IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	
This Order Relates to ALL CASES	)	No. A89-0095-CV (HRH)

ORDER NO. 365

Class Counsel's
Renewed Motion for Award of
Attorney Fees and Costs

Class Counsel move for an award of attorney fees and costs.[1] Due notice of the motion was given to plaintiffs.[2] Plaintiffs' written and oral statements in favor of and in opposition to the motion have been received and considered. Defendants Exxon Mobil Corporation (D-1) and Exxon Shipping Company (D-2), hereinafter "Exxon", oppose the motion.[3] As set forth in the court's notice, a hearing on Class Counsel's motion was conducted on September 26, 2003.

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[1] Clerk's Docket No. 7650.

[2] Order (granting motion for approval of form of notice) (June 13, 2003), Clerk's Docket No. 7674; Affidavit of Service with attachments (Affidavit of Mailing Notice), Clerk's Docket No. 7708.

[3] Clerk's Docket No. 7724.

I.

DESCRIPTION OF PENDING MOTION

Counsel for plaintiffs participating in the Plan of Allocation, hereinafter "Class Counsel", request an order "awarding attorney's fees from the punitive and any future compensatory damage recoveries, and awarding plaintiffs' lawyers their unreimbursed costs and expenses."[4] Class Counsel specifically request the court to: (1) "order that 3% of all plaintiffs' punitive and future compensatory damages recoveries (including interest) be allocated to the Consolidated Case Fund", and (2) "award Class Counsel a 20% fee award from the remaining recoveries of all plaintiffs (including interest) except for three groups: (i) Chugach Regional Corporation and its related Village Corporations; (ii) the Seattle Seven, who already have settled with the remaining plaintiffs regarding their share of recoveries; and (iii) the portions of the recoveries that six seafood processors have assigned to Exxon."[5]

Taken together, the two awards amount to a total fee of 22.4% of the net class recovery, i.e., all recoveries covered by the Plan of Allocation that have not been assigned away.[6] Based on the $4 billion punitive damages judgment which was in place when the instant motion was filed, Class Counsel calculated that the requested fee amounts to approximately $774,656,000, plus

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[4] Plaintiffs' Renewed Motion for Attorneys' Fees and Costs at 1, Clerk's Docket No. 7650.

[5] Id. at 50.

[6] Id. at 1.

$355,343,000 in interest since 1994, for a total fee award of $1,130,000,000 as of April 30, 2003.[7] The amended judgment just entered by the court increases the punitive damages award to $4.5 billion. Based on the amended judgment, the court estimates that the total fee award at the 22.4% rate, including interest, amounts to approximately $1,293,373,000, as of April 30, 2003.

Class Counsel also request the court to hold that Class Counsel are entitled to recover their reasonable costs and expenses of litigation from the common fund, and to order that "(1) this Court will review the reasonableness of any particular costs application upon later motion and hearing; and (2) class notice will not be required at that time upon the application."[8] Class Counsel estimate that gross costs are currently at $30 million, $8 million of which have been reimbursed, leaving a remainder of $22 million.[9]

II.

STATEMENT OF EARLIER PROCEEDINGS
RELEVANT TO THE RENEWED MOTION FOR ATTORNEY FEES

After the grounding of the Exxon Valdez on March 24, 1989, and the subsequent oil spill, a multitude of cases were filed in state and federal court. Most civil cases were ultimately consolidated into this case, although some municipal claims and Native

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[7] Plaintiffs' Oral Argument Chart entitled "Counsel's Fee Request of $4 Billion" at 3, attached to Hearing Minutes, Clerk's Docket No. 7752.

[8] Plaintiffs' Reply in Support of Renewed Motion at 24, Clerk's Docket No. 7734.

[9] Renewed Motion for Attorneys' Fees and Costs at 44, Clerk's Docket No. 7650.

corporation claims were tried in state court. In the consolidated cases, Exxon's liability for compensatory damages was undisputed, but the amount of plaintiffs' losses was controverted. Exxon's liability for punitive damages was vigorously litigated.

A.

Creation of Punitive Damages Class

Prior to the commencement of trial in this case, the court became convinced of the necessity of creating a single, mandatory punitive damages class. On January 28, 1994, pursuant to Rule 23(b)(1)(B), Federal Rules of Civil Procedure, Exxon moved the court to certify a mandatory punitive damages class, composed of all persons or entities who possessed claims for punitive damages against Exxon arising out of or related to the grounding of the Exxon Valdez and the resulting oil spill.[10] On March 1, 1994, the court filed Amended Order No. 180,[11] granting preliminary approval of a mandatory punitive damages class, and ordering counsel to provide notice by mail and publication to potential class members of a hearing on April 8, 1994, to consider final approval of the class certification. Order No. 180 Supplement presents the court's reasons for granting preliminary approval of the class certification.[12]

Numerous members of the proposed class subsequently filed written objections to the proposed certification and/or appeared at

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[10] Clerk's Docket No. 4458.

[11] Clerk's Docket No. 4590.

[12] Clerk's Docket No. 4625.

the April 8 hearing to object to the proposed certification. All objections were carefully considered by the court. On April 15, 1994, the court entered Order No. 204,[13] granting final approval of the mandatory punitive damages class. The court's reasons for doing so were set forth in Order No. 204 Supplement.[14] The court subsequently learned that although notice of the hearing on the mandatory punitive damages class was mailed to over 50,000 persons, notice by publication had not been made as directed by Amended Order No. 180. Consequently, another hearing was held on May 2, 1994, to give potential class members who had not previously received notice the opportunity to be heard regarding the proposed mandatory punitive damages class. No new objections were filed after publication of the notice.

In Order No. 204 Second Supplement, dated May 12, 1994, the court found that the punitive damages class met the requirements of Rule 23(b)(1)(B), and certified the mandatory punitive damages class.[15] The mandatory punitive damages class consists of "all persons or entities who possess or have asserted claims for punitive damages against Exxon and/or Exxon Shipping which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill."[16] Pursuant to Rule 23(c)(4)(A), Federal

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[13] Clerk's Docket No. 4856.

[14] Clerk's Docket No. 4857.

[15] Clerk's Docket No. 5032.

[16] Order No. 204 (granting conditional final approval and certifying mandatory punitive damages class) at 2, Clerk's Docket No. 4856.

Rules of Civil Procedure, certification of the class was limited to the issues of "(1) whether Exxon and/or Exxon Shipping are liable to members of the class, or any of them, for punitive damages, and (2) if so, what amount of punitive damages should be assessed."[17]

The court "certified a mandatory punitive damages class so the award would not be duplicated in other litigation and would include all punitive damages the jury thought appropriate." In re Exxon Valdez, 270 F.3d 1215, 1225 (9th Cir. 2001). As a result of certification of the mandatory punitive damages class, no claims for punitive damages against Exxon arising out of or related in any way to the grounding of the Exxon Valdez or the resulting oil spill were pursued or asserted in any court other than through the mandatory punitive damages class proceeding in the United States District Court.[18]

By order dated March 14, 1994, the court also certified the Commercial Fishing Class, the Native Class, the Area Business Class, and the Landowner Class for compensatory damages.[19]

In Order No. 204,[20] filed April 15, 1994, the court appointed thirteen attorneys from different law firms as counsel for the mandatory punitive damages class. The order further provided that "[t]he court's previous orders with respect to the appointment

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[17] Id. at 5.

[18] Notice at 2, attached to Order Approving Form of Summary Class Notice, Clerk's Docket No. 4888.

[19] Clerk's Docket No. 4653.

[20] Clerk's Docket No. 4856 at 2-3.

and duties of Liaison Counsel, Co-Lead Counsel, and Lead Trial Counsel shall remain in place and apply to the mandatory punitive damages class."[21] Pre-Trial Order No. 9,[22] filed December 22, 1989, previously established that all plaintiffs' cases would be managed through a case management team consisting of Lead Counsel, Liaison Counsel, and the Executive, Operations, Discovery, Law, Damages, Government Liaison, and Equitable Relief Committees.

B.

Summary of Trial

A trial consisting of four phases, Phase I, Phase II-A and II-B, Phase III, and Phase IV, was held in this court from May 2, 1994, through September 16, 1994. In Phase I, the jury determined that Exxon and Joseph Hazelwood were reckless in connection with events leading up to the oil spill, thereby exposing them to a possible award of punitive damages.

In Phase II-A, the jury awarded $287 million in compensatory damages to all class members and direct action plaintiffs for claims involving: lost harvest for salmon or herring in Prince William Sound, Kodiak, Upper Cook Inlet or Chignik; reduced prices for salmon or herring in these areas; and for devaluation of certain limited entry salmon or herring permits in these areas. Phase II-B, which was to have tried the claims of the Alaska Native Class for damages to their subsistence harvest, was settled for $22.6 million. After notice was given, 717 individual Natives opted out of the

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[21] Id. at 3-4.

[22] Clerk's Docket No. 748.

settlement in order to have their claims determined as part of Phase IV.

In Phase III, plaintiffs' punitive damages claims against Exxon and Joseph Hazelwood were tried. On September 16, 1994, the jury returned its verdict on behalf of all members of the mandatory punitive damages class, awarding plaintiffs $5 billion in punitive damages against Exxon and $5,000 in punitive damages against Joseph Hazelwood.

Phase IV was to have tried the claims of commercial fishers whose claims were not tried as part of Phase II-A, Native Alaskans who had opted out of the settlement class for Phase II-B, landowners, and certain Native corporations. However, a settlement was reached in the amount of $13.4 million and approved by the court. Settlements totaling $2.172 million were also obtained by some municipalities who brought suit in state court.

On October 3, 1994, Exxon moved for a reduction or remittitur of the punitive damages award.[23] The court denied the motion by Order No. 267 on January 27, 1995.[24]

On September 24, 1996, after extensive post-trial motion practice, this court entered final judgment,[25] which was amended and re-entered on January 30, 1997.[26] The amended judgment awarded compensatory damages for Phase II-A, after offsets, in the amount

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[23] Clerk's Docket No. 5970.

[24] Clerk's Docket No. 6234.

[25] Clerk's Docket No. 6911.

[26] Clerk's Docket No. 6966.

of $19,590,257,[27] pre-judgment interest on the Phase II compensatory damages award in the amount of $37,971,043.91, and punitive damages for Phase III of the trial in the amount of $5,000 against Joseph Hazelwood and $5 billion against Exxon. The amended final judgment awarded interest pursuant to 28 U.S.C. § 1961, as well as taxable costs, in the amount of $690,354.66.

On February 12, 1997, Exxon filed its notice of appeal of the compensatory and punitive damages judgments with the Ninth Circuit Court of Appeals. Exxon sought and obtained a stay of execution on the judgment by posting a supersedeas bond in the amount of $6.75 billion.[28]

C.

Prior Orders on Punitive Damages Award

On January 18, 2002, the Ninth Circuit issued its mandate to this court regarding the appeal. The Ninth Circuit affirmed the compensatory damages awards and Exxon's liability for punitive damages, but vacated the $5 billion punitive damages award, holding that it was too high to withstand the review required under BMW of North America v. Gore, 517 U.S. 559 (1996), and Cooper Industries, Inc. v. Leatherman Tool Group, Inc., 532 U.S. 424 (2001), two Supreme Court cases that were decided after this court ruled on punitive damages. The court of appeals specifically remanded the

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[27] Prior to trial, Exxon made partial payments to many fishermen claimants, hence the substantial disparity between the jury's compensatory damages award in the Phase II-A trial and the judgment.

[28] Order Staying Execution on Money Judgment and Approving Letter of Credit, Clerk's Docket No. 6914.

case "so that the district court can set a lower amount in light of the BMW and Cooper Industries standards." In re Exxon Valdez, 270 F.3d 1215, 1246-47 (9th Cir. 2001).

On June 12, 2002, Exxon filed a renewed motion for a reduction or remittitur of the punitive damages award.[29] On December 6, 2002, the court entered Order No. 358, ruling on Exxon's motion.[30] In Order No. 358, the court again concluded "that a $5 billion award was justified by the facts of this case and is not grossly excessive so as to deprive Exxon of fair notice--its right to due process."[31] However, in compliance with the court of appeals' instruction to reduce the punitive damages award, the court ordered the sum of $1 billion remitted, reducing the punitive damages award to $4 billion. The court resolved the amount of punitive damages by adopting plaintiffs' position that "a punitive damage[s] award of at least $4 billion satisfies the requirements of due process consistent with BMW v. Gore, 517 U.S. 559 (1996)."[32] The court entered judgment on December 10, 2002,[33] awarding punitive damages for the plaintiffs and against Exxon in the amount of $4 billion.

Both defendants and plaintiffs timely filed notices of appeal to the Ninth Circuit. Thereafter, the United States Supreme

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29 Clerk's Docket No. 7487.

30 Clerk's Docket No. 7564.

31 Id. at 50.

32 Id. at 51.

33 Clerk's Docket No. 7566.

Court rendered its decision in State Farm Mut. Auto. Ins. Co. v. Campbell, ___ U.S. ___, 123 S. Ct. 1513 (2003),[34] adding to the Supreme Court jurisprudence announced in BMW. By order dated August 18, 2003, without briefing or an opinion on the merits of the appeals, the Ninth Circuit vacated the portion of the judgment fixing punitive damages in this case at $4 billion and again remanded the matter to this court for reconsideration in light of State Farm.[35]

On September 30, 2003, Exxon filed a second renewed motion for a reduction or remittitur of the punitive damages award.[36] Concurrent herewith, the court has entered Order No. 364, ruling on Exxon's motion. By Order No. 364, the court withdrew its Order No. 358 and reexamined the punitive damages award issue anew, based now upon BMW, Cooper Industries and State Farm. The court has again concluded that a $5 billion award was justified by the facts of the case and was not grossly excessive so as to deprive Exxon of fair notice--its right to due process. The court has again concluded that it must reduce the punitive damages award because of the ruling of the court of appeals in remanding the case for further review; but, based upon that further review and the addition of State Farm to the calculus, the court has concluded that a punitive damages

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[34] State Farm will also be published as 538 U.S. 408.

[35] Ninth Circuit Court of Appeals Judgment/Final Order, Clerk's Docket No. 7737.

[36] Clerk's Docket No. 7753.

award of $4.5 billion is justified by the BMW guideposts and is not unconstitutional.

Class Counsel filed their renewed motion for award of attorney fees and costs on April 30, 2003, several months before the Ninth Circuit vacated this court's amended punitive damages judgment and remanded it for reconsideration in light of State Farm.[37] With the concurrence of the parties and because the court's judgment had been vacated, the court withheld ruling on the attorney fees and costs issues until the punitive damages issue was again resolved and a new judgment entered.

D.

Prior Orders on Attorney Fees

Early in this litigation, the court entered several preliminary orders related to attorney fees. Pre-Trial Order No. 9, filed December 22, 1989, required plaintiffs' counsel to agree upon a fee structure and method of payment for counsel appointed to serve on the case management team, and to advise the court in camera of the terms of the agreement by January 31, 1990. In the event no such agreement could be reached, the court indicated that it would resolve any disagreements after soliciting any necessary information from plaintiffs.[38] The court's order also applied to the attorneys appointed to serve as counsel for the mandatory punitive damages class.

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[37] Plaintiffs' Reply at 2, Clerk's Docket No. 7734.

[38] Clerk's Docket No. 748 at 11.

On March 26, 1992, the court entered its Order Establishing Regime for Compensation of Plaintiffs' Counsel.[39] The order established the Consolidated Case Fund and stated in pertinent part:

> Three percent of any recovery received by any plaintiff, individually or as a member of a certified class, whether by judgment, settlement or otherwise, after February 14, 1991, shall be contributed to the Consolidated Case Fund. Contributions are to be made with respect to recoveries by certified classes of plaintiffs as well as by plaintiffs who are not members of certified classes or who have opted out of certified classes.
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> Counsel who are active members of the CMT [Case Management Team] or who perform administrative and/or other tasks benefitting the combined plaintiffs at the request or direction of Co-Lead Counsel or the CMT may apply for compensation from the Consolidated Case Fund, whether or not said counsel are also applying for compensation from the Class Action Attorneys Fee Fund or being paid by their individual clients pursuant to engagement agreements.[40]

The order provided that Class Counsel would apply to the court for an award of attorney fees based on the following percentages: 20% of any recovery by the commercial fishing class either by settlement or trial after entry of a final pretrial order, and 30% of any recovery by the Alaska Native, area business, property owner, and cannery and seafood processor employees classes, either by settlement or trial after entry of a final pretrial order.[41] The order further provided that all attorney fees awarded

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[39] Clerk's Docket No. 2396.

[40] Id. at 2.

[41] Id. at 3-4.

by the court to class action plaintiffs' counsel "shall go into a single fund (as opposed to separate funds for each class) to be known as the Class Action Attorneys' Fees Fund."[42]

The order establishing a compensation regime also established a Fee Committee composed of five of plaintiffs' counsel who were charged with the duty of monitoring all plaintiffs' attorneys' hours, disbursements, and fee investments as they accrued.[43]

On January 19, 1996, the court entered an order granting preliminary approval of the Plan of Allocation[44] that provides for distribution of all punitive and compensatory recoveries by plaintiffs in the Exxon Valdez litigation. The Plan of Allocation was the result of a Joint Prosecution Agreement[45] in which plaintiffs agreed that all recoveries by any plaintiff or group of plaintiffs, whether by settlement or trial, would be shared among all plaintiffs in accordance with an allocation matrix.

The Plan of Allocation further provides:

> Although ... the Fee Orders provide for attorneys fees of 3% for the Consolidated Case Fund, 20% from the Commercial Fishing and Tender Class, and 30% from other classes, all signatories' counsel, including direct action counsel, have volunteered to limit their fees similarly to 22.4% for recoveries obtained after the Alyeska Settlement--i.e., the Native/Municipality Settlements, Commercial Fishermen Phase II Compensatory Damage Verdict,

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[42] Id. at 4.

[43] Id.

[44] Clerk's Docket No. 6603.

[45] Joint Prosecution Agreement, Exs. F and G, which are attached to Oesting Affidavit, Clerk's Docket No. 6592.

> Punitive Damage Verdict and Kodiak Island Borough Compensatory Damage Verdict....[46]
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> The 22.4% rate is derived as follows. Three percent of recoveries would be set aside for contribution to the Consolidated Case Fund, created by the courts to compensate plaintiffs' counsel for work done for the common good of all plaintiffs. From the remaining 97% of recoveries, 20% would be taken, which is the court-ordered percentage for recoveries by the commercial fishing class. Thus, the 22.4% rate includes 3% for the Consolidated Case Fund, plus 20% of the remaining 97%. For some direct action plaintiffs, the percent fee specified in their retainer agreement may be lower than 20%. In such cases, the lower percent will be used.[47]

The court granted final approval of the Plan of Allocation on June 11, 1996, by Order No. 317.[48]

E.

Orders on Initial Motion for Attorney Fees

Class Counsel previously filed a motion for award of attorney fees and costs on October 8, 1996, shortly after judgment was first entered in this matter.[49] In accordance with the Plan of Allocation, Class Counsel requested a contingent fee of 22.4% of the plaintiffs' net recovery. Proceedings on the motion were greatly extended and resulted in several orders from the court directing Class Counsel to provide additional information. On

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[46] Plan of Allocation at 35, Ex. C attached to Oesting Affidavit (in support of motions for preliminary approval of Phase IV settlement and Plaintiffs' Plan of Allocation), Clerk's Docket No. 6591.

[47] Id. at 35, n.50.

[48] Clerk's Docket No. 6806.

[49] Clerk's Docket No. 6925.

March 18, 1997, Class Counsel filed a supplement to the attorney fees motion.[50]

On April 22, 1997, a preliminary hearing was held on the motion for an award of attorney fees, after which the court entered Order No. 333,[51] directing Class Counsel to make available to the court "data with respect to the time devoted to the litigation of this case by all plaintiffs' counsel and their respective normal hourly rates for purposes of evaluating the reasonableness of the fees sought."[52]

In response, Class Counsel submitted a more detailed disclosure of time and rate data,[53] as well as a Report to the Court by Plaintiffs' Fee Committee on Accumulated Fees and Expenses.[54] The report included "(1) a short description of the activities of the fee committee; (2) information about all plaintiffs' counsel's lodestar ... based on normal hourly amounts at the time submitted, and, alternatively, with an attributed prime interest rate; (3) a narrative of work done on the case by plaintiffs' counsel; and (4) a statement of the out-of-pocket costs expended by plaintiffs' counsel on the litigation as of May 20,

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[50] Clerk's Docket No. 6984.

[51] Clerk's Docket No. 7001.

[52] Id. at 3.

[53] Plaintiffs' Compliance with Order No. 333, Clerk's Docket No. 7011.

[54] Clerk's Docket No. 7015.

1997."[55] On July 1, 1997, Exxon filed another motion for an order directing plaintiffs to comply more fully with Order No. 333.[56]

After court-approved notice of the motion for attorney fees was mailed and published, a hearing on the motion was held on August 13, 1997. Six plaintiffs filed objections, which were considered by the court. By Order No. 344,[57] the court ordered plaintiffs to make available to the court the detailed time records of each involved attorney. As an alternative, the court suggested the possible withdrawal of the motion for an award of attorney fees pending disposition of the appeal. Class Counsel responded with another supplemental presentation concerning attorneys' time,[58] after which Exxon filed another motion for additional disclosures.[59]

In Order No. 346 of April 14, 1999,[60] the court concluded that plaintiffs' supplemental filing in response to Order No. 344 did not provide the level of detail as to attorney time charges that the court had expected. The court again offered plaintiffs the option of withdrawing their motion for attorney fees with leave to renew 30 days following the issuance of a mandate to the court by the Ninth Circuit Court of Appeals.

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[55] Id. at 2.

[56] Clerk's Docket No. 7031.

[57] Clerk's Docket No. 7255.

[58] Plaintiffs' Supplement, Clerk's Docket No. 7280.

[59] Clerk's Docket No. 7291.

[60] Clerk's Docket No. 7302.

On May 7, 1999, Class Counsel filed a notice advising the court that they wanted to defer consideration of the attorney fees motion.[61] By Order No. 347,[62] the court deemed plaintiffs' motion for attorney fees withdrawn with leave for plaintiffs to renew the motion after appeal.

III.

PROCEDURAL BACKGROUND
OF RENEWED MOTION FOR ATTORNEY FEES

On April 30, 2003, all plaintiffs' Lead Counsel filed plaintiffs' renewed motion for award of attorney fees and costs,[63] with attached declarations and affidavits by Class Counsel, and exhibits including: (1) the Exxon Valdez oil spill time report database on CD, which presents "the time expended by each lawyer and paralegal during each month of the pendency of this case on each of 20 categories of litigation tasks, together with the fees which would be charged by such lawyer and/or paralegal for that work at the rates in effect at the time those services were provided;"[64] (2) a chronology of the litigation from March 24, 1989, to the present; and (3) a report of the Fee Committee's activities, which provides a "detailed history of the gathering of all of the time records of all of the law firms representing plaintiffs in this litigation" and "chronicles the Fee Committee's review, auditing

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[61] Clerk's Docket No. 7310.

[62] Clerk's Docket No. 7311.

[63] Clerk's Docket No. 7650.

[64] Jamin Dec., Ex. B at 1, Clerk's Docket No. 7650.

activities, and 'valuation' of the recorded time for each of the lawyers and paralegals who provided services in this matter."[65] Plaintiffs' Fee Committee also assembled and made available for the court's inspection approximately 200 binders with the original time and fee data received from each firm, and Fee Committee audit files for each of the over 60 law firms involved in plaintiffs' representation.

On June 24, 2003, notice of the renewed motion for an award of attorney fees and costs was mailed to 40,065 "persons and entities who have asserted claims against Exxon Corporation and/or Exxon Shipping Company arising out of or related to the Exxon Valdez Oil Spill of March 24, 1989."[66] Notice was also published in twelve newspapers between July 3 and July 10, 2003. The court-approved notice informed claimants of the August 29, 2003, deadline for filing and serving objections, and of the September 26, 2003, hearing on the renewed motion for attorney fees.

The notice also indicated that Lead Counsel would make available to any interested class member "the full range of information on the subject of class counsels' fees and costs, including the materials filed with the Court in support of their request for an award of attorney fees and costs, computer-generated compilations of that data, class counsels' time report database, and the original attorney time records."[67] Because of the volume of the materials,

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[65] Id. at 8-9.

[66] Affidavit of Mailing at 1-2, Clerk's Docket No. 7708.

[67] Notice at 3, Clerk's Docket No. 7708.

Class Counsel made the fee database available to class members on computer disk, but indicated that the original time records could be made available for inspection upon reasonable notice.

Notice was provided to give all claimants "the opportunity to support or object to the request of plaintiffs' counsel that they be awarded reimbursement of their reasonable expenses and no more than 22.4% of signatory plaintiffs' recovery as compensation for their services in this case."[68] All members of the mandatory punitive damages class were given the opportunity to object to the renewed motion for attorney fees and costs by filing written objections and/or by appearing at the hearing.

On September 26, 2003, a hearing was held on the renewed motion for award of attorney fees and costs. During the hearing, plaintiffs' counsel presented a detailed argument and visual presentation in support of the renewed motion. Three plaintiffs testified in opposition to the motion: All Alaskan Seafoods (AAS), which objected to paying attorney fees on a contingency fee basis and requested the court to enforce the hourly fee agreement AAS had entered into with retained counsel; Ken Castner, who objected to changes in the attorney fee agreement after the case became a class action, particularly the 3% allocation to the Consolidated Case Fund; and, Mike Kalbarczyk, who objected on the basis that the attorneys should not be paid because the deck hands had not been compensated fairly. Exxon also argued in opposition to the motion.

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[68] Id.

On October 28, 2003, the court issued a minute order[69] stating that it would defer ruling on the attorney fees motion until after the punitive damages issue was resolved. As set out above, that issue has now been decided and a further amended judgment entered.

IV.

APPLICABLE LAW

A.

Fee Law for Common Fund Cases

Under Ninth Circuit law, the district court has discretion to use either the percentage-of-the-fund or the lodestar method in calculating attorney fees in common fund cases. Vizcaino v. Microsoft, 290 F.3d 1043, 1047 (9th Cir. 2002); Hanlon v. Chrysler Corporation, 150 F.3d 1011, 1029 (9th Cir. 1998).

"Under the lodestar/multiplier method, the district court first calculates the 'lodestar' by multiplying the reasonable hours expended by a reasonable hourly rate." In re Washington Public Power Supply System Securities Litigation ("WPPSS"), 19 F.3d 1291, 1295 n.2 (9th Cir. 1994) (citing Pennsylvania v. Delaware Valley Citizens' Council for Clean Air, 478 U.S. 546, 565 (1986)). "The court may then enhance the lodestar with a 'multiplier,' if necessary, to arrive at a reasonable fee." Id. (citing Blum v. Stenson, 465 U.S. 886, 888 (1984)). A "multiplier" is a number by which the base lodestar figure is multiplied in order to increase the award of attorney fees on the basis of such factors as the risk

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[69] Clerk's Docket No. 7763.

involved and the length of the proceedings. Staton v. Boeing Co., 327 F.3d 938, 967-968 (9th Cir. 2003).[70] Multipliers of one to four are frequently awarded in common fund cases when the lodestar method is applied. Vizcaino, 290 F.3d at 1051 n.6.

Under the percentage method, the court awards the attorneys a percentage of the fund sufficient to provide class counsel with a reasonable fee. Hanlon, 150 F.3d at 1029 (citing Paul, Johnson, Alston & Hunt v. Graulty, 886 F.2d 268, 272 (9th Cir. 1989)). The Ninth Circuit has established 25% of the common fund as a benchmark award for attorney fees in common fund cases. Six (6) Mexican Workers v. Arizona Citrus Growers, 904 F.2d 1301, 1311 (9th Cir. 1990) (citing Graulty, 886 F.2d at 272). That percentage amount can be adjusted upward or downward to account for any unusual circumstances involved in the case. Graulty, 886 F.2d at 272. "Selection of the benchmark or any other rate must be supported by findings that take into account all of the circumstances of the case." Vizcaino, 290 F.3d at 1048.

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[70] "Courts must consider the following factors--at least those most relevant under the circumstances--in calculating the lodestar figure: (1) the time and labor required; (2) the novelty and difficulty of the questions involved; (3) the skill requisite to perform the legal service properly; (4) the preclusion of other employment by the attorney due to acceptance of the case; (5) the customary fee; (6) whether the fee is fixed or contingent; (7) time limitations imposed by the client or the circumstances; (8) the amount involved and the results obtained; (9) the experience, reputation, and ability of the attorneys; (10) the 'undesirability' of the case; (11) the nature and length of the professional relationship with the client; and (12) awards in similar cases." Fischel v. Equitable Life Assur. Society of U.S., 307 F.3d 997, 1007 n.7 (9th Cir. 2002) (citing Quesada v. Thomason, 850 F.2d 537, 539 n.1 (9th Cir. 1988) (citation omitted)).

Because a reasonable fee award is the hallmark of common fund cases, neither the percentage or lodestar method should be applied in a formulaic or mechanical fashion. WPPSS, 19 F.3d at 1295 n.2. Rather, "when determining attorneys' fees, the district court should be guided by the fundamental principle that fee awards out of common funds be 'reasonable under the circumstances.'" Id. at 1296 (quoting Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990)).

B.

The Range of Presumptive Fees

When the percentage method is used, common fund fee awards ordinarily range from 20% to 30% of the fund created. Graulty, 886 F.2d at 272. In a Ninth Circuit survey of "fee awards from 34 common fund settlements of $50-200 million from 1996-2001, with fees awarded under the percentage method," awards ranged from 3% to 40%, with most awards around 10% to 30% and a bare majority "clustered" in the 20% to 30% range. Vizcaino, 290 F.3d at 1050 n.4. The Manual for Complex Litigation reports that federal district courts applying the percentage method generally award attorney fees in the range from 25% to 30% of the fund.[71] In a study of class actions in four federal district courts (Eastern District of Pennsylvania, Southern District of Florida, Northern District of Illinois, and Northern District of California) from 1992 to 1994, the Federal

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[71] Manual for Complex Litigation (Third) § 24.12 (1995).

Judicial Center found that the median attorney fee ranged from 27% to 30% when the percentage method was used.[72]

C.

The Role of Early Preliminary Approval of Attorney Fee Regimes

Several courts and the Manual for Complex Litigation encourage courts to establish fee regimes early in class actions. See, e.g., Six Mexican Workers, 904 F.2d at 1312 (Sneed, J., concurring) (encouraging trial judges to inquire early in the proceedings which mode of fee recovery class counsel anticipate utilizing because responses to this inquiry "will facilitate case management by the trial judge as well as the final resolution of the fee calculation issue"); Manual for Complex Litigation (Third) § 24.23 (court should routinely specify, at the outset of the litigation, the method of compensation that will be used); Manual for Complex Litigation (Third-Annotated) § 24.21(2003) ("Disputes will be reduced if the court advises the parties at the outset of the litigation what method will be used for calculating fees and, if using the percentage method, the range of likely percentages"); and In re Synthroid Marketing Litigation, 264 F.3d 712, 719 (7th Cir. 2001) (early establishment of fee schedules "in the shadow of the litigation's uncertainty" allows the court to design a structure that "emulates the incentives a private client would put in place").

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[72] Thomas E. Willging, et al., Empirical Study of Class Actions in Four Federal District Courts: Final Report to the Advisory Committee on Civil Rules 73 (1996).

New amendments to Rule 23, Federal Rules of Civil Procedure, effective December 1, 2003, also reflect a preference for early establishment of attorney fee regimes in class actions. Rule 23(g)(1)(C)(ii) provides that "[i]n appointing class counsel, the court ... may direct potential class counsel to provide information on any subject pertinent to the appointment and to propose terms for attorney fees and nontaxable costs." The Advisory Committee notes for subsection (h) provide that "[a]ny directions or orders made by the court in connection with appointing class counsel under Rule 23(g) should weigh heavily in making a fee award under this subdivision." Fed. R. Civ. P. 23, advisory committee's notes at 137.[73]

Early in this case, the court made a preliminary decision that a percentage-of-the-fund approach to Class Counsel's fees should be employed. Nothing has occurred in these proceedings, nor has anyone made a showing, which would cause the court to change its view. The court concludes that its preliminary approval should be persuasive, but not conclusive, of the fee award method to be employed. Thus, the court will proceed, testing the requested 22.4% blended fee for reasonableness.

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[73] While the Ninth and Seventh Circuits and the Manual for Complex Litigation encourage establishing the method of fee recovery early in the litigation, the court's research has not produced any cases from the Ninth or Seventh Circuits that state the role preliminary approval of a percentage fee should play in determining the final attorney fees award.

D.

The Role of a Lodestar Comparison

When the court calculates attorney fees based on the percentage method in a common fund case, the court may apply the lodestar method as a cross-check on the reasonableness of a percentage award.[74] Vizcaino, 290 F.3d at 1050; see also Fischel, 307 F.3d at 1007.

In Vizcaino, the Ninth Circuit stated that "[t]he lodestar method is merely a cross-check on the reasonableness of a percentage figure," id. at 1050 n.5, further explaining that:

> Calculation of the lodestar, which measures the lawyers' investment of time in the litigation, provides a check on the reasonableness of the percentage award. Where such investment is minimal, as in the case of an early settlement, the lodestar calculation may convince a court that a lower percentage is reasonable. Similarly, the lodestar calculation can be helpful in suggesting a higher percentage when litigation has been protracted. Thus, while the primary basis of the fee award remains the percentage method, the lodestar may provide a useful perspective on the reasonableness of a given percentage award.

Id. at 1050.

In Vizcaino, the district court's lodestar cross-check resulted in a multiplier of 3.65. Id. at 1051. "The court found this number reasonable by considering the factors in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67,69-70 (9th Cir. 1975), including

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[74] Similarly, where the lodestar method is employed, the court may "compare the lodestar fee, or sum of lodestar fees, to the 25% benchmark, as one measure of the reasonableness of the attorneys' hours and rates." In re Coordinated Pretrial Proceedings, 109 F.3d 602, 607 (9th Cir. 1997).

'the complexity of this case, the risks involved and the length of the litigation.'" Id. (quoting Vizcaino v. Microsoft Corp., 142 F. Supp. 2d 1299, 1306 (W.D. Wash. 2001)).

V.

ANALYSIS OF OBJECTIONS

In determining a reasonable attorney fee, the court should consider the presence or absence of substantial objections by members of the class to the fees requested by counsel. Fischel, 307 F.3d at 1007. This factor is not outcome determinative, but must be considered in light of all of the other factors. Id. at 1008. Following extensive notice, fifteen of the 32,677 plaintiffs filed objections to Class Counsel's renewed motion for attorney fees. The court's review of those objections follows.

A.

Claimants Who Raise Issues
with Respect to Distribution of Recoveries

Four plaintiffs who filed objections raise issues related to the distribution of recoveries, which are untimely as well as irrelevant to the issue of attorney fees.

Stephen Anderson[75] objects to the payment of attorney fees until adequate compensation is made to the cannery worker class. Anderson alleges that under the Plan of Allocation, other classes, such as the fish processor class, received larger shares proportionately than the cannery worker class. Anderson's objection fails to address issues related to attorney fees. His objection to

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[75] Plaintiff Anderson's Objection, Clerk's Docket No. 7723.

the Plan of Allocation, which was approved by the court in Order No. 317 on June 11, 1996,[76] reaffirmed in Order No. 327 on September 11, 1996,[77] and amended and re-approved in Order No. 351 on February 12, 2002,[78] comes far too late.

Similarly, Donald Tirrell[79] and Michael Kalbarczyk,[80] both crewmen in the Cook Inlet salmon drift net fishery, object on the basis that Class Counsel should not be paid until after the Alaska Bar Association investigates an alleged conflict of interest by plaintiffs' counsel who represent both boat owners and crew members. This court and the bar association have very different functions, as well as different issues before them. The court must rule on the overall reasonableness of fees to be paid to Class Counsel for the entire case and as to all plaintiffs. The court is confident that the Alaska Bar Association can and will address the discrete representation issue before it. Both Tirrell and Kalbarczyk also allege that permit devaluation was wrongfully charged against the crew members' share of compensatory damages. Kalbarczyk and Tirrell essentially object to the division of recoveries among participants in the Upper Cook Inlet Drift Net Fisheries Distribution Plan. As that distribution plan was approved

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[76] Clerk's Docket No. 6806.

[77] Clerk's Docket No. 6895.

[78] Clerk's Docket No. 7441.

[79] Plaintiff Tirrell's Objection, attached as Ex. D to Clerk's Docket No. 7750.

[80] Plaintiff Kalbarczyk's Opposition, Clerk's Docket No. 7697.

by the court in September 1998, plaintiffs' objections are untimely. Moreover, they do not address the reasonableness of the requested compensation for Class Counsel.

Louie Jones[81] objects to the renewed motion for attorney fees on the grounds that he wants the $5 billion punitive damages award reinstated. Jones' objection does not address the reasonableness of the requested fee. Furthermore, the reduction of the $5 billion punitive damages award to $4 billion has been reconsidered in separate proceedings after a second remand from the Ninth Circuit, and on reconsideration punitive damages have been redetermined at $4.5 billion rather than $4 billion.

B.

Claimants Objecting to Paying Attorneys First

Five plaintiffs (Jack Dragseth,[82] Herman and Clarisa Killian,[83] Louie Jones,[84] and Greg Weaver[85]) object to the renewed motion for attorney fees on the basis that Class Counsel should not be paid before the case is concluded and plaintiffs have received their shares of the punitive and compensatory damages recoveries. Class Counsel "are not seeking to collect their fee until the

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[81] Plaintiff Jones' Objection, attached as Ex. E to Clerk's Docket No. 7750.

[82] Plaintiff Dragseth's Objection, attached as Ex. A to Clerk's Docket No. 7750.

[83] Plaintiff Killian's Objection, attached as Ex. B to Clerk's Docket No. 7750.

[84] Plaintiff Jones' Objection, attached as Ex. E to Clerk's Docket No. 7750.

[85] Plaintiff Weaver's Objection, attached as Ex. C to Clerk's Docket No. 7750.

plaintiffs themselves are able to collect their shares of the punitive damages judgment."[86] Thus, this objection is met and conceded.

C.

Objections and Letters of Support
that Are Pertinent to
the Renewed Motion for Attorney Fees

1. Plaintiffs' objections.

Six other plaintiffs filed objections which are pertinent to the renewed motion for attorney fees. Robert Wood[87] objects to the 22.4% contingent fee award as excessive and suggests, without stating a reason or citing any authority, that a 15% contingent fee would be reasonable and appropriate.

Rita and Brian King[88] object to Class Counsel receiving 3% of the overall punitive damages award, and then "double dipping" by charging an additional 20% of the amount recovered by each plaintiff. The Kings further argue that 3% of the $4 billion punitive damages award, which amounts to $120,000,000, "is more than sufficient to compensate plaintiff's counsel."[89] The Kings contend that Class Counsel achieved limited success because: (1) the compensatory damages were not sufficient to cover the damages caused to commercial fishing businesses by lost years of fishing, lost good will and reputation with customers, and lost shelf space with

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[86] Plaintiffs' Reply at 3, Clerk's Docket No. 7734.

[87] Clerk's Docket No. 7721.

[88] Clerk's Docket No. 7722 at 3.

[89] Id.

retailers, and (2) the punitive damages award, although large, is involved in a lengthy appeal process.

Class Counsel respond that the Kings' contention that 3% of the recoveries and Wood's suggestion that 15% of the recoveries would be an appropriate fee "are simply contrary to Ninth Circuit precedent concerning reasonable percentage rates in common fund cases."[90] Class Counsel further respond that the Kings' objection to Class Counsel's decision to settle some of the compensatory claims is untimely, as that part of the settlement was approved by Order No. 318[91] on June 11, 1996. The court concurs. Neither 3% nor 15% comport with reasonableness in Class Counsel fees as discussed hereinafter.

Three other plaintiffs, Randall Hansen, Jeffrey Guard, and All Alaskan Seafoods, object to the renewed motion for attorney fees on the basis that the requested fee does not comport with the terms of the individual retainer agreements they entered with their respective counsel. Randall Hansen[92] objects to the renewed motion because he agreed to pay attorney fees in the amount of 20%, not 22.4%, of recovered damages. Hansen alleges that the attorneys are now "guaranteeing their expenses with the additional 3% ... off the top."[93]

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[90] Plaintiffs' Reply at 7, Clerk's Docket No. 7734.

[91] Clerk's Docket No. 6807.

[92] Clerk's Docket No. 7686.

[93] Id.

Jeffrey Guard[94] objects to the renewed motion on the basis that he wants the court to enforce the fee agreement he entered with his attorney, which provided for a 20% contingency fee after the deduction of limited costs. Guard argues that Class Counsel's request for a 22.4% fee award and $22 million in expenses does not benefit plaintiffs like himself who signed contingent fee agreements for less than 22.4%.

All Alaskan Seafoods (AAS)[95] opposes the requested 22.4% attorney fees on the grounds that AAS entered an hourly fee agreement with its counsel Ken Adams and Anthony Shapiro. AAS alleges that it has already paid Adams and Shapiro between $400,000 and $500,000 under their hourly fee agreement, and argues that law and equity do not allow Class Counsel "to take the equivalent of a contingency fee, 22.4 percent common fund award, on top of the hourly fee that All Alaskan has already paid."[96] AAS requests the court to hold that AAS's recovery is not subject to Class Counsel's proposed contingency fee scheme, but solely to the agreement negotiated between AAS and its counsel.

Class Counsel respond that while AAS, Randall Hansen, and Jeffrey Guard allege that they should not be assessed any fee greater than the amount provided for in private retainer agreements with their individual counsel, the court's previous orders and applicable case law dictate that "every member of the mandatory

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[94] Clerk's Docket No. 7696.

[95] Clerk's Docket No. 7717.

[96] Clerk's Docket No. 7717, Ex. 8 at 3.

punitive damages class must share their financial benefits with Class Counsel, regardless of whether they hired additional attorneys in connection with this case."[97]

Under the common fund doctrine, the burden of litigation expenses is shared proportionally among those who are benefitted. Graulty, 886 F.2d at 271. "'The doctrine rests on the perception that persons who obtain the benefit of a lawsuit without contributing to its costs are unjustly enriched at the successful litigant's expense.'" Id. (quoting Boeing Co. v. Van Gemert, 444 U.S. 472, 478 (1980)).

While the fundamental purpose of the common fund doctrine is to spread the burden of litigation expenses among those who are benefitted, merely sharing the costs of litigation is deemed insufficient under the common fund doctrine. Id. "Since the Supreme Court's 1885 decision in Central Railroad & Banking Co. of Ga. v. Pettus, 113 U.S. 116, 5 S.Ct. 387, 28 L.Ed. 915 (1885), it is well settled that the lawyer who creates a common fund is allowed an extra reward, beyond that which he has arranged with his client, so that he might share the wealth of those upon whom he has conferred a benefit." Id. The task of determining what would be reasonable compensation for creating this common fund is left to the district court. Id. at 272.

The principal recovery in which these objectors will participate is the punitive damages judgment that was generated by Class Counsel on behalf of the entire mandatory punitive damages

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[97] Plaintiffs' Reply at 19, Clerk's Docket No. 7734.

class. As Class Counsel point out, they were appointed to represent the punitive damages class and "never entered into any retainer agreements with these objectors or any other members of the class."[98] Moreover, plaintiffs such as AAS are no more entitled to seek specific enforcement of an individual agreement with attorneys calling for fees below the requested 22.4% rate, than Class Counsel are entitled to seek specific enforcement of the myriad of similar, pre-compensation order agreements calling for fees in excess of 22.4%.

Furthermore, Class Counsel state that "[n]either All Alaskan nor any other class member will be required to pay more than 22.4% of their punitive recoveries to attorneys. To the extent that class members in All Alaskan's position made payments to individual attorneys in relation to this case, they will receive a credit for those payments when Class Counsel collect their court-awarded fee."[99] All Alaskan Seafoods has no cause for complaint.

For the reasons stated above, plaintiffs' objections are rejected. None of the plaintiffs has advanced a persuasive reason why a 22.4% blended fee for Class Counsel would be unreasonable.

2. Plaintiffs' support for requested attorney fees.

In contrast to the fifteen plaintiffs who filed objections to the renewed motion for attorney fees, numerous plaintiffs' groups, representing thousands of plaintiffs, wrote letters in support of the 22.4% attorney fee, including: the Cook Inlet

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[98] Id. at 20.

[99] Id. at 23.

Fishermen's Fund, Kenai Peninsula Fishermen's Association, United Cook Inlet Drift Association, Cook Inlet Aquaculture Association, Cordova District Fishermen United, Old Harbor Native Corporation, and City of Kodiak.[100]

For example, Kenai Peninsula Fishermen's Association, the largest setnet organization in Cook Inlet, filed a letter stating:

> Over the past fourteen years, we have agreed with our counsels' efforts to correct the inequities resultant from the great Exxon Valdez spill incident. They have been diligent in their efforts to represent us and have taken on the tremendous expense of litigation and other court costs. We believe that they have represented us with the utmost professionalism and expertise.[101]

Old Harbor Native Corporation, which "is slated to receive a substantial share of any future recoveries under the real property plan of distribution," also wrote a letter in response to Class Counsel's renewed motion for attorney fees, stating in part:

> Old Harbor Native Corporation fully supports your request to take an attorneys' fee of 22.4% from any future recoveries in this litigation. We appreciate the support you have provided to us throughout the litigation, both before the 1994 trial as we were forced to participate in discovery which seemed very burdensome, at trial, and after trial, as you and your fellow counsel have tried to preserve the jury's award.[102]

The City of Kodiak's letter in support of Class Counsel's renewed motion for attorney fees states in part:

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100 Id., Exs. A - F.

101 Id., Ex. B at 1.

102 Id., Ex. E.

> The City of Kodiak supports your request that plaintiffs' counsel receive a 22.4% attorney fee from any future recoveries in the Exxon Valdez Oil Spill litigation. The City believes that this result is fair given the duration of the case, the effort you and your co-counsel have made, and the result you have obtained. [103]

3. Exxon's objections to the requested fee.

On May 20, 2003, Exxon filed a pleading stating its intent to file objections to the renewed motion for attorney fees at the appropriate time. Exxon stated that its objective was to help "the Court perform its fiduciary duty to the class by refining and sharpening the legal and factual issues that need to be decided."[104]

In Order No. 363, dated June 3, 2003, the court addressed the issue of Exxon's standing to participate in proceedings on plaintiffs' renewed motion for attorney fees and costs.[105] Based on the fact that Exxon has no pecuniary interest in the subject matter and is seeking no relief, the court determined that Exxon's standing to object to the renewed motion is limited. The court further concluded that "Exxon does not have standing as a class member to review class counsel's attorney's fees data which has not been made public," but that as a party to this litigation Exxon may "file objections to class counsel's motion for attorney's fees and costs based upon the public record in this case."[106]

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103 Id., Ex. F.

104 Clerk's Docket No. 7656 at 4.

105 Clerk's Docket No. 7666.

106 Id. at 13.

The court has carefully reviewed Exxon's objections to plaintiffs' renewed motion for attorney fees and costs.[107] Rather than assisting the court "by refining and sharpening the legal and factual issues that need to be decided," most of Exxon's objections functioned as "red herrings."

In its objection to the renewed motion for attorney fees, Exxon first argues that "[p]roceedings pursuant to the Ninth Circuit's remand must be completed, and a new judgment entered, before the Court may entertain a petition for attorneys' fees."[108] Noting that they filed their fee petition several months before the Ninth Circuit remanded the punitive damages judgment for reconsideration, Class Counsel agree that "it is, of course, appropriate for this Court to enter a new punitive damages judgment before it enters any final order concerning this Fee Petition."[109] Class Counsel argue, however, that the attorney fees briefing and notices based on the court's $4 billion judgment will remain sufficient no matter what the court decides with regard to the punitive damages issue. Consequently, "[r]equiring a new round of briefing and notice would be wasteful and inefficient."[110] The court concurs.

Exxon next alleges that even if the court chooses to use the percentage method to determine a reasonable attorney fee, the court must evaluate the reasonableness of the requested percentage

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107 Defendants' Objections, Clerk's Docket No. 7724.

108 Id. at 2.

109 Plaintiffs' reply at 2, Clerk's Docket No. 7734.

110 Id. at 2.

fee by using a lodestar calculation.[111] Exxon cites Ninth Circuit cases, including WPPSS and Vizcaino, as "requiring comparison with the lodestar in percentage of the fund cases, when the fund is large."[112] None of the cases cited by Exxon require the court to conduct a lodestar calculation if it chooses the percentage method to calculate attorney fees. In Vizcaino, the Ninth Circuit stated that when using the percentage method, the court may apply the lodestar method as "merely a cross-check on the reasonableness of a percentage figure." Vizcaino, 290 F.3d at 1050 n.5. There is no controlling authority requiring a court that chooses to use the percentage method to also conduct a lodestar analysis. The Ninth Circuit requires "only that fee awards in common fund cases be reasonable under the circumstances." WPPSS, 19 F.3d at 1295 (quoting Florida v. Dunne, 915 F.2d 542, 545 (9th Cir. 1990)).

The Ninth Circuit also expressly stated in Vizcaino that it did not adopt the principle that the percentage of an award decreases as the amount of the fund increases, but merely noted that in cases with large common funds, "fund size is one relevant circumstance to which courts must refer." Id. at 1047.

Exxon repeatedly refers to the court's requests for additional information in Order No. 344 and No. 346 on the first motion for attorney fees, and alleges that the renewed motion for award of attorney fees and supporting documents contain no more information than was included in the previous motion. Citing the court's

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[111] Defendants' Objections at 8, Clerk's Docket No. 7724.

[112] Id. at 9.

previous orders, Exxon argues that Class Counsel have not provided information which permits "segregation of individual time charges between items which are clearly includable in a lodestar fee from those charges which are arguably not includable," and "for making a finding as to the lodestar hours fairly and reasonably attributable to the development of the fund."[113]

Exxon's arguments assume that the court will use the lodestar method rather than the percentage-of-the-fund method to calculate attorney fees. Moreover, Class Counsel have substantially responded to the court's earlier requests for additional information in Order No. 344 and No. 346 by means of their renewed motion for attorney fees.

In Order No. 344 and No. 346, the court indicated that it desired access to Class Counsel's billing records. Pursuant to the court's orders, Class Counsel's Fee Committee has assembled approximately 200 notebooks of billing statements and over 60 redwell binders of audit notes and correspondence that contain the underlying data for the 2003 Fee Report, and have made this material available to the court for inspection.[114] More importantly, because these records are so voluminous, Class Counsel have also provided the court with a computer database, which contains summaries of the raw hour and hourly fee data for each of the over 60 law firms and approximately 2,348 attorneys and paralegals involved in plaintiffs' representation over the past fourteen years.

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[113] Id. at 3.

[114] Renewed Motion at 45, Clerk's Docket No. 7650.

The computer program has allowed the court to analyze the time and hourly rate data used for each timekeeper's individual lodestar calculation. Going further into the raw data is unlikely to assist the court and is not required for purposes of cross-checking a percentage fee, especially in light of what follows.

Class Counsel have also provided detailed information about the Fee Committee's internal review and audits of all time records submitted by plaintiffs' counsel. Fee Committee audits on expense and time data commenced in January 1995 and "resulted in the reduction of more than $1,000,000 of time submitted by the firms."[115] In 1999, the Fee Committee conducted another audit, discounting by a factor of 25% time submissions for which detailed time records could not be reconstructed. The 1999 audit resulted in the reduction of over 50,000 hours of time as submitted by plaintiffs' counsel.[116]

In support of Class Counsel's current fee application, the Fee Committee has audited time for the last four years, again reducing travel time not spent actually working on the case, omitting time entries for compiling fee and expense data and responding to Fee Committee requests, discounting time submissions for which detailed time records could not be reconstructed, and checking for any indications of over-billing or mathematical errors.[117]

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[115] Jamin Dec., Ex. B at 23, Clerk's Docket No. 7650.

[116] Id. at 26.

[117] Id. at 27.

The court has carefully reviewed the hour and fee data provided on disk and the results of the Fee Committee's internal audits of the original time sheets. The court finds it to be unnecessary and likely wasteful of everyone's time to sift through millions of pages of time sheets in order to check individual expenditures of time on a particular motion or other activity, or to determine what one attorney, out of hundreds, was doing on one particular day out of this over fourteen-year litigation. Ninth Circuit cases which were decided after the court's earlier orders were issued, such as Vizcaino, make it clear that a court does not need to do a full-blown lodestar calculation if it chooses to use the percentage method to determine attorney fees. Rather, the court may apply the lodestar method merely as "a cross-check on the reasonableness of a percentage figure." Vizcaino, 290 F.3d at 1050 n.5. The court is satisfied that it has adequate information to conduct a cross-check of the percentage fee by means of a lodestar calculation and will do so.

Exxon next argues that Class Counsel can only recover fees for work that conferred a benefit on the common fund, and then lists 10 categories of time which allegedly are not compensable. Most of the cases Exxon cites regarding non-compensable time are cases applying fee-shifting statutes that have little to do with this court's duty to determine an appropriate fee in this common fund case. Exxon must be aware that "[t]he procedures used to determine the amount of reasonable attorneys' fees differ concomitantly in cases involving a common fund from those in which attorneys' fees

are sought under a fee-shifting statute." Staton v. Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003). In common fund cases such as this, and if a percentage fee is awarded, class counsel are paid on the basis of results actually achieved, not the categories of work performed.

Exxon asserts that plaintiffs' lodestar calculation includes substantial time that did not contribute to the creation or preservation of the common fund or is non-compensable, or both, including hours that are excessive or unnecessary, time spent on settled compensatory damages claims, time that has already been compensated such as time related to claims against Alyeska, time spent on unsuccessful claims, and time spent on lobbying and media activity. Class Counsel, on the other hand, allege that all of the time included in Class Counsel's lodestar calculation is properly included as work which tended to create, increase, protect or preserve the common fund. Class Counsel do not dispute that "a lawyer is not entitled to be compensated from a common fund for work he did not do or hours he did not spend" or "for hours a reasonable lawyer would not have spent, hours unreasonably spent, or work done so badly it is of no value to the common fund beneficiaries." In re Coordinated Pretrial Proceedings, 109 F.3d 602, 608 (9th Cir. 1997).

If a lodestar calculation is to serve as a meaningful cross-check on a percentage fee, the lodestar must of course be reasonably accurate in collecting the time reasonably devoted to producing the fund. The court is not convinced that plaintiffs' time is unreasonable or overstated. Plaintiffs' Fee Committee has

already audited the hours submitted by plaintiffs' counsel and has deducted hours not reasonably spent or accounted for from the hours used in plaintiffs' lodestar calculations. Were this court making a lodestar fee award, it would inquire further and verify the completeness of the committee's work. Such detailed inquiry into individual time expenditures is not necessary since the court here uses the lodestar as a cross-check on the percentage fee.

As to Exxon's suggestion that the time spent obtaining compensatory damages, other than the $20 million judgment, did not contribute to the creation or presentation of the common fund, Class Counsel respond that all of plaintiffs' compensatory recoveries directly benefitted the punitive damages common fund inasmuch as Class Counsel needed to develop a solid base of compensatory damages in order to recover a substantial punitive damages verdict.

Plainly, Class Counsel's position is the correct view of the above matter. Punitive damages are a function of the amount of harm done to plaintiffs, which includes all of the compensatory payments that Exxon has paid out voluntarily and involuntarily, whether as a result of settlements or court-ordered judgments. Class Counsel had to develop and present the full scope of compensatory payments made by Exxon for purposes of providing the jury with a compensatory damages base against which they would determine the amount of punitive damages.

Similarly, while Exxon argues that the time spent on the Alyeska settlement and the Native corporations' claims against the Trans-Alaska Pipeline Liability Fund should be excluded from the

lodestar, the court included those recoveries in calculating the harm that supported the punitive damages judgment.[118] Moreover, contrary to Exxon's suggestion, including those hours in a lodestar calculation for the purpose of assessing the reasonableness of the requested fee will not result in counsel being compensated twice for the same work or in double-billing the punitive damages class. The Alyeska settlement and Native corporations settlements are expressly excluded from the percentage fee request.

Citing Hensley v. Eckerhart, 461 U.S. 424, 439 (1983), Exxon next alleges that hours spent on unsuccessful claims are not compensable. The court first observes that Hensley is a fee-shifting case. Furthermore, Exxon overstates the Supreme Court's holding in Hensley, which is in pertinent part that:

> Where a lawsuit consists of related claims, a plaintiff who has won substantial relief should not have his attorney's fee reduced simply because the district court did not adopt each contention raised. But where the plaintiff achieved only limited success, the district court should award only that amount of fees that is reasonable in relation to the results obtained.

Id. at 440.

In the present case, plaintiffs did not achieve limited success, but rather won substantial compensatory relief and a very large punitive damages award in a lawsuit consisting of related claims. While Exxon correctly notes that Class Counsel have not prevailed on every claim or motion advanced, Class Counsel's positions on those issues have had a reasonable basis in law and

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[118] Reply at 10, Clerk's Docket No. 7734.

strategy. More importantly, the court must again observe that Class Counsel's fee will likely be a percentage of actual results, based exclusively on claims won. The lodestar calculation is but one means of testing the reasonableness of the preliminarily approved percentage fee. Exacting analysis of the few claims not proved is unnecessary.

Citing Greater L.A. Council on Deafness v. Community T.V., 813 F.2d 217 (9th Cir. 1987), Exxon also alleges that hours spent on lobbying and legislative advocacy are not compensable in a lodestar calculation. In the above cited case, the district court used the lodestar method, rather than the percentage method, to calculate attorney fees and disallowed the inclusion of time spent on publicity and lobbying in the lodestar calculation. Id. at 221. Class Counsel allege that "[s]hortly after the oil spill, Congress began considering the legislation that became the Oil Pollution Act of 1990" and that "Exxon actively sought statutory language that would have deprived this Court of the ability to assess a significant punitive award against it."[119] The court concludes that Class Counsel acted reasonably in tracking Exxon's attempts to obtain legislation that might have reduced its punitive damages exposure. This time tended to preserve or protect the punitive damages common fund.

Class Counsel observe that "even if Exxon could establish that small fractions of the lodestar were improperly included in the Fee Petition and that these things could be segregated and shaved

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[119] Reply at 14, Clerk's Docket No. 7734.

off of the [proposed lodestar figure], any reduction in that figure will be more than offset as a result of Counsel's ongoing work and the lodestar's continuing interest accrual in the time lag before Class Counsel get paid."[120]

Both Exxon and plaintiffs appealed the court's last ruling on punitive damages, and the court entertains no doubt that both will do so again. Class Counsel's work on the distribution of litigation proceeds to the plaintiffs is nowhere near an end. Their work in defending the common fund--the punitive damages award--both on appeal and in this court, did not stop with the filing of the motion for attorney fees. The fact that the lodestar figure has and will continue to grow weighs heavily against the usefulness of conducting a more detailed lodestar calculation in this matter.

Finally, Exxon alternatively argues that even if every hour claimed by plaintiffs is properly included in the lodestar, their fee application is unreasonable on its face. Exxon suggests that Class Counsel have worked a total of 1,229,001 hours with a lodestar value of $185,814,008--which, if Class Counsel receive the originally requested fee of $774,656,000, represents an average hourly rate of $871 for lawyers and $290 for paralegals.[121] The latter numbers are useless. Exxon's calculation ignores the third and fourth elements of a lodestar calculation: an adjustment of historic rates for delay in payment and an appropriate multiplier. (See the court's lodestar analysis hereinafter.)

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[120] Id. at 16.

[121] Defendants' Objections at 16-17, Clerk's Docket No. 7724.

The court has treated Exxon as having standing to participate in the attorney fees proceedings because it is, after all, a party to the case. Ultimately, however, "[h]ow the fund is divided between members of the class and class counsel is of no concern whatsoever to the defendants who contributed to the fund." WPPSS, 19 F.3d at 1301.

VI.

FEE DETERMINATION

As indicated above, either the lodestar or percentage method may have its place in determining what is reasonable compensation for creating a common fund: "'the choice between lodestar and percentage calculation depends on the circumstances.'" WPPSS, 19 F.3d at 1296 (quoting Six Mexican Workers, 904 F.2d at 1311).

A.

Choice of Method
for Determining Attorney Fees

Having considered the pleadings filed in support of and in opposition to the renewed motion for attorney fees, the over fourteen years of litigation, the fee regime orders entered early in the litigation based on a percentage method, the contingency fee agreements that most plaintiffs initially entered with their counsel before this case became a class action, and the number of law firms and lawyers involved in plaintiffs' representation, the court concludes that the percentage method is the most appropriate method for calculating attorney fees in this case.

Given the unique circumstances of this case, namely the fourteen-plus years of litigation, the fact that over 60 law firms

and approximately 2,348 attorneys and paralegals have been involved in representing 32,677 plaintiffs, who are divided into multiple claimant groups, and the fact that this matter involves one federal suit, two state suits, and numerous settlements, the court concludes that here, as in Graulty, "it would be impractical, if not impossible," to calculate reasonable attorney fees based on the lodestar method. Graulty, 886 F.2d at 272.

B.

Reasonableness of a 22.4% "Blended" or Net Fee

The court must next determine what percentage of the common fund will provide counsel with reasonable compensation. As set forth above, Class Counsel request a blended fee of 22.4% of the net class recovery. The requested fee is below the Ninth Circuit's 25% benchmark fee in common fund cases, which is a "starting point for analysis." Vizcaino, 290 F.3d at 1048. It is also well within the usual range of 20% to 30% in common fund fee awards. Graulty, 886 F.2d at 272.

The court next considers the reasonableness of the requested fee in light of the circumstances and unique factors of the case. The factors used in making a percentage fee award of attorney fees in a common fund case vary, but may include the: size of the fund created and the number of persons benefitted; presence or absence of substantial objections by members of the class to the fees requested by counsel; skill and efficiency of the attorneys involved; complexity and duration of the litigation; risk of nonpayment; amount of time devoted to the case by plaintiffs'

counsel; and awards in similar cases. Manual for Complex Litigation (Third) § 24.121 (1995).

The court concludes that a blended 22.4% fee is reasonable and appropriate based on the following factors.

1. Market rates as reflected by evidence on record.

Evidence on record, including the original contingent fee agreements most plaintiffs entered, the direct action client fee agreements, and counsel's affidavits regarding current market rates, indicate that a 22.4% attorney fee is below market rate for privately negotiated contingent fee agreements in similar cases.

"Where evidence exists, such as here, about the percentage fee to which some plaintiffs agreed ex ante, that evidence may be probative of the fee award's reasonableness." Vizcaino, 290 F.3d at 1050. Here, the majority of plaintiffs and their counsel originally entered retainer agreements in which plaintiffs promised to pay between 30% and 33-1/3% of any recovery obtained as the result of trial.

For example, Faegre & Benson, which represents over 1,500 commercial fisher permit/license holders and crew members, eight fish processors, and 45 other types of plaintiffs in this matter, negotiated fee agreements with each of these clients. Most of the agreements provided for attorney fees of 33-1/3% of all damages if collection is made after trial.[122] Jameson & Associates, along with Levin, Fishbein, Sedran & Berman, represent approximately 1,000 plaintiffs in the Exxon litigation. The majority of these plain-

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[122] O'Neill Aff. at 2-3, Clerk's Docket No. 7650.

tiffs "have retainer agreements that provide for the payment of a 25% contingent fee prior to the pretrial hearing, and 30% of the proceeds thereafter."[123]

The court acknowledges that retainer agreements between counsel and plaintiffs alone, "although somewhat probative of a reasonable rate, are not particularly helpful" when the retainer agreements were made pre-certification, and are not binding on the class. Vizcaino, 290 F.3d at 1049. However, Class Counsel have also presented evidence showing that the retainer agreements reflect the standard contingency fee for similar cases. For example, Faegre & Benson, one of the firms representing plaintiffs, was paid a 33-1/3% contingent fee in the Glacier Bay oil spill litigation, In re Glacier Bay, 746 F. Supp. 1379 (D. Alaska, 1990), as well as "in connection with two oil spills in Minnesota that resulted in multi-party litigation, Anderson v. Lakehead Pipeline Co., No. 5-91-75 (D. Minn.), and Admave v. Amoco Pipeline Co., No. 4-93-50 (D. Minn.)."[124] See Vizcaino, 290 F.3d at 1049 (crediting class counsel's evidence showing that the retainer agreements reflected the standard contingency fee for similar cases).

In addition, fee agreements with direct action clients in this matter also serve as evidence of market rate. Approximately 40% of the oiled fisheries claimants in this litigation are direct action plaintiffs who signed individually negotiated contingent fee retainer agreements with their counsel. The great majority of those

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[123] Jameson Dec. at 1, Clerk's Docket No. 7650.

[124] O'Neill Aff. at 3-4, Clerk's Docket No. 7650.

retainer agreements "provide for contingent fees well in excess of 22.4% when the recovery is achieved during or after trial."[125] The record also contains evidence that "the Alaska market rate for contingency fees is 33 - 40% plus costs."[126]

The court finds that the market rate for contingent fee agreements in similar cases is significantly higher than the 22.4% requested by Class Counsel, especially when, as in the present case, the bulk of the recovery was achieved through trial.

2. Class Counsel's reasonable expectations regarding potential fees.

The Ninth Circuit has also recognized that evidence of "lawyers' reasonable expectations" regarding potential fees may be probative of a fee award's reasonableness. Vizcaino, 290 F.3d at 1050 (while evidence of the percentage fee to which some plaintiffs agreed ex ante may be probative of the fee award's reasonableness, "in most cases it may be more appropriate to examine lawyers' reasonable expectations, which are based on the circumstances of the case and the range of fee awards out of common funds of comparable size").

As indicated above, most plaintiffs' counsel in this matter initially entered into contingency fee agreements with their clients, the majority of which provided for attorney fees of 30% if the case proceeded to trial. After the case became a class action, the court entered an order establishing a regime for compensation

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[125] Oesting Dec. at 12-13, Clerk's Docket No. 7650.

[126] Coe Dec. at 2, Clerk's Docket No. 7650.

of plaintiffs' counsel, providing that Class Counsel would apply to the court for an award of attorney fees based on the following percentages: 20% of any recovery by the commercial fishing class either by settlement or trial after entry of a final pretrial order, and 30% of any recovery by the Alaska Native, business, property owner, and cannery and seafood processor employee classes, either by settlement or trial after entry of a final pretrial order.[127] In addition, the order provided that 3% of any recovery would be contributed to the Consolidated Case Fund for plaintiffs' counsel's compensation.

Class Counsel, on their own initiative, subsequently agreed to limit their fees to 22.4% of recoveries after the Alyeska settlement, i.e., the Native/municipality settlements, commercial fishermen Phase II compensatory damages verdict, punitive damages verdict, and Kodiak Island Borough compensatory damages verdict.

Based on the above contingency fee agreements, the direct action clients' fee agreements, the compensation orders entered early in this case, and the range of fee awards in similar cases, plaintiffs' counsel reasonably expected a fee award based on a percentage fee of at least 22.4%.

3. Complexity and duration of the litigation.

The undeniable complexity and protracted nature of this litigation further support the requested fee of 22.4%. This

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[127] Order Establishing Compensation Regime at 3-4, Clerk's Docket No. 2396.

litigation, which commenced in 1989, has lasted over fourteen years and the end is an appeal or two and a year or two away at best.

Discovery, which commenced in 1990 and continued through trial, included the production of over ten million documents by parties and non-parties, and over 2,500 days of depositions.[128] In addition, approximately 552 discovery matters were adjudicated, resulting in at least 277 numbered orders of the discovery master appointed by the court and compensated by the parties.[129]

Trial in this court was four and a half months long. But for excellent trial preparation and management by counsel, the trial would have been far longer. There were 83 official days of trial, 155 witnesses who actually testified at trial, including 36 experts, 453 plaintiffs' exhibits admitted, 656 defendants' exhibits admitted, and 7,714 pages of trial transcript.[130] To date, there have been 7,836 filings docketed in this case.

For ten years after trial, Class Counsel have defended the verdict on multiple appeals, which have resulted in three remands by the court of appeals, including two remands as to the award of punitive damages for reasons over which plaintiffs had no control.

The litigation has also been replete with complicated factual and legal issues, such as causation of injury and amount of compensatory damages for the over 50 different claimant categories; the availability of punitive damages under maritime law; the appro-

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[128] Oesting Dec. at 8, Clerk's Docket No. 7650.

[129] O'Neill Aff. at 7, Clerk's Docket No. 7650.

[130] Id.

priate scientific and econometric evidence concerning the impact of the oil spill and the duration of its harmful effects; and the availability of non-economic damages for claims concerning injury to the Native Alaskan claimants' subsistence way of life.[131] Class Counsel accurately summarize some of the subjects tried as including "corporate personnel policies, seamanship, alcoholism, fatigue, Coast Guard rules, blood alcohol tests, fish biology, fishery management, economics, ecology, finances, and the general subject of punishment."[132]

Class Counsel represented 32,677 victims of the oil spill in many different claimant categories. The litigation was further complicated by the fact that each claimant category involved distinct considerations with respect to the presentation and resolution of claims. Based on the multiple claimant categories, Class Counsel have now filed and the court has approved over 50 separate distribution plans.[133]

Over 60 law firms and about 2,348 attorneys and paralegals were involved in plaintiffs' representation. Consequently, Class Counsel had to establish a cooperative working relationship among over 60 different law firms representing direct action and class action plaintiffs.

This was not a case of few and easy issues. This was not a case that was quickly resolved by a settlement. Class Counsel

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[131] Oesting Dec. at 8, Clerk's Docket No. 7650.

[132] O'Neill Aff. at 7, Clerk's Docket No. 7650.

[133] Oesting Dec. at 7, Clerk's Docket No. 7650.

have worked hard and long for a proposed fee which is average in rate.

4. Burdens of representation borne by counsel.

In Vizcaino, "counsel's representation of the class--on a contingency basis--extended over eleven years, entailed hundreds of thousands of dollars of expense, and required counsel to forgo significant other work, resulting in a decline in the firm's annual income." Vizcaino, 290 F.3d at 1050. The Ninth Circuit held that these burdens are relevant circumstances in determining a reasonable attorney fee. Id. (citations omitted).

Here, counsel's representation of the class on a contingency fee basis has extended over fourteen years, entailed over $30 million dollars of expense which has been largely borne by counsel and their firms, and has required many counsel to forego significant other work.

Class Counsel testify that "[m]any attorneys for the classes, in reliance on the fee structure established in the Compensation Order, essentially withdrew themselves from the stream of commerce to work on this case and, therefore, were unable to take on other work that would either have generated non-contingent billings or contingent fees at rates in excess of the fee requested in this litigation."[134] Lead Counsel David Oesting testifies that many counsel, especially those who had a leadership role in the litigation, "essentially committed themselves to full time activity

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[134] Renewed Motion at 7-8, Clerk's Docket No. 7650.

in this matter and were unavailable for other retentions."[135] Oesting, for example, was unable to accept the representation of the State of Alaska in two major matters, and was also unable to accept "a significant role in a major antitrust case involving the Alaska salmon industry."[136] In all three cases, the representation would have been compensated at his regular hourly market rate with no risk of nonpayment. Lead Trial Counsel Brian O'Neill further testifies, "I have invested much of the last fourteen years of my life and my firm's resources in this case.... During that time, I was largely unavailable to accept retentions in other matters, some at hourly rates and others that would have involved contingent fee agreements having percentages in excess of the amounts sought herein."[137]

The above burdens, which are relevant circumstances in determining what percentage of the common fund would provide Class Counsel reasonable compensation, affirm the reasonableness of a 22.4% fee award.

5. Size of the fund created and the number of persons benefitted.

Fund size is another relevant circumstance to which courts must refer in determining a reasonable fee. Vizcaino, 290 F.3d at 1047 (citing WPPSS, 19 F.3d at 1297). Here, the huge size of the common fund created and the large number of persons benefitted by Class Counsel's efforts validate the reasonableness of a percentage

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[135] Oesting Dec. at 5, Clerk's Docket No. 7650.

[136] Id. at 5-6.

[137] O'Neill Aff. at 6, Clerk's Docket No. 7650.

fee at the norm for common fund cases. If the fund were not as large, the 22.4% fee could be inadequate compensation for the work done.

The $4.5 billion punitive damages award ranks among the largest awards ever obtained. Furthermore, all 32,677 members of the mandatory punitive damages class will benefit from the common fund created by Class Counsel's efforts.[138] They will receive significant financial benefits even after Class Counsel are paid.[139] In addition, while the common fund at issue is comprised primarily of punitive damages and some future compensatory damages recoveries, the court notes that results achieved by Class Counsel also include the past compensatory damages verdict of $287 million and several prior settlements with Exxon. Admittedly, much of this sum had already been paid by Exxon, but Class Counsel had to do all the work to prove all the compensatory damages through settlement or trial in order to establish the base for the punitive damages claim.

It is also arguable that Class Counsel's performance generated benefits beyond the common fund in that the punitive damages award will hopefully "deter Exxon and other corporations

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[138] As a perverse result of divisive, secret settlements--of which the court and jury had no knowledge until after the verdict was in--Exxon will itself recoup approximately $670,500,000 of the punitive damages which the jury believed would go the plaintiffs. See Order No. 327, Clerk's Docket No. 6895; In re Exxon Valdez, 229 F.3d 790 (9th Cir. 2000).

[139] "In a common fund case, the judge must look out for the interests of the beneficiaries, to make sure that they obtain sufficient financial benefit after the lawyers are paid." In re Coordinated Pretrial Proceedings, 109 F.3d 602, 608 (9th Cir. 1997).

that ship hazardous substances from endangering the health and safety of Alaskans or other Americans in the future."[140]

This is not a case where a large number of plaintiffs receive a few cents or a few dollars or a chit for a discount on some product.

6. Skill and efficiency of the attorneys involved.

The skill and efficiency of the attorneys representing both plaintiffs and defendants in this matter were outstanding, and further support the reasonableness of the requested fee.

Based on experience with the above-referenced Glacier Bay litigation, plaintiffs' counsel devised an ingenious and efficient trial plan. As Class Counsel point out, "[t]he phased structure of the case, the manner in which issues were tried and the collective nature of much of the proof were all innovative."[141] Class Counsel "had four opening arguments and three closing arguments, seven different sets of instructions, and three verdicts."[142]

At oral argument, plaintiffs' Lead Trial Counsel suggested that courts are ill-equipped to deal with mega-cases such as this. I disagree.[143] For the Exxon trial, counsel arranged for and employed state-of-the-art equipment which enhanced and accelerated the presentation of evidence. As a result of this equipment and

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[140] Renewed Motion at 18, Clerk's Docket No. 7650.

[141] O'Neill Aff. at 7, Clerk's Docket No. 7650.

[142] Id.

[143] Many courts, including this one, now have installed evidence presentation equipment comparable to that employed in the trial of this case.

cooperation between counsel for plaintiffs and defendants on an inventive and efficient trial plan, it was possible to try in four months what might have lasted a year or more had it been necessary to somehow try all of the individual claims.

Exxon's counsel were of equally impressive caliber. Class Counsel aptly refer to Exxon's trial opposition as "the best in America"[144] and further allege "that the quantity and quality of Exxon's representation in this civil action reflect the difficulty and risk undertaken by plaintiffs' counsel and illustrate that the fees requested are reasonable."[145] The court agrees with Class Counsel's appraisal of their opposition. Exxon put up an unflagging, spare-no-expense defense that might have been overwhelming but for the skill and resources of Class Counsel.

7. Class Counsel's communication with clients.

Class Counsel's ongoing program for keeping their clients informed further demonstrates the reasonableness of the requested fee. From 1989 through 2003, plaintiffs' lawyers have maintained consistent contact with the 32,677 plaintiffs and multiple plaintiffs' groups they represent. Counsel's efforts include establishing local offices in commercial fishing towns during fishing seasons, holding annual meetings in Seattle, as well as numerous other meetings in Alaska, Washington, and Oregon, establishing toll free numbers and websites with case updates and requests for client

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144 O'Neill Aff. at 7-8, Clerk's Docket No. 7650.

145 Id. at 8.

input, and regularly sending correspondence to clients, updating them on the status of case.[146]

Letters from plaintiffs' groups further testify to Class Counsel's ongoing communication with their clients. As the president of the Cook Inlet Fishermen's Fund wrote,

> The Attorney's have constantly communicated with their clients in writing as well as attending Board and Membership meetings. There have never been any problems contacting the Attorney's offices to have assistance with document preparation or just to have general questions addressed. [147]

8. Presence or absence of substantial objections by class members to the requested fees.

Only fifteen of the 32,677 plaintiffs filed objections to Class Counsel's renewed motion for attorney fees, which amounts to "less than one tenth of one percent of [the] mandatory punitive damages class."[148] Of these objections, only four address the reasonableness of the requested fee. In contrast, numerous plaintiffs' groups, representing thousands of plaintiffs, wrote in support of the 22.4% fee, stating, for example, that "paying attorney's fees of 22.4% is more than fair to compensate the attorneys

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[146] Oesting Dec. at 29 n.20, Clerk's Docket No. 7650.

[147] Letter from Cook Inlet Fishermen's Fund at 1, attached as Ex. A to Plaintiffs' Reply, Clerk's Docket No. 7734.

[148] Plaintiffs' Reply at 1, Clerk's Docket No. 7734.

for their hard work,"[149] and that plaintiffs' counsel "have more tha[n] earned the 22.4% fees with regard to this litigation."[150]

The absence of substantial objections by class members and the evidence demonstrating strong support by many plaintiffs' groups for the requested fees corroborates the reasonableness of a 22.4% fee award.

9. Fee awards in similar cases.

Another circumstance the court considers in determining a reasonable attorney fee is whether the requested fee award is within the range of fees awarded in common fund cases of comparable size. Vizcaino, 290 F.3d at 1050 n.4. Given the unique circumstances of this case, particularly the fact that the litigation involves America's largest oil spill caused by one of the world's largest corporations, finding similar cases with which to compare fee awards is no easy task.

The information presented by Class Counsel "comparing this case to other class actions involving the transport of raw fuels and to the handful of similarly large common fund cases"[151] is helpful. As for other class actions involving the transport of raw fuels, Class Counsel point to the previously referenced Glacier Bay oil spill litigation and the multi-party litigations concerning two oil

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[149] Letter from United Cook Inlet Drift Association, attached as Ex. C to Plaintiffs' Reply, Clerk's Docket No. 7734.

[150] Letter from Cook Inlet Fishermen's Fund at 2, attached as Exhibit A, Clerk's Docket No. 7734.

[151] Renewed Motion at 39, Clerk's Docket No. 7650.

spills in Minnesota where counsel were paid a 33-1/3% contingent fee.

Evidence concerning fee awards in mega-fund cases is limited since there are few cases to study. Class Counsel cite three published federal cases involving requests for attorney fees from common funds of over $1 billion. Two of the cases are relevant here: Shaw v. Toshiba Am. Info. Sys., 91 F. Supp. 2d 942, 972 (E.D. Tex. 2000) ($1-1.1 billion), and In re NASDAQ Market-Makers Anti-trust Litig., 187 F.R.D. 465, 486 (S.D.N.Y. 1998) ($1.027 billion). In Shaw and NASDAQ, neither of which went to trial, the court awarded fees in the 14% to 15% range, even through Shaw settled in less than one year and NASDAQ settled after just four years. Shaw, 91 F. Supp. 2d at 945; NASDAQ, 187 F.R.D. at 471.

Class Counsel also present evidence regarding the fee awards in four major state-sponsored tobacco class actions that generated common funds in the multi-billion dollar range.[152] In these cases, where the common funds ranged from $4.1 to $17.365 billion, the courts awarded fees based on percentages from 16.7% to 35%. Class Counsel point out that none of these cases were tried to a jury, nor did any of them last even half as long as this litigation.[153]

The Ninth Circuit has also surveyed fee awards from 34 common fund settlements of $50 to $200 million from 1996 to 2002, with fees awarded under the percentage method, and found a majority

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[152] Id. at 42-43.

[153] Id. at 43.

of fee awards clustered in the 20% to 30% range. Vizcaino, 290 F.3d at 1050 n.4. In Vizcaino, for example, the Ninth Circuit approved a fee award of 28% of the $96.885 million settlement fund. Id. at 1050. In Six Mexican Workers, the Ninth Circuit held that departure from the 25% standard benchmark award was not required where the litigation lasted more than thirteen years, obtained substantial success, and involved complicated legal and factual issues. Id. at 1311. Here, as in Vizcaino and Six Mexican Workers, the requested percentage is clearly not too large in light of all the circumstances of the case.

The above comparisons with fee awards in similar cases affirm the reasonableness of the 22.4% fee award requested by Class Counsel. Indeed, the foregoing suggests that 22.4% is on the low side of a range of reasonable fees given the duration, complexity, and results of this litigation.

10. Riskiness of case.

"Risk is a relevant circumstance" in determining a reasonable percentage fee. Vizcaino, 290 F.3d at 1048. Exxon suggests that because 60 law firms were apparently willing to assume the risk of this litigation, there was not a lot of risk in taking the case. Exxon cites no authority to support its proposition that the riskiness of a case is measured in proportion to the number of lawyers willing to take a case.

Rather, courts award significant attorney fees in common fund cases, in part, to ensure "that competent counsel continue to be willing to undertake risky, complex and novel litigation."

Manual for Complex Litigation (Third), § 24.121 (1995). And because courts do so, counsel are more inclined to take on such cases. The court's incentive system seems to work, but that does not mean that there is no risk associated with taking on such cases.

Class Counsel testify that "[t]his case has always been a high risk matter for plaintiffs' counsel" and that "[a]s long as the appeals are unresolved, risks continue."[154] Class Counsel aver that "[a] principal area of risk was the extent to which a jury would find Exxon liable for compensatory damages, in a context in which Exxon had already paid over $300,000,000 to persons injured by the oil spill, and was taking the position that the spill victims had already been fully compensated for their losses."[155] The fact that Exxon admitted liability for compensatory damages and paid out large sums of money voluntarily, also necessarily meant that compensatory damages in this case would be far smaller than they might have been had Exxon paid out nothing.

A second and far more significant area of risk from the outset of the litigation was the uncertain prospect for obtaining punitive damages, both in terms of liability and amount. The claim for a punitive damages award was always the centerpiece of this litigation and was hotly disputed from beginning to end. Until the jury spoke in September of 1994, there was always an element of risk that plaintiffs would get no award for punitive damages. Captain Hazelwood gave perfect instructions for navigating around ice in

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154 Oesting Dec. at 11, Clerk's Docket No. 7650.

155 Id.

shipping lanes, and a jury might have found against the plaintiffs on the issue of recklessness. It might have found that the grounding was just a negligent accident. In challenging Exxon, Class Counsel assumed the very significant risk of winning a modest compensatory recovery and losing the very costly litigation war as to punitive damages. Indeed, while liability has been finally adjudicated, the amount of punitive damages still remains in dispute. The court is under no illusion that Exxon will give up the punitive damages fight until all avenues of review are exhausted.

Given the size and wealth of Exxon, plaintiffs' counsel had to assume from the outset that the prosecution of this case would be extraordinarily expensive, both in terms of time and resources. Class Counsel allege that plaintiffs have been "litigating against a giant corporation able to hire the finest counsel and to pour virtually unlimited funds into the defense of this litigation."[156] Plaintiffs' counsel aptly observe that a "hallmark"[157] of Exxon's vigorous defense tactics has been to litigate any conceivable issue, and point to the "scope and intensity of the defenses raised and financed by Exxon and its ability to draw the litigation out over many years."[158] Plaintiffs have prevailed in the most recent proceedings, but the war is not over.

Over fourteen years after commencing this litigation, Class Counsel still have not received payment for most of their

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[156] Id. at 11-12.

[157] Id. at 9.

[158] Id. at 12.

work. The court does not doubt that Exxon can pay whatever judgment is given final approval; but plaintiffs are still at risk as to what that amount will be. Someone has been paying for bacon and beans for Class Counsel for fourteen years, and it may be several more years before Exxon will make its contribution to those who have supported Class Counsel for so long. The requested 22.4% fee is reasonable compensation for taking on a case that was risky from the outset, and continues to involve significant deferral of compensation.

11. Ongoing cost of claims administration.

In making a fee award, the court may also consider the future services Class Counsel will be required to perform for class members. See Hanlon v. Chrysler Corp., 150 F.3d 1011, 1029 (9th Cir. 1998) (including "all future services that class counsel must provide through the life of the latch replacement program" as support for the fee award).

Here, because of the 52 separate classes of claimants and the huge number of claimants, claims administration in this case has been and will continue to be time-consuming and expensive work for plaintiffs' counsel. The claims administration process includes: creating, mailing, and reviewing claims forms; writing and testing algorithms; data entry and migration; lost income adjudication; vessel devaluation adjudication; permit devaluation adjudication; determining assignment and lien issues; reviewing allocations;

filing for court approval of final percent shares; and distributing allocations.[159]

At oral argument, Class Counsel testified that it can take years to put together one final allocation order for a particular claimant group, and that claims administration costs approximately $10 million per year. Plaintiffs' law firms are financing that cost. Class Counsel will conceivably continue to devote significant time and money to claims administration after this litigation is over.

12. Summary.

In light of the above factors, most notably the riskiness of the case from the outset, the exceptional results achieved by Class Counsel, the size of the fund created and the number of plaintiffs benefitted, the complexity and duration of the litigation, the burdens of representation borne by Class Counsel, and the fact that 22.4% is below both the benchmark and the market rate, the court finds that the requested blended fee award of 22.4% of the net class recovery is reasonable under the circumstances of this case. A 22.4% fee award based on the court's most recent amended judgment will provide Class Counsel with reasonable compensation. In addition, based on the size of the common fund created by Class Counsel, the court further finds that plaintiffs will obtain significant financial benefits after Class Counsel are paid. The great bulk of the money to be divided between plaintiffs and Class Counsel is the

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[159] Plaintiffs' Oral Argument Chart entitled "Illustration by Way of UCI Drift Claim Process" at 50, attached to Hearing Minutes, Clerk's Docket No. 7752.

punitive damages award--a recovery intended to punish and deter Exxon, not to compensate plaintiffs for their actual losses.

C.

Lodestar Cross-Check

For the same reasons that the court chooses not to use the lodestar method to calculate reasonable attorney fees, the court could choose not to do a lodestar cross-check. Out of an abundance of caution, however, the court will conduct a lodestar cross-check for purposes of further assessing the reasonableness of a 22.4% fee.

As indicated above, over 60 law firms and about 2,348 attorneys and paralegals who were involved in plaintiffs' representation submitted hours for review and audit by plaintiffs' Fee Committee. The hours and fees which were audited by plaintiffs' Fee Committee as of April 30, 2003, were used in calculating the lodestar.[160] To calculate a lodestar for each timekeeper, Class Counsel multiplied each timekeeper's reasonably incurred hours by that timekeeper's hourly rate at the time the work was performed. Then the lodestar figure for each of the 2,348 timekeepers was added together to arrive at a total lodestar figure of approximately $186 million as of April 2003. The total number of hours allowed by the Fee Committee amounted to 1,229,001.09 hours.[161] The sum of all the fees reasonably incurred amounted to $185,814,008.34.[162]

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[160] Notice of Filing Supplemental Spreadsheets at 2, Clerk's Docket No. 7821.

[161] Id.

[162] Tables on Disk, Clerk's Docket No. 7821.

In their reply brief filed September 5, 2003, Class Counsel stated that their historical lodestar of approximately $186 million had grown "by about $4 million since they filed the Fee Petition on April 30, 2003," and that the "great majority of the work underlying this increase has consisted of claims administration performed from March 1, 2003 through August 31, 2003."[163] Class Counsel assert that motions practice in the Ninth Circuit and this court regarding the punitive damages judgment also continues to generate new work. Based on the above information, it is probable that as of the date of this order the lodestar figure has increased by another $3 to $4 million since September 2003. However, for purposes of the lodestar cross-check, the court will use the $186 million lodestar figure based on historic fees through April 30, 2003, the date on which the renewed motion for attorney fees was filed.

The court next considers what adjustment of the historic lodestar figure is appropriate in light of the delay in payment in this litigation which has spanned over fourteen years. "Attorneys in common fund cases must be compensated for any delay in payment." Fischel, 307 F.3d at 1010 (citing Coordinated Pretrial Proceedings, 109 F.3d at 609. The court has discretion to compensate Class Counsel either by applying the attorneys' current rates to all hours billed during the course of the litigation or by using the attorneys' historical rates and adding a prime rate enhancement. Id.; WPPSS, 19 F.3d at 1305.

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[163] Clerk's Docket No. 7734 at 15.

For purposes of testing the reasonableness of the percentage fee, the court will employ the attorneys' historical rates and add a prime rate enhancement. Applying the attorneys' current rates to all hours billed during the course of this protracted litigation is impractical for several reasons, including the fact that several counsel have died during the course of the litigation and other lawyers have retired, left the practice of law, or moved on to positions with other firms. In addition, Class Counsel point out that "even for those who are still practicing at the firms at which they accrued their lodestar, increases in hourly rates fluctuated dramatically," suggesting that using current rates is a poor approximation for the value of money lost by delay in payment.[164]

To calculate the value of the lodestar with a prime rate enhancement, Class Counsel first obtained the historical annual prime interest rates for each month from March 1989 through April 2003. Each of those variable rates was then divided by twelve to calculate a monthly prime rate. To calculate an interest factor for each month during which lodestar accrued, Class Counsel added one to the monthly prime rate. Each month's historical lodestar was then multiplied by the interest factors for all months which followed it.[165]

Based on a $186 million, historic lodestar enhanced by monthly prime interest rates calculated as set out above and

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[164] Jamin Dec. at 5, Clerk's Docket No. 7650.

[165] Id. at 2.

compounded through April 2003, the total lodestar figure amounts to approximately $373 million.[166]

Citing Harris v. Marhoeffer, 24 F.3d 16, 18 (9th Cir. 1994), Exxon argues that no significant risk multiplier is appropriate here because "only in rare cases should the lodestar figure be adjusted," and the "probability, as viewed by counsel at the start of this litigation, that plaintiffs would recover nothing and therefore that counsel would not be paid" was low.[167] The court observes that only Exxon objects to a multiplier. No class member objected either to the use of a multiplier or to the size of either the 2.78 or 3.03 proposed multipliers.

Class Counsel point out that Exxon again relies on fee-shifting cases when it alleges that no multiplier is appropriate and that the lodestar figure should only be adjusted in rare cases. However, it is well established that in common fund cases "the court can apply a risk multiplier when using the lodestar approach." Staton v. Boeing Co., 327 F.3d 938, 967 (9th Cir. 2003). "Indeed, 'courts have routinely enhanced the lodestar to reflect the risk of non-payment in common fund cases.'" Vizcaino, 290 F.3d at 1051 (quoting WPPSS, 19 F.3d at 1300).

> This mirrors the established practice in the private legal market of rewarding attorneys for taking the risk of nonpayment by paying them a premium over their normal hourly rates for winning contingency cases. In common fund cases, "attorneys whose compensation depends on their winning the case must make up in compensation

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[166] Id. at 4.

[167] Defendants' Objection at 26-27, Clerk's Docket No. 7724.

> in the cases they win for the lack of compensation in the cases they lose.

Id. (quoting WPPSS, 19 F.3d at 1300-01).

While a district court generally has discretion to apply a multiplier to the attorney fees calculation to compensate for the risk of nonpayment associated with losing common fund cases, it is an abuse of discretion to fail to apply a risk multiplier when "(1) attorneys take a case with the expectation that they will receive a risk enhancement if they prevail, (2) their hourly rate does not reflect that risk, and (3) there is evidence that the case was risky." Fischel, 307 F.3d at 1008.

With regard to the first and second factors, here, as in Vizcaino, the evidence demonstrates that Class Counsel would not have taken this case other than on a contingency fee basis and that market hourly rates would not have been deemed compensatory.

"The final consideration is the risk involved in the case," which includes both the legal and factual strength of the case. Fischel, 307 F.3d at 1009. "[R]isk should be assessed when an attorney determines that there is merit to the client's claim and elects to pursue the claim on the client's behalf." Id. As discussed more thoroughly in the court's percentage-of-the-fund analysis, the evidence demonstrates that this case has been risky from the outset. The following testimony from Lead Trial Counsel O'Neill further attests to the risks involved in this case:

> The terms of the contingent fee agreements in the Exxon Valdez case were negotiated at a time when Faegre & Benson, like other plaintiff firms, was facing a major investment in attorney time and resources in the litigation

> against a large, "well-heeled," and powerful defendant, with no certainty as to outcome, its size, or the amount of time it would take to reach final resolution of the litigation. There is still no certainty concerning any of these factors, except that the size and complexity of the case and the effort required of plaintiffs' counsel has proved to be enormous. The litigation is already fourteen years old with no clear termination date in sight.[168]

The court does not question Exxon's ability to pay. There is no risk as to that, but "payday" is likely still several years away. Overall, however, Class Counsel assumed significant risk in taking on this case. Based on the circumstances of this case, a risk multiplier is certainly appropriate. An adjustment of the lodestar upward is also appropriate considering the factors in Kerr v. Screen Extras Guild, Inc., 526 F.2d 67, 69-70 (9th Cir. 1975), including the complexity of the case, the time and labor required, the riskiness of the case, the preclusion of other employment due to acceptance of the case, the results obtained, and the experience and ability of the attorneys. See, e.g., Vizcaino, 290 F.3d at 1051 (referencing Kerr factors).

We turn now to the size of the multiplier. In a survey of fee awards in common fund settlements of $50 to $200 million, the Ninth Circuit found that most of the multipliers applied in the cases ranged from one to four. Vizcaino, 290 F.3d at 1051 n.6 (citing In re Prudential Ins. Co. Sales Practices Litig., 148 F.3d 283, 341 (3d Cir. 1998)). In Vizcaino, where the district court's lodestar cross-check resulted in a multiplier of 3.65, the Ninth

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[168] O'Neill Aff. at 4, Clerk's Docket No. 7650.

Circuit specifically found the 3.65 multiplier well within the range of multipliers commonly applied in common fund cases. Id. at 1051.

Increasing plaintiffs' fee calculation of $774,656,000 by 22.4% of the $500 million in punitive damages, the principal amount of the percentage attorney fees will increase to about $886,656,000. Class Counsel's share of the interest accruing on the $4.5 billion judgment will amount to about $406,717,400, for a total fee award of approximately $1,293,373,000 as of April 30, 2003. Using the $373 million lodestar figure, which includes a prime rate enhancement through April 2003, the percentage attorney fees of $1,293,373,000 divided by $373 million yields an implicit multiplier of 3.47.

Class Counsel allege, however, that they do not expect any payout of attorney fees from a punitive damages verdict until at least two years from May 1, 2003, based on the history of this litigation and Exxon's representations that it will appeal this court's judgment to the Ninth Circuit Court of Appeals, and possibly to an en banc panel of that court and to the United States Supreme Court.[169] Class Counsel suggest that the lodestar calculation be extended with a prime rate enhancement through May 1, 2005. With the April 2003 prime rate extended for another 24 months, the total lodestar figure is estimated to be $406 million.[170]

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[169] Jamin Dec. at 3, Clerk's Docket No. 7650.

[170] Class Counsel allege that the April 2003 prime rate of 4.25% "happens to be the lowest rate during the 14-year period." Jamin Dec. at 3-4, Clerk's Docket No. 7650.

The court concludes that it is unlikely that Class Counsel will be paid for at least another two years. If the court were to use the $406 million lodestar figure, which includes a prime rate enhancement for the delay in payment through May 1, 2005, the implicit multiplier based upon the present expected recovery would be 3.18. However, if, as appears appropriate, the percentage fee is projected from April 30, 2003, to May 1, 2005, based upon the accrual of interest on the judgment in which Class Counsel share, the implicit multiplier changes very little from 3.47.

In approving a multiplier, the court may consider "class counsel's continuing obligations to the class." Wing v. Asarco Inc., 114 F.3d 986, 989 (9th Cir. 1997). As discussed above, Class Counsel have substantial continuing obligations to the class. Therefore, the lodestar in this matter continues to grow on a regular basis. The percentage fee will also grow because of the accrual of interest on the judgment. These increases seem likely to cancel one another out as regards the multiplier implicit in the comparison of a percentage and a lodestar fee.

The court's lodestar cross-check, which now results in a multiplier of 3.47, further corroborates the reasonableness of a 22.4% fee award, for a multiplier of 3.47 is well within the range of multipliers commonly applied in the Ninth Circuit.

D.

Conclusion

"[C]ourts have stressed that when awarding attorneys' fees from a common fund, the district court must assume the role of fidu-

ciary for the class plaintiffs." WPPSS, 19 F.3d at 1302. Accordingly, the court has closely scrutinized Class Counsel's renewed motion for award of attorney fees and costs. Based on the court's analysis of the relevant circumstances of this case, the court finds that a blended fee award of 22.4% of the net class recovery is reasonable compensation for Class Counsel. That fee is certainly not too high, and it may be too low given the complexity of the case, the amount of work required and yet to be done, and the results achieved for the plaintiffs.

VII.

COSTS

Class Counsel also request the court to enter an order holding that Class Counsel are entitled to recover their reasonable costs and expenses of litigation from the common fund, and to order that "(1) this Court will review the reasonableness of any particular application upon later motion and hearing; and (2) class notice will not be required at that time upon the application."[171] Class Counsel allege that gross costs are currently at $30 million, of which $8 million have been reimbursed, for a remainder of $22 million.

None of the fifteen plaintiffs who objected to the renewed motion for attorney fees challenge the principle that Class Counsel are entitled to recover their costs. Exxon also does not dispute that plaintiffs are entitled to recover their costs, but argues that

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[171] Plaintiffs' Reply at 24, Clerk's Docket No. 7734.

"[n]o costs should be recoverable without proof of what they are."[172] Class Counsel, however, have not requested an order awarding them $22 million in unreimbursed costs; rather, Class Counsel request the court to hold that pursuant to the Plan of Allocation, Class Counsel are entitled to recover reasonable costs and expenses from the common fund.

Without citing any authority, Exxon further argues that the "Court should adopt an overall percentage cap applicable to both costs and attorneys fees, so that even with a smaller award the bulk of the award goes to the class, not its attorneys."[173] Exxon might better have thought about capping costs during the development of this case when it would have worked to the benefit of all, rather than arguing after the money has been spent that one side should be subject to cost restrictions other than reasonableness. The court rejects Exxon's unsupported contention that a cap be imposed on plaintiffs' costs and expenses.

It is undisputed that Class Counsel are entitled to recover their reasonable costs and expenses of litigation from the common fund. See, e.g., Hanlon, 150 F.3d at 1029; Lobatz v. U.S. West Cellular of California, Inc., 222 F.3d 1142, 1148 (9th Cir. 2000).

At this point, the court holds only that plaintiffs are entitled to recover costs reasonably incurred in the prosecution of this litigation. The court will make a determination as to what

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[172] Defendants' Objection at 36, Clerk's Docket No. 7724.

[173] Id. at 38.

costs were reasonably incurred upon further application of Class Counsel, at which point Class Counsel will be expected to have documented and audited the costs requested as was done with the fee application.

Class Counsel also request the court to order that class notice will not be required at the time of further application. Class members received notice of the $22 million in unreimbursed costs requested by Class Counsel. No objections have been received. Consequently, as long as Class Counsel's requested costs do not exceed $22 million, no further notice to the class will be required. Class Counsel do not cite any authority stating that notice should not be required if their requested costs increase significantly. The court reserves ruling on whether class notice will be required should the requested unreimbursed costs exceed $22 million.

VIII.

HOLDINGS

A. A blended fee for All Plaintiffs' Class Counsel of 22.4% of the net class recovery is reasonable. The blended fee shall be comprised of 3% of all plaintiffs' punitive and future compensatory damages recoveries (including interest) to be allocated to the Consolidated Case Fund and a 20% fee award from the remaining recoveries of all plaintiffs (including interest) except for three groups: (1) Chugach Regional Corporation and its related village corporations; (2) the Seattle Seven, who already settled with the remaining plaintiffs regarding their share of recoveries; and

(3) the portions of the recoveries that six seafood processors have assigned to Exxon.

B. Plaintiffs are entitled to recover costs reasonably incurred in the prosecution of this litigation. The court will make a determination as to what costs were reasonably incurred upon further application of Class Counsel.

C. The court retains jurisdiction over the matter of costs and attorney fees for purposes of taking up the following:

1. To determine Class Counsel's recoverable costs, and

2. To reevaluate Class Counsel's attorney fees if requested by them to do so after a further appeal.

DATED at Anchorage, Alaska, this 29 day of January, 2004.

H. Russel Holland
United States District Judge

A89-0095--CV (HRH)

D. SERDAHELY
L. MILLER
D. OESTING

MAILED ON 1/29/04

BY