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

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

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INTRODUCTION

Plaintiffs' brief addressing costs and interest offers no meaningful legal or logical justification for denying Exxon Shipping Co. and Exxon Mobil Corporation (collectively "Exxon") appellate costs or for awarding post-judgment interest dating to a vacated and unlawful judgment. Instead plaintiffs rely on cases in which appellate courts exercised their *discretion* over costs and interest, making awards under circumstances that are legally and factually distinguishable from the instant case. And few of the cases plaintiffs cite actually analyze the legal, logical, and equitable bases for a given award, instead simply issuing a conclusory judgment about costs and interest. By contrast, Exxon's opening brief demonstrates why in *this case* law, logic, and equity favor at least an equitable apportionment of appellate costs, and at least an equitable order on interest that would reflect the economic theory of lost time value that plaintiffs themselves advance. Plaintiffs' opening submission contains no effective counter-argument to Exxon's showing.

I. EXXON SHOULD BE AWARDED ITS APPELLATE COSTS AS THE PARTY THAT PREVAILED ON APPEAL

Plaintiffs have no serious argument against an award of costs that reflects Exxon's success in challenging on appeal the $5 billion punitive damages judgment originally entered in this case. Instead they argue that the Court must adhere to the costs award in its 2001 opinion, which directed "[e]ach party to bear

its own costs," *In re the Exxon Valdez*, 270 F.3d 1215, 1254 (9th Cir. 2001) – even though that opinion has now been superseded by a Supreme Court judgment securing Exxon a clear appellate victory. Plaintiffs also urge the Court to follow other cases directing that parties bear their own costs – even though the defendants-appellants in such cases could not claim anything like the appellate success Exxon achieved here. Costs should be awarded to Exxon, or at a minimum allocated to reflect the proportion of Exxon's ultimate success on appeal.

A. This Court's 2001 Opinion Has Been Supplanted By The Recent Judgment Of The Supreme Court And This Court

Plaintiffs' first argument on costs is that this Court's 2001 opinion directing each party to bear its own costs "dictates the proper outcome here." Pls. Br. 12 (citing *Exxon Valdez*, 270 F.3d at 1254). It does not. In fact, it is irrelevant. The 2001 opinion issued an appellate costs award based on the outcome of the appeal *at that time*, which was only a vacatur of the judgment and a remand for the district court to set a "lower amount" of punitive damages. 270 F.3d at 1246-47. The opinion did not direct any particular money judgment, but simply ordered the district court to reduce the award by some unspecified amount. And on remand, the district court remitted the award only to $4 billion, then *increased* it $4.5 billion after a sua sponte remand from this Court instructing the district court to review the award again. *See Baker v. Exxon Mobil Corp.*, 472 F.3d 600, 602 (9th Cir. 2006). In short, Exxon could not reasonably be said to have "prevailed" under

this Court's 2001 open-ended vacatur.

By contrast, the recent judgment of this Court, executing the mandate of the U.S. Supreme Court, directs a very different outcome for this appeal, reflecting almost total success for Exxon. And, to be clear, the appellate costs Exxon incurred to obtain that successful result were *not* merely costs incurred *since the 2001 opinion*. The Supreme Court's opinion supersedes both the 2006 opinion *and* the 2001 opinion on punitive damages, both of which were under review by the Court, and neither of which – the Supreme Court held – applied maritime law standards correctly to the award in this case.[1] In fact, it was *only* the 2001 opinion that addressed maritime law standards for punitive damage awards, holding that maritime law imposes *no* substantive standards beyond "passion or prejudice" review. 270 F.3d at 1239. The 2006 opinion declined to revisit that holding (the Court limited its analysis to due process review), and the en banc Court declined to rehear the maritime law holding. The Supreme Court, however, addressed the maritime law issue directly and held that the standards described in the 2001 opinion were overly "indeterminate," *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2627-29 (2008), thereby reversing outright the 2001 opinion's holding that

[1] Exxon's petition for a writ of certiorari, granted by the Supreme Court, explicitly challenged both the 2001 and 2006 opinions on punitive damages. *See* Petition for Writ of Certiorari, *Exxon Shipping Co. v. Baker*, No. 07-219 (U.S.), at 1, 7, 21 (reprinted at 2007 WL 2383784).

maritime law did not constrain the size of the award independently of due process. The costs incurred by Exxon prior to the interlocutory 2001 opinion were thus essential to the final outcome of this appeal, just like the costs incurred after that opinion.

Because the Supreme Court's judgment applies directly to the 2001 opinion, the Supreme Court's judgment necessarily applies directly to the order on costs accompanying the 2001 opinion. As the Second Circuit has explained:

> When a district court judgment is reversed or substantially modified on appeal, any costs awarded to the previously prevailing party are automatically vacated. . . .
>
> A parallel situation plainly exists when the Supreme Court reverses a circuit court order, which included an award of costs to the then successful appellee, and awards costs for the Supreme Court litigation to the now prevailing appellant. The award of costs by the circuit court must be vacated and costs awarded 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. *See Cotler v. Inter-County Orthopaedic Ass'n, P.A.,* 530 F.2d 536, 538 (3d Cir.1976) (taxation of costs follows the same principles at both trial and appellate levels).
>
> . . . It is often sound policy, of course, to wait until a controversy is finally decided on the merits before awarding costs, and to then determine who is the "prevailing party", instead of judging that issue piecemeal at each stage of the litigation. Nonetheless, it logically follows that, when a circuit court judgment is reversed by the Supreme Court, Rule 39 must be construed to define appellants as the prevailing party so as to entitle them to costs.

Furman v. Cirrito, 782 F.2d 353, 355-56 (2d Cir. 1986); *see* Charles Alan Wright et al., Federal Practice & Procedure § 3985, at 717 (3d ed. 1999) ("In most

circumstances, reversal of the court-of-appeals decision should be followed by an award of costs in the court of appeals to the party that ultimately prevailed in the Supreme Court.").

Put slightly differently, Exxon was not a "prevailing party" in 2001 for purposes of a costs award under Rule 39(a)(4), and thus an order directing each party to bear its own costs made sense *at that time.*[2] Exxon did not become the prevailing party entitled to costs *until the Supreme Court's judgment*, which superseded the 2001 opinion (as well as the 2006 opinion) by applying substantive maritime law standards to the punitive damage award, mandating a 90% remittitur under those standards, and declaring Exxon the party entitled to costs in the Supreme Court. Accordingly, there is no legal or logical basis for adhering to the 2001 opinion's order on costs. Now that the challenges to the punitive damages award have finally been resolved – overwhelmingly in Exxon's favor – Exxon has now clearly become the prevailing party. It should be awarded all the costs that were necessary to secure that appellate success.[3]

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[2] No costs order at all accompanied the 2006 opinion, because the mandate never issued.

[3] The Clerk of the Court recently issued a letter suggesting that Exxon's Bill of Costs relating to the 2001 opinion was untimely. That is incorrect for two reasons. First, as explained in the text, Exxon was not the prevailing party entitled to appellate costs at that stage in the litigation, but it is now, and thus this is the first opportunity Exxon has had to claim all appellate costs incurred to obtain a successful outcome. Second, because the Court's 2001 judgment expressly

B. None Of Plaintiffs' Cases Compels Denial Of Exxon's Appellate Costs

Beyond their misplaced reliance on the 2001 opinion, plaintiffs offer no serious reason why Exxon should be denied the costs it was forced to incur to successfully challenge *$4.5 billion* in unlawful punitive damages liability. Instead plaintiffs simply cite other cases in which courts have ordered that each party bear its own costs in very different situations. In every case cited by plaintiffs involving a remitted punitive damage award, the defendant was *also* appealing numerous and substantial non-punitive issues going to whether any substantive liability existed at all, even for compensatory damages, including (for example) jurisdictional challenges, substantive legal issues concerning statutory elements or affirmative defenses, evidentiary and procedural rulings, jury instructions, and sufficiency of the evidence. *See* Pls. Br. 11 (citing cases). That is, in those cases the punitive damages award was *not* the central issue on appeal, unlike here. Obviously, when a plaintiff successfully defeats on appeal claims that the defendant has not even committed an actionable wrong, that the trial was free from prejudicial error, that jurisdiction was proper, and that compensatory damages were allowable and proper, it makes sense for the appellate court to determine that the plaintiff has

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directed that each party bear its own costs, there was no basis for filing a Bill of Costs at that time. Now that the 2001 opinion on punitive damages has been effectively reversed, it has become appropriate for Exxon to seek costs for that appeal.

prevailed enough to avoid liability for the costs of a defendant's partially successful appeal, even though defendant did prevail on a comparatively peripheral issue about the size of punitive damages.

In this case, by contrast, the massive punitive damages award was by far and away the dominant issue on appeal. Exxon had stipulated to its underlying liability for compensatory damages, and indeed had paid the vast majority of compensatory damages before trial. Nobody doubted, in 2001, that the central issue on appeal was whether Exxon could properly be required to pay an additional $5 billion in punitive damages. The very first sentence of the Court's 2001 opinion confirms as much: "This is an appeal of a $5 billion punitive damages award arising out of the *Exxon Valdez* oil spill." 270 F.3d at 1221.[4] And while Exxon did not obtain *complete* appellate success on that issue, there is no question but that Exxon's success in obtaining a 90% remittur – and defeating plaintiffs' own cross-appeal seeking to restore the original $5 billion award – qualifies Exxon as the "prevailing party" by any meaningful sense of the concept. Certainly plaintiffs and

[4] In the proceedings leading to the 2001 opinion, Exxon did also challenge the jury's calculation of compensatory damages for certain fisheries, and opposed plaintiff's partly-successful cross-appeal of the district court's ruling restricting additional compensatory damage recoveries by certain non-fishermen plaintiffs. But those issues were proportionally minuscule aspects of the appeal: they account for only a small fraction of compensatory damages as compared to the $5 billion punitive award, and the Court dealt with them in about 2500 out of the 20,000 words in its 2001 opinion. *See* 270 F.3d at 1247-48, 1250-53. The punitive damage award was the only subject of the 2006 opinion.

commentators – not to mention the Supreme Court – saw things that way at the time. Exxon Br. 8 & n.2.

C. At A Minimum, Costs Should Be Apportioned To Reflect The Extent Of Exxon's Success On Appeal

Even if this case should be treated as having a "mixed" outcome (disregarding the practical reality of the matter), plaintiffs ignore that appellate courts issuing cost awards in mixed-outcome cases under Rule 39(a)(4) regularly apportion costs by some measure that accounts for the "mixed" result. *See New York, L.E. & W. R. Co. v. Estill*, 147 U.S. 591, 623 (1893); *Republic Tobacco, Inc. v. N. Atl. Trading Co.*, 481 F.3d 442, 449 (7th Cir. 2007); *Quaker Action Group v. Andrus*, 559 F.2d 716, 719 (D.C. Cir. 1977); *Fanchon & Marco, Inc. v. Paramount Pictures, Inc.*, 202 F.2d 731, 739 (7th Cir. 1953); *Messenger Corp. v. Smith*, 136 F.2d 172, 174 (7th Cir. 1943); *Shima v. Brown*, 133 F.2d 48, 50 (D.C. Cir. 1942); Wright et al., *supra*, § 3985, at 709 & n.6; Hon. Jon O. Newman, *Decretal Language: Last Words of an Appellate Opinion*, 70 Brooklyn L. Rev. 727, 735 (2005).

Exxon submits that its success is complete enough to warrant an award of full appellate costs. But even if the Court concludes that plaintiffs plucked at least some victory from the ruins of their exorbitant punitive damages claims, at a minimum Exxon should be awarded some apportionment of the substantial costs it was forced to incur to obtain security for the profoundly excessive and

demonstrably unlawful punitive damages judgments upheld by the district court. Indeed, at no point did the district court enter a judgment anywhere *close* to the legally allowable amount. The district court's judgments forced Exxon to incur, over a ten-year period, the significant (and unnecessary) costs of securing a judgment first for $5 billion, then for $4 billion, and finally for $4.5 billion – amounts not remotely justifiable under the relevant legal standards, as proven by the later judgments of this Court and the Supreme Court imposing awards only a fraction of the district court's awards. And Exxon repeatedly warned plaintiffs that spending money on this security was entirely unnecessary, that it would result only in wasteful payment of millions of dollars to banks that contributed nothing useful, and that the ultimate cost would be borne by plaintiffs if Exxon prevailed. Plaintiffs had their eyes open to the consequences, and they went ahead. There is no conceivable reason that Exxon, having established that it *never* should have been liable for anything more than $507.5 million, should now be required to bear the costs of providing security, for more than a decade, for demonstrably unlawful and excessive punitive damages judgments eight to ten times that amount. Awarding Exxon 90% of its appellate costs would allow Exxon to recoup at least those costs of security Exxon never should have incurred in the first place.

* * * *

Plaintiffs' brief ultimately offers no persuasive reason Exxon should be

denied an award of appellate costs. Plaintiffs do not and cannot explain why Exxon should suffer a major financial penalty for taking an appeal that turned out to be highly successful. And they do not and cannot explain why they should be relieved of the consequences of their decision to demand security for the appeal, despite Exxon's unquestionable ability to pay and despite an explicit warning that the costs of security would be taxable against them. Exxon Br. 9-10. Exxon should be awarded its appellate costs, or at least an apportionment of those costs reflecting Exxon's success on appeal.

II. ALLOWING INTEREST TO THE DATE OF THE ORIGINAL JUDGMENT WOULD PRODUCE AN UNJUST AND ECONOMICALLY IRRATIONAL RESULT

As Exxon's opening brief demonstrated, a federal appellate court has complete discretionary authority over interest on a damages award vacated and modified on appeal. Exxon Br. 11-14. Exxon's brief further explained why this Court should exercise that authority to allow interest only from the entry of the Supreme Court's judgment – the first judgment to ascertain the maritime-law basis for a punitive damages award of $507.5 million. *Id.* at 15-20. And if the Court is inclined to allow interest dating to the original, unlawful and now-vacated and modified judgment, Exxon's brief concluded, the Court can and should exercise its authority over interest to prescribe an equitable interest rate that more accurately reflects the value of a $507.5 million judgment entered September 24, 1996. *Id.* at

21-24.

Plaintiffs' opening brief does not address at all the issue of what interest rate would be equitable, but assumes – incorrectly – that this Court must apply the 5.9% rate that would apply under 28 U.S.C. § 1961 if an *actual* final and enforceable judgment had been entered September 24, 1996. Plaintiffs instead make only two arguments: first, that this Court is legally *required* to allow interest dating to the original judgment; and second, that this Court in any event *should* allow interest dating to the original judgment. Neither argument has merit – and even if they did, neither argument would justify the application of an interest rate that bears no connection whatsoever to the true economic value of an original judgment hypothetically assumed to be $507.5 million.

A. Section 1961 Does Not *Require* That Interest Date To A Vacated And Modified Judgment

Plaintiffs first contend that a plaintiff who obtains an unlawfully excessive punitive damages judgment and successfully defends only "part of that judgment" is "*entitled* to interest on the reduced award from the date of the original judgment." Pls. Br. 3 (emphasis added). Sensibly, the law creates no such *entitlement* – at best a plaintiff may be awarded interest dating to the original judgment as a matter of the appellate court's *discretion* under Appellate Rule 37(b).

Plaintiffs' entitlement theory rests on 28 U.S.C. § 1961, which provides that

annually compounded interest "shall be allowed on any money judgment in a civil case recovered in a district court." By its terms, however, that provision plainly does not entitle plaintiffs to interest on the September 24, 1996 judgment for $5 billion because *that judgment no longer exists*. Only one final judgment will be entered in this case – the judgment entered on remand holding Exxon liable to plaintiffs for $507.5 million in punitive damages. Plaintiffs will indeed have a "statutory entitlement" (Pls. Br. 4) under § 1961 to interest from the date of *that* judgment, but all of the previous money judgments entered by the district court – first for $5 billion, then for $4 billion, then for $4.5 billion – have been vacated and are no longer of any legal force. The only "money judgment" that could be subject to § 1961 is the one final judgment the district court will issue on remand from the Supreme Court and this Court.

It is true, however, that an appellate court that directs entry of a new, lower money judgment possesses the authority to award interest dating back to an earlier judgment, *if that court so chooses*. In other words, the exercise of that authority is a matter of discretion, not entitlement. As one of plaintiffs' own authorities states: "The standard for determining whether post-judgment interest *should* run from the original judgment is well established. Specifically, the decision turns on *the degree to which the original judgment was upheld or invalidated on appeal.*" *Loughman v. Consol-Pennsylvania Coal Co.*, 6 F.3d 88, 97 (3d Cir. 1993)

(emphasis added); *see* Exxon Br. 13-14 (citing same standard).

The appellate court's discretionary authority over interest on a vacated and modified judgment derives directly from the text of Appellate Rule 37, which confirms that § 1961 plays no mandatory role in the court's interest determination in this context. Rule 37(a) governs an award affirmed outright on appeal, and it confirms that "whatever interest is allowed by law" – i.e., allowed by § 1961 – "is payable from the date when the district court's judgment was entered." Fed. R. App. P. 37(a). By contrast, Rule 37(b), which governs interest on a new or reduced award mandated by the appellate court, provides only that "the mandate must contain instructions about the allowance of interest." Fed. R. App. P. 37(b). It assuredly does *not* say, as plaintiffs would have it, that "interest is payable on a reduced judgment from date when the district court's original judgment was entered." The Rule instead clearly leaves the question of interest on a vacated and reduced judgment entirely in the hands of the appellate court responsible for the vacatur and reduction. Section 1961 itself plays no role, except insofar as it mandates the payment of interest on the new judgment *going forward*. As to interest on the vacated judgment, § 1961 can be relevant only to the extent the appellate court decides to rely on it as a guidepost for the court's own discretionary

determination to allow interest dating to that earlier judgment.[5]

B. Dating Interest To The Original Judgment Is Not Justified As Compensation Or Punishment

Beyond their flawed entitlement theory, plaintiffs suggest that interest should be awarded dating back to September 24, 1996 as a matter of equity, to ensure (a) that plaintiffs are "compensate[d]" for the "lost time-value of money", and (b) that Exxon suffers the same "punitive sting" it would have experienced if a lawful $507.5 million award actually had been entered on September 24, 1996. Pls. Br. 4. Neither argument has merit as applied here.

1. Dating interest to the original judgment is not warranted because the plaintiffs have not suffered a "loss" during the appeal of this case. The Supreme Court made clear that the award in this case – unlike the assumed premise of the award in *Planned Parenthood, supra* – did not compensate plaintiffs for any type of loss. Exxon Br. 16. Nor is it correct to say that plaintiffs suffered a loss because they from were denied use of a monetary award to which they were legally

[5] Plaintiffs cite the statement in *Planned Parenthood of the Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 518 F.3d 1013 (9th Cir. 2008), that plaintiffs there were "entitled" to interest. *Id.* at 1021. That statement , however, came only after the Court satisfied itself that the "legal and evidentiary basis" of the award had been sufficiently ascertained by the original judgment to justify an award of interest dating to the original judgment, *id.* Plaintiffs were "entitled" to interest from the earlier judgment, in other words, because the Court had decided to allow them that interest – not because all plaintiffs always have a conclusive "statutory entitlement" to interest from the original judgment, as plaintiffs contend here.

entitled during this period. Pls. Br. 4. As discussed above, the judgment that was entered by the district court was not affirmed on appeal. The original award has been vacated, and it has now been remitted to an amount just over 10% of the original award. When judgment is entered pursuant to that remittitur, plaintiffs will *then* become true judgment creditors, with a statutory entitlement to interest as compensation for the short-term period between entry of the award and final payment by Exxon on any amount still owing. But plaintiffs suffered no "loss" *prior* to the Supreme Court's ruling, because that ruling was the first time that any court determined what amount of punitive damages would serve lawful public purposes under standards of federal maritime law.

Plaintiffs' contrary theory of loss rests on the premise that their legal and factual entitlement to a $507.5 million punitive damages award was sufficiently "ascertained" by the original judgment that they should be compensated for Exxon's failure to have paid them that amount on September 24, 1996. But as explained in Exxon's opening brief, in this case the amount of punitive damages appropriate under federal maritime law was not ascertained by the original judgment – or by any subsequent judgment prior to the Supreme Court's opinion – because none of those judgments applied federal maritime law standards to the award. Exxon Br. 19-21. It is thus literally impossible to say that the "legal basis" for the award was ascertained by the original judgment: there was simply no way

for either plaintiffs or Exxon to know on September 24, 1996, what amount, if any, of punitive damages were actually permissible under the applicable maritime law standards. To be sure, the original judgment did establish that punitive damages were generally allowed under maritime law and were not displaced by federal statutes, but that threshold holding says nothing whatsoever about whether maritime law standards would permit recovery of punitive damages *in this case*, and, if so, in what amount, or even in what general range. None of that was known or knowable until the Supreme Court enunciated the pertinent maritime law standards and applied them to this case.

This case thus differs crucially from the cases plaintiffs cite, where appellate courts ordered *due-process-based* reductions in punitive damage awards but allowed interest dating back to the original judgment. In addition to *Planned Parenthood*, such decisions include *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1152 (9th Cir. 2002); *Johansen v. Combustion Eng'g Co.*, 170 F.3d 1320, 1340 (11th Cir. 1999); and *Snyder v. Freight, Const., Gen. Drivers, Warehousemen & Helpers, Local No. 287*, 175 F.3d 680, 690 (9th Cir. 1999). "[I]n the context of a *constitutionally* excessive verdict," it may be reasonable to treat the award as "correct to the extent of" of the constitutionally permissible amount, where are a "clearly identifiable excessive portion" can be "stricken," leaving a "remaining portion" that is not only "just as clearly

identifiable," *Johansen*, 170 F.3d at 1340, but is also clearly lawful under the substantive standards that *controlled the verdict's determination*. Here no maritime-law standards were applied by the jury, or by any reviewing court until the Supreme Court. There is therefore no basis for treating the award as correctly ascertained by the original judgment "to the extent of" of the remitted $507.5 million judgment, for that is simply a new judgment, ascertained and approved on appeal under the auspices of new maritime law standards enunciated and applied for the first time by the Supreme Court.

2. It is also incorrect to say that dating interest to the original, now-vacated judgment is necessary to ensure the "punitive sting" of that judgment. Pls. Br. 4. The Supreme Court held that a spiller in Exxon's position can be required to pay no more than the amount of actual harm caused to plaintiffs (as measured by compensatory damages). To the extent that judgment reflects a purely moral condemnation of the conduct that caused the spill, that condemnation exists regardless of how the Court now treats interest on the award. And to the extent the "punitive sting" reflects the more instrumental objective of deterring Exxon and others from engaging in similar conduct, that deterrence effect also will be *exactly the same* regardless of how the Court now treats interest on the award – either way, all potential spillers in Exxon's position will know they may be required to pay punitive damages in an amount up to compensatory damages. In short, neither the

moral condemnation nor the economic deterrence components of punitive damages requires an award of interest dating to the original judgment.

C. Any Interest Awarded Under Authority Of Rule 37(b) Should Be Economically Rational

Whatever else may be true about plaintiffs' interest request, one point that cannot seriously be disputed is that on plaintiffs' own theories of loss and punishment, interest cannot date to the original, now-vacated judgment at the fixed 5.9% annually compounded rate that would have applied to a true final judgment actually issued that day. If interest dating to the original judgment is justified as compensation for the lost "time value" of $507.5 million, using a fixed 5.9% rate compounded annually would significantly *over*compensate plaintiffs, because it would overvalue by up to $183 million the actual value today of a $507.5 million award issued on September 24, 1996. Exxon Br. 22-23. Likewise, if interest dating to the original judgment is justified to ensure that Exxon is punished by an award today that would have been equal to $507.5 million in compensatory damages on September 24, 1996, then using a fixed 5.9% rate compounded annually would result in a punitive award more than 30% *greater* than the compensatory damages, in direct contravention of the Supreme Court's ruling in this case. *Id.* The only just and rational way to serve the objectives of compensation and punishment in dating interest to the original judgment would be to use a blended average or annual adjustment method to determine the actual

value of $507.5 million over that period of time. *Id.* at 24. Using one of these more accurate methods would allow for $262-272 million in interest, by Exxon's estimates. *Id.* at 22.

Plaintiffs do not even acknowledge the obvious problems with using a fixed 5.9% rate, much less do they propose any solution. They appear simply to assume that if interest dates to the original judgment, § 1961 necessarily dictates the applicable rate. It does not. Indeed, as discussed above, *supra* at 11-13, § 1961 does not apply *at all* – the entire issue of interest is subject to this Court's discretion under the plain language of Rule 37, which clearly allows the Court to determine what equitable rate should apply when the Court decides to allow interest to run from a vacated judgment. Plaintiffs do not and cannot demonstrate otherwise.

CONCLUSION

For the foregoing reasons, and for the reasons previously stated, 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.

Respectfully submitted,

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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 ANSWERING 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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