be treated as the prevailing party entitled to full costs under Appellate Rule 39(a)(4). *See supra* at 3-5. If the Supreme Court believed Exxon did not prevail, it would have declined to award costs to Exxon under Rule 42.1, but the Court instead concluded the opposite, and treated Exxon as the prevailing party – as did numerous commentators, and even plaintiffs themselves.² This Court should do the same.

² *See, e.g.*, Editorial, Anchorage Daily News, July 2, 2008 ("Let's be clear. Exxon Mobil won this case."); Erika Bolstad, *Exxon Valdez: 'This is it; it's done'*, Anchorage Daily News, June 26, 2008 (quoting commentators and plaintiffs' counsel); Lisa Stiffler, *Exxon Damages Slashed*, Seattle Post-Intelligencer, June 26, 2008 (quoting plaintiffs and commentators).

Assuming the Court awards Exxon appellate costs as the prevailing party, it should clearly specify that Exxon is entitled to appellate costs taxable in the district court under Rule 39(e). Of those costs, the major item is the LOC costs, which are treated by courts as equivalent to the supersedeas bond premiums explicitly identified as taxable by Rule 39(e)(3). *See, e.g., Johnson v. Pac. Lighting Land Co.*, 878 F.2d 297, 298 (9th Cir. 1989); *Republic Tobacco*, 481 F.3d at 450.

The cost of a bond or its equivalent “has long been held a proper item of costs,” *Berner v. British Comm. Airlines, Ltd.*, 362 F.2d 799, 801 (2d Cir. 1966), and there is no reason to depart from that rule here. To be sure, the letter of credit costs in this case were large – reflecting the size of the multibillion dollar awards Exxon successfully appealed – but those costs are easily covered by the final punitive damages award. Even more important, plaintiffs *willfully assumed the risk* that LOC costs would be shifted to them in the event Exxon prevailed on appeal. After entry of the initial judgment in 1997, Exxon urged the plaintiffs and the district court not to require a supersedeas bond or other security as a cost of appealing the judgment, on the ground that Exxon could easily satisfy the judgment if it was sustained, and – to the point here – that plaintiffs themselves would be stuck with the substantial costs of the security in the event the judgment was not sustained. *E.g., D. Ct. Dkt. No. 6691*, at 8. Plaintiffs objected, arguing vigorously – and successfully – that despite Exxon’s undisputed financial

soundness, Exxon should be required to bear the usual costs of any appeal. *E.g.*, D. Ct. Dkt. No. 6751, at 2-3. Plaintiffs had a right to insist on security for the appeal, but having exercised that right with eyes open, they must now accept its standard consequences: liability for the cost of the security they demanded.

Finally, while Exxon submits that it is entitled to full costs as the prevailing party, at a minimum Exxon should be awarded a percentage of its costs reflecting the measure of its success on appeal. Apportionment of costs is common in cases involving modified damages judgments or other “mixed” results. *See, e.g., Quaker Action Group v. Andrus*, 559 F.2d 716, 719 (D.C. Cir. 1977); *Shima v. Brown*, 133 F.2d 48, 50 (D.C. Cir. 1942); *see also* Hon. Jon O. Newman, *Decretal Language: Last Words in an Appellate Opinion*, 70 Brooklyn L. Rev. 727, 735 (2005) (“If the opinion directs a mixed outcome, appellant’s costs can be apportioned, e.g., ‘the appellant may recover 2/3 of its costs.’”). Applying that approach here, the Court could award Exxon at least 90% of its costs, to reflect Exxon’s success in obtaining a remittitur to an award approximately 10% of the original award. Such an approach certainly would be more logical than requiring Exxon to bear its own costs, which would effectively punish Exxon for successfully challenging the unlawful punitive damage awards imposed during the course of this litigation. *See Sun Ship, Inc. v. Lehman*, 655 F.2d 1311, 1317 (2d Cir. 1983) (“the denial of costs [to a prevailing party] is in the nature of a penalty” (quotation omitted)).

II. INTEREST SHOULD NOT BE REQUIRED TO DATE TO THE ORIGINAL JUDGMENT

The second question concerning the content of the mandate is whether this Court should provide that interest on the remitted award dates to the initial, unlawful \$5 billion judgment. The answer to that question is no. The underlying legal basis for any award of punitive damages was not ascertained until the Supreme Court – for the first time in this litigation – established and applied federal maritime law standards for punitive damages awards. And because punitive damages awards do not compensate for “loss” of any kind, interest is not needed to make plaintiffs whole. Finally, if interest *were* justified on the theory that plaintiffs should be compensated for loss in the value of a punitive damages award payable in 1996, it would be completely irrational to apply a 5.9% rate compounded annually, because that approach would result in an award far exceeding the real value of a judgment entered September 24, 1996. If the Court concludes that interest should be awarded back to that date, the Court should exercise its exclusive authority over interest on a remitted judgment to prescribe a rate that realistically reflects the value of a judgment properly ascertained and entered in September 1996.

A. Interest Is Governed By This Court’s Equitable Discretion

Because the Supreme Court remanded the question of interest on the remitted judgment to this Court, the question is governed by Rule 37(b) of the

Federal Rules of Appellate Procedure. Rule 37(b) provides: “If the [appellate] court modifies or reverses a judgment with a direction that a money judgment be entered in the district court, the mandate must contain instructions about the allowance of interest.” This Rule is functionally parallel to Rule 39(a)(4) concerning costs, discussed above: when a damages judgment under review is reversed or modified, it is up to the reviewing court responsible for the modification to decide what interest, if any, is applicable to the new damages judgment directed by the court – and if the reviewing court fails to provide directions in its judgment or mandate for the payment of interest, interest can only run from the date of the new judgment on remand. *See Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948); *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 518 F.3d 1013, 1020 (9th Cir. 2008); *SEB SA v. Sunbeam Corp.*, 476 F.3d 1317, 1319-21 (11th Cir. 2007); *Westinghouse Credit Corp. v. D’Urso*, 371 F.3d 96, 103 (2d Cir. 2004); *Tronzo v. Biomet, Inc.*, 318 F.3d 1378, 1381 (Fed. Cir. 2003). The purpose of the rule is to remind reviewing courts to provide for interest if they wish to allow it. *See Planned Parenthood*, 518 F.3d at 1018; *Westinghouse*, 371 F.3d at 103.³

³ The precedents and principles cited in text explain why, contrary to plaintiffs’ submission in the Supreme Court, the interest issue is *not* governed by the earlier district court order awarding plaintiffs interest to the date of the original judgment. As this Court explained in *Planned Parenthood*, plaintiffs’ emphasis on the district court’s award “is inconsistent with the allocation of judicial authority

Inherent in the appellate court's authority to prescribe the interest applicable to a vacated and modified money judgment is the discretion to determine whether interest should date to the original award. Rule 37 is a rule of "equitable construction," which "neither requires nor prohibits that interest be payable from the date judgment is entered in the district court – or any other fixed date – in every case where a judgment is modified or reversed on appeal." *Affiliated Capital Corp. v. Houston*, 793 F.2d 706, 709-10 (5th Cir. 1986); see *Smith v. Nat'l R.R. Passenger Corp.*, 856 F.2d 467, 473 (2d Cir. 1988) ("[T]his Court has the discretion under Rule 37 to decide in a particular case whether interest should run from the date of the original jury verdict."); *U.S. v. Hougham*, 301 F.2d 133, 135 (9th Cir. 1962) ("if [28 U.S.C. § 1961] is not to be applied, the court of appeals can expressly so order in its mandate"). Because "the 'equities' vary from case to case," *Affiliated Capital*, 793 F.2d at 710, identifying the judgment from which interest should run "requires an inquiry into the nature of the initial judgment, the action of the appellate court, the subsequent events upon remand, and the

contemplated by *Briggs* and Rule 37(b)," because under Appellate Rule 37(b), "[i]t is the *court of appeals* – not the district court – that is charged with setting the date that interest accrues on the damages [the appellate court has] specified." 518 F.3d at 1020. This Court's previous judgment in this case ordered that the punitive damages award be reduced to \$2.5 billion, but did not award interest on the punitive damages judgment as so reduced. Nor did this Court award interest in the first appeal. As the case currently stands, in short, there is no interest included in the judgment.

relationship between the first judgment and the modified judgment,” *Guam Society of Obstetricians & Gynecologists v. Ada*, 100 F.3d 691, 702 (9th Cir. 1996) (quotation omitted).

Courts conducting this inquiry consider “the extent to which the [initial judgment] was reversed,” *Ashland Oil Co. v. Phillips Petroleum Co.*, 607 F.2d 335, 336 (10th Cir. 1979), and they are less likely to award interest dating to the initial judgment when “the mandate of the appellate court alters the original judgment in more than relatively minor respects,” *Reaves v. Ole Man River Towing, Inc.*, 761 F.2d 1111, 1112 (5th Cir. 1985); see *Riha v. Int’l Telephone & Telegraph Co.*, 533 F.2d 1053, 1055 (8th Cir. 1976) (finding “no injustice” warranting recall of mandate to award interest dating to original excessive damages judgment, where new remand judgment was 60% of original); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 476-77 (8th Cir. 1977) (allowing interest only on remand judgment where first judgment vacated for more detailed Rule 52 factfinding). Applying interest back to the initial judgment also is disfavored when the plaintiff’s ultimate victory was “far from clear-cut,” *Affiliated Capital*, 793 F.2d at 711, and when the interest applies to extra-compensatory damages, meaning that the plaintiff is not “the usual, uncompensated ‘wronged plaintiff’ for which the equitable construction and application of § 1961 and Rule 37 was intended.” *Id.* at 712.

B. Neither Equity Nor Precedent Requires That Interest Date To The Initial Unlawful Judgment On The Facts Of This Case

The equitable principles discussed above disfavor an award of interest dating to the original punitive damages judgment here.

First, plaintiffs won nothing like a “clear-cut” victory. The judgment dictated by the Supreme Court alters the original award in much more than “relatively minor respects.” *Reaves*, 761 F.2d at 1112. Plaintiffs saw their outlier punitive damages award vacated and its amount twice substantially reduced, ultimately to just over 10% of their initial award. *See supra* at 14 (citing cases applying interest only to new judgment). Moreover, the Supreme Court divided equally on the vicarious punishment issue, which this Court itself described as a close question. *In re Exxon Valdez*, 270 F.3d 1215, 1235 n.84 (9th Cir. 2001). A ruling favorable to Exxon on the vicarious punishment issue, of course, would have completely eliminated the punitive damages award. Although the Supreme Court ultimately ruled that a \$507.5 million punitive damages award would be consistent with newly enunciated maritime-law standards, the case simply is not comparable to those in which courts award interest from the date of an original judgment that, while reduced, is substantially affirmed and upheld.

Second, this case does not involve any uncompensated “loss” to a “wronged plaintiff” requiring compensation in equity under Rule 37(b). *See Affiliated Capital*, 793 F.2d at 712 (declining to allow interest back to initial judgment where

plaintiffs already received extra-compensatory treble damages). “The purpose of post-judgment interest is to compensate the successful plaintiff for the loss from the time between the ascertainment of the damage and the payment by the defendant.” *Kaiser Aluminum & Chem. Co. v. Bonjorno*, 494 U.S. 827, 835-36 (1990). Here there is no “loss” and no plaintiff “wronged” by lack of compensation. To the contrary, all plaintiffs here were fully compensated years ago. As the Supreme Court held in this very case, no plaintiff has any type of personal or property right to be paid punitive damages; such damages are imposed purely in the public interest for the purposes of punishment and deterrence. *Exxon Shipping*, 128 S. Ct. at 2621 & n.9, 2633 n.27. The Court having now established that \$507.5 million is proper punishment under federal maritime law to deter Exxon and others from future oil spills, the effect of a \$507.5 million award will be the same whether post-judgment interest is paid or not: Exxon and any other potential spillers will know that for conduct like Exxon’s, they will face punishment in an amount up to the extent of damage they cause.

Third, allowing post-judgment interest back to the date of the initial judgment also is inappropriate because there was no “ascertainment” within the meaning of *Bonjorno* of the lawful amount of punitive damages until the Supreme Court ultimately determined the amount under maritime law. In an ordinary case of compensatory damages, the jury decides the amount to award, and its

determination of the amount of damages is a “fact” which under the Seventh Amendment may not be set aside easily. It is thus reasonable to consider a factual determination an “ascertainment” of the amount of damages. But the amount of *punitive* damages is not a “fact” found by the jury, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436-37 (2001), and the amount proper here under maritime law was not “ascertained” in any sense until the Supreme Court’s ruling.

Plaintiffs no doubt will contend otherwise on the basis of *Planned Parenthood*, where this Court held part of a punitive damages award unconstitutionally excessive, but exercised its discretion to award interest on the constitutional amount dating back to initial judgment. 518 F.3d at 1021. In so ruling, the *Planned Parenthood* Court explained that the initial judgment “meaningfully ascertained” the “legal and evidentiary basis” of the award, even though part of it was later excised as unconstitutionally excessive. 518 F.3d at 1021. That ruling does not control the result here.

First, *Planned Parenthood* explicitly addressed only the “ascertainment” issue. Unlike here, the defendants in that case did not raise – and the Court did not squarely address – other equitable considerations, including whether the plaintiffs in that case had won a sufficiently “clear-cut victory” and whether plaintiffs had actually suffered any private “loss” during the appeal of a public-serving punitive

damages judgment. In fact, the *Planned Parenthood* Court *did* treat the punitive damages judgment as compensating the plaintiffs for uncompensated losses. See *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (justifying remitted 9:1 ratio in part because “not all of physicians’ damage is quantifiable, and not all of it was compensated; emotional distress as well as security costs will no doubt continue despite the injunction”). If the premise that punitive damages may compensate for loss were valid, it would indeed justify awarding interest dating to the initial judgment, to compensate for a loss that continued through the appeals. But the premise is *not* valid here – the Supreme Court’s opinion in this case makes perfectly clear that this punitive damages award does not provide compensation of any kind. *Exxon Shipping*, 128 S. Ct. at 2621 & n.9, 2633 n.27. Thus a key justification for awarding interest dating to the initial judgment in *Planned Parenthood* simply does not apply here.

Second, and even more significant, *Planned Parenthood*’s key ruling – that the original judgment “meaningfully ascertained” the “legal and evidentiary basis” of the punitive damages award, 518 F.3d at 1021– also has no application here. *Planned Parenthood* was a *due process* case; as the Court explained, the initial judgment “meaningfully ascertained” the *underlying legal basis* for the award, and the appellate modification of the award “permitted the district court’s original

judgment to stand to the extent that it comported with *constitutional limitations* on punitive damages awards.” *Id.* (emphasis added). In other words, this Court simply invalidated the unconstitutional portion of an otherwise legally valid award, without addressing the underlying “legal basis” for the remaining award.

This case is different. Here there was no due process review by the Supreme Court – the Court denied certiorari on the due process question presented. Instead the Court reviewed the punitive damages award “*for conformity with maritime law*, rather than for conformity with the outer limits of due process.” *Exxon Shipping*, 128 S. Ct. at 2626 (emphasis added). In so doing the Court did not simply identify and excise the unconstitutional portion of an award otherwise valid under governing substantive law. Rather, the Court *ascertained for itself*, “in the exercise of [its] federal maritime common law authority,” the appropriate standard of punishment under the governing substantive law for the type of conduct involved in this case. *Id.* The Court explicitly described its analysis as “working out the governing maritime tort principles,” *id.* at 2631 n.21 – specifically, “the desirability of regulating [punitive damages] as a common law remedy for which responsibility lies with this Court as a source of judge-made law in the absence of statute.” *Id.* at 2627. “[T]he Judiciary,” the Court emphasized, “has traditionally taken the lead in formulating flexible and fair remedies in the law maritime, and Congress has largely left to his Court the responsibility for fashioning the

controlling rules of admiralty law.” *Id.* at 2631 n.21 (quotation marks omitted). To address its perceived “need for a new remedial maritime rule” governing punitive damage awards, the Court established a “judicially derived standard” to regulate such awards. *Id.*

Thus, unlike due process review, where the appellate court accepts as a given the legitimacy of an award under governing state or federal law, here the Supreme Court itself determined, for the first time in this case, the underlying legal standards by which punitive damages could be assessed. Under *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), a defendant is entitled to a post-verdict determination of whether a given punitive damage award conforms to the standards of the underlying substantive law. Here, however, neither the district court nor the appellate court reviewed the punitive damages award for conformity with maritime law standards, which were enunciated for the first time in the Supreme Court’s opinion. See *Exxon Valdez*, 270 F.3d at 1240 (stating that no substantive nonconstitutional standards govern punitive damages review). In other words, the plaintiffs’ entitlement to *any* amount of punitive damages under maritime law was not – and could not have been – “meaningfully ascertained” (as *Planned Parenthood* put it) until the Supreme Court decided what legal standards govern punitive damages under maritime law, and how those standards apply here. Until the Supreme Court acted, the legally valid award was literally *anything* between

zero and the maximum award allowed by the Constitution – neither the legal basis for the award, nor the legal basis for any component of the award, was ascertained by the jury’s verdict alone. Only when the award was evaluated under substantive maritime law was any measure of the award finally ascertained.

Thus, while it may make sense to apply interest back to the date of an initial award that is legally valid except for an unconstitutionally excessive component, it makes no sense to award interest back to an initial award whose legal validity was unknown and unknowable until the Supreme Court enunciated the controlling legal standards and applied them to the award.

C. Awarding Interest Dating To The Initial Judgment Would Impose An Unjustifiable Penalty On Exxon

Finally, requiring that a fixed 5.9 % interest rate, compounded annually, date to the original judgment here would impose an enormous penalty on Exxon, merely for taking a successful appeal from an unlawful judgment, and would confer an unjustified windfall on plaintiffs.

If the Court orders interest at a constant 5.9% annual compound rate set by 28 U.S.C. § 1961 for a judgment actually issued September 24, 1996, Exxon estimates that plaintiffs would receive approximately \$445 million in interest. Colton Decl. ¶ 8. That estimate is based on the new \$507.5 million judgment, minus an agreed offset of \$54,150,250 reflecting cede-back settlements upheld by this Court, for a total net award of \$453,349,750. *Id.* ¶ 6. Plaintiffs contended in

the Supreme Court that interest must date to September 24, 1996, to compensate them for the lost time value of their award, and to ensure that its current “value” reflects a 1:1 ratio, as if it actually had been issued on September 24, 1996. Pls. Rule 42.1 Reply, at 8. But that of course wrongly assumes that a constant rate of 5.9% interest compounded annually would accurately reflect the value of \$453.3 million received on September 24, 1996. In fact, it would grossly inflate the value of such an award, since actual interest rates – reflecting the actual “value” of borrowed money – have fluctuated significantly since 1996, averaging well under 5.9% during that period. Using either of two methods that more accurately capture interest rate fluctuations over the period – methods endorsed by this Court in a closely related context⁴ – Exxon estimates that actual interest on \$453.3 million would be in the range of \$262-272 million. Colton Decl. ¶¶ 9-10. Applying a fixed 5.9% rate to allow \$445 million in interest, in other words, would inflate the actual “value” of the penalty by as much as \$183 million, producing an award with a value not equal to compensatory damages, as the Supreme Court mandated, but

⁴ In the pre-judgment interest context, where maritime courts normally employ a § 1961 rate from the date of loss, *see Nelson v. EG&G Energy Measurements Group*, 37 F.3d 1384, 1391 (9th Cir. 1994), this Court and others have sanctioned the use of blended average or annually adjusted rates to calculate interest on losses over extended periods of time, to reflect real-world fluctuations in the § 1961 rate. *See id.* at 1392; *Davis v. City of San Francisco*, 976 F.2d 1526, 1557-58 (9th Cir. 1992); *Ingersoll Milling Machine Co. v. M/V BODENA*, 829 F.2d 293, 311 (2d Cir. 1987).

up to 36% *greater than* compensatory damages.

That excess penalty cannot be justified. First, it is not required by the Supreme Court's ruling, which did not confer on plaintiffs a legal entitlement to a punitive damages award with a "value" of \$507.5 million paid in 1996. It instead established the substantive rule of maritime law that punitive damages in cases of this nature must be measured by the harm caused to the plaintiffs, and it directed entry of a judgment based on harm deemed to be \$507.5 million, reflecting "maximum punitive damages in that amount." 128 S. Ct. at 2633. Nothing in the opinion suggests an intent to direct a judgment "worth" \$507.5 million *in 1996*.

Second, Exxon should not be punished for the time the judicial process took to vindicate Exxon's challenge to the original award. This Court twice remanded the case to the district court to reduce the original award; both times plaintiffs fought any reduction vigorously, arguing that this Court was simply wrong, and urging the district court to "explain that to the Court of Appeals." ER, No. 04-35182, at 501:20-22. The district court, which had initially reduced the award to \$4 billion on the first remand, reversed that initial reduction and *increased* the award to \$4.5 billion. This Court reduced the award to \$2.5 billion on due process grounds, and the Supreme Court, finally applying maritime-law standards as Exxon had urged from the outset, remitted the award to just over 10% of the original verdict under review. Exxon should not be penalized for its successful

appeal by application of a fixed 5.9% rate to the entire pendency of the appeal.

If the Court does conclude, in its equitable discretion, that plaintiffs should be compensated for the value of a \$453.3 million award received on September 24, 1996, the Court should avoid imposing the “appeal penalty” inflicted by using an artificial fixed rate based on the one-year rate applicable under § 1961 in September 1996. Instead the Court should direct the use of blended average or annually adjusted one-year T-Bill rates applicable under § 1961 since September 24, 1996. *See* Colton Decl. ¶¶ 4, 8-10. Nothing in the text of Rule 37(b) precludes an appellate court from prescribing an equitable interest rate.⁵ And such an approach would be consistent with precedents departing from a strict application of a single § 1961 rate in the pre-judgment interest context, when the equities require an approach that better reflects the value of a loss over time. *See supra* note 4.

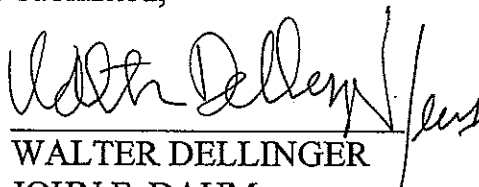
⁵ Rule 37(b) simply provides that when the court directs the entry of a new or modified money judgment below, “the mandate must contain instructions about the allowance of interest.” Fed. R. App. P. 37(b). The Rule specifies no limitations whatsoever on the type of “instructions” the mandate may include. By contrast, Rule 37(a) – which governs interest on affirmed judgments – expressly provides that “whatever interest is *allowed by law* is payable from the date when the district court’s judgment was entered.” *Id.* 37(a) (emphasis added). The “allowed by law” phrase in Rule 37(a) clearly limits interest to that allowed by § 1961, which otherwise governs interest on district court judgments. The absence of the phrase from Rule 37(b) confirms the absence of a comparable limitation on the appellate court’s authority to prescribe interest on a modified or new judgment. Further, inasmuch as the appellate court has equitable discretion under Rule 37(b) not to award *any* interest back to the date of the initial judgment, *see supra* at 13, the court must have the discretion to award some measure of interest different from or less than the interest that would be applicable under § 1961.

CONCLUSION

For the foregoing reasons, the Court should award Exxon its full appellate costs (or in any event no less than 90% of those costs), and it should require that interest begin running from the date the punitive damages award was finally ascertained by the Supreme Court. In the alternative, the Court should prescribe an interest award that more equitably reflects the value of a judgment paid in 1996.⁶

Respectfully submitted,

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Attorneys for Exxon Mobil Corporation

⁶ If the Court does allow interest dating to the initial judgment, it should also require that pre-judgment interest be paid on any LOC costs awarded. Such interest will likely approach \$17 million, depending on the rate applied. Colton Decl. ¶ 5. This Court has previously required that interest (or some other enhancement factor) be applied to an award of attorneys' fees, to compensate for the fees lost during that period. *In re Washington Pub. Power Supply Sys. Sec. Litig.*, 19 F.3d 1291, 1305 (9th Cir. 1994). Exxon's affirmative LOC cost outlays over the last 12 years represent an even more direct loss than unpaid attorney fees. There is also analogous maritime-law precedent requiring payment of interest on costs incurred in an administrative proceeding. *See Morgan Guaranty Trust Co. v. Hellenic Lines Ltd.*, 593 F. Supp. 1004, 1010 (S.D.N.Y. 1984).

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 04-035182 & 04-035183

In re: the EXXON VALDEZ

GRANT BAKER, et al., as representatives of
the Mandatory Punitive Damages Class,
Plaintiffs-Appellees-Cross-Appellants,

v.

EXXON MOBIL CORPORATION, et al.,
Defendants-Appellants-Cross-Appellees.

On Appeal from the United States District Court
for the District of Alaska

DEFENDANTS-APPELLANTS' BILL OF COSTS

E. EDWARD BRUCE
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Pursuant to FRAP 39, 28 U.S.C. § 1920 and Circuit Rule 39-1, Defendants-appellants Exxon Shipping Company and Exxon Mobil Corporation (collectively "Exxon") submit the attached Bills of Costs, reflecting costs incurred in this Court in Appeal Nos. 97-35191, 04-35182, and 04-35183.

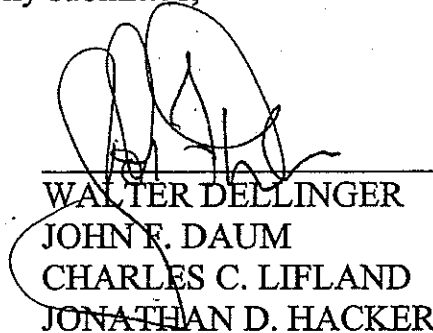
As set forth in the bills, Exxon requests costs for 15 copies of the excerpt of record, and for 25 copies of the appellant's brief and the appellant's reply brief. In accordance with the rules, Exxon filed an original and five copies of the excerpts of record with the Court, and an original and fifteen copies of the appellant's brief and an original and fifteen copies of the appellant's reply brief with the court.

Pursuant to a Stipulation Regarding Service Protocol for Appellate Papers and entered by the United States District Court for the District of Alaska on November 20, 1996 (attached hereto as Addendum A), Exxon also served nine copies of the excerpts of record and of each brief on counsel. Accordingly, appellant requests costs for the additional copies required by the Stipulation.

###

Respectfully submitted,

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Form 10. Bill of Costs

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

Baker, et al. v. Exxon Corporation, et al.

CA No. 97-35191

The Clerk is requested to tax the following costs against: Plaintiffs-Appellees

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST	
Excerpt of Record	15	2018	.10	3,027.00					
Appellant's Brief	25	134	.10	335.00					
Appellee's Brief	—	—	—	—					
Appellant's Reply Brief	25	131	.10	327.50					
Other	—	—	—	—					
	TOTAL				\$3,689.50	TOTAL \$			

Form 10. Bill of Costs - Continued

Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

* If more than 7 excerpts or 20 briefs are requested, a statement explaining the excess number must be submitted.

** Costs per page may not exceed .20 or actual cost, whichever is less. Circuit Rule 39-1.

I, Karen Ezell swear under penalty of perjury that the services for which costs are taxed were actually and necessarily performed, and that the requested costs were actually expended as listed. The printer's itemized statement showing actual costs per page is attached.

Signature: 
Date: 9/24/08

Name of Counsel (printed or typed): John F. Daum
Attorney for: Exxon Corporation

Date: _____ Costs are taxed in the amount of \$ _____

Clerk of Court
By: _____ Deputy Clerk

Form 10. Bill of Costs

United States Court of Appeals for the Ninth Circuit

BILL OF COSTS

Note: If you wish to file a bill of costs, it **MUST** be submitted on this form and filed, with the clerk, with proof of service, within 14 days of the date of entry of judgment, and in accordance with Circuit Rule 39-1. A late bill of costs must be accompanied by a motion showing good cause. Please refer to FRAP 39, 28 U.S.C. § 1920, and Circuit Rule 39-1 when preparing your bill of costs.

Baker, et al. v. Exxon Mobil Corporation, et al.

CA No. 04-35182; 04-35183

The Clerk is requested to tax the following costs against: Plaintiffs-Appellees

Cost Taxable under FRAP 39, 28 U.S.C. § 1920, Circuit Rule 39-1	REQUESTED Each Column Must Be Completed				ALLOWED To Be Completed by the Clerk				
	No. of Docs.*	Pages per Doc.	Cost per Page**	TOTAL COST	No. of Docs.	Pages per Doc.	Cost per Page	TOTAL COST	
Excerpts of Record	15	1099	.10	1,648.50					
Appellant's Brief	25	71	.10	177.50					
Appellee's Brief	—	—	—	—					
Appellee's Reply Brief	25	71	.10	177.50					
Other	—	—	—	—					
	TOTAL				\$2,003.50	TOTAL \$			

Form 10. Bill of Costs - Continued

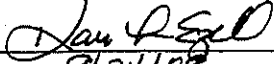
Other: Any other requests must be accompanied by a statement explaining why the item(s) should be taxed pursuant to Circuit Rule 39-1. Additional items without such supporting statements will not be considered.

Attorneys fees **cannot** be requested on this form.

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Signature: 
Date: 9/24/08

Name of Counsel (printed or typed): John F. Daum
Attorney for: Exxon Mobil Corporation

Date: _____ Costs are taxed in the amount of \$ _____

Clerk of Court
By: _____ Deputy Clerk

FILED

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UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA
77 Deputy

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Lead Counsel for Plaintiffs

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Liaison Counsel for Plaintiffs

Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re:)
The EXXON VALDEZ) Case No. A89-095-CV (HRH)
) (Consolidated)
)
THIS DOCUMENT RELATES TO)
ALL CASES)

STIPULATION BETWEEN ALL PLAINTIFFS,¹ THE VILLAGE
CORPORATIONS,² THE SEAFOOD PROCESSORS,³ EXXON CORPORATION,
EXXON SHIPPING COMPANY, AND JOSEPH HAZELWOOD
REGARDING SERVICE PROTOCOL FOR APPELLATE PAPERS

¹All Plaintiffs does not include Chenega Corporation, Port Graham Corporation, English Bay Corporation, Chugach Alaska Fisheries, Tatitlek Corporation, Eyak Corporation, Icicle Seafoods, Inc., Peter Pan Seafoods, Inc., Seven Seas Corporation, Stellar Seafoods, Inc., Ocean Beauty Seafoods, Inc., Ocean Beauty Alaska, Inc., Wards Cove Packing Company, Alaska Boat Company, North Pacific Processors, Inc., ADF, Inc. d/b/a Aleutian Dragon Fisheries, Trident Seafoods Corporation, and North Coast Seafood Processors, Inc.

²Chenega Corporation, Port Graham Corporation, and English Bay Corporation.

³Icicle Seafoods, Inc., Peter Pan Seafoods, Inc., Seven Seas Corporation, Stellar Seafoods, Inc., Ocean Beauty Seafoods, Inc., Ocean Beauty Alaska, Inc., Wards Cove Packing Company, Alaska Boat Company, North Pacific Processors, Inc., ADF, Inc. d/b/a Aleutian Dragon Fisheries, Trident Seafoods Corporation, and North Coast Seafood Processors, Inc.

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Law Offices
550 West 7th Avenue - Suite 1450
Anchorage, Alaska 99501
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1 It is hereby stipulated between the undersigned on behalf of
2 their respective clients that service of all appellate papers
3 filed by any party in the United States Court of Appeals for the
4 Ninth Circuit with respect to any appeal arising out of or
5 related to the proceedings in In re Exxon Valdez, Case No.

6 A89-095-CV (HRH) (Consolidated) may be accomplished as follows:

7 1. With respect to service on All Plaintiffs, by service
8 in accordance with FRAP 25(c) on Lloyd B. Miller, Plaintiffs'
9 Liaison Counsel, at Sonosky, Chambers, Sachse, Miller & Munson,
10 900 West 5th Avenue, Suite 700, Anchorage, AK 99501 (Facsimile:
11 (907) 258-6380).

12 2. With respect to service on Exxon Corporation and Exxon
13 Shipping Company, by service in accordance with FRAP 25(c) on
14 Douglas J. Serdahely, Defendants' Liaison Counsel, at Bogle &
15 Gates, 1031 West 4th Avenue, Suite 600, Anchorage, AK 99501
16 (Facsimile: (907) 276-4152).

17 3. With respect to service on Chenega Corporation, Port
18 Graham Corporation, and English Bay Corporation, by service in
19 accordance with FRAP 25(c) on Samuel J. Fortier, Fortier & Mikko,
20 2550 Denali Street, Suite 1500, Anchorage, AK 99503 (Facsimile:
21 (907) 277-4221).

22 4. With respect to service on the Seafood Processors, by
23 service in accordance with FRAP 25(c) on Bradley S. Keller,
24

1 Byrnes & Keller, 1000 Second Avenue, 38th Floor, Key Tower,
2 Seattle, WA 98104 (Facsimile: (206) 622-2522).

3 5. With respect to service on Defendant Joseph Hazelwood,
4 by service in accordance with FRAP 25(c) on Thomas M. Russo,
5 Chalos & Brown, 300 East 42nd Street, New York, NY 10017
6 (Facsimile: (212) 697-8999).

7 The undersigned further agree for the convenience of the
8 parties that all appellate papers will also be distributed as
9 follows:

10 6. All papers filed by All Plaintiffs will be delivered
11 either by hand or by overnight courier service to:

12 A. Douglas J. Serdahely
13 Bogle & Gates
14 1031 West 4th Avenue, Suite 600
Anchorage, AK 99501

15 B. John Daum
16 O'Melveny & Myers LLP
17 555 13th Street NW
18 Washington, DC 20004-1109

19 C. Charles C. Lifland
20 O'Melveny & Myers LLP
21 400 South Hope Street
22 Los Angeles, CA 90071

23 D. James R. Stevens, Jr.
24 Senior Counsel-Law Department
25 Exxon Company, USA
800 Bell Street, 16th Floor
Houston, TX 77002-7426

E. Samuel J. Fortier
Fortier & Mikko
2550 Denali Street, Suite 1500
Anchorage, AK 99503

1 F. Kenneth F. McCallion
2 Goodkind, Labaton, Rudolf & Sucharow
3 100 Park Avenue, 12th Floor
4 New York, NY 10017

4 G. Bradley S. Keller
5 Byrnes & Keller
6 1000 Second Avenue
7 38th Floor, Key Tower
8 Seattle, WA 98104

7 H. Thomas M. Russo
8 Chalos & Brown
9 300 East 42nd Street
10 New York, NY 10017

9 7. All papers filed by Defendants Exxon Corporation or
10 Exxon Shipping Company will be delivered either by hand or by
11 overnight courier service to:

12 A. David W. Oesting
13 Davis Wright Tremaine LLP
14 550 West 7th Avenue, Suite 1450
15 Anchorage, AK 99501

15 B. Brian B. O'Neill
16 Faegre & Benson
17 2200 Norwest Center
18 90 South Seventh Street
19 Minneapolis, MN 55402-3901

18 C. James vanR. Springer
19 Dickstein, Shapiro, Morin & Oshinsky LLP
20 2101 "L" Street NW
21 Washington, DC 20037

20 D. David C. Tarshes
21 Davis Wright Tremaine LLP
22 2600 Century Square
23 1501 Fourth Avenue
24 Seattle, WA 98101-1688

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1000 Second Avenue
38th Floor, Key Tower
Seattle, WA 98104

H. Thomas M. Russo
Chalos & Brown
300 East 42nd Street
New York, NY 10017

8. All papers filed by the Village Corporations will be delivered either by hand or by overnight courier service to:

A. David W. Oesting
Davis Wright Tremaine LLP
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Anchorage, AK 99501

B. Brian B. O'Neill
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- 14 H. Charles C. Lifland
15 O'Melveny & Myers LLP
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17 Los Angeles, CA 90071
- 18 I. James R. Stevens, Jr.
19 Senior Counsel-Law Department
20 Exxon Company, USA
21 800 Bell Street, 16th Floor
22 Houston, TX 77002-7426
- 23 J. Thomas M. Russo
24 Chalos & Brown
25 300 East 42nd Street
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9. All papers filed by the Seafood Processors will be delivered either by hand or by overnight courier service to:

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11 Fortier & Mikko
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- 14 F. Kenneth F. McCallion
15 Goodkind, Labaton, Rudolf & Sucharow
16 100 Park Avenue, 12th Floor
17 New York, NY 10017
- 18 G. Douglas J. Serdahely
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1 10. All papers filed by Defendant Joseph Hāzēlwood will be
2 delivered either by hand or by overnight courier service to:

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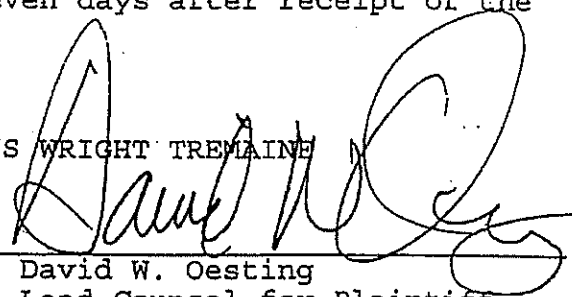
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Senior Counsel-Law Department
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800 Bell Street, 16th Floor
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11. Any party may make a substitution in the persons on whom service is to be made (or their addresses) by mailing a notice to that effect to the persons listed in paragraphs 1 through 4 hereof, with a copy by facsimile to such persons. The substitution shall be effective seven days after receipt of the facsimile copy of the Notice.

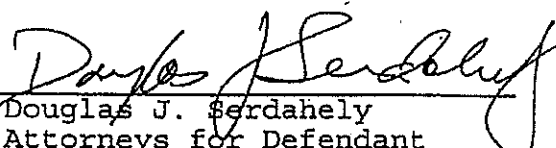
DAVIS WRIGHT TREMAINE

DATED: November 25, 1996

By: 
David W. Oesting
Lead Counsel for Plaintiffs

BOGLE & GATES

DATED: November 25, 1996

By: 
Douglas J. Serdahely
Attorneys for Defendant
Exxon Shipping Company and
Liaison Counsel for Defendants
and Co-Member of Defendants'
Coordinating Committee

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CLOUGH & ASSOCIATES

DATED: November 25, 1996.

By: *John F. Clough, III*
John F. Clough, III
Attorneys for Defendant Exxon
Corporation

FORTIER & MIKKO

11/25/96

By: *Samuel J. Fortier*
Samuel J. Fortier
Attorneys for Chenega
Corporation, Port Graham
Corporation, and English Bay
Corporation

BYRNES & KELLER

By: *Bradley S. Keller*
Bradley S. Keller
Attorneys for Icicle Seafoods,
Inc., et al.

FRIEDMAN, RUBIN & WHITE

By: *Richard H. Friedman*
Richard H. Friedman
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Davis Wright & Irwin LLP
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(907) 257-5800 - Fax: (907) 257-5399

FILED

NOV 29 1996

ORDER

UNITED STATES DISTRICT COURT
DISTRICT OF ALASKA

By TH Deputy

1
2 Upon the basis of the foregoing stipulation,

3 IT IS SO ORDERED.

4 DATED this 27 day of Nov, 1996.

5
6 
7 THE HONORABLE H. RUSSEL HOLLAND
8 UNITED STATES DISTRICT COURT JUDGE

9
10 A89-0095--CV (HRH)

11 -----
12 D. RUSKIN
13 D. SERDAHELY (ROGLE)
14 L. MILLER

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Davis Wright Therman LLP
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CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 400 South Hope Street, Los Angeles, California 90071-2899. I caused the within DEFENDANTS-APPELLANTS' BILL OF COSTS to be served pursuant to Rule 25(b), F. R. App. P. by sending via first class mail two copies of said brief, postage prepaid, to Liaison Counsel for Plaintiffs-Appellees at the following address:

Lloyd B. Miller
Sonosky, Chambers, Sachse, Miller & Munson
900 West 5th Avenue, Suite 700
Anchorage, AK 99501
Tel: (907) 253-6377

In addition, pursuant to an existing stipulation of the parties in this matter, I have caused courtesy copies of the within motion to be delivered, via first class mail, postage prepaid to:

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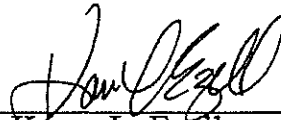
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Port Washington, NY 11050
Tel: (516) 767-3600

DATED: September 24, 2008



Karen L. Ezell

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-035182
04-035183

In re: the EXXON VALDEZ

GRANT BAKER, et al., as representatives of
the Mandatory Punitive Damages Class,
Plaintiffs-Appellees-
Cross-Appellants,

v.

EXXON MOBIL CORPORATION, et al.,
Defendants-Appellants-
Cross-Appellees.

On Appeal from the United States District Court
for the District of Alaska

DECLARATION OF WILLIAM M. COLTON

E. EDWARD BRUCE
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Washington, D.C. 20004-2401
(202) 662-6000
*Attorneys for Exxon Shipping
Company*

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Attorneys for Exxon Mobil Corporation

EXHIBIT B

DECLARATION OF WILLIAM M. COLTON

I, William M. Colton, declare as follows:

1. I am the Assistant Treasurer of Exxon Mobil Corporation ("ExxonMobil"), based in Irving, Texas. I make this declaration based on my personal knowledge and my review of records kept by ExxonMobil in the ordinary course of its business.
2. I have been requested to estimate the amount of money ExxonMobil has expended, since 1996, to establish and maintain the letter of credit ("LOC") facilities used as security to obtain a stay of execution on the punitive damages judgments in this case during the pendency of ExxonMobil's appeals. I have also been requested to compute interest on Exxon's LOC costs from the dates expended to the present. These estimates and computations are preliminary in nature, intended to inform the Court of Appeals of the approximate magnitude of the LOC costs ExxonMobil will claim in the district court if the Court of Appeals grants ExxonMobil's present motion to be awarded such costs. ExxonMobil will submit appropriate documentation of those costs in the district court if and when it is authorized to claim them.
3. I estimate that ExxonMobil has incurred and paid, from 1996 through the present, fees and expenses of approximately \$60.6 million to establish and maintain the LOC facility required by the district court as a condition to staying

execution on the punitive damages judgments pending appeal. These costs primarily consist of syndication, participation and other fees paid to the various issuing banks, together with associated smaller fees and expenses.

4. I have used two alternative methods to compute interest on ExxonMobil's LOC costs. The first method begins with the 1-year Treasury bill rate specified in 28 U.S.C. § 1961 as of the dates that Exxon paid the LOC costs, and adjusts that rate at each annual compounding date to reflect the new statutory rate in effect at each one-year interval up to the present. This method simulates a "rolling" annual investment in the 1-year instruments specified in the statute. The second method uses a blended average rate that incorporates each monthly or weekly change in the statutory rate during the period of the computation. For both methods, I have conservatively assumed for simplicity's sake that ExxonMobil paid all LOC costs expended during a given calendar year on the last day of that year, and have computed the interest accordingly.

5. Using the annually adjusted 28 U.S.C. § 1961 rate, I estimate the interest on ExxonMobil's LOC costs to be approximately \$17.3 million, bringing the total estimated LOC cost claim to \$77.9 million. Using the blended average 28 U.S.C. § 1961 rate, I estimate the interest on ExxonMobil's LOC costs to be approximately \$16.7 million, bringing the total estimated LOC cost claim to \$77.3 million.

6. I have also been asked to compute, again under several alternative methods, the interest that would be due on the principal amount of the punitive damages if plaintiffs' motion for an award of interest on that amount from September 24, 1996 to the present were granted. Under an order of the district court implementing a settlement of punitive damages claims by certain seafood processors in the plaintiff class, ExxonMobil is entitled to a credit of \$54,150,250 against the \$507,500,000 principal amount, along a corresponding credit for any interest that would otherwise be awarded on the credited amount. Accordingly, I have based my computations of the interest claimed by plaintiffs on the net principal amount of \$453,349,750 (*i.e.*, \$507,500,000 less ExxonMobil's credit of \$54,150,250).

7. In addition, as acknowledged in a Partial Satisfaction of Judgment executed by plaintiffs on August 27, 2008, ExxonMobil on that date made a cash payment satisfying all but \$70 million of the net principal amount (reserving payment of the final \$70 million pending resolution of ExxonMobil's claim for LOC costs). Accordingly, my computations of the interest claimed by plaintiffs assume that interest begins on September 24, 1996 and ends on August 27, 2008. My computations do not include any interest accruing after August 27, 2008 on the \$70 million of principal that remains unpaid, which (if awarded) would need to be added to the total.

8. I have computed the interest on the net principal amount using three different methods. The first, which I understand to be the method advocated by plaintiffs, compounds the interest annually at fixed rate of 5.9 percent per annum (the 28 U.S.C. § 1961 rate in effect on September 24, 1996) for the entire 12-year period. Under this method, the interest on \$453,349,750 from September 24, 1996 through August 27, 2008 is approximately \$444.8 million.

9. Under the second method, which compounds the interest annually at a starting rate of 5.9 percent per annum, but adjusts the rate upward or downward at each anniversary date to correspond to the 28 U.S.C. § 1961 rate then in effect (*i.e.*, the annually adjusted rate method described above), the interest on \$453,349,750 from September 24, 1996 through August 27, 2008 is approximately \$271.6 million.

10. Under the third method, which compounds the interest annually at a blended average rate that incorporates all the historical increases and decreases in the 28 U.S.C. § 1961 rate over the relevant 12-year period, the interest on \$453,349,750 from September 24, 1996 through August 27, 2008 is approximately \$261.7 million.

I declare under penalty of perjury under the laws of the United States that the foregoing is true and correct and that this declaration was executed on September 24, 2008 in Irving, Texas.



William M. Colton

CERTIFICATE OF SERVICE

I am a citizen of the United States and employed in Los Angeles County, California, at the office of a member of the bar of this Court at whose direction this service was made. I am over the age of eighteen years and not a party to the within action. I am a resident of or employed in the county where the service described below occurred. My business address is 400 South Hope Street, Los Angeles, California 90071-2899. I caused the within BRIEF OF DEFENDANTS- APPELLANTS ADDRESSING APPELLATE COSTS AND POST-JUDGMENT INTEREST to be served pursuant to Rule 25(b), F. R. App. P. by sending via first class mail two copies of said brief, postage prepaid, to Liaison Counsel for Plaintiffs-Appellees at the following address:

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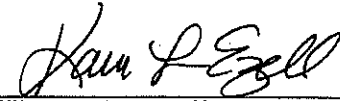
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DATED: September 24, 2008



Karen L. Ezell

