COPY

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35182
No. 04-35183

GRANT BAKER, *et al.*, as representative of the Mandatory Punitive Damages Class,

Plaintiffs-Appellees,

vs.

EXXON CORPORATION, *et al.*,

Defendants-Appellants.

On Remand from the United States Supreme Court

PLAINTIFFS' RESPONSE TO EXXON'S MEMORANDUM WITH RESPECT TO POST-JUDGMENT INTEREST AND COSTS

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street N.W.
Washington, DC 20006-5403
(202) 420-2200

Brian B. O'Neill
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402-3901
(612) 766-8318

David W. Oesting
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
Suite 800, 701 W. Eighth Avenue
Anchorage, AK 99501-3468
(907) 257-5300

Attorneys for Plaintiffs

CORPORATE DISCLOSURE STATEMENT

Those few plaintiffs that are corporations have no parent corporation, subsidiaries or affiliates that have issued shares to the public.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

FEDERAL CASES

FEDERAL STATUTES

RULES

OTHER AUTHORITIES

I. EXXON PROVIDES NO REASON WHY THIS COURT SHOULD DEPART FROM THE ESTABLISHED RULE THAT INTEREST ON A REDUCED PUNITIVE DAMAGES AWARD RUNS AT THE STATUTORY RATE FROM THE DATE OF THE ORIGINAL JUDGMENT.

Exxon's effort to deny plaintiffs interest on the portion of the punitive damage verdict approved by this Court and the Supreme Court is a futile attempt to dodge the uniform precedents of this and other circuits awarding interest on such a reduced punitive damage amount from the date of the original judgment. Those precedents are listed and discussed at pages 5-7 of plaintiffs' opening Memorandum. The most recent and comprehensive decision is *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists*, 518 F.3d 1013 (9th Cir. 2008), where this Court reiterated and followed the principle that under 28 U.S.C. § 1961 "[p]ost-judgment interest ***must*** run from the date of a judgment when the damages were "supported by the evidence" and meaningfully "ascertained." *Id.* at 1017-18 (quoting *Kaiser Aluminum & Chemical Corp. v. Bonjorno*, 494 U.S. 827, 835-36 (1990), and *Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986)) (emphasis added).

Exxon's opening Brief seeks to evade *Planned Parenthood* and the numerous cases uniformly agreeing with it by contending (A) that despite the mandatory nature of section 1961, this Court has discretion to deny interest from the date of the initial judgment if it wishes to do so and (B) that the equities of this case somehow dictate that plaintiffs should be deprived of interest. As a fallback argument (C), Exxon urges this Court to deviate from the interest rate specified by section 1961. None of these arguments has merit.

A. The *Planned Parenthood* Mandatory-Interest Rule Controls This Case.

1. Exxon's primary contention is that Fed. R. App. P. 37(b) gives this Court "[i]nherent" discretion to deny interest when it remits a punitive award. Exxon Brief at 11-14. But this Court has squarely rejected that argument. *Planned Parenthood* holds that "[s]ection 1961 provides for the ***mandatory*** award of post-judgment interest" in this circumstance. 518 F.3d at 1017-18; *see also, e.g., Dunn v. HOVIC*, 13 F.3d 58, 60-61 (3d Cir. 1993) (interest is "mandatory" in this situation). Applying the *Kaiser* criteria, *Planned Parenthood* held that section 1961 required interest to run on the remitted award because "the legal and evidentiary basis of the original punitive damages award . . . remained unaltered" and the ultimate award "was meaningfully ascertained as of the Original Judgment." 518 F.3d at 1021; *see also* Plaintiffs' Mem. at 5-7 (collecting other cases to this effect).

Exxon does not cite a single case denying interest in this situation. The cases cited in Exxon's Brief at 12 address the situation confronted in *Planned Parenthood*, where a prior mandate had failed to comply with Rule 37(b)'s requirement that "the mandate must contain instructions about the allowance of interest." That issue is not present here.[1] In the only post-*Kaiser* decision cited in Exxon's Brief at 13-14, this Court made clear that interest ran from the date of entry of the initial judgment to the extent that the original award was included in that judgment and was supported by the evidence. *Guam Society of Obstetricians and Gynecologists v. Ada*, 100 F.3d 691, 703 (9th Cir. 1996).[2]

2. Exxon next contends that interest on a reduced award need not run from the date of the original judgment when the reduction is large, such as the 90% reduction in this case. Exxon Brief at 15. Again, one need look no further than *Planned Parenthood* to confirm that no such principle exists. There, this Court had

[1] The first appellate decision specifying a punitive damages amount in this case was the Court's December 22, 2006 decision, amended May 23, 2007. *In re: the Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006), *amended* 490 F.3d 1066 (9th Cir. 2007). The Court's order of June 11, 2007 (Docket No. 91) stayed issuance of a mandate from that decision pending the Supreme Court's review.

[2] In the cases cited by Exxon at 13-14 (all prior to the Supreme Court's 1990 *Kaiser* decision) in which courts declined to award interest from the original judgment, the original judgment either (1) did not include the damages in question, *Affiliated Capital Corp. v. Houston*, 793 F.2d 706, 708 (5th Cir. 1986) & 519 F. Supp. 991, 1005-1009, 1029 (S.D. Tex. 1981); *United States v. Hougham*, 301 F.2d 133, 134-135 (9th Cir. 1962), or (2) was not supported by the evidence and therefore did not meaningfully ascertain the damages, *Ashland Oil Co. v. Phillips Petroleum Inc.*, 607 F.2d 335, 336 (10th Cir. 1979) & 554 F.2d 381, 392 (10th Cir. 1977); *Hysell v. Iowa Pub. Serv. Co.*, 559 F.2d 468, 471, 476 (8th Cir. 1977) & 534 F.2d 775, 788 (8th Cir. 1976); *Riha v. Int'l Tel. & Tel. Co.*, 533 F.2d 1053, 1054 (8th Cir. 1976) & 516 F.2d 840, 842-46 (8th Cir. 1975). This Court long ago rejected the argument that those cases support denial of interest from the date of an initial judgment that was supported by the evidence. *See Handgards, Inc. v. Ethicon, Inc.*, 743 F.2d 1282, 1299 & n.26 (9th Cir. 1984); *Mt. Hood Stages, Inc. v. Greyhound Corp.*, 616 F.2d 394, 406-07 (9th Cir. 1980).

reduced the punitive damage award 95.6%, from $108.5 million to $4.7 million. 518 F.3d at 1016, 1022; 422 F.3d 949, 964-65 (9th Cir. 2005). Similarly, in *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002), this Court recognized that plaintiffs were entitled to interest from the date of the original judgment despite the fact that the Court had reduced the punitive damage award by 89%, from $4.5 million to $500,000.[3]

In short, all that matters in this situation is whether the initial judgment established the basis for liability, not whether a subsequent remittitur was large or small. "Where the initial judgment is supported by the evidence and the later judgment merely reflects a remittitur of a certain portion of that judgment as excessive," the "initial judgment is viewed as correct to the extent it is permitted to stand, and interest on a judgment partially affirmed should be computed from the date of its initial entry." *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339-40 (11th Cir. 1999), *citing Tinsley v. Sea-Land Corp.*, 979 F.2d 1382, 1383 (9th Cir. 1992). *Accord Planned Parenthood*, 518 F.3d at 1021; *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 98-100 (3d Cir. 1993) ("the evidentiary

[3] *See also Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339-40 (11th Cir. 1999) (90% reduction in punitive damages); *Dunn*, 13 F.3d at 61 (96% reduction); *Greenway v. Buffalo Hilton Hotel*, 143 F.3d 47, 49, 55 (2d Cir. 1998) (80% reduction); *Klein v. Grynberg*, 127 F.3d 1109, 1997 WL 643899 (10th Cir. 1997) (unpublished) (80% reduction); *Morrill v. Becton Dickinson & Co.*, 747 F.2d 1217, 1225 (8th Cir. 1984) (85% reduction); *Maxey v. Freightliner Corp.*, 727 F.2d 350, 351 (5th Cir. 1984) (95.5% reduction).

basis for liability on those claims was never upset. . . . All that the district court ever questioned regarding these claims was the evidentiary basis for the jury's finding as to the ***amount*** of damages") (emphasis in original); *Northern Natural Gas Co. v. Hegler*, 818 F.2d 730, 737 (10th Cir. 1987) ("This was a large dollar difference but the reversal was not on any basic liability errors or errors in procedure which affected the basic issues but on a dollar value, a matter of degree.").

The punitive damage judgment in this case meets this standard. Exxon's liability for both compensatory and punitive damages was established in the September 26, 1996 judgment. The legal and evidentiary basis of that judgment was never disturbed. *See In re: the Exxon Valdez*, 270 F.3d 1215, 1236-38 (9th Cir. 2001); *In re: the Exxon Valdez*, 490 F.3d 1066, 1084 (9th Cir. 2007) (expressing "no need to reconsider" the reprehensibility of Exxon's misconduct).[4]

[4] Nor is there any basis for Exxon's suggestion that interest need not run from the earlier judgment if liability questions are "close" or are resolved by close votes in this Court or the Supreme Court. Exxon Brief at 15. *Planned Parenthood*, for example, had been decided by a 6-5 *en banc* vote that prompted 34 pages of dissenting opinions. 290 F.3d 1058, 1088-1121 (9th Cir. 2002). *See also Dunn v. HOVIC*, 1 F.3d 1371 (3d Cir. 1993) (8-5 *en banc* vote); *Maxey v. Freightliner Corp.*, 665 F.2d 1367, 1382-87 (5th Cir. 1982) (15-8 *en banc* vote); *Malandris v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 703 F.2d 1152, 1175 (10th Cir. 1981) (2-1 panel decision where "the question is close" regarding sufficient evidence to support punitive damages).

3. Exxon's suggestion that the rules governing interest are somehow different for punitive damages because "no plaintiff has any type of personal or property right to be paid punitive damages," Exxon Brief at 16, fares no better. *Planned Parenthood* again forecloses this argument, recognizing that 28 U.S.C. § 1961 applies to "any" money judgment. 518 F.3d at 1017. *See also Air Separation, Inc. v. Underwriters at Lloyd's of London*, 45 F.3d 288, 290 (9th Cir. 1995) (section 1961 applies equally to "punitive damages"); Plaintiffs' Mem. at 5-6 (citing other cases); *Tinsley,* 979 F.2d at 1384.

In connection with this argument, Exxon asserts that "the effect of a $507.5 million award will be the same whether post-judgment interest is paid or not." Exxon Brief at 16. In light of the basic principle of the time value of money, this statement is patently false. *See generally Till v. SCS Credit Corp.*, 541 U.S. 465, 487 & n.1 (2004) (Thomas, J., concurring) ("To put it simply, $4,000 today is worth more than $4,000 to be received 17 months from today"). As plaintiffs' opening Memorandum explains, at 7-8 and Appendix B, absolving Exxon of the requirement to pay interest from the date of the original judgment would reduce the net value in September 1996 of $507.5 million to be paid in 2008 to $257.5 million. Exxon's punishment would thus be halved from the one-to-one ratio that the Supreme Court found appropriate, *see Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2633 (2008) to a ratio of only 0.5-to-one.

4. Finally, Exxon contends that *Planned Parenthood* applies to remittiturs of punitive awards only when based on constitutional grounds, and not when based on maritime-law or common-law grounds. Exxon Brief at 18-21. Again, the categorical language of section 1961 – "any money judgment" – forecloses this argument. Accordingly, numerous decisions have allowed plaintiffs to recover interest on punitive damages that were remitted based on common law review rather than due process review. *See, e.g., Dunn*, 1 F.3d at 1391; *Greenway*, 143 F.3d at 50; *Klein v. Grynberg*, 44 F.3d 1497, 1505 (10th Cir. 1995); *Morrill*, 747 F.2d at 1224-25; *Malandris*, 703 F.2d at 1177; *Maxey*, 665 F.2d at 1378; *Ogilvie v. Fotomat Corp.*, 641 F.2d 581, 586-87 (8th Cir. 1981).[5]

B. Even if the Award of Interest Were a Matter of Discretion, the Equities Require Interest in This Protracted Case.

This Court has explained that, as between a wrongdoer and a party harmed by the wrongdoer's conduct, the interest burden appropriately rests with the wrongdoer:

> Costs of the loss of use of a money judgment should not be borne by the injured plaintiff, but by the "defendant whose initial wrongful conduct invoked the judicial process and who has had the use of the money judgment

[5] Cases applying the same principle to compensatory damage awards reduced pursuant to common law review also rebut Exxon's argument. *See, e.g., Snyder v. Freight, Const., Gen. Drivers, Warehousemen & Helpers, Local No. 287*, 175 F.3d 680, 689-90 (9th Cir. 1999); *Tinsley*, 979 F.2d at 1383; *Northern Natural Gas Co.*, 818 F.2d at 737-38. *See also Perkins v. Standard Oil Co. of Calif.*, 487 F.2d 672, 676 (9th Cir. 1973) (same rule as to attorney fee award).

> throughout the period of delay." *Perkins* [*v. Standard Oil Co. of Calif.*, 487 F.2d 672, 676 (9th Cir. 1973)]; *see also Devex Corp. v. General Motors Corp.*, 577 F. Supp. 429, 433 (D. Del. 1983) (reasoning that because money has time value, the only way to make a party whole is to award interest from the time the party "should have received the money."), *aff'd*, 749 F.2d 1020 (3d Cir. 1984), *cert. denied*, 474 U.S. 819, 108 S.Ct. 68, 88 L.Ed.2d 55 (1985). Failure to award post judgment interest would create an incentive for defendants to exploit the time value of money by frivolously appealing or otherwise delaying payment. *See Bailey v. Chattem, Inc.*, 838 F.2d 149, 152 (6th Cir. 1988), *cert. denied*, 486 U.S. 1059, 108 S.Ct. 2831, 100 L.Ed.2d 931 (1988); *R.W.T. v. Dalton*, 712 F.2d 1225, 1235 (8th Cir. 1983), *cert. denied*, 464 U.S. 1009, 104 S.Ct. 527, 78 L.Ed.2d 710 (1983).

Air Separation, Inc., 45 F.3d at 290. *See also Kaiser*, 494 U.S. at 839 (running of interest at statutorily-fixed rate permits parties to "make informed decisions" about whether to appeal).

In light of the time value of money, the imposition of interest with regard to punitive damage judgments is particularly important. The purpose of punitive damages is to punish and deter. Failing to impose interest on a wrongdoer decreases the punishment below the amount determined in the judgment to be appropriate.

Contrary to Exxon's suggestion that this case involves no "wronged plaintiff," Exxon Brief at 15, the Supreme Court, this Court, and the district court all determined that Exxon's conduct was wrongful and deserving of punishment.

See Exxon Shipping Co. v. Baker, 128 S.Ct. at 2630 n.23; *In re: the Exxon Valdez*, 490 F.3d 1066, 1084 (9th Cir. 2007) & 270 F.3d 1215, 1236-38, 1242 (9th Cir. 2001); *In re: the Exxon Valdez*, 296 F. Supp. 2d 1071, 1092-97 (D. Alaska 2004). No good reason exists for reducing the impact of the punishment by half through absolving Exxon of the obligation to pay interest from the date of the initial judgment.[6]

C. The Applicable Interest Rate Is Fixed by Statute.

Once a court has determined that the original judgment is the relevant starting date for interest, 28 U.S.C. § 1961 specifies the method by which the interest must be calculated:

> (a) Interest shall be allowed on any money judgment in a civil case recovered in a district court. . . . Such interest shall be calculated from the date of the entry of the judgment, at a rate equal to the weekly average 1-year constant maturity Treasury yield, as published by the Board of Governors of the Federal Reserve System, for the calendar week preceding, the date of the judgment. . . .
>
> (b) Interest shall be computed daily to the date of payment except as provided [in other sections relating to claims against the United States], and shall be compounded annually.

[6] Contrary to Exxon's suggestion, the plaintiff class members did not receive compensation for all of the harm caused by Exxon's wrongful conduct. *See, e.g., In re: the Exxon Valdez*, 270 F.3d at 1253; *In re: the Exxon Valdez*, 296 F. Supp. 2d at 1094, 1103.

Despite the precision of this prescription, which incontestably results in a 5.9% rate, Exxon argues that this Court should ignore the statute because it would "impose an enormous penalty on Exxon . . . and would confer an unjustified windfall on plaintiffs." Exxon Brief at 21. Exxon suggests that, instead, the Court should take it upon itself to concoct a blended rate averaging different rates selected from different periods during the past 12 years. *Id.* at 24.

The Supreme Court has already considered and rejected the argument that section 1961 permits courts to deviate from the statutory rate based on "the equities" of any particular case. *Kaiser*, 494 U.S. at 840 (rejecting plaintiff's argument that equities called for higher rate than mandated by section 1961). Under the statute, "the interest rate for any particular judgment is to be determined as of the date of the judgment, and that is the single rate applicable for the duration of the interest accrual period." *Id.* at 838-39. *See also Ford v. Alfaro*, 785 F.2d 835, 842 (9th Cir. 1986) (language of section 1961 is mandatory; district court erred by awarding interest at a rate lower than rate mandated by section 1961).

Exxon does not mention *Kaiser* in this portion of its argument. Nor does it cite to any other case addressing the computation of post-judgment interest. Instead, it refers only to three cases addressing the selection of rates for the calculation of ***pre-judgment*** interest. Exxon Brief at 22 n.4. It is well established, however, that courts have flexibility with regard to the calculation of pre-judgment interest that does not exist with regard to the calculation of post-judgment interest. *See, e.g., Nelson v. EG&G Energy Measurements Group*, 37 F.3d 1384, 1391-92 (9th Cir. 1994); *see also Ingersoll Mill. Mach. Co. v. M/V Bodena*, 829 F.2d 293, 310-311 (2d Cir. 1987) (explaining that 28 U.S.C. § 1961 sets forth the method for computation of post-judgment interest, but that "the rate of interest used in awarding ***pre-judgment*** interest rests firmly within the sound discretion of the trial court") (emphasis in original).

In any event, Exxon's claim of unfairness ignores reality. Its disingenuous argument about other return rates generally available during the past 12 years fails to disclose the fact that Exxon's own return on capital during that time has ranged between 10.3% and 35.6%. *See* Appendix A. As a result, by refraining from paying plaintiffs for the past 12 years, Exxon has earned over $3.9 billion on that $507.5 million. *Id.* Put another way, Exxon could have taken $52.4 million at the time of the judgment in 1996, invested it in its business, and would have had $507.5 million available from that investment today. *See* Appendix B. As a practical matter, Exxon's argument would all but eliminate the punitive impact of the punitive damage award approved in this case.

II. EXXON PROVIDES NO REASON WHY THIS COURT SHOULD DEPART FROM ITS PRIOR DECISIONS, CONSISTENT WITH ITS SUBSTANTIALLY UNIFORM PRACTICE IN ANALOGOUS CASES, TO AWARD NO COSTS IN THIS LITIGATION.

Exxon's argument relating to costs rests on the proposition that Fed. R. App. P. 39 requires this Court (1) to determine which party more nearly "prevailed" in dollar terms in this mixed-result appeal and (2) award that party all of its costs or, at a minimum, a percentage of its costs that mirrors the dollar value it gained from the appellate process. Exxon's argument ignores, among other things, the clear language of Rule 39(a)(4); this Court's explicit decision regarding costs when it similarly vacated the punitive damage award in this very case in 2001; and the nearly uniform practice of this Court in such cases – all of which dictate that the Court should leave each party to bear its own costs under these circumstances. And to the extent that Exxon attempts to argue the equities of this case, it fails to acknowledge the factors that would particularly militate against the enormous penalty of at least $60 million that Exxon is seeking to impose on the plaintiff class for supporting the judgments of the district court and this Court, with considerable success, on appeal and certiorari.[7]

[7] As Exxon recognizes (Exxon Brief at 6-7) the amount of any costs that might be taxable would largely remain to be determined by the district court under Fed. R. App. 39(e) in the event that this Court were to determine that costs should be awarded. In particular, the district court would then have to determine whether the security costs claimed by Exxon were proper and reasonable.

A. The Only Costs at Issue Are Those Incurred Since This Court's Second Remand on August 18, 2003.

It is, of course, well established, that the law of the case doctrine precludes this Court from reconsidering both matters that it has already decided explicitly and matters that it has decided by necessary implication. *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 917 (9th Cir. 2001). Exxon, however, ignores the fact that this Court has already disposed of any question regarding costs for the period up to the 2003 second remand.

The jury's punitive damage verdict has been the subject of three successive and separate appeals in this Court. The first appeal, resulting in this Court's November 7, 2001 decision, *In re: the Exxon Valdez*, 270 F.3d 1215 (9th Cir. 2001), rejected Exxon's challenge to the jury instructions on managing agents and its Clean Water Act preemption argument, as well as other arguments challenging the judgment in its entirety. That decision, however, directed the district court to reassess the amount of the punitive damage award in light of the new due process jurisprudence developed during the intervening five years. The judgment incorporating the verdict was thus affirmed in part, vacated in part and remanded. The opinion expressly stated that "[e]ach party [is] to bear its own costs." *Id.* at 1254. That order is now the law of the case and no longer subject to challenge.

After the district court reduced the award on remand, Exxon again appealed. While the appeal was pending, the Supreme Court decided another due process case, and on August 18, 2003, this Court vacated the amended judgment for further consideration in light of that decision. *See* Plaintiffs' Mem. at 9. Since the remand order did not order any taxation of costs, and neither party had prevailed, each party was required, by operation of Rule 39(a)(4), to bear its own costs with respect to that second appeal as well. That is because the Rule provides, without exception, that in such a situation "costs are taxed only as the court orders." *See Golden Door Jewelry Creations, Inc. v. Lloyds Underwriters Non-Marine Ass'n*, 117 F.3d 1328, 1340 (11th Cir. 1997). This disposition of costs up to that point is also the law of the case.

B. This Court May Not Award Costs in This Mixed-Result Appeal Absent an Affirmative Finding of Equitable Considerations Requiring Such an Award.

1. Consistent with the numerous Ninth Circuit precedents cited in plaintiffs' opening Memorandum at 10-12, the authoritative treatise on this Circuit's practice confirms that "[i]n most cases with a 'mixed' disposition, the panel orders the parties to bear their own costs." Christopher Goelz and Meredith Watts, Rutter Group Practice Guide, Federal Ninth Circuit Civil Appellate Practice ¶ 10:303 (2008). This practice results from the unusually specific language of Fed. R. App. P. 39(a), which establishes firm rules for situations where one party is completely successful (subsections (1)-(3)) but mandates that "(4) if a judgment is affirmed in part, reversed in part, modified or vacated, costs are taxed ***only*** as the

court orders." (emphasis added). In this last situation, which is the present one, the rule dictates that costs are awarded only if the court of appeals finds, in the exercise of its discretion, some affirmative reason why there should be an award. As plaintiffs' opening Memorandum shows, at 10-12, this Court has consistently – with one trivial exception – left defendants to bear their own costs when, as here, their only success in appealing a punitive damage award has been to reduce the amount.

Exxon attempts to conflate the explicit provision of Fed. R. App. P. 39(a)(4) with the general language of Fed. R. Civ. P. 54(d)(1) that "[u]nless a federal statute, these rules, or a court order provides otherwise, costs . . . should be allowed to the prevailing party." That general approach suits the less structured proceedings in trial courts, where often there are multiple claims and counterclaims and a determination must be made as to which of the parties has come out better on the whole. And it creates a presumption that whichever party "prevails" on balance gets its costs. But the appellate rule takes a very different approach, eschewing any debate about which party "prevailed" and specifically creating a presumption against any award of costs when the outcome is mixed. Thus, the clear language of Rule 39(a)(4) negates Exxon's contention that it should automatically get its costs simply because its appeal succeeded in reducing the amount of a punitive damages award that it unsuccessfully tried to wipe out entirely on several unfounded theories.[8]

Nor is the fact that the Supreme Court awarded Exxon its relatively minor printing costs of $14,324 relevant to how this Court should apply Fed. R. App. P. 39(a)(4) to the more than $60 million that Exxon claims as costs. The Supreme Court's rule on costs is very different, providing that "[t]he Clerk's fees and the cost of printing the joint appendix are the only taxable items in this Court," Sup. Ct. R. 43.3, and establishing a simple default rule that "[i]f [as here] the Court reverses or ***vacates*** a judgment, the respondent or appellee shall pay costs unless the Court otherwise orders." Sup. Ct. R. 43.2 (emphasis added). In the absence of any dispute as to those limited Supreme Court costs, the Court simply applied its

[8] All of the cases in Exxon's Brief at 3-4 are cases where there was an unqualified victory on appeal (governed by Rule 39(a)(2)), cases applying Fed. R. Civ. P. 54(d) to district court costs, or cases involving civil rights fee-shifting statutes. *Republic Tobacco, Inc. v. North Atlantic Trading Co.*, 481 F.3d 442 (7th Cir. 2007), cited in Exxon's Brief at 7 and 9, held that the question of awarding costs to secure a judgment pending appeal was one for the district court's discretion in the first instance, and then merely found that the district court's award there was not an abuse of that discretion. In light of Fed. R. App. P. 39(e)'s clear indication that the question ***whether*** a party is entitled to costs is one for the court of appeals, it is doubtful that this Court would take that approach. In any event, the circumstances of this case would call for a different discretionary conclusion, as we shall show. Section 3985 of 16A Wright et al., Fed. Prac. & Proc., cited in Exxon's Brief at 4-5, merely restates the uncontested proposition that a court of appeals has discretion to award costs in a mixed-result appeal, correctly noting that neither party "becomes entitled to an award of costs as a matter of course" in a situation "where no party completely prevails." Exxon itself recognizes that principle in its Brief at 6.

default rule as a ministerial matter inasmuch as it vacated the judgment, without addressing any other possible disposition or providing any direction to this Court. Here, as occurs commonly in the courts of appeals, vastly more money is at stake, and that is surely why the default rule under Fed. R. App. P. 39(a)(4) is the exact opposite, expressly requiring an affirmative exercise of discretion before any costs may be awarded for a mixed-result appeal such as the present one.[9]

To be sure, Rule 39(a)(4) would give this Court discretion to award costs to one side or the other if it were persuaded that the equities so required. But failing such an affirmative determination, the appellate rule and the precedents applying it lead to the default principle of leaving costs where they lie.

C. The Equities Negate Any Award of Costs to Exxon.

This Court has already applied the default rule in its mixed 2001 decision that the parties should bear their own costs up to that point. This Court allowed the default rule to apply again by its silence when it again vacated the modified award in 2003. Exxon has shown no reason to do otherwise with respect to costs incurred

[9] As Exxon implicitly acknowledges, *see* Exxon Brief at 8, the Second Circuit's decision in *Furman v. Cirrito*, 782 F.2d 353 (2d Cir. 1986), would not apply even if it were a correct interpretation of the interplay between the Supreme Court rule and the appellate rule. That case simply held that a complete Supreme Court reversal of a judgment including an award of costs wipes out the costs as well as the main judgment. Here, there is no such complete reversal and there was no award of costs to be wiped out. More fundamentally, as we have shown, Fed. R. App. P. 39(a)(4) provides a clear rule at odds with the default rule that Sup. Ct. R. 43.2 provides. As far as we are aware, no court has ever relied upon *Furman* to justify a cost award.

since those decisions. To the contrary, the equities here would, if anything, require an award of costs to the plaintiff class, although we do not seek it in view of the law of the case.

Wright and Miller's treatise on Federal Practice and Procedure explains:

> Aside from statutory considerations, equitable and public-policy factors may influence a court of appeals to grant or deny recovery [of] costs. It has been said, for example, that "a combination of equitable considerations, turning on the state of the law at the time of the district court judgment and the nature of the litigation itself" can govern a court's decision about costs.

16A Wright et al., Fed. Prac. & Proc. § 3985 at 709 (3d ed. 1999) (citation omitted). Furthermore, in assessing district court discretion under Fed. R. Civ. P. 54(d)(1), this Court has held that costs may be denied to even completely successful defendants when one or more of the following factors are present:

(1) The case "involve[s] issues of substantial public importance" or is an "extraordinarily important[] case";

(2) "[T]he issues in the case are close and difficult" or the "[p]laintiffs' case, although unsuccessful, had some merit";

(3) "[T]here is great economic disparity" between the parties; or

(4) The costs "are extraordinarily high."

Ass'n of Mexican-American Educators v. State of Cal., 231 F.3d 572, 592-93 (9th Cir. 2000).

All of these factors are present here, strongly negating any reason to excuse Exxon from the default rule denying costs in this mixed-result case.

1. The public importance of this case is incontestable. The Supreme Court called the spill "[t]he most notorious oil spill in recent times" and the "largest oil spill in United States history." *United States v. Locke*, 529 U.S. 89, 94 96 (2000). Exxon's conduct caused "staggering damage" to tens of thousands of Alaskans. *Exxon Shipping Co. v. Baker,* 128 S. Ct. 2605, 2632 (2008). The spill led to one of the largest and most complex pieces of litigation in recent history, involving the claims of over 30,000 people, the only mandatory punitive damage class claim ever to proceed to judgment and, even after the Supreme Court's decision, one of the largest punitive damage awards in U.S. history. The case was also important because of the important legal issues it presented, including the scope of liability for maritime torts, the duty of corporate shipowners, and "an issue of first impression" regarding the amount of punitive damages that may be awarded under maritime law. *Id.* at 2619.

2. Plaintiffs' position on the important issues raised in these appeals had a great deal of merit. They prevailed throughout the appellate process on the decisive issues concerning Clean Water Act preemption and punitive damages liability for the reckless conduct of a ship's captain. Furthermore, the Supreme Court agreed with the district court and this Court that punitive damages were

proper because "Exxon's and [Captain] Hazelwood's failings were [no] less than reprehensible." 128 S. Ct. at 2632 n.23; *see, e.g., In re: the Exxon Valdez*, 490 F.3d at 1084; *In re: the Exxon Valdez,* 270 F.3d at 1236-38, 1242. While Exxon argued that any such punitive damages should be trivial at most (no more than $25 million), the Supreme Court allowed more than half a billion dollars. Three of the eight Justices sitting on the case would have upheld a punitive damage award of at least $2.5 billion.

Insofar as the Supreme Court ultimately reduced the amount of damages to its final level, Exxon was simply the beneficiary of the Supreme Court's adoption of a new and unprecedented rule of maritime law.[10] Given the fact that the one issue on which Exxon thus partially prevailed was one of first impression, and that "the state of the law at the time of the district court judgment," 16A Wright et al., Fed. Prac. & Proc. § 3985 at 709, supported the entire punitive damage award, plaintiffs had every right to pursue their defense of that award both in this Court and in the Supreme Court.

3. There is great economic disparity between the parties. Exxon is the largest corporation in the world. The plaintiffs, by contrast, are primarily individuals and small businesses, many of whom suffered severe adverse financial

[10] Exxon's certiorari petition also asked the Supreme Court to set the award aside on due process grounds, but failed to persuade the Court to entertain that argument.

consequences, including bankruptcy, as a result of Exxon's wrongdoing and the lengthy delay in resolution of this litigation.

4. The costs sought by Exxon are extraordinarily high. Exxon has indicated that the costs that it will seek in this matter are at least $60 million and may be as high as $77 million. *See* Declaration of William Colton ¶ 5 (Defendants-Appellants' Bill of Costs, Ex. B). Awarding costs of such a magnitude to Exxon would reduce the sting of the punitive damage award by as much as 15% (not counting interest).[11] The costs awarded should not negate the underlying liability to such a degree.

There is no basis for Exxon's imperious suggestion that plaintiffs should be penalized because they had the temerity to argue that Exxon should be subject to the normal requirement of security to stay execution of a judgment. Exxon Brief at 9-10. The parties argued the point before the district court, which allowed Exxon to substitute letters of credit for a supersedeas bond but declined to excuse it entirely from any security requirement. *See* Order No. 330 (Clerk's Docket No. 6905); Amended Order No. 325 (Clerk's Docket No. 6875). Exxon has not challenged that determination as either legally erroneous or an abuse of

[11] The punishment to be inflicted has already been reduced by 11.38% pursuant to this Court's decisions permitting punitive damage rebates. *See In re: the Exxon Valdez*, 239 F.3d 985 (9th Cir. 2001); *In re: the Exxon Valdez*, 229 F.3d 790 (9th Cir. 2000).

discretion.[12] As the district court noted, Exxon was by its own admission entirely capable of avoiding the expense of third-party security by depositing the amount of the original verdict into a "sinking fund" although there were "financial reasons why Exxon would prefer not to follow such an approach." Amended Order 325 at 4. No doubt the principal reason was that Exxon knew that the value of keeping the money available for use in its business would be much greater than the income it could earn on any dedicated fund. *See* Appendix A. Thus, Exxon has substantially benefited from its investment in the letters of credit, and it would be plainly inequitable to reward it doubly by requiring plaintiffs to reimburse that investment.

There is accordingly every reason why this Court should continue to adhere to the conclusion it reached in its 2001 decision regarding costs and followed implicitly in its 2003 remand order. There remains no justification for shifting any costs from Exxon to plaintiffs in this third mixed-result appeal.

III. CONCLUSION

For the foregoing reasons and those stated in plaintiffs' opening Memorandum, this Court should include in its mandate direction that plaintiffs are entitled to statutorily compounding interest from the date of entry of the original

[12] Recent economic events confirm that no corporation's claim of "undisputed financial soundness" is perpetually bankable. Plaintiffs had no responsible course of action other than to ensure some form of security on their judgment.

judgment, September 26, 1996, and should leave each party to bear its own appellate costs.

RESPECTFULLY SUBMITTED this 15th day of October, 2008.

David W. Oesting by JLF

David W. Oesting
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
Suite 800, 701 W. Eighth Avenue
Anchorage, AK 99501-3468
(907) 257-5300

Attorneys for Plaintiffs

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street N.W.
Washington, DC 20006-5403
(202) 420-2200

Brian B. O'Neill
FAEGRE & BENSON LLP
2200 Wells Fargo Center
90 South 7th Street
Minneapolis, MN 55402-3901
(612) 766-8318

PROOF OF SERVICE

I hereby certify that the foregoing Plaintiffs' Response to Exxon's Memorandum with Respect to Post-Judgment Interest and Costs has been served by hand delivery on the 15th day of October, 2008 to the following:

Lloyd B. Miller
SONOSKY, CHAMBERS, SACHSE, MILLER & MUNSON
900 West 5th Avenue, Suite 700
Anchorage, AK 99501

Douglas J. Serdahely
PATTON BOGGS, LLP
601 West 5th Avenue, Suite 700
Anchorage, AK 99501

Samuel J. Fortier
FORTIER & MIKKO
101 W. Benson Blvd., Suite 304
Anchorage, AK 99503

and courtesy copies of the same were sent via DHL Airways to the following counsel:

John Daum
O'MELVENY & MYERS LLP
400 S. Hope Street, Suite 1060
Los Angeles, CA 90071

Taylor F. Snelling, III
Counsel-Law Dept.
EXXON MOBIL CORPORATION
800 Bell Street, 16th Floor
Houston, TX 77002

Charles C. Lifland
O'MELVENY & MYERS LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071

Brian B. O'Neill
FAEGRE & BENSON
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

James vanR. Springer
DICKSTEIN, SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006-5403

David C. Tarshes
DAVIS WRIGHT TREMAINE LLP
1201 Third Avenue, Suite 2200
Seattle, WA 98101-3045

Kenneth F. McCallion
McCALLION & ASSOCIATES LLP
24 West 40th Street, 17th Floor
New York, NY 10018

Michael G. Chalos
FOWLER RODRIGUEZ & CHALOS
366 Main Street
Port Washington, NY 11050

Bradley S. Keller
BYRNES & KELLER
1000 Second Avenue
38th Floor, Key Tower
Seattle, WA 98104

David W. Oesting by

David W. Oesting

APPENDIX A

Calculation: Earnings Difference Between Exxon's Rate of Return on Capital and Federal Rate

Objective

Determine the earnings benefit to Exxon from not having to pay $507.5 million judgment in 1996. Benefit calculated as difference between Exxon's publicly-reported return on capital rates and the federal judgment rate since the judgment date.

Approach

Compare the difference between the earnings at the return on capital rates reported by Exxon on a year-by-year basis and the federal rate of 5.9% to determine the net additional earnings to Exxon from a delay in payment, without regard to fault or responsibility for delay.

Earnings Difference Calculation

Year		Years Interest	Exxon Earnings (1) Return on Capital	Exxon Earnings (1) Earnings	At Federal Rate (2) Judgment Rate	At Federal Rate (2) Interest Amount	Additional Net Earnings to Exxon
1	1996	0.27	14.7%	$20,142,675	5.9%	$8,084,475	$12,058,200
2	1997	1.00	15.5%	$81,784,615	5.9%	$30,419,484	$51,365,131
3	1998	1.00	10.7%	$65,208,720	5.9%	$32,214,234	$32,994,486
4	1999	1.00	10.3%	$69,487,509	5.9%	$34,114,873	$35,372,636
5	2000	1.00	20.6%	$153,289,445	5.9%	$36,127,651	$117,161,794
6	2001	1.00	17.8%	$159,739,507	5.9%	$38,259,182	$121,480,325
7	2002	1.00	13.5%	$142,715,584	5.9%	$40,516,474	$102,199,110
8	2003	1.00	20.9%	$250,772,423	5.9%	$42,906,946	$207,865,477
9	2004	1.00	23.8%	$345,252,434	5.9%	$45,438,456	$299,813,978
10	2005	1.00	31.3%	$562,114,481	5.9%	$48,119,325	$513,995,157
11	2006	1.00	32.2%	$759,278,381	5.9%	$50,958,365	$708,320,016
12	2007	1.00	31.8%	$991,296,876	5.9%	$53,964,908	$937,331,968
13	2008	0.55	35.6%	$804,460,483	5.9%	$31,431,861	$773,028,622
	Total Years	11.82			**Additional Earnings (3)**		**$3,912,986,898**

The additional net amount earned by Exxon from the delay in payment is <u>$3,912,986,898</u>

(1) Interest compounded annually on award of $507.5 MM using Exxon's "Return on Average Capital Employed," derived from publicly available sources, including Exxon's 2007 Financial and Operating Review (for 2003-2007) and 2003 Summary Annual Report (for 1999-2003).
(2) Interest compounded annually on award of $507.5 MM using federal statutory rate of 5.9%.
(3) Covers period from September 24, 1996, to July 18, 2008

APPENDIX B

Present Value Calculation: Exxon Rate of Return on Capital

Objective

Calculate the real cost to Exxon of $507.5 million in punitive damages as of the original judgment date, assuming payment of judgment on July 18, 2008, *but no payment of post-judgment interest*.

Method

Use the actual return on capital rates reported by Exxon on a year-by-year basis to discount the award amount of $507.5 million back to the judgment date.

First and Last Year Partial Period Calculation

	Start Date	End Date	Portion of Year
Judgment Year Interest	9/24/1996	12/31/1996	0.27
Final Year Interest	1/1/2008	7/18/2008	0.55

Present Value Calculation

Year		Years Interest	Exxon Return on Capital (1)	Beginning Balance	Interest	Ending Balance
1	1996	0.27	14.7%	$52,422,957	$2,080,667	$54,503,624
2	1997	1.00	15.5%	$54,503,624	$8,448,062	$62,951,686
3	1998	1.00	10.7%	$62,951,686	$6,735,830	$69,687,517
4	1999	1.00	10.3%	$69,687,517	$7,177,814	$76,865,331
5	2000	1.00	20.6%	$76,865,331	$15,834,258	$92,699,589
6	2001	1.00	17.8%	$92,699,589	$16,500,527	$109,200,116
7	2002	1.00	13.5%	$109,200,116	$14,742,016	$123,942,131
8	2003	1.00	20.9%	$123,942,131	$25,903,905	$149,846,037
9	2004	1.00	23.8%	$149,846,037	$35,663,357	$185,509,394
10	2005	1.00	31.3%	$185,509,394	$58,064,440	$243,573,834
11	2006	1.00	32.2%	$243,573,834	$78,430,774	$322,004,608
12	2007	1.00	31.8%	$322,004,608	$102,397,465	$424,402,074
13	2008	0.55	35.6%	$424,402,074	$83,097,926	$507,500,000
	Total Years	11.82				

The discounted value of the award at time the original judgment is $52,422,957

This figure is 10.3% of the punitive damages amount.

(1) Interest compounded annually using Exxon's "Return on Average Capital Employed," derived from publicly available sources, including Exxon's 2007 Financial and Operating Review (for 2003-2007) and 2003 Summary Annual Report (for 1999-2003).