[UNOFFICIAL TRANSCRIPT] [begin audio file]

JON HACKER: Good afternoon, Your Honors. If it may please the Court, Jon Hacker for Appellants Exxon Shipping Company and Exxon Mobile Corporation. I am going to reserve five minutes for rebuttal. Today's proceeding presents two issues containing the content of the mandates be issues by this Court. One issue raised by Exxon and one issue raised by Plaintiffs. First Exxon asks that the mandate include an award of appellate costs to Exxon since Exxon prevailed in obtaining 90 percent of the relief it sought in appeal.

JUDGE: Counsel -- Counsel -- I didn't understand in the briefs the distinction from *Planned Parenthood*; maybe if you explain it orally I will understand it.

MR. HACKER: Well, there are several distinctions I would say. First of all in *Planned Parenthood*, this is on the question of interest --

JUDGE: I can see the distinctions but I don't understand why they make a difference in terms of -- what the --

JUDGE: Are we talking about interests or costs?

MR. HACKER: That issue goes to interests which I was going to address second, but I am happy to answer the question.

JUDGE: Were you going to address it whenever you like?

MR. HACKER: I will get to that -- let me -- let me -- let me --

JUDGE: That's my question for you.

MR. HACKER: I look forward to answering --

JUDGE: You want talk about something else, I may just forget about it before you --

MR. HACKER: No, no. I promise I will answer. Let me begin with costs though because our -- sort of our motion if you will.

JUDGE: Costs. I have a question too.

MR. HACKER: Please.

JUDGE: Why should it be 90 percent instead of 100 percent?

MR. HACKER: Well, we don't disagree. We would accept -- we think 90 percent would be not an unreasonable allocation under the circumstances because when the appellate proceedings began Exxon's face, potential punitive damagers liability of five billion dollars, to exercise its right to challenge the lawfulness of that award on appeal, Exxon was forced to, required to, file a letter of credit securing the entire five billion dollar judgment. That letter, of course, came with substantial costs in terms of interest over the period.

JUDGE: But it protected your assets.

MR. HACKER: That's correct, that's correct

JUDGE: The plaintiffs had a present right to -- a right then to execute on the judgment and the assets so you did get a benefit from that. Because if they had executed on judgment you would be out the money.

MR. HACKER: Right, we are not saying that there is no -- that we were -- that we should not have been required to file one. We are simply saying that it was a requirement to exercise our rights to challenge the lawfulness on appeal. Which we pointed out to Plaintiffs that we asked that we not be required to file and plaintiffs insisted that we file. Insisted on treating the case like a normal case and that is essentially all we ask --

JUDGE: It's not a normal case because your client had so many resources; is that -- is that the difference?

MR. HACKER: We think it's an usual case but it is a normal case in that Exxon prevailed by obtaining 90 percent of the relief that it sought in appeal. When the appellate proceeding began we faced five billion dollars of potential liability; at the end of the proceedings we had an award that was 10 percent or 90 percent less than the original award. For centuries the law has recognized a strong presumption favoring an award of cost to the party that prevails in a legal proceeding. That presumption is now codified in Civil Rule 54 for

trial proceedings and for appellate proceedings in appellate rule 39 under that --

JUDGE: For what -- why is -- why isn't this really a mixed judgment? I mean you didn't prevail on all issues and the ordinary case in front of us -- before us the -- if -- if one party wins some and one party loses some that's a mixed judgment up to the Court's discretion. Why do you think we should depart from that?

MR. HACKER: We agree it's a mixed judgment governed by Rule 39(a)(4) so that it's not required that we obtain costs though. We think the Court ought to exercise its discretion to award costs under the circumstances because the standard this Court has employed in circumstances like this isn't simply in any mixed case where one party wins most of everything and another party wins a little bit, costs are automatically -- each party automatically bears its own costs. Instead, the standard is when a party substantially or primarily prevails that parties -- for purposes --

JUDGE: Well you owe -- you owe the Plaintiffs a lot of money.

MR. HACKER: Yes.

JUDGE: And you fought very hard for the principle that you should not be liable at all in punitive damages and to now say "well the case was really all about just the amount of damages" seems to me something of a distortion. Because we all spend a lot of time and effort and money debating the issue of whether or not damages were appropriate at all.

MR. HACKER: Two answers, Your Honor; two points. First of all, it is true that at the end of the day we owe the plaintiffs roughly 500 million dollars. That's why the Plaintiffs were the prevailing parties in the District Court. They start out with an entitlement of zero and established that they're at the end of the day entitled to 500 million dollars. Nobody would contend they didn't prevail in the District Court. But by the same token remember they were seeking 20 billion dollars and then you get the rest of that. That doesn't mean they didn't prevail, and by now if you would see the same point here on appeal we began with a potential

liability of five billion dollars. At the end of the appeal. We owe 90 percent less than that.

JUDGE: I can't remember right now what the federal provision is. In Alaska what we used to do is routinely make offers of judgment and that would turn the loser into the winner automatically. No more discretion so if you are being sued and make an offer of judgment for more than you ultimately lose by you are the winner. There is nothing like that here, right?

MR. HACKER: Yeah, that only operates when you have an offer of judgment situation.

JUDGE: There was no offer of judgment, right?

MR. HACKER: Not to my knowledge.

JUDGE: So this is purely a matter of our Rule 39 or fact 39 discretion.

MR. HACKER: If I understand, an offer judgment goes to the amount -- the ultimate amount. There would have been an offer judgment 400 million and they would obtain 500 million but they would only be entitled to 400 million. This is purely the issues we are discussing right now; just address the appellate costs. It's important to distinguish the appellate cost from costs in the trial court.

JUDGE: You don't have offer of judgment, right?

MR. HACKER: No.

JUDGE: Well I don't think it matters because there was none made, correct?

MR. HACKER: To my knowledge there was no offer of judgment made and that's not an argument that we are resting on here. What we are resting on here is the contention that when we started the appeal we owed essentially or we faced potential liability of five billion dollars and now owe 90 percent less than that which is substantially and primarily appealing within the context of the appellate proceeding. Now the plaintiffs argue that despite that, that there are four equitable factors for equitable reasons this Court ought exercise its discretion under 39(4) and grant Exxon its appellate costs or even 90 percent of its appellate costs that

we were required to incur in order to exercise its appellate rights. But upon closer inspection all of those factors actually militate in favor of awarding Exxon implying the traditional presumption favoring the award of costs to the party that was deemed prevailing at the end of the legal proceeding. The first factor is the importance of the case. Well here it was Exxon that threw its appeal, set an extremely important national precedence which will protect American shipping comers from excessive monetary liability and will likely bring greater rationality to the administration of punitive damages in other cases. The second factor is whether the issues were close and complex. Here even on the issues of which Exxon did not prevail to your point, Judge Schroeder, the questions were very close. Exxon came very near to prevailing in erasing the entire jury verdict. Supreme Court was split four to four on the vicarious punishment issue. This Court itself acknowledged the strength of Exxon's argument, that the clean water act preclude punitive damages all together. The issue on which Exxon did prevail, the size of the award, the issue was never close. This Court itself held the award as unlawful by 2.5 billion dollars and no justice of the Supreme Court suggested that an award of five billion dollars was anywhere close to a lawful amount. In fact the Court denied without comment Plaintiffs' cross petition seeking to restore the award to five billion dollars. The third factor and an important one is economic disparity between the parties. Plaintiffs, of course, point to the disparity between Exxon and individual class members, but the Supreme Court in this very case specifically held that the award here has to be considered on a class-wide basis. These are the Court's words: "In a class action where large number of potential plaintiffs are involved individual awards are not the touchdown for it's the class option that facilitates to and the class recovery of more than 500 million dollars is substantial" given that substantial recovery --

JUDGE: Counsel, usually these cases are much -- small so we just make discretionary judgments and it is worth anybody's money to argue about. This one is big so we have an

argument. I am familiar with the Seventh Circuit case and Republic something -- *Republic Tobacco,* I am not aware that there is a Ninth circuit precedence that tells us exactly what to do here, is there?

MR. HACKER: There wouldn't be one that tells you exactly what to do because as we conceded it's a question in case what the equities compel. But in *Cooper v. Letterman* case the Court did do what we are suggesting here. Now it's true that was a different case involving different numbers but that gets to the fourth point I was going to make which is the fourth equity factor the plaintiffs point to. The costs are unusually large which is true that it is an important equitable factor but here that is all the more reason you shouldn't penalize the party that so successfully prevailed on appeal.

JUDGE: But the odd -- you see the odd thing here is that when you started out you didn't have all the Supreme Court law in your favor so by barring the costs of keeping the appeal going you really go the benefit of a lot of changing laws so it's not as if you were from the very beginning fighting the battle where you would be vindicated because the law was so clearly in your favor. I am not sure the equities lay in quite the way you -- you would like to characterize them. It is a very interesting problem.

MR. HACKER: I understand and I would suggest that I am not aware of precedence in sort of parses the parties' entitlement at the end of a case based on developments in the law in the interim like that.

JUDGE: No I am just -- the general idea of your -- or who should bear the costs equitably in this case. It's a different situation.

MR. HACKER: I think it's different only in the sense that you are talking about a very unusual -- unusually large costs that are indeed a consequence of the fact that the appeals --

JUDGE: When you are talking about the area of punitive damages generally which in a very shifting field --

MR. HACKER: Right but you are also talking about, if I may, a case that is unique because of the unusual size of the award. Enormous and the unusual length of time it took to reach the end of the appellate proceedings. So you have 12 years of appellate proceedings in a bond securing variously 500 billion to 2.5 billion over the period of time. The main equitable question though I think -- you know I have gone through and I think tried to demonstrate that the factors plaintiffs point to if anything, in favor of applying the traditional presumption. I think the most important equitable factor is --

JUDGE: When you talk about the traditional presumption but that's only on the prevailing party. Thinking back onto my practice, it's very rare in case of a mixed judgment that each party hasn't born its own costs at least on panels I have been on. I can think of maybe two in which it was just a trivial point in which one party prevail but that would be the standard presumption at least as far as my operation. I don't think we apply a presumption in this circuit that if you win most of your arguments you get your costs. Want to turn to interest question.

JUDGE: I don't understand why you focused on the importance of the issues and the arguments you won instead of the amount of money.

MR. HACKER: That is -- that is -- that is the ultimate equity I was going to get to simply was you are penalizing the party that was so successful --

JUDGE: Your best argument is you won 90 percent relief.

MR. HACKER: I am sorry --

JUDGE: Your best argument is that you won 90 percent relief.

MR. HACKER: Yes, I agree with that. That's why -- all I am saying is what the plaintiffs have argued is despite the fact that we won 90 percent of the relief the plaintiffs say there are four reasons that nevertheless the Court shouldn't exercise discretion, and my submission is that the those factors actually favor an award here. Let me do turn to the interest

question. Going back to Judge Kleinfeld, where we started. The Court's authority to award interests in this case on the final 507.5 million dollar award is controlled in the first instance by appellate Rule 37(b). Which provides that if the Court modifies or reverses a judgment with a direction that a money judgment be entered in the District Court, the mandate must contain instructions about the odds of interest. That provision contrasts with Rule 37(a) which provides that where a money judgment is simply affirmed "whatever interest is allowed by law is paid from the date of the District Court judgment". Unlike that language, 37(b) does not require either the interest be paid to any particular date or that the rate be "whatever is allowable by law" instead when an appellate court directs the entry of new or modified monetary judgment below the plain terms of Rule 37(b) allow the appellate court to dictate the interest applicable to the new award. The Plaintiffs here contend that interest should date back to the original 500 billion dollar punitive damages judgment as if that judgment has actually awarded a lawful 507.5 million amount on that date. In order to compensate them for hypothetical loss of use of that amount during the appellate period. We submit that basic theory is inconsistent with the public purpose of punitive damages which are to deter future misconduct.

JUDGE: I had asked you a question at the outset of argument and said I don't want to answer it now; I will get to it later. Are you going to at some point?

MR. HACKER: I will answer it right now. That is the part -- is -- was just getting to, that point of the argument, *Planned Parenthood*. *Planned Parenthood* did award interest dating back to the original award. We suggest it's distinguishable on two bases. I don't want to label the legal distinction, and *Planned Parenthood* treated the punitive damages partly compensatory and we know that is not the way punitive damages are supposed to be treated in this case. The Supreme Court had instructed otherwise and in *Planned Parenthood* the underlying -- the award was factually legally valid under the underline law. The Court simply

applied already existing recognized constitutional standards.

JUDGE: That's what we did.

JUDGE: Are you saying that we should not distinguish *Planned Parenthood*; we should treat it as overruled by subsequent Supreme Court decisions?

HACKER. No, no, no. I am saying it is different because in this case no Court applied maritime standards, there weren't any maritime standards to apply the award. The first Court that ascertained the lawful amount was the Supreme Court when it announced the maritime standard had been applied to this case.

JUDGE: I don't understand why the maritime standard matters because 1961 28 U.S.C. 1961 appears to speak to judgments regardless of whether there ordinary civil cases or maritime cases.

MR. HACKER: That is such an important point because Plaintiffs rest their argument on the text of 1961 as if it's 1961 that controls, and we don't think *Planned Parenthood* holds that. What *Planned Parenthood* holds is that because the judgment was earlier ascertained the Court in that case would allow the Plaintiffs the interest to date back to the original judgment. They can't be required to the matter of 1961 that can't be what the text of the statute requires because the Supreme Court decision in the *Briggs* case, and this Court's decision in *Planned Parenthood* itself squarely held the appellate court has the power to deny interest outright. To deny interest outright on a new modified monetary award. In fact *Briggs* decision made exactly the arguments Plaintiffs are making here. That 1961 predecessor statute requires that interest on a money judgment directed by the appellate court date back to the original district court award despite the terms of the appellate mandate. The *Briggs* majority flatly rejected that argument and said no, it is the appellate mandate that controls interest award not the district court interest statute. So if 1961 doesn't control its own force and the appellate court has a greater power to deny interest all together, then we would submit that even assuming

there is an ascertainment under *Planned Parenthood* and other cases would you except that legal argument or not. This Court has the discretion to decide what the appropriate interest rate ought to be, that is, ought to exercise the power that exists under Rule 39(b) as interpreted in *Planned Parenthood* that described an interest rate that accurately reflects the compensation the Plaintiffs were seeking here. Remember, that is the reason they believe there ought to be interest dating back to 1996 to compensate them.

JUDGE: 1961 was amended and a later version does not apply here; it's not retroactive. I think we are together so far, right?

MR. HACKER: That's right.

JUDGE: Go through the words of 1961 as it was in effect at the relevant time and show me where we get this discretion that we are speaking of

MR. HACKER: While 1961, I can tell you from 1961 the discretion I am arguing comes from Rule 37(b) and *Planned Parenthood*. 1961: we know it cannot operate its own terms because it said then, I don't have the exact language here, but interest shall be allowed on any money judgment. Well here there are three or four judgments below, it can't be 1961 doesn't tell you which money judgment --

JUDGE: That argument I don't get. The only money judgment interest could possibly be allowed on was the one that wasn't vacated.

MR. HACKER: It will be the final judgment at the end of this case.

JUDGE: Yes.

MR. HACKER: Right, so 1961 isn't doing any work here; it's this Court's mandate telling the parties in the Court what it should do.

JUDGE: The others don't exist; once they are vacated they don't exist.

MR. HACKER: That is correct.

JUDGE: So it says interest shall be allowed. It says "shall" instead of "may" so it's

mandatory. "It shall be calculated" that means must, not may, from the date of entry of the judgment and then it says what the rate is. Now it is -- says the weekly one year back then it used a different formula.

MR. HACKER: But not if the early judgment has been vacated. It doesn't exist any more. So the only way interest can run back to that is under this Court's power on Rule 37(b) awarded.

JUDGE: So your argument is not just timing, it's amount.

MR. HACKER: Right.

JUDGE: We are on the record and where on the record would we set that amount from?

MR. HACKER: We submitted declarations that are contested by Plaintiffs that represent a more accurate -- as Judge Schroeder said in *Savad vs. Korea Airlines* case -- the most accurate way to compensate Plaintiffs for the loss of use of money is through a fluctuating interest rate. Nobody contends, the Plaintiffs aren't going to stand up --

JUDGE: No, but you haven't agreed on what the rate is, no. But I mean we don't have expert testimony; we don't have findings. If we choose now to depart from the words that Congress has used and we have employed, then really we are going to have to this in every single case.

MR. HACKER: Two answers there. First of all, what we are suggesting are two rates this Court has used? It doesn't mean unbounded discretion; it means discretion to use logical rates. This Court has used them. The familiar from the prejudgment interest context. This is not an unusual method. The second point is this is an unusual case. Your Honor, in most cases you don't have a judgment this large, 500 million dollars at the end of the case, over this much period of time, over 12 years, and a delta -- a gap this large between the actual real world interest rate, the fluctuating rate and the fixed rate that would otherwise be applied. That's the

problem here.

JUDGE: Sure we do. I remember it in the 70s when the rates were going up instead of down. In fact, if I recall correctly that is why we have all these statutes that have the fancy adjustment provisions.

JUDGE: We used to have a fixed 10 percent.

MR. HACKER: But this is still very unusual in terms of the size of the case and the amount of time.

JUDGE: Why should that make any difference analytically?

MR. HACKER: Well because -- because -- the problem --

JUDGE: You can say it's a large case and it takes a lot of time.

MR. HACKER: Then what you have then is vast over-punishment and over-compensation. If you don't award, if you award interest at a 5.9 percent rate you inflate the value of the punitive damages award by about 200 million beyond what it would be if it had actually been on Plaintiffs' theory. Plaintiffs say they should be given punitive damages today that --what a 507.5 million dollars would have been worth on September 24, 1996. If you apply the 5.9 percent rate they get an award that is about 200 million dollars more than that. That is the reason this is an unusual case that you shouldn't apply 5.9 percent. But in the back -- in the minor of cases it makes perfect sense to go ahead and apply the 1961 rate as normally been applied.

JUDGE: You have used your time.

MR. HACKER: Thank you.

JEFF FISHER: May I please Court. I am Jeff Fisher here representing the Plaintiffs today. The reality is with respect to both interests and costs we are asking the Court to do nothing more than apply its recent decision in *Planned Parenthood*. In that case, the Court confronted 108 million dollar punitive damage judgment. That it reduced to 4.7 million

dollars. That was a 96 percent reduction in that award. This Court held that the Plaintiffs were entitled to recover interest to the date of the original judgment and that each party was required to bear its own costs. In *Planned Parenthood* is consistent with case after case in this Court and indeed with the uniform precedent of all other circuit courts in the county.

JUDGE KLEINFELD: Counsel, I don't have much trouble with what you say about the interest from *Planned Parenthood*, but on the costs of course we have discretion and I am having some difficulty following why we should treat as though nobody really won. I am quite sure that after the Supreme Court made its decision, the victory parties were at Exxon's office, not at the Plaintiffs' attorneys' offices. No victory parties after that decision on the Plaintiff side. As a practical matter, nobody really cares about all the legal arguments and amiable [unintelligible] and all that unless the arguments enable them to win. Now, when I look at the money, what strikes me on this case is that all the costs that matter here because of what they had to pay to post the supersedeas bonds. If they had not posted the supersedeas bonds they could not have preserved the money while they appealed. That was entirely under the control of the plaintiff. You had a defendant as close to judgment-proof as it's possible to get; absolutely no risk that you couldn't get your money at the end of the case no matter what it turned out to be. Now, since you take the option -- of course there's plenty of reason even in that situation to require a supersedeas bond. They may go bankrupt like Texaco because they don't have the cash, puts a lot of leverage on, gets it up to the Board of Directors for settlement discussion, all kinds of reason. But nevertheless, totally the plaintiffs' control to make them spend all that money on the supersedeas bond, 60 million dollars or 70 million dollars, on supersedeas bonds. And as a practical matter the case was all about money, and they got most of the money wiped out. I don't see why they shouldn't get 90 percent of what it cost them to post those supersedeas bonds because they got rid of 90 percent of the money.

MR. FISHER: There's a lot there, Judge Kleinfeld. Let me start --

JUDGE KLEINFELD: I wanted to lay out my thinking for you --

MR. FISHER: Thank you.

JUDGE KLEINFELD: -- so you could really address it.

MR. FISHER: Thank you. Let me start with the precedent and then I'll explain why it makes sense to follow precedent in this case. And I just want to remind the Court where I stopped off in the *Planned Parenthood* with a 96 percent reduction, in *Southern Union* with a 98 percent reduction, in the *Baines* case which, Judge Kleinfeld, I believe you were on the panel on, with over 90 percent reduction. In case after case in this Court with large equivalent or greater reductions this Court has held that the parties should bear their own costs. And so why does that make sense and why should you not deviate from that here? Well, first --

JUDGE KLEINFELD: Now, in *Baines*, I happen to recall since I was on it. Costs didn't amount to anything. It was the usual sort of thing. It was just nickels and dimes.

MR. FISHER: Well first, as a matter of -- of practicalities as you put it, let me say that the plaintiffs did achieve a great deal in this case, Judge Kleinfeld. The punitive damages judgment that this Court has now confirmed is one of the handful largest ever in a federal court. And the battle, as Judge Schroeder was speaking earlier, over liability in the first place was a very difficult one and one that we were, as you would put it, very pleased to prevail on in a very meaningful victory in this case. And then -- and then as a matter of applying that to the bond it was not so late -- our choice as to when to get a bond -- although I would certain -- I would emphasize that we do have a fiduciary duty to the class in this case and so, especially in light of current economic events I think it is quite clear why we had to do everything we could to secure the judgment and make sure that money would be there in the event of prevailing. But even with respect to Exxon's own volition, Eckland had a couple of choices if it didn't want to pay for a bond. One is it could have paid the money into the district court. And it chose not to do that. And there was a good reason why Exxon chose not to do that

because by keeping the money Exxon was able to capitalize on its own internal rate of return. Over the twelve years in which this appeal has been going on Exxon has made 4.4 billion dollars on the 507 million that they should have paid the plaintiffs in 1996. So we hardly think it's unfair for Exxon --

JUDGE KLEINFELD: How do you figure that?

MR. FISHER: Pardon me?

JUDGE KLEINFELD: How do you figure that? I don't understand

MR. FISHER: It's just simply using the numbers that Exxon publishes every year of its internal rate of return on capital which are public documents. We have a chart that's attached to our answering brief. It's Exhibit A, Your Honor. By that chart we lay out how Exxon has capitalized to the extent of 4.4 billion dollars. Now we seek to recoup one-ninth of that for our interest. And then --

JUDGE KLEINFELD: Does that internal brief include things like this? I would think that for something like this a business would have to set aside a reserve.

MR. FISHER: I think Exxon had the option to do that but did not because, as it says, it has -- it was flush, so to speak. But -- so in terms of the equities, Exxon, even if it pays us our interest which we're entitled to, and even if it absorbs its costs including a letter of credit, it is going to benefit to the tune of over 3.8 billion dollars simply by the passage of time while this appeal has played its way out by virtue of the fact that they were able to sponsor the money that was rightfully the plaintiffs' in 1996. And even if --

JUDGE KLEINFELD: That 3.8 or 4.4 billion, that's on the 500 million that you got?

MR. FISHER: Yes.

JUDGE KLEINFELD: Or the five billion that you're --

MR. FISHER: That's --

JUDGE KLEINFELD: -- working with?

MR. FISHER: That's starting with 507 million in 1996 on the date of judgment.

JUDGE KLEINFELD: They would have made ten times the money?

MR. FISHER: Yes, yes. And as I said, that played our in our exhibit and it's supported by public filings that Exxon has made about its internal rate of return. So in terms of the equities -- at this point well just start with the equities. We think that's a strong equitable argument that this Court should follow this precedent in other cases and, as Mr. Hacker repeatedly -- referred repeatedly to the size of this, the size of this we think equitably favors plaintiffs. But --

JUDGE KLEINFELD: I don't think rate of return means that actually. I think what you're looking at here is taking the assets on their balance sheet and the profits, but I'm not sure. Is that what you're doing?

MR. FISHER: I believe what we're doing is taking the numbers in their SEC filings, without the money they make on their own investments within their company at the end of the year which has fluctuated between 10 and 36 percent on an annual basis. And we've taken those numbers from their SEC filings and laid them out

JUDGE KLEINFELD: Right. This one's not profit from --

MR. FISHER: Pardon me?

JUDGE KLEINFELD: Investments not profit from continuing operations.

MR. FISHER: That's right. If I used that word I used the wrong one.

JUDGE KLEINFELD: No, I don't think you did that.

MR. FISHER: Okay. But even putting that equitable component aside and looking simply at the success here, remember Judge Kleinfeld, you asked about an offer of judgment as of -- as an analogy. Exxon took the position of course that it should have to pay zero in punitive damages from the beginning of this case right up until the Supreme Court argument. But in the Ninth Circuit, remember, when we had our appeals, its fallback argument was if we

have to pay we should only have to pay 20 or 25 million dollars. So if you look at how the parties prevailed in terms of going to this circuit as to where the ships were, Exxon can spin the numbers one way and say well, they got the award cut by 90 percent. From our perspective, Exxon's fallback position was 25 million dollars. We multiplied that by 20 times by defending a judgment again that we, as a fiduciary matter, were duty-bound to defend for our clients. So we think there's no reason for this Court to create an internal conflict with its own juris prudence or to create a conflict with courts outside of this Circuit which held -- hold time again that mixed decisions, which of course that's what we have here, are ones in the punitive realm even if the award is significantly reduced the parties should bear their own costs.

JUDGE KLEINFELD: Is it correct that they did not make an offer of judgment?

MR. FISHER: Yes.

JUDGE KLEINFELD: I can't put much stock in how much the plaintiff tells the jury a case is worth or how much the defendant tells the jury it's worth compared to an Offer of Judgment. But they've just flat out it's none of -- none there, right?

MR. FISHER: I think Exxon's position from the beginning was they weren't going to settle this case.

JUDGE KLEINFELD: It only has to be served under Rule 68(a). It doesn't have to be filed. So that's why I have to ask.

MR. FISHER: Well, all I can say is I will say what my colleague said then. I'm not aware of any and I'm happy to check and see and file something with this Court if there's something that I'm not aware of. But --

JUDGE SCHROEDER: Closing counsel seems to agree.

MR. FISHER: I think that's right. And I think I -- I think for this Court's purposes and understanding --

JUDGE KLEINFELD: I'm not asking you to check; I was just narrowing it down.

MR. FISHER: Of course, of course. Okay. But -- but in using this Court's equitable discretion in the cost realm, remember that it's important to understand it is not a prevailing party test. That is the test under Rule 54. Exxon hasn't cited a single case that decides the cost question as a matter of pure prevailing parties. The one case it cites where it starts its argument is the *Baez* [phonetic] case from the D.C. Circuit. That's a case where one party prevailed entirely. And of course that's a prevailing party situation. But it's an equitable test under all the circumstances and we think that it's clear; there's no reason to deviate from uniform practice in this case. If I might turn to interest, unless the Court has any other further questions about the cost question, we think the interest question is like the cost question, squarely controlled by precedent in this Court. In *Planned Parenthood*, this Court considered the question of length as to what to do in a situation where a punitive damage judgment is reduced on appeal and then judgment is later entered in the district court. And this Court squarely held that plaintiffs are entitled to interest dating back to the original date of judgment.

JUDGE SCHROEDER: Can I just ask you a question of that? You seem to agree that the interest that you want and that is at issue here is 5.9 --

MR. FISHER: Yes.

JUDGE SCHROEDER: -- percent. Is that -- is that rounded up from 5.88 or --

MR. FISHER: It may be, Your Honor.

JUDGE SCHROEDER: I couldn't --

MR. FISHER: I'm not --

JUDGE SCHROEDER: Is that -- I just -- I was looking at the charts and I couldn't find 5.9 anywhere.

MR. FISHER: I'm not certain.

JUDGE SCHROEDER: So you must be right.

MR. FISHER: I'm not -- to be honest, I'm not certain about the --

JUDGE SCHROEDER: Okay.

MR. FISHER: -- answers to that.

JUDGE KLEINFELD: Is there a file --

MR. FISHER: But the parties agree on that and then supports this to be administered by the district court.

JUDGE KLEINFELD: Is it clear that we meet the earlier version of the statute and not the amended version?

MR. FISHER: Yes, because under *Kaiser*, this Court holds that --

JUDGE KLEINFELD: Otherwise --

MR. FISHER: Supreme Court, that is.

JUDGE KLEINFELD: Supreme Court actually.

MR. FISHER: Yes. And -- but that -- *Kaiser*'s important for one other reason, and that is because it says that Section 1961 is the driving force here. 1961 -- Section 1961 kicks in when a judge -- when the evidentiary basis for an award is established and so the damages are meaningfully ascertained. And of course that's the situation we have here. We did not have a trial in the United States Supreme Court and preserve -- and present evidence about punitive damages. That trial happened in the district court in Alaska in the 1990s and that's where the evidentiary basis for this award was established and that's where it stands. And let me say one final thing about *Kaiser* because my colleague has suggested this Court has some power to deviate from the 5.9 percent interest rate. With all due respect, this Court doesn't have that power. In *Kaiser*, the very -- the last section of that Opinion, the U.S. Supreme Court made clear that the plain text of Section 1961 selects the single interest rate to be determined by looking at the weekly T-Bill rate surrounding the date of judgment and that has to be a -- that is a rate that is constant from the date of judgment to the present day. So under

Kaiser and the plain language of 1961, there's a single interest rate that this Court needs to apply across the board. If there are no further questions -- I am happy to answer any further questions about our position on interest or costs, or I'm happy to submit the case.

JUDGE KLEINFELD: Help me find where in *Planned Parenthood* it speaks to the divisibility of costs issue?

MR. FISHER: Oh, it's in the -- it's in the Opinion before the Opinion that deals with interest. So in the Opinion that's reported at 422 F.3d 949 --

JUDGE KLEINFELD: Can you read the language?

MR. FISHER: I'm sorry, I don't have the copy of the Opinion before me, Your Honor, but it's the last -- it's the very end of the Opinion, and this Court says the parties are to bear their own costs. There's something about giving --

JUDGE KLEINFELD: Does it say why or anything or is it just --

MR. FISHER: No.

JUDGE KLEINFELD: So we don't actually even know if it was contested or anything.

MR. FISHER: I don't know but it would have been because ordinarily -- at least in the ordinary course of business I don't know that costs would have been discussed in the appellate briefs debating the size of the punitive award and whether or not it was --

JUDGE SCHROEDER: Can you help me out just for a minute?

MR. FISHER: I -- sure.

JUDGE SCHROEDER: Why the Supreme Court -- the little history of this in the Supreme Court. I didn't quite understand why this is bounced back to us to decide the procedure --

MR. FISHER: The reason why, Judge Schroeder, is because after we got the Supreme Court's decision suggesting that a one to one ratio is appropriate and therefore a 570 million

dollar judgment was appropriate, we -- the question arose whether Supreme Court Rule 42.1, which is the Supreme Court equivalent of Rule 39 -- I'm sorry, Rule 37, kicked in and required -- and was going to require the Court to speak about interest in its mandate. And so to protect ourselves we asked Exxon whether they would agree that we were entitled to interest or whether we needed to file something to protect ourselves in the Supreme Court. They advised that we ought to file something to protect ourselves. So we filed something in the Supreme Court that said in the alternative either find that Rule 42.1 doesn't present any problem and just send the case back unencumbered or if you find that 42.1 does apply in the way that this Court has found that Rule 37 applies when it reduces a punitive judgment that we ought to get our interest. Exxon --

JUDGE KLEINFELD: And --

MR. FISHER: I'm sorry.

JUDGE KLEINFELD: Oh, I'm sorry. Go ahead and --

MR. FISHER: Oh, and Exxon took the position that 42 -- Rule 42 did apply and asked the Court to deny its interest. And I think at that point, with the Court, all on summer vacation, not used to deciding this, and I think frankly the Court was taken by surprise. I think the *Briggs* situation is somewhat different than this situation and a situation where a court orders a judgment -- money to be recovered for the very first time in litigation. And I think the Court was unexpectedly caught between its rule and its -- perhaps its ordinary practices and just decided to send the case back.

JUDGE KLEINFELD: Counsel, let me take you back to costs. The Supreme Court knew it was making a split decision, and I think they were divided on whether to just throw out the award all together because of the vicarious liability aspect possible under the instructions. But they were split four to four so they had to let our award -- our two and a half -- or rather our liability determination stand. However, regarding costs, they had the same discretion we

do. It's worded differently, but they can do whatever they want on costs. And what they said in their mandate it they said the judgment of the above court, that's us, is vacated with costs. And then down below they award the costs to the penny. And then considering our record, I'm a little wary of getting out in front of the Supreme Court and saying we're fairer than they are.

[laughter]

MR. FISHER: I don't think you need to worry about that, Judge Kleinfeld, but the Supreme Court rule on costs is quite different than Rule 39. The Supreme Court rule on costs provides that if the judgment is at all disturbed, that is, if it's vacated, reversed or remanded, that the petitioner recovers costs, and I think they're --

JUDGE KLEINFELD: Not quite. Let's see. I've got the rule here, and what it says is just what you said, but then it has another clause. It says "unless the court otherwise orders."

MR. FISHER: Right. But --

JUDGE KLEINFELD: And "unless the Court otherwise orders" means they can do whatever they want.

MR. FISHER: Right. But I think that it's important to understand there's two different -- even for a starting place there's two different presumptions in place. The presumption in the Supreme Court is that if the judgment is disturbed at all then the petitioner recovers costs, and I think there was good reason for that. If you succeed in being the one in a hundred case that the Supreme Court grants and you get anything out of the court then it's reasonable to recover costs and remember, they're very, very small in U.S. Supreme Court. The only costs you can recover is there's filing fee and the costs of printing the briefs. And so this case, which has costs at $14,000, the Supreme Court was actually a very, very large cost award, as U.S. Supreme Court cost awards go. Now, in contrast, Rule 39 has the opposite presumption, Its presumption in a mixed case, at least it has an opposite presumption in a

mixed case, and that presumption is that the parties bear their own costs unless the Court orders otherwise so that --

JUDGE KLEINFELD: Well, let's see. The difference in the wording that matters here is their rule says "unless the court otherwise orders," and our rule says "costs are taxed only as the court orders" in the mixed case. Not it -- it doesn't seem to make much of a difference. Maybe a difference in presumption, but not much of one because there's very presumption that the winner gets costs anyway.

MR. FISHER: Well, remember, in the U.S. Supreme Court, if you get a case vacated and remanded you're not necessarily the winner. There's not a prevailing party rule even there. Again, it's just a default rule that if you are successful, they're a very, very rare, rare, rare party to get a court to disturb a judgment. And I think -- we can mince the words, but I think a fair reading of the Supreme Court rules is there's a presumption that costs are awarded in those circumstances. And again, they're going to be very small. In this -- in this Court, under Rule 39, the presumption, I think if it's not in the language, Judge Kleinfeld, I think it certainly is in the cases. Exxon cannot cite a single case where costs have been awarded to a defendant in a mixed judgment situation like this one. The closest it comes is *Republic Tobacco* --

JUDGE KLEINFELD: Oh, I actually remembered -- remembered in a case I was on, but it was just not a significant amount of money, and I don't think it was even published opinion. Usually costs just doesn't matter much.

MR. FISHER: That's a fair statement, I think. But there are plenty of cases where it might. And the only published opinion that Exxon can cite is *Republic Tobacco* that the Seventh Circuit case -- where actually in the Seventh Circuit's own opinion it said the parties to bear its own costs, and then oddly enough on remand, the district court nonetheless went ahead and awarded costs to the defendant. The Seventh Circuit, as the case came back up, held that the -- that it would not disturb the discretion of the trial court which is an odd ruling

in that even Exxon, at page six of its own brief, acknowledges that this Court is the only court that can award costs to Exxon on --

JUDGE KLEINFELD: Let's say hypothetically that the Supreme Court, instead of cutting your five billion, had cut it at -- to 500 million -- had cut it to one dollar. They said well, they're entitled to nominal punitive damages. I can't think of a theory right offhand --

[laughter]

JUDGE KLEINFELD: -- but let's say they had done that. You'd still be the prevailing party entitled to costs?

MR. FISHER: I -- well, we're not -- we're not saying that we're the prevailing party; we're thinking a mixed result.

JUDGE SCHROEDER: Mixed result.

MR. FISHER: But we think that this Court could have, under its discretionary decision, reversed its subsection e, find that the parties should nonetheless bear their own costs, but I do think --

JUDGE KLEINFELD: What I'd like to do in that case, if they cut it down from five billion to one dollar, would be no costs.

MR. FISHER: I think you could do that. I think that in an extraordinarily extreme situation like that you might -- you might be able to award costs to the defendant, but --

JUDGE KLEINFELD: Where do you draw the line? I mean you're not at the one dollar --

MR. FISHER: Yeah.

JUDGE KLEINFELD: -- you're not at a nominal amount, but five hundred million --

MR. FISHER: Well, I'm happy to draw the line for this Court --

JUDGE KLEINFELD: At this point, I'm trying to find --

MR. FISHER: I know how it is to get its --

JUDGE KLEINFELD: -- any --

MR. FISHER: I'm sorry. I'm happy to draw the line where this Court draws it in its own precedents. *Southern Union* is a 98% reduction,

JUDGE SCHROEDER: But --

MR. FISHER: -- *Planned Parenthood* is a 94% reduction. *Baines* --

JUDGE SCHROEDER: It's not nominal.

MR. FISHER: -- was an over 90 percent reduction. And then just to read the number in raw terms, it is one of the -- we believe it's the fourth largest punitive damage verdict upheld in a federal --

JUDGE KLEINFELD: Are there any where it was contested?

JUDGE SCHROEDER: You --

MR. FISHER: I'm sorry?

JUDGE KLEINFELD: Are there any of those no-costs considerable great reduction where it was contested and the courts discussed it?

MR. FISHER: I believe in the three cases I just cited to you from this Court, they're all at the end of the Opinion, and so there -- I can certainly say there isn't extensive consideration but we submit that doesn't show that -- that it doesn't matter, it's just sort -- it's so routine and easy that this Court has a custom that it follows and just because there's a lot of money and a well-financed set of briefs on the other side of this case, this Court shouldn't --

JUDGE SCHROEDER: Okay.

MR. FISHER: -- deviate from that --

JUDGE SCHROEDER: You've had --

MR. FISHER: -- typical practice.

JUDGE SCHROEDER: -- you have used your time.

MR. FISHER: Thank you.

JUDGE SCHROEDER: Thank you.

MR. FISHER: [off mic] The Court [unintelligible] if I may take three seconds to make two points. I won't take any more time than that.

JUDGE SCHROEDER: Okay.

JUDGE KLEINFELD: Very, very quickly.

MR. FISHER: Just on internal rate of return point, Your Honors, I don't know if this came out in the briefs. That's an average rate across all of Exxon's capital. It's a risk-adjusted rate. There were a lot of dry holes that were drilled. This is marginal dollars. It has nothing to do whatsoever with the overall internal rate of return. And on the *Kaiser* question, *Kaiser* held that 1961 applies because that was the judgment. What *Kaiser* held is you couldn't apply interest going back to an earlier verdict, but to the judgment, and 1961 did apply by its own terms, and of course the 1961 rate applied under those circumstances. Here, we're talking about applying interest to a judgment --

JUDGE SCHROEDER: Okay.

MR. FISHER: -- to which 1961 does not apply by its own terms.

JUDGE SCHROEDER: Okay.

MR. FISHER: Thank you very much.

JUDGE SCHROEDER: Thank you. The matter just argued is submitted for decision and that concludes the Court's calendar. The Court stands adjourned.

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