UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 04-35182
No. 04-35183

In re: the EXXON VALDEZ

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

Plaintiffs-Appellees-Cross-Appellants,

v.

EXXON CORPORATION, et al.,

Defendants-Appellants-Cross-Appellees.

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

BRIEF OF PLAINTIFFS

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CORPORATE DISCLOSURE STATEMENT

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

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INTRODUCTION

This fifteen-year-old case returns to this Court following the district court's "exacting review of the $5 billion punitive damages award not once or twice, but three times, with a more penetrating inquiry each time." Order 364, ER 648.[1] The first review came in post-trial Orders 264 through 275, which this Court's 2001 decision affirmed in all respects except for remanding so the district court could consider "in the first instance" "the constitutionality of the amount of the award in the light of the guideposts established in *BMW* [*v. Gore*, 517 U.S. 559 (1996)]." *In re: the Exxon Valdez*, 270 F.3d 1215, 1241 (2001). The second review, on that remand, applied the standards described in *BMW* and *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and held that the jury's verdict satisfied those standards, but reduced the award as this Court directed. ER 505. The third review followed this Court's *sua sponte* suggestion (supported by plaintiffs but opposed by Exxon) of a further remand to consider the impact of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003).

This appeal addresses the product of the district court's third review, Order 364, in which the district court found that Exxon's conduct was "highly

[1] This brief adopts the same form as Exxon's brief for record citations. *See* Exxon Br. 2 n.1. The Supplemental Excerpts of Record ("SER") contain trial transcript excerpts, beginning at SER 1.

reprehensible," ER 621; determined that the harm to the class was $513.1 million, before taking into account unquantified actual and potential harm, ER 629; and noted that both *State Farm* and this Court's subsequent decision in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), endorse single-digit ratios between harm and punitive damages. ER 646-49. This left the district court with "no principled means by which it can reduce [the jury's $5 billion] award." ER 649. Recognizing, however, that this Court had directed it to cut the award, the district court determined that a $4.5 billion judgment represented an appropriate "means of resolving the conflict between its conclusion and the directions of the court of appeals." ER 650.

Plaintiffs submit that Order 364's factual clarifications and legal analysis show not only that $4.5 billion is constitutionally permitted, but also that the full $5 billion verdict should be reinstated, as requested by plaintiffs' cross-appeal.

Exxon contends the "most the Constitution permits" is $25 million (less than 5% of the quantified harm and equal to 1.5% of what the jury awarded), or an average of $765 for each of the 32,677 punitive damage class members. Exxon Br. 3. Exxon's arguments in support of this position rewrite the evidence presented to the jury and the district court and distort the opinions of this Court and the district court. Moreover, Exxon ignores the enormous – and ultimately

dispositive – differences between the controlling facts in the few Supreme Court decisions setting aside punitive damages awards on due process grounds and the circumstances here. For example:

• The defendant in *BMW* failed to disclose that it had repaired blemishes on new vehicles, which caused a single plaintiff $4,000 harm; the passing-off conduct in *Cooper* "was more foolish than reprehensible" and resulted in no "significant actual harm to consumers or to [plaintiff]," *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002); and *State Farm* involved 18 months of anxiety to an insured couple when the defendant initially said it would not pay a verdict against them. By contrast, Exxon repeatedly and deliberately allowed a relapsed alcoholic to command a fully-loaded supertanker through Prince William Sound, which caused a "notorious" disaster, the "largest oil spill in United States history." *United States v. Locke*, 529 U.S. 89, 94-96 (2000). *See* ER 575-76, 609-620. Exxon shut down some of the richest fisheries in the world and caused $513 million of private economic harm, in addition to incalculable non-economic harm, to 32,677 class members.

• The ratios between the punitive verdicts and harm in *BMW, Cooper,* and *State Farm* ranged from 90:1 to 500:1. By contrast, the verdict here involves a 9.74:1 ratio, a ratio that becomes even smaller after one takes into account

additional, but unquantifiable, actual and potential harm. ER 621-29, 633-35. The only Supreme Court decision involving an analogous ratio upheld a punitive verdict 10 times the potential harm. *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993).

• The punitive verdicts in *BMW, Cooper* and *State Farm* "dwarfed" comparable statutory penalties. *State Farm,* 538 U.S. at 428 (verdict 14,500 times comparable penalty); *Cooper,* 532 U.S. at 442-43 (180 times); *BMW,* 517 U.S. at 584 (1,000 times). By contrast, Exxon's misconduct exposed it to penalties ***exceeding*** the jury's verdict. ER 640-46.

• The *BMW* and *State Farm* verdicts punished defendants for conduct toward persons beyond the court's jurisdiction and exposed defendants to "multiple punitive damages awards for the same conduct." *State Farm*, 538 U.S. at 423; *accord BMW*, 517 U.S. at 593 (Breyer, J., concurring). By contrast, Exxon's successful request for a mandatory punitive damages class ensured that it would be punished only once for its misconduct, even though it injured tens of thousands who otherwise could have sued separately. 270 F.3d at 1225; ER 608-09.

Accordingly, nothing in the Supreme Court's recent punitive damages cases casts doubt on this verdict, which, as the district court found, addresses a situation "in an entirely different galaxy." Order 364, ER 621. Exxon's deliberate decisions

to allow Joseph Hazelwood to captain its supertanker debilitated an entire region's way of life. Although other proceedings addressed the oil spill's environmental impacts, Exxon never has been punished for the catastrophe's human toll. As the district court explained, the jury's $5 billion punitive verdict is well within constitutional bounds.

JURISDICTION

Plaintiffs agree with Exxon's Statement as to Exxon's appeal. This Court's jurisdiction over Exxon's appeal confers jurisdiction over plaintiffs' cross-appeal, which was timely filed on February 27, 2004. FRAP 4(a)(3); *Bryant v. Technical Research Co.*, 654 F.2d 1337, 1341-42 (9th Cir. 1981).

STATEMENT OF ISSUES

1. On Exxon's appeal, whether the $4.5 billion punitive damages judgment exceeds the maximum amount due process allows in this case.

2. On plaintiffs' cross-appeal, whether the jury's $5 billion punitive damages verdict is within the maximum amount due process allows in this case.

STATEMENT OF THE CASE

Repeating assertions that this Court rejected three years ago, Exxon opens by claiming that the Exxon Valdez disaster happened only because the third mate failed to make a turn as he had been instructed, with no culpability on Exxon's

part. Exxon Br. 5. Exxon suggests, as alternatives, that Captain Joseph Hazelwood was just a "social" drinker who was not drunk the night of the grounding; that if he was drunk, Exxon management had no reason to suspect he had relapsed; that if Exxon knew he had relapsed, Hazelwood's intoxication did not cause the disaster; and that even if Exxon knew of Hazelwood's relapse, and deliberately put him in a position where his intoxication caused the grounding, the jury did not base its punitive verdict on Exxon's own conduct. Exxon Br. 5, 8-9, 24, 33-34.

Exxon made all these arguments on its first appeal. Plaintiffs' responsive brief described extensive evidence demonstrating Exxon management's knowledge of Hazelwood's relapse; the corporate culture that led to Exxon's inexcusable refusal to act when it learned this fact; the staggering amount of alcohol Hazelwood consumed before the grounding; and the causal link between Hazelwood's drinking and the disaster. Plaintiffs' Br. 10-47, Nos. 97-35191, 97-35192 (Aug. 28, 1997). This Court then rejected Exxon's story, 270 F.3d at 1221-23, 1234, 1237-38, as did the jury and the district court at every step of this case.[2] As this Court summarized:

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[2] Order 364, ER 574-77, 609-621; Order 358, ER 506-08, 527-30; Order 265, SER 1149-1155, Order 267, SER 1166-67, Order 268, SER 1194-97; ER 354-55, 375-76 (verdicts).

> The jury could infer from the evidence that Exxon knew Hazelwood was an alcoholic, knew he had failed to maintain his treatment regimen and had resumed drinking, knew that he was going on board to command its supertankers after drinking, yet let him continue to command the Exxon Valdez through the icy and treacherous waters of Prince William Sound.

270 F.3d at 1237-38. *See also id.* at 1234 ("Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence"). The jury could find that Hazelwood's leaving the bridge, which Exxon stipulated "was a legal cause of the oil spill," 5:9-13, "was an extraordinary lapse of judgment caused by Captain Hazelwood's intoxication." 270 F.3d at 1223.

Exxon's recklessness foreseeably and forever changed the lives of tens of thousands of people. The Exxon Valdez discharged 11 million gallons of oil into Prince William Sound, SER 990, which spread over 600 miles, 5449:4-7, SER 1013-1032, roughly the distance between San Francisco and Seattle. The spill caused economic harm of $513,147,740 to 32,677 class members, including commercial fishermen, seafood processors, Natives engaged in subsistence activities, landowners, area businesses, and others. Order 364, ER 625-29. The spill also inflicted unquantified harm "beyond the purely economic." 270 F.3d at 1242. It caused high incidences of "severe depression, post-traumatic stress

disorder, [and] generalized anxiety disorder," as well as "social conflict, cultural disruption and psychological stress." Order 364, ER 613.

PROCEDURAL HISTORY

After the grounding, suits were filed on behalf of more than 30,000 individuals, businesses, native corporations and local governments. On Exxon's motion, the district court certified a mandatory punitive damages class consisting of ***all*** persons seeking punitive damages arising out of the grounding, "so the [punitive] award would not be duplicated in other litigation and would include all punitive damages the jury thought appropriate." 270 F.3d at 1225. During the four-and-one-half-month trial in 1994, the jury heard 146 witnesses and considered 1099 exhibits. After deliberating for 14 days in Phase III, the jury returned a punitive damages verdict of $5 billion. This Court determined that "[t]here was substantial evidence to support the jury verdict," 270 F.3d at 1237, leaving open only the question of the constitutionality of the amount.

The State of Alaska and the federal government also brought criminal charges and civil claims against Exxon, which soon settled. Although Exxon suggests those public settlements somehow should limit its punitive damages liability to the individual victims of the oil spill, Exxon Br. 6-8, 37, this Court has explained that the governmental proceedings addressed only "harm to the

environment and natural resources" and had nothing to do with harm to the individuals who make up the punitive damages class. 270 F.3d at 1228. Nor do the district court's comments at Exxon's 1991 criminal sentencing, Exxon Br. 7-8, carry any weight. The evidence presented in this case, which was not available to the district court in 1991, dramatically altered the district court's views as to the reprehensibility of Exxon's misconduct and the harm it inflicted. Order 364, ER 642 n.111. The only ongoing significance of the criminal proceedings is "that Exxon has admitted criminal responsibility for its conduct." ER 642-43.

STANDARD OF REVIEW

These cross-appeals present the question whether the jury's $5 billion verdict exceeds "the maximum [punitive] award consistent with constitutional principles and the facts." *Leatherman,* 285 F.3d at 1147. Although the district court's determination of this ultimate legal question is subject to *de novo* review, *Cooper*, 532 U.S. at 436, this Court "must accept the underlying facts as found by the jury and the district court" unless they are clearly erroneous. *Leatherman*, 285 F.3d at 1150; *accord Cooper*, 532 U.S. at 435, 440 n.14; *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1334 (11th Cir. 1999). Thus, for example, this Court must defer to the district court's assessments regarding the "character of the defendant's conduct" and "the extent of [the plaintiffs'] injury." *Cooper*, 532 U.S.

at 432, 439 n.12, 440 n.14. This is so because the district judge "sat through the trial, heard the testimony, observed the witnesses and had the unique opportunity to consider the evidence in the living courtroom context, while [an appellate court has] only the cold paper record." *Johansen*, 170 F.3d at 1335 (quotation omitted). Here, the district judge had far more than a "cold paper record," having presided over a four-and-one-half-month trial and managed the litigation – both civil and criminal – for 15 years.

SUMMARY OF ARGUMENT

I. The district court complied with this Court's mandate when it reviewed the verdict under *BMW's* guideposts "in the first instance," carefully considered this Court's guidance, found that the jury's award comported with due process, but nevertheless reduced the verdict by $500 million. In so finding, the district court properly construed the facts in the light most favorable to plaintiffs. Further, the district court adhered to Supreme Court precedent when it focused on whether Exxon had "fair notice" of the punishment it faced for this disaster and concluded that its task was to decide if the jury verdict was "grossly excessive," not whether it achieved some ideal amount of punishment and deterrence.

II. The district court's application of the *BMW* guideposts demonstrates that the $5 billion punitive verdict is not constitutionally excessive.

A. The district court properly found that Exxon's conduct was highly reprehensible. Exxon knew that drunken misjudgments by the master of the Exxon Valdez posed an enormous risk to the livelihood and culture of over 30,000 people. Exxon easily could have avoided that risk by putting a sober captain at the helm. Nevertheless, Exxon repeatedly and deliberately chose to keep Hazelwood in command of its supertanker while it crossed the Sound's resource-rich waters, with predictably tragic consequences.

B. The relationship between the punitive verdict and the harm falls well within constitutional limits. The ratio between the verdict and the $513 million in quantified harm is 9.74 to 1, within the single-digit range the Supreme Court and this Court have held presumptively valid – even before taking into account the unquantified harm Exxon inflicted on the plaintiffs and additional potential harm that Exxon fortuitously avoided. In computing the ratio, the district court evaluated Exxon's claim that the harm should be reduced by amounts Exxon paid after the disaster and properly rejected that argument based on the facts of this litigation.

C. Comparable penalties afforded Exxon notice "that billions of dollars were at stake if it were to criminally spill a tanker-load of oil in Prince William Sound." Order 364, ER 644. The relevant benchmarks here are "[c]eilings," 270

F.3d at 1245, that is, statutory maximum penalties. Criminal penalties alone – calculated according to statutes under which Exxon was indicted – could have exceeded $5 billion. Civil penalties could have exceeded $80 million, easily satisfying *State Farm*'s suggestion that a punitive award may be as much as 100 times greater than a statutory civil fine. In response to the spill, state and federal legislatures increased civil penalties to $1.3 billion for spilling part, and $4.3 billion for spilling all, of the oil from a tanker the size of the Exxon Valdez.

ARGUMENT

I. The District Court's Analysis Followed Both This Court's Mandate and the Supreme Court's Due Process Jurisprudence.

Before discussing the due process analysis, we address Exxon's unjustified attacks on the district court's analytical framework. Exxon Br. 13-31.[3]

A. This Court's Mandate Shapes, But Does Not Predetermine, These Proceedings.

The district court followed the law of mandate. This Court held that the $5 billion punitive award "must be reduced," 270 F.3d at 1246, and the district court recognized it "must do that." Order 364, ER 649. At the same time, this Court also directed the district court to apply the appropriate due process standards "in the first instance," 270 F.3d at 1241. If this Court had already decided the

[3] Section II of this brief will discuss Exxon's specific arguments about the *BMW/State Farm* factors.

constitutional issues, as Exxon contends, Exxon Br. 13-14, there would have been no reason for this open-ended remand. In response, the district court did reduce the award as directed, while advising this Court that its "exacting review" under the current constitutional standards unavoidably led it to conclude that "a $5 billion award was justified by the facts of the case." ER 648.

"[T]he rule of mandate is designed to permit flexibility where necessary, not to prohibit it." *United States v. Kellington*, 217 F.3d 1084, 1095 n.12 (9th Cir. 2000). "[T]he ultimate task is to distinguish matters that have been decided on appeal, and are therefore beyond the jurisdiction of the district court, from matters that have not." *Id.* at 1093. If an issue was ***not*** "decided explicitly or by necessary implication in [the] previous disposition," neither the district court nor this Court is bound by suggestions or observations in that disposition – especially with respect to "thorny" issues that require careful and detailed analysis, such as those here. *Rebel Oil Co. v. Atl. Richfield Co.*, 146 F.3d 1088, 1093-94 (9th Cir. 1998) (internal quotation omitted); *accord Russell v. Commissioner*, 678 F.2d 782, 785 (9th Cir. 1982). And even if a previous disposition ***did*** decide an issue, the "law of the case" doctrine permits further consideration in light of new authority and circumstances. *Tahoe-Sierra Pres. Council, Inc. v. Tahoe Reg'l Planning Agency*,

216 F.3d 764, 786-88 (9th Cir. 2000); *United States v. Cuddy,* 147 F.3d 1111, 1114 (9th Cir. 1998).

Under these principles, this Court's prior suggestions regarding the *BMW* factors "to aid their consideration" on remand, 270 F.3d at 1241, did not predetermine the result in the district court. Nor is this Court bound by its view in 2001 that a $5 billion award was "too high." 270 F.3d at 1246. For example, this Court said then that "it is difficult to determine the value of the harm from the oil spill in the case at bar" and thought the punitives-to-harm ratio might be "between 12 to 1 and 17 to 1." 270 F.3d at 1243. The district court now has clarified as a factual matter that the ratio is 9.74:1, before accounting for additional unquantified and likely harm. ER 633. The intervening decisions in *State Farm*, 538 U.S. at 425, and *Zhang*, 339 F.3d at 1044, have established that single-digit ratios are presumptively permissible, and *State Farm* has made clear that punitive awards may exceed comparable penalties by large multiples. 538 U.S. at 428-29.

B. The District Court Appropriately Evaluated the Jury's Verdict.

The district court's opinion consistently demonstrates its "independent evaluation of the *BMW* guideposts as applied to the facts of this case." ER 649; *see also* ER 589-90, 611-21, 625-29, 633-35, 642-46, 648. Though Exxon would prefer to go further and reargue the evidence on a cold record ten years later, due

process review does not allow a defendant to ignore that a trial occurred. Rather, the evidence must be "viewed in [the plaintiffs'] favor." *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1014 (9th Cir. 2004); *see also Cooper*, 532 U.S. at 435, 439 n.12. The district court properly gave "due deference" to the jury's fact-finding role, and then used *State Farm*'s "objective criteria" to evaluate independently Exxon's conduct in light of the facts that the jury reasonably could have found on this evidence. ER 611.

As part of its effort to persuade this Court to act as a super-factfinder, Exxon claims the jury never decided "whether Exxon was at fault independently of Hazelwood" and accuses the district court of relying on an "unsupportable hypothesis" that the jury found "'Exxon's management knew that Captain Hazelwood had resumed drinking, knew he was drinking on board their ships, and knew that he was drinking and driving.'" Exxon Br. 24 (quoting ER 617). But this Court squarely rejected Exxon's same argument in 2001, holding that "[t]he jury could infer from the evidence" that Exxon "knew . . . [Hazelwood] had resumed drinking" and "knew that he was going on board to command its supertankers after drinking." 270 F.3d at 1237-38. Accordingly, this Court concluded that "the jury found that the corporation, not just the employee, was reckless." *Id.* at 1234.

Moreover, Exxon's specious claim that the jury never found it responsible for the spill rests on an instruction delivered in Phase I of the trial. *See* Exxon Br. 22 n.6, 24. This appeal, however, addresses ***only*** Phase III, when "[t]he jury had a second chance ... to deny punitive damages altogether." 270 F.3d at 1233. The Phase III instructions told jurors that their Phase I recklessness verdict did ***not*** require them to award punitive damages against either Hazelwood or Exxon and that they could award punitive damages against one defendant but not the other. SER 1133, 1136. Several instructions told the jury to focus on factors peculiar to Exxon's conduct. *E.g.*, SER 1139-43. Based on these instructions, the jury awarded $5 billion to punish and deter Exxon – a verdict that could not plausibly be attributed to a Phase I instruction delivered months before.[4]

C. The District Court Properly Focused on "Fair Notice" Principles.

The due process limitation on punitive damages derives from the principle that "elementary notions of fairness enshrined in our constitutional jurisprudence

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[4] Exxon also argues from press reports suggesting that the jury did not base its Phase I verdict on the recklessness of Exxon's upper management. Exxon Br. 9. Exxon knows better: these articles do not have any legal significance. Fed. R. Evid. 606(b), 802. Even if press reports mattered, the most probative would be the one that appeared immediately after trial, in which jurors said they found Exxon reckless on the basis of ***both*** upper management's conduct and Hazelwood's actions. Natalie Phillips, *We Did the Right Thing*, Anchorage Daily News, Sept. 18, 1994, at A6.

dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574); *accord* 270 F.3d at 1240. The Supreme Court has held repeatedly that this "fair notice" inquiry requires courts to consider the harm that was likely to occur from the defendant's conduct, not merely the harm did occur, and the maximum potential penalties that could be imposed, not merely the actual penalties imposed. *See* §§ II.B, C, *infra* (addressing Exxon's arguments in the context of the guideposts). In light of the clear Supreme Court guidance, Exxon's attack (Exxon Br. 26-28) on the district court for employing a "forward-looking inquiry from Exxon's point of view ***prior*** to the grounding," Order 364, ER 603, is frivolous.

D. The District Court Paid Appropriate Attention to Both Punishment and Deterrence.

The *BMW* guideposts do not, as Exxon would like, allow a reviewing court to "limit[] punishment to 'the least amount'" necessary to deter future misconduct. Exxon Br. 29. As an initial matter, "deterrence is not the only purpose served by punitive damages." *Cooper*, 532 U.S. at 439. Instead, punitive damages serve two time-honored goals: "to punish reprehensible conduct and to deter its future occurrence." 270 F.3d at 1241 (internal quotes omitted); *accord State Farm*, 538 U.S. at 416 ("deterrence and retribution").

Even with respect to deterrence, *Cooper* squarely held that due process permits juries to "insist that they are willing to tolerate some loss in economic efficiency in order to deter what they consider morally offensive conduct." 532 U.S. at 439-40 (quotation omitted); *see also Ciraolo v. New York*, 216 F.3d 236, 246 n.10 (2d Cir. 2000) (Calabresi, J., concurring) (punitive verdicts may reflect judgment that, "for certain conduct, a cost-benefit analysis is inappropriate"). Accordingly, when applying the *BMW* guideposts, a reviewing court may not seek to fix any precise "right" amount of punitive damages, much less the "least amount" necessary for deterrence.[5] "The judicial function is to police a range, not a point," *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) – that is, to ensure only that the award is not "grossly excessive." *BMW*, 517 U.S. at 574.

II. The District Court Properly Applied the Due Process Guideposts in Concluding that the $5 Billion Award Was Not Grossly Excessive.

A. Exxon's Conduct Was Highly Reprehensible.

The reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness of a punitive damages award." *State Farm*, 538

[5] The district court properly noted that Exxon's financial condition also obviates concerns about over-deterrence. ER 638-39; *see State Farm*, 538 U.S. at 427-28 (not "unlawful or inappropriate" to consider a defendant's wealth, though it "cannot justify an otherwise unconstitutional punitive damages award").

U.S. at 419 (quoting *BMW*, 517 U.S. at 575). The district court correctly found that Exxon's decision "deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil" was "highly reprehensible" and "many degrees of magnitude more egregious" than the conduct in *State Farm* or *BMW*. ER 575-76, 609-621.

That Exxon "did not spill the oil on purpose," Exxon Br. 32 (quoting 270 F.3d at 1242), does not undercut the district court's finding that Exxon's conduct was highly reprehensible. Creating and then consciously disregarding risks to others is highly reprehensible conduct.[6] This is especially so when the harm likely to be inflicted dwarfs the cost of avoiding the harm.[7] Here, Exxon knew that keeping Hazelwood in command of the Exxon Valdez after his relapse created

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[6] *See, e.g., Niebel v. Trans World Assur. Co.*, 108 F.3d 1123, 1132 (9th Cir. 1997); *Hopkins v. Dow Corning Corp.*, 33 F.3d 1116, 1127 (9th Cir. 1994); *McClain v. Metabolife Int'l, Inc.*, 259 F. Supp. 2d 1225, 1232 (N.D. Ala. 2003); *Union Pacific R.R. v. Barber*, ___ S.W. 3d ___, 2004 WL 352525 (Ark. 2004); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 806 (Cal. App. 2003); *Weidler v. Big J Enterprises, Inc.*, 953 P.2d 1089, 1101-02 (N.M. App. 1997).

[7] *See, e.g. White v. Ford Motor Co.*, 312 F.3d 998, 1029 (9th Cir. 2002) (Graber, J., concurring in part and dissenting in part); *Grimshaw v. Ford Motor Co.*, 174 Cal. Rptr. 348, 361, 388 (Cal. App. 1981) (failure to cure known defects in Ford Pinto); *cf. United States v. Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (standard of care measured in light of comparison of likely harm to burden of avoiding harm).

enormous risks that it easily could avoid, but it deliberately chose not to do so. In particular:

- Exxon knew that Prince William Sound was "highly valuable for its fishery resources," Order 364, ER 616, that thousands of fishermen and their families depended on the Sound for their livelihood, and that thousands of Native Alaskans based their culture and diet on the bounty of the Sound. Through the proceedings leading to approval of the Trans-Alaska Pipeline, Exxon knew "[t]he economy of this area depends almost entirely on commercial fishing, the processing of the catch, and related activities." SER 1775; *see also* SER 1771-73, 1782-84, 1790-97.

- Exxon knew that carrying huge volumes of crude oil through "the icy and treacherous waters of Prince William Sound," 270 F.3d at 1238, was inherently "a dangerous business." Order 364, ER 576. Exxon shared the common knowledge that "a major oil spill in the Valdez area would cause [an] incalculable disaster" to the fisheries. SER 1797; *see also* 6:21-7:2, 1623:2-14, 3838:1-4, 7144:7-19, 7149:2-7150:20, 7166:20-7167:11, SER 889, 913-15, 1786-1803.

- Exxon knew that the ***only*** effective defense against a massive spill was "prevention." 7193:16-21. Equipment adequate to contain such a spill did not

exist in Alaska. 7192:17-7193:15; SER 1096. The official contingency plan for the area admitted that a spill of over 200,000 barrels (8.4 million gallons) could not be contained, 7149:2-7150:20, 7166:20-7167:2, SER 889, 913-15, and Exxon acknowledged that the oil from a spill that large would "persist for years." SER 1114. Exxon USA's President later told Congress that the Exxon Valdez spill unfolded "pretty well as much as envisioned" in advance. SER 889, 1078. Exxon, however, regarded the risk of such a spill "as acceptable." *Id.*

- Exxon knew that allowing a captain with an alcohol-abuse problem to command a tanker in Prince William Sound increased exponentially the likelihood of a major spill. Putting a drinking captain in command was, as Exxon Shipping's President recognized, "a potential for a disaster." 1622:24-1623:14; *see also* 1071:20-24 ("dangerous"), 1626:2-8, 2065:6-8, 2258:3-25, 2532:7-15, 2560:6-9, 2911:23-2912:22, 3615:6-24; SER 889, 1010.

- Exxon knew that Hazelwood had "fallen off the wagon." 270 F.3d at 1223.[8] Despite Exxon's wishful thinking that Hazelwood "took care to conceal" this behavior, Exxon Br. 34, Hazelwood made no attempt to hide his drinking.

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[8] *See* 371:20-375:5, 381:11-382:5, 1004:9-1006:10, 1093:23-25, 2142:6-2144:5, 2150:6-2153:12, 2172:7-2210:21, 2488:22-2493:14, 2497:1-2498:4, 2566:10-2567:8, 2903:22-2904:12, 2914:18-2915:23, 3618:2-15, 3720:8-3721:9, 3726:22-25; SER 889, 918-20, 1319, 1325-44.

353:2-7. Fifteen witnesses described ***at least*** 35 occasions before the date of the grounding on which Hazelwood drank, usually with other Exxon personnel.[9]

- Exxon knew that "[t]he first drink [Hazelwood] had after he had been rehabilitated was a basis for dismissal." SER 997; *see also* 1625:25-1626:1, 1940:20-1941:12, 1951:2-1952:8, 2059:7-9, 2551:15-2552:1, 2560:1-5, 3607:12-14, 3638:14-19. "[K]nowing that [Hazelwood] had violated his treatment regimen by subsequently resuming drinking" and was acting improperly aboard ship, Exxon could have "fired [him], or at the very least transferred [him] to less dangerous duty," such as a shoreside position. 270 F.3d at 1238; *see* 1892:10-1893:10, 2329:9-21; SER 889, 1007. Exxon had sober individuals available to captain the Exxon Valdez. SER 970, 991.[10]

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[9] 142:24-146:1, 151:5-154:5, 201:3-203:9, 352:2-353:1, 365:11-378:14, 384:16-385:23, 416:2-417:6, 699:10-25, 875:1-21, 1001:1-25, 1004:9-1016:18, 1093:12-1095:17, 1693:16-1694:10, 1696:8-24, 1708:16-1712:12, 1970:13-1972:14, 1980:1-1982:8, 2140:15-2153:23, 2172:2-2204:14, 2222:22-2225:24, 2408:8-24, 2488:5-2491:12; *see also* SER 1325-44 (three additional incidents revealed in related litigation). Even without the direct testimony that Exxon knew about Hazelwood's drinking, *see* n.8, one may infer an employer's knowledge from information generally known to co-workers. *Goodman v. Pennsylvania Turnpike Comm'n,* 293 F.3d 655, 671 (3d Cir. 2002). Hazelwood's relapse and his reputation as a "partier," 2952:15-17, and a "sailor who liked to drink," 2227:17-19, were well known throughout the Exxon fleet.

[10] Exxon suggests that its "policy to allow those who completed treatment to return to work" justified leaving Hazelwood in command, but that policy did not require putting Hazelwood back on board ship. SER 1007. As a result, Exxon's Chairman

- Exxon knew that Hazelwood's drinking was impairing his judgment.

Exxon Shipping's President heard that Hazelwood was acting "kind of crazy or kind of strange." 2914:18-2915:23. Those who reported his drinking believed "something was wrong with him." 2151:14. Hazelwood was abusive to his supervisor and other officers. 381:11-382:5; SER 1335-36. He was violating government regulations that prohibited drinking within four hours before returning to duty, 2222:22-2225:3, and ignoring Exxon's rules requiring him to remain on the bridge while transiting Prince William Sound, 1066:12-1067:15, 1111:7-25 – the very same behaviors that later caused the Exxon Valdez to ram into Bligh Reef. 270 F.3d at 1222-23, 1236-37; 5:9-13.

Exxon's behavior in the face of the known risks to the population of the Sound was egregious. As the district court found, "[f]or approximately three years, . . . [o]ver and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving" a 987-foot, 211,000-ton tanker, carrying 53 million gallons of toxic crude. ER 617; SER 921. This corporate decision furthered no business or societal purpose; Exxon could have transported oil to supply the

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thought the decision to do so was a "gross error" and a "bad judgment . . . on a going-in basis." SER 889, 1007, 1086, 1094. In any event, this Court has already held that such a policy was "of little significance" once Exxon learned that Hazelwood had resumed drinking. 270 F.3d at 1238.

country's energy needs with a sober captain at no extra cost. Instead, Exxon callously created the conditions for inflicting a massive disaster on tens of thousands of people—a disaster that Exxon envisioned in advance.

Exxon does not dispute that the district court's factual findings describe highly reprehensible conduct. Instead, it argues that "the evidence would not support" the findings that it knew Hazelwood had relapsed and that his drinking was a problem, Exxon Br. 33, and asserts that it thought Hazelwood engaged in only harmless "off-duty social drinking." *Id.* 34. But these factual issues are settled. This Court already has found that the "highest executives in Exxon Shipping" knew that Hazelwood "had fallen off the wagon and was drinking on board their ships and in waterfront bars." 270 F.3d at 1223. *See also id.* at 1234, 1237-38; Order 364, ER 575-76, 617-21. As this Court explained, "[t]he evidence established that Exxon gave command of an oil tanker to a man they knew was an alcoholic who had resumed drinking after treatment that required permanent abstinence, and had previously taken command in violation of Exxon's alcohol policies." 270 F.3d at 1234.

Given these circumstances, the district court correctly found that Exxon's historic wrong was highly reprehensible and "in an entirely different galaxy than selling repainted cars as new, passing off a product as that of a competitor's, or

refusing for eighteen months to pay an excess judgment of $185,849." ER 621. As discussed below, the five "*State Farm* reprehensibility factors," *id,* ER 612, confirm this conclusion, and Exxon's post-spill payments do not diminish the reprehensibility of its conduct.

1. The District Court's Reprehensibility Analysis Properly Considered All of the Harm to Class Members.

Conduct that inflicts "physical harm" is more reprehensible than conduct that causes solely "economic harm." *State Farm*, 538 U.S. at 419. "Physical harm," for due process purposes, includes emotional harm. *Planned Parenthood v. ACLA*, 300 F. Supp. 2d 1055, 1060 (D. Or. 2004); *Millazzo v. Universal Traffic Serv. Inc.*, 289 F. Supp. 2d 1251, 1257 (D. Colo. 2003); *Campbell v. State Farm Mut. Auto. Ins. Co.*, ___ P.3d ___, 2004 WL 869188 at *5-*7 (Utah 2004), *pet'n for cert. filed* (July 20, 2004) (No. 04-116); *Bocci v. Key Pharm. Inc.*, 76 P.3d 669, 674, *amended* 79 P.3d 908 (Or. App. 2003).

Exxon's actions caused serious emotional distress in addition to economic harm. When Exxon's spill shut down the region's fishing economy, it deprived fishermen of their livelihood for a substantial period of time. Common sense counsels that extinguishing a person's means of supporting their family will cause great emotional distress. And, as the district court found, several studies confirmed that "a high percentage of affected fishermen suffered from severe depression,

post-traumatic stress disorder, generalized anxiety disorder, or a combination of all three." ER 613; SER 1347-1508. Indeed, "the social fabric of Prince William Sound and Lower Cook Inlet was torn apart." Order 364, ER 613. Alaska Natives and others who relied on fish, plants and animals for food for their own tables experienced similar – or even greater – emotional distress. Order 364, ER 578; SER 1390-93, 1510-33. *See generally United States v. Alexander*, 938 F.2d 942, 945 (9th Cir. 1991) ("if [Alaska Natives'] right to fish is destroyed, so too is their traditional way of life"); *McDowell v. State*, 785 P.2d 1, 4 (Alaska 1989).

Exxon's attacks on the district court's recognition of these impacts are unfounded. Exxon first contends that settling the government's environmental lawsuits took the emotional and psychological spill effects off the table. Exxon Br. 37. But this Court has held the contrary, that "the harm and punishment" here are "distinct from the harm to the environment and natural resources" addressed in those actions. 270 F.3d at 1228. *See also id.* at 1221, 1223. The governments, in fact, lacked power to redress the personal economic and emotional injuries that Exxon's conduct inflicted on the 32,000 class members. *Alfred L. Snapp & Son, Inc. v. Puerto Rico*, 458 U.S. 592, 607 (1982) (state may assert only "quasi-sovereign" interest "apart from the interests of particular private parties"). Further, when some class members expressed concern that Exxon might later

contend the government settlement affected their claims (as it now has), the government and the district court assured them that this would not occur, and the settlement was clarified to confirm that "[n]othing in this Agreement . . . is intended to affect legally the claims, if any, of any person or entity not a Party to this Agreement." ER 246; SER 1121-30.

Second, Exxon argues that the district court improperly considered scientific studies because they did not become part of the record until the post-trial proceedings to evaluate the verdict in light of the post-trial decision in *BMW*. Exxon Br. 37.[11] But the studies only confirmed what human experience teaches: if the principal regional industry suddenly shuts down, grave social and emotional consequences inevitably ensue. In any event, Exxon did not object to the studies in the district court, instead relying below (as it does here, Exxon Br. 43) on its own post-trial declarations asserting "facts" far more debatable than the inevitable emotional devastation of class members following the spill. ER 411-467. Exxon cannot object now.

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[11] Contrary to Exxon's assertion, Exxon Br. 37, independent researchers unaffiliated with plaintiffs wrote the majority of the articles discussing the studies. SER 1363, 1412, 1458, 1510. Experts retained by plaintiffs wrote one of the articles. SER 1398. Another retained expert co-authored two other articles, based largely on work he performed before being retained. SER 1347, 1382.

Finally, Exxon contends that the Court should not consider non-economic harm because plaintiffs could not recover for it. But courts conducting due process reviews consider ***all*** harm inflicted when assessing reprehensibility and ratios, without regard to whether all harm was compensable. *See, e.g., EEOC v. W&O, Inc.*, 213 F.3d 600, 614 (11th Cir. 2000); § II.B.3.c., *infra*. Indeed, one of the historic purposes of punitive damages is "to compensate for intangible injuries, compensation for which was not otherwise available under the narrow conception of compensatory damages." *Cooper*, 532 U.S. 437 n.11; *accord Ciraolo*, 216 F.3d at 243-45 (Calabresi, J., concurring); *In re: Simon II Litigation*, 211 F.R.D. 86, 159 (E.D.N.Y. 2002). The award here serves that classic purpose.

2. The District Court Properly Weighed Exxon's Reckless Disregard of Health and Safety.

"[I]ndifference to or reckless disregard for the health and safety of others" is an "aggravating" factor in judging reprehensibility. *BMW*, 517 U.S. at 576; *accord State Farm*, 538 U.S. at 419. The district court appropriately found that "Exxon's decision to leave Captain Hazelwood in command of the Exxon Valdez not only showed a reckless disregard for the health and safety of those who lived and worked on the Sound, but also recklessly put the captain himself, his crew, and all of his rescuers in harm's way." ER 614-15; *see also id.*, ER 576-77; SER 1096;

148:8-11, 1326:5-1327:13, 7220:1-15 (describing danger posed by grounding and Hazelwood's attempt to remove the ship from the rocks).

Tacitly conceding the threat to the crew's health and safety, Exxon claims that threat is irrelevant because the "oil spill never put at risk the health and safety of any ***plaintiff***." Exxon Br. 38 (emphasis added). Exxon is incorrect on the facts and the law. Substantial evidence supports the district court's finding that Exxon ***did*** "threaten the health and safety" of the class members who "lived and worked on the Sound." ER 614-15. Dumping 11 million gallons of toxic crude in the water corrupted the food supply and jeopardized the health of Natives and others who gathered food from intertidal zones, forcing them to abandon their centuries-old subsistence lifestyle. *See* SER 1510-33. And, as explained above, the spill damaged the psychological and emotional health of thousands of people. Order 364, ER 613.

Moreover, Exxon misperceives the function of the "health and safety" factor. A reviewing court considers threats to safety to assist in measuring the quality of the defendant's conduct, distinguishing it from purely economic torts, such as the passing-off claims in *Cooper*. To be sure, a defendant cannot be punished for actions other than "the conduct that harmed the plaintiff." *State Farm*, 538 U.S. at 423. But here, the conduct that threatened the crew's lives was

precisely the "conduct that harmed the plaintiff[s]." *See Bocci*, 76 P.3d at 674 (acts that caused plaintiff doctor financial harm were "the same acts" that caused his patient physical harm); *see also DeNofio v. Soto*, 2003 WL 21488668 at *2 (E.D. Pa. 2003) (conduct that caused plaintiffs financial harm was more reprehensible because it also threatened "the safety of others in the vicinity"). Exxon's willingness to put lives at risk increased the reprehensibility of its behavior, no matter who wound up being injured.

3. The District Court Properly Considered the Vulnerability of Class Members.

The vulnerability of a defendant's victims enhances reprehensibility. *State Farm*, 538 U.S. at 419. The district court properly found that aggravating factor here. ER 616.

Exxon does not dispute the plaintiffs' vulnerability. Instead, Exxon contends that the Supreme Court's use of the word "target" requires intent, and that plaintiffs' vulnerability makes no difference because "[t]his case involves no intentional tort." Exxon Br. 38. Exxon's wordplay misses the point. The vulnerability test focuses on whether the defendant's misconduct foreseeably injured victims who could not protect themselves, thus making the misconduct more reprehensible than if the victims and the defendant stood on equal footing. The test does ***not*** depend on whether misconduct was intentional, for then it would

duplicate the separate inquiry into "intentional malice, trickery or deceit." *State Farm*, 538 U.S. at 419.

Here, the fishing and subsistence economies of the region depended on fisheries that were "especially vulnerable" to oil spills. SER 1770. The fishermen, Natives and others dependent on those resources had no ability to protect themselves against Exxon's behavior.

4. The District Court Properly Considered that Exxon Repeatedly Acted Recklessly.

The district court correctly found that the repetitive nature of Exxon's misconduct aggravated its reprehensibility. ER 617. Because the Exxon Valdez ran aground only once, Exxon claims it made only a "single mistake," Exxon Br. 39, but this argument mischaracterizes the nature of Exxon's misconduct.

The "repetition" test distinguishes between long-running reckless conduct and isolated actions. *See Interclaim Holdings Ltd. v. Ness, Motley,* 2004 WL 725287 (N.D. Ill. 2004) at *17 (repeated deceptions in settlement negotiations); *Bocci,* 76 P.3d at 674 ("continuing misrepresentations"); *see also Neibel*, 108 F.3d at 1132 (defendant "received several warnings" regarding agent's conduct); *Hopkins*, 33 F.3d at 1127 (defendant continued marketing product despite known defects). Repeated instances of drunk driving, for example, are more reprehensible than an isolated case of driving while drunk, even if only the last instance injures

people. *Craig v. Holsey*, 590 S.E.2d 742, 747 (Ga. App. 2003). Thus, the fact that "[o]ver and over and again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving" rendered its conduct highly reprehensible. Order 364, ER 617.[12]

5. The District Court Properly Viewed Exxon's Conduct as Deliberate.

Intentional conduct, as distinguished from a "mere accident," aggravates reprehensibility. *State Farm*, 538 U.S. at 419. And when a party "consciously refus[es] to remedy" a situation it knows is dangerous, it acts "intentionally." *Union Pacific*, ___ S.W.3d ___, 2004 WL 352525; *accord White*, 312 F.3d at 1029 (Graber, J., concurring in part and dissenting in part); *Neibel*, 108 F.3d at 1123; *Hopkins*, 33 F.3d at 1127.

The district court correctly found that the misconduct for which the jury punished Exxon – "deliberately permitting a relapsed alcoholic to continue operating a vessel carrying over 53 million gallons of volatile, toxic, crude oil" – was intentional. ER 619. Although Exxon did not discharge oil into Alaskan waters on purpose, Exxon "knowingly," "intentionally," and "deliberately" kept

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[12] Exxon also repeatedly disregarded reports of crew fatigue, which contributed to the grounding. *See* 270 F.3d at 1238; Order 265, SER 1151-52; 839:24-840:4, 949:2-950:12, 1081:6-1082:14, 1991:2-1992:1, 2134:2-15; SER 923-25.

Hazelwood in command, *id.*, fully aware of the danger, 1626:2-8, 2065:6-8, 2532:7-15, 2560:6-9, 3615:6-24, and the likely consequences. SER 889, 1078.

Exxon asks rhetorically "why on earth would Exxon's management have behaved as it did intentionally," if it knew that Hazelwood was "virtually certain" to cause an expensive oil spill? Exxon Br. 39. But this is a loaded and irrelevant question. Exxon's conduct was highly reprehensible not because of any "virtual certainty," but because it consciously and immeasurably ***increased*** the likelihood of a catastrophe by leaving Hazelwood in charge of the Exxon Valdez, instead of "at the very least transferr[ing him] to less dangerous duty" when it learned of his relapse. 270 F.3d at 1238.

Furthermore, as the district court found, Exxon's behavior defied any cost-benefit analysis. ER 637-38. Nothing in *State Farm* requires a reviewing court to determine why this was so. In broad terms, however, the answer appears to lie in an alcoholic culture that pervaded Exxon Shipping Company.[13] Exxon did

[13] Scholars have described this general phenomenon, in which management chooses not to confront unsafe drinking. *See generally* Samuel Bacharach et al., *Driven to Drink: Managerial Control, Work-Related Risk Factors, and Employee Problem Drinking*, 45 Acad. Management J. 637, 641 (2002); Harrison Trice & William Sonnenstuhl, *On the Construction of Drinking Norms in Work Organizations,* 51 J. Stud. Alc. 201, 207-08 (1990); Danielle Hitz, *Drunken Sailors and Others: Drinking Problems in Specific Occupations*, 34 J. Stud. Alc. 496 (1973).

not enforce the policy that nominally prohibited drinking on board ship. 800:3-6, 1070:21-23, 1707:20-1708-15, 3456:19-23; SER 1321; *see also* 1946:25-1948:4, 1952:11-25 (Exxon's medical director would not have done anything if he had heard of Hazelwood's relapse). Indeed, Exxon's crews were "pretty conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you." 2183:4-22; *accord* 1631:9-15, 2153:13-23, 2175:5-24, 2207:5-10. Exxon crews held parties on board ship, 1710:1-1712:12, drank together in port, 148:14-154:5, 354:19-24, 365:15-366:20, circulated guides to bars, 383:3-17; SER 978-88, "destroyed" confiscated liquor by drinking it, 144:11-146:18, and violated rules forbidding returning to duty within four hours after drinking. 415:8-418:16, 2221:5-25, 2223:6-2224:13. Hazelwood's supervisors held his back-to-work meeting after alcohol rehabilitation ***in a bar*** – and one drank during that meeting. 338:1-339:22. It was no surprise, therefore, when Exxon's human resources manager agreed that Exxon's alcohol policies, "knowing the risk to the public, of the catastrophic results of a supertanker accident, allow[ed] a relapsed alcoholic to command a supertanker." 3840:14-17; *see also* 3830:5-10 (human resources manager "wound up with an empty bag and had no policy to protect the safety of the public").

This Court need not determine precisely why Exxon accepted problem drinking, without regard to safety, its own economic self-interest, or the likely harm to thousands of innocent third parties. For present purposes, it is enough to find, as the district court did, that Exxon knew of the risk of a catastrophe but made an "intentional decision . . . that led to the plaintiffs being harmed." ER 620.

6. Exxon's Post-Tort Conduct Does Not Reduce Reprehensibility.

Finally, Exxon contends that a factor not listed in *State Farm* – its actions ***after*** the tort – makes its conduct less reprehensible because its environmental cleanup expenditures and claims payments allegedly ameliorated the harm it caused "promptly and comprehensively." Exxon Br. 41-42 (quoting 270 F.3d at 1242). Exxon's argument fails at several levels.

First, the passage from this Court's prior opinion on which Exxon relies referred only to Exxon's payment of private claims, not to environmental cleanup expenses. 270 F.3d at 1242. Because "[t]his is not a case about befouling the environment," *id.* at 1221, Exxon's cleanup expenditures – which the law required even an innocent spiller to undertake, Order 364, ER 578 & n.16 – cannot reduce its culpability any more than the extensive and persisting damage to the environment can enhance Exxon's culpability. ER 629 n.101; *see generally* Exxon Valdez Oil Spill Trustee Council Annual Status Reports <http://www.evostc.

state.ak.us/publications.html>. Moreover, Exxon's environmental response was "slow and inefficient," not prompt and comprehensive. National Response Team, The Exxon Valdez Oil Spill and Response Preparedness: A Report to the President (1989), *reprinted in* The Exxon Valdez Disaster 39 (1997). Exxon cleaned up only about 14% of its oil. Exxon Valdez Oil Spill Trustee Council, *Lingering Oil* <http//www.evostc.state.ak.us/facts/lingeringoil/html>. While Exxon may have been adept at conveying the impression of effective remediation, its cleanup had marginal value.[14]

Nor did Exxon's post-spill payments to class members "promptly and comprehensively" remedy their harm. As we discuss in detail in Section II.B.2.c., *infra*, Exxon paid only after being sued, paid some plaintiffs but refused to pay others, and paid for some types of harm but refused to pay for other types.

More fundamentally, because a reviewing court must measure reprehensibility according to "the enormity of the offense" itself, *BMW*, 517 U.S. at 575, post-spill conduct has no logical bearing on the forward-looking fair-notice inquiry that *BMW* requires. *Swinton v. Potomac Corp.*, 270 F.3d 794, 813-15 (9th

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[14] One Exxon official was captured on tape demanding deployment of cleanup equipment, but adding "I don't care so much whether it's working or not but ... it needs to be something out there that looks like an effort is being made.... I don't care if it picks up two gallons a week. Get that shit out there ... and ... standing around where people can see it." SER 1096.

Cir. 2001); *Miller v. Cudahy Co.*, 858 F.2d 1449, 1459 (10th Cir. 1988); *see also* § I.C., *supra*. A jury might choose to mitigate punishment because of post-tort conduct, and the district court here instructed the jury that it could do so. 7663:4-6. But after-the-fact payments do not change the nature of the defendant's offense for constitutional fair-notice purposes.[15]

B. The Relationship Between the Punitive Award and the Harm Is Well Within Constitutional Limits.

After finding Exxon's conduct to be "highly reprehensible," the district court examined the second *BMW* guidepost, the relationship between "the actual or potential harm suffered by the plaintiff and the punitive damages award," *State Farm*, 538 U.S. at 418, and correctly found that the relationship here falls well within the constitutionally acceptable range.

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[15] If any aspect of Exxon's post-tort conduct mattered here, it would be Exxon's lack of contrition, which demonstrates a need for greater punishment. *See United States v. Gallant*, 136 F.3d 1246, 1248 (9th Cir. 1998); *Planned Parenthood*, 300 F. Supp. 2d at 1063; *Sheldon v. Vermonty*, 237 F. Supp. 2d 1270, 1282 (D. Kan. 2003); *Campbell*, ___ P.3d ___, 2004 WL 869188 at *7-*8. The district court explained that the jury could have found a lack of contrition from viewing the testimony of Exxon's executives at trial. Order 267, SER 1182; *see also* 7162:19-7163:18, 7176:18-7177:23; SER 995-96, 1011. "[E]ven today, [Exxon] has not come to grips with the opprobrium which society rightly attaches to drunk driving." Order 364, ER 621.

1. The District Court Correctly Determined that Exxon Caused $513 Million in Quantified Harm.

Unlike most punitive damages cases, the compensatory claims here were not fully tried to the same jury; instead, the jury determined harm only to commercial fishermen in the major fisheries. To avoid presenting the jury with voluminous evidence concerning the rest of the economic harm that Exxon inflicted, the parties stipulated to the actual value of some of that harm and their respective estimates of the rest, and agreed to have that stipulation read to the jury. SER 1554-59. Together, the jury's $287 million Phase II verdict and the stipulation established that Exxon caused economic harm between $432 million (Exxon's estimate) and $768 million (plaintiffs' estimate). In Order 364, the district court resolved the stipulation's outstanding issues and determined that Exxon inflicted $513,147,740 in quantifiable economic harm, a figure within the range of the stipulation. ER 625-29. *See also* SER 1304-13.

Despite the advantages the stipulation conferred on Exxon at trial (by avoiding, for example, presentation of evidence showing the havoc wreaked on Native class members), Exxon now seeks to disavow the stipulation and contends that the harm should be reduced by $98 million that plaintiffs recovered from Alyeska, the service company that initially responded to the spill. Exxon Br. 45

n.19; *see* CD 4016 (Alyeska settlement).[16] But Exxon long ago waived any right to raise this point. Exxon never sought to deduct this amount from its stipulation, even though Alyeska paid it before trial. And, as Exxon has acknowledged, its stipulation was "not just evidence; [it] conclusively establish[ed] facts for purposes of the record." SER 1288-89. "[A]bsent indications of involuntary or uninformed consent," parties are bound by a stipulation. *CDN, Inc. v. Kapes,* 197 F.3d 1256, 1258 (9th Cir. 1999). Further, Exxon did not object when the district court instructed the jury in Phase III that the harm included both its Phase II verdict and the harm set forth in the stipulation. 7656:10-7658:19; SER 1136-37.

Even if Exxon could raise this argument, settlements by a co-defendant such as Alyeska do not reduce the harm for purposes of reviewing punitive awards. *Kelley v. Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995); *Evans v. Dean Witter Reynolds*, 5 P.3d 1043, 1053-54 (Nev. 2000); *Exxon Corp. v. Yarema*, 516 A.2d 990, 997-98 (Md. App. 1986). Further, "[f]oreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence." W. Page Keeton, et al., *Prosser & Keeton on Torts* (5th ed. 1984) § 44 (collecting

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[16] Exxon's contention that the harm should be reduced by an additional $39 million, Exxon Br. 45 n.19, lacks any supporting discussion and therefore cannot provide a basis to upset the district court's findings. *In re Worlds of Wonder Sec. Litigation*, 35 F.3d 1407, 1424 (9th Cir. 1994).

cases). Exxon knew Alyeska would be unable to deal with a spill of this magnitude. SER 913-15. Moreover, Exxon was contractually obligated to "[i]ndemnify and hold Alyeska harmless from all claims." Order 163 at 18 n.10 (CD 4193) (quoting Port Information Manual).

2. Exxon's Pretrial Payments Should Not Offset the $513 Million in Harm.

Relying on this Court's prior statement that, in order to encourage settlements, "[t]he amount that a defendant voluntarily pays before judgment should ***generally*** not be used as part of the" harm, Exxon contends that the $513 million in quantified harm should be reduced to $20.3 million. Exxon Br. 44 (quoting 270 F.3d at 1244) (emphasis added). Exxon is not entitled to reduce the harm in this manner, for three independent reasons.

a. Exxon's Contention Is Inconsistent with this Court's Prior Assessment of the Amount of Harm, Which Did Not Offset Exxon's Payments.

Although Exxon contends that "it is the law of the case" that the harm should be reduced due to its pretrial payments, Exxon Br. 44, 46, just the opposite is true. This Court's 2001 analysis of the punitive verdict used "total harm" figures for ratio purposes, calculated without deducting for any "voluntary" payments. 270 F.3d at 1243.

To the extent that using a "total harm" figure is in tension with the opinion's subsequent "general[]" statement about how reviewing courts should treat pretrial payments, *id.* at 1244, this Court should adhere to the former approach. The Supreme Court's decisions make clear that ratio analysis is a part of the overall determination whether the defendant received "fair notice" of the punishment it could receive for particular misconduct. *BMW*, 517 U.S. at 574-75; Exxon Br. 57 n.27. Because notice is a prospective concept, after-the-fact payments and settlements have nothing to do with the consequences of which a tortfeasor has prior notice. The Supreme Court thus has described the relevant benchmark as "harm" and "potential harm," or "likely harm," not merely the net compensatory damage award. *State Farm*, 538 U.S. at 418, 419, 422, 424-27; *Cooper*, 532 U.S. at 435, 440, 441; *BMW*, 517 U.S. at 575, 576, 580-582.

The district court, therefore, correctly recognized that total harm controls for purposes of the constitutional analysis, whether or not a defendant (or co-defendant) has taken steps that reduce the net compensatory judgment. ER 625 n.73, 629-30 (citing *United Phosphorous v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1231 & n.6 (10th Cir. 2000); *Kelley*, 59 F.3d at 1055); *see also Evans*, 5 P.3d at 1053-54; *Allsup's Convenience Stores v. North River Ins. Co.*, 976 P.2d 1, 19 (N.M. 1998) ("that damages may be offset does not mean that they were not

caused or that they never existed"); *Yarema*, 516 A.2d at 997-98.[17] That rule makes sense, for if the law were otherwise, a defendant could immunize itself from punitive damages (or dramatically reduce its exposure), regardless of how egregious its conduct, simply by tendering compensation prior to judgment. Companies could institute "pollute and pay" policies, *Johansen*, 170 F.3d at 1339, or decline to address known safety risks under a callous "cost-benefit analysis balancing human lives against corporate profits," *Grimshaw,* 174 Cal. Rptr. at 384, secure in the knowledge that they could fend off punitive damages with compensatory payments after the fact.

To be sure, as this Court noted, federal courts have a "general policy . . . to promote settlement before trial," 270 F.3d at 1244, and courts may accommodate that policy in cases involving statutory or common law issues. But the only issue here is whether the jury's $5 billion award is "consistent with ***constitutional*** rinciples." *Leatherman*, 285 F.3d at 1147 (emphasis added). When applying the

[17] The same is true in the context of criminal punishment. Even when a defendant pleads guilty (settling liability without a trial) or pays restitution, the Supreme Court does not consider that in deciding whether the fine or sentence is constitutionally excessive. *See United States v. Bajakajian,* 524 U.S. 321, 325 (1998) (fine); *Solem v. Helm,* 463 U.S. 277, 281 (1983) (prison sentence); *United States v. Wilkins,* 911 F.2d 337, 340 (9th Cir. 1990) (refusing to consider defendant's "individual circumstances," including guilty plea, in determining constitutionality of sentence).

Constitution, "it is not for this Court to employ untethered notions of what might be good public policy." *Whitmore v. Arkansas,* 495 U.S. 149, 161 (1990); *see also Members of City Council v. Taxpayers for Vincent,* 466 U.S. 789, 815-16 (1984) (even if "public policy arguments" support a potential rule, "it by no means follows that it is therefore constitutionally mandated").[18] Indeed, the Supreme Court has made clear in another context that policy considerations favoring pretrial settlement of complex class actions have no bearing on constitutional due process inquiries. *See Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 612-13, 628-29 (1997) (formation of a settlement class cannot disregard due process restrictions).

b. An Offset Would Conflict with Exxon's Prior Positions and with this Court's Prior Opinions in this Litigation.

Even if pretrial payments ordinarily were subtracted from the harm relevant to punitive damages, this Court's prior decisions in this litigation and Exxon's pretrial settlement strategy would require an exception here because both were

[18] Even if policy preferences did matter in this constitutional inquiry, the district court cogently explained why offsetting pretrial payments "does not encourage settlements; it encourages trials." Order 364, ER 630-31. Not only would defendants risk less by insisting on trial, but plaintiffs would not want to accept pretrial compensatory payments, for fear that the payments would cost them many times the settlement amount in foregone punitive damages.

explicitly premised on the concept that the unreduced "total harm" is the proper measuring stick.

Exxon made some of its pretrial payments in exchange for "cede-back" agreements, under which settling plaintiffs agreed to give back to Exxon any punitive damages they ultimately recovered. When the class challenged those agreements in *In re: the Exxon Valdez (Icicle)*, 229 F.3d 790 (9th Cir. 2000), and *In re: the Exxon Valdez (Baker)*, 239 F.3d 985 (9th Cir. 2001), Exxon argued that, in a mandatory punitive damages class action, the cede-back provisions were the ***only*** means by which a defendant could reduce its punitive damages exposure through pretrial settlements. SER 1230-33. Exxon explained that "[j]uries assessing punitive damages must consider the harm resulting from the defendant's conduct" and "***all harms may be considered.***" SER 1230-31 (emphasis added). "And since all harms may be considered, if the jury does its job right the punishment will be commensurate with ***the totality of the harm.***" SER 1231 (emphasis added); *see also* SER 1232 ("the jury will consider the harm suffered by the settling class member" notwithstanding any settlement). "The obvious answer" in this situation, Exxon urged, "is to recognize that the jury will make a single award of punitive damages, based on the defendant's conduct and the ***totality*** of the harm," but that individual class members are free to "cede their share of the

award to Exxon." SER 1232-33 (emphasis in original). Indeed, Exxon emphasized that it had stipulated to a total harm figure that did ***not*** subtract its pretrial payments and relied on the fact that the jury was instructed to consider "harms to all persons who suffered actual damages as a legal result of the spill," for ratio purposes, "including any harm to the persons set forth in the stipulation." SER 1136-37, 1216.

This Court accepted Exxon's argument, holding that because Exxon's pretrial payments would ***not*** affect the "determination of the total punitive damages to be awarded to the class," the Court had to enforce Exxon's cede-back arrangements. *Baker,* 239 F.3d at 986. "Partial settlement," this Court declared in no uncertain terms, "does not reduce the [punitive] award's amount." *Icicle*, 229 F.3d at 796; *see also id.* at 793.

Judicial estoppel, which "prohibits a litigant from asserting inconsistent positions in the same litigation," *Humetrix, Inc. v. Gemplus S.C.A.*, 268 F.3d 910, 917 (9th Cir. 2001), prohibits Exxon from arguing now that pretrial payments "should not count as 'harms' for *BMW* purposes." Exxon Br. 45. The very core of its successful position in *Icicle* and *Baker* was precisely the opposite: that the punitive damages would be based on "***the totality of the harm***," including harm reflected in pretrial settlements. SER 1231 (emphasis added). And Exxon's

current argument that its pretrial settlements, by means of ratio analysis, dramatically reduce the maximum permissible punitive award squarely conflicts with this Court's prior holdings that a pretrial settlement "does not reduce the award's amount." *Icicle*, 229 F.3d at 796; *accord Baker,* 239 F.3d at 986-87.

Indeed, Exxon's current argument, in practical terms, would give it the exact same benefits as cede-back agreements, without requiring it to bargain over the point and without any notice to the recipients. Exxon did not seek cede-back arrangements across the board; instead, it asked many plaintiffs for "only receipts" in return for payments and told them they were preserving their punitive damages claims. *Icicle*, 229 F.3d at 800. Exxon then told the jury it should be praised for not seeking anything in exchange for these payments. *Id.* at 794; 7477:13-7478:5, 7592:12-7593:2. If this Court now were to hold that pretrial payments must be subtracted from harm for ratio purposes, Exxon will have tricked those plaintiffs from whom it obtained "only receipts" into forfeiting the ability to recover punitive damages in ***multiples*** of the payments they accepted (and misled the jury as well). To avoid such a manifest injustice, this Court should adhere to its prior rulings in *Icicle* and *Baker*, and reject Exxon's attempt to take inconsistent positions in this Court.

c. Even if Exxon Were Allowed Offsets, Its Claim Is Overstated.

Even if Exxon were entitled to reduce the harm by the amount of its voluntary pretrial payments, the rationale of encouraging pretrial settlements could justify such reductions only to the extent that Exxon (rather than someone else) paid voluntarily, without first forcing the plaintiff to proceed to trial, and without already obtaining a similar reduction through other means. Under these criteria Exxon would be entitled to exclude only $149 million from consideration, not the nearly $500 million it seeks to exclude.

First, Exxon paid the commercial fishermen in the major fisheries prior to trial with respect to only one of four types of harm adjudicated in Phase II, *i.e.*, the $118.3 million of harvest losses due to cancelled fisheries in 1989.[19] Exxon refused to pay anything for 1989 price diminishment,[20] for 1992-1993 harvest

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[19] 4433:15-4434:16, 4445:1-4446:10, 4490:3-4501:25, 4513:6-4514:8; SER 1048-1069, 1097-1102, 1541, 1546. Exxon paid $112,066,217 of this amount; the remainder was satisfied through payments from the Trans-Alaska Pipeline Liability Fund and credits for opt-outs and dismissals. CD 6463, 6588. Exxon's payments for lost harvest damages were not as prompt as Exxon claims. Exxon Br. 43. Exxon made none of these payments before being sued and paid only $72 million by the end of August, ER 456; CD 1, when most of these fisheries are completed. *See* DX3283, 3289, 3330, 3335, 3336, 3812, 3826, 5748, 5759, 5760.

[20] 5073:15-21, 5083:14-5084:2, 5165:4-5166:18, 5181:18-5186:24, 5191:14-5195:12, 5207:11-5208:16; SER 1117-20, 1548, 1551.

losses,[21] or for declines in permit values.[22] SER 1304-05. Exxon forced the plaintiffs to recover for these losses, totaling $168.5 million, at trial.[23]

Second, verdicts or settlements reached ***after*** trial began account for an additional $36.7 million, including $20 million to Natives that Exxon stipulated is part of the harm.[24]

Third, Exxon seeks credit for $129.5 million others paid, including the Trans-Alaska Pipeline Liability Fund ($30 million),[25] the State of Alaska ($1.5 million),[26] and Alyeska ($98 million, applied to Phase II verdict).[27] Not only did Exxon not pay this money, but it resisted plaintiffs' efforts to recover from the Fund. SER 1297-99. And though Exxon ultimately reimbursed Alyeska, it paid only because it had a pre-existing contractual obligation to do so. Order 163 at 18

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[21] 4702:14-24, 4734:18-4737:18, 4741:20-4743:25, 4755:1-4756:21, 4760:3-4761:6, 4980:4-4984:6, 5040:10-5042:6; SER 1070-77, 1117-20, 1543, 1547.

[22] 5259:5-5262:18, 5280:7-5285:20; SER 1552.

[23] SER 1543, 1547-48, 1551-52. The $20.3 million in judgments Exxon touts resulted largely from a post-trial stipulation to satisfy these portions of the Phase II verdict through other recoveries. CD 6463, 6588.

[24] Order 364, ER 626-29 (categories 4, 6, 7, 10, 11, 13, 14, 22-24); SER 1555 (stipulation).

[25] Order 364, ER 625-28 (categories 5, 8, 15, 18, 21, plus portions of categories 1 ($2.9 million) and 17 ($600,000)).

[26] Order 364, ER 628 (category 16).

[27] CD 4016 (settlement approval), 6463, 6588.

n.10 (CD 4193). Indeed, Exxon tried to avoid this obligation through an unsuccessful suit against Alyeska that sought to reconfigure the settlement with plaintiffs in a manner that would have made it unacceptable to Alyeska. SER 1306-07.

Finally, Exxon should not receive any credit for the $133.8 million that seafood processors recovered.[28] Exxon stipulated during Phase III that the harm included $123 million of this recovery. SER 1305, 1558 (¶¶ 5-6). The rest was paid by Exxon pursuant to post-trial settlements[29] or by the TAPL Fund.[30] Moreover, Exxon paid approximately $83 million of this money in exchange for cede-back agreements such as those approved in *Icicle*, 229 F.3d 790, and *Baker*, 239 F.3d 985, which will give Exxon a rebate of 11.38% of its punitive damage liability. SER 1302-04. Providing Exxon the benefits of both the *Icicle/Baker* rebates and the reduction it now seeks would reduce Exxon's punitive damage liability twice by virtue of the same payments.[31]

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[28] Order 364, ER 625-26, 628 (categories 2-5, 22).

[29] ER 626, 628 (categories 4, 22).

[30] ER 626 (category 5).

[31] For example, assume a defendant causes $100 million of harm, including $10 million paid to a plaintiff who agrees to cede back its share of punitive damages to the defendant. Assume further a $1 billion punitive award, for a 10:1 ratio. Exxon would have the reviewing court (1) deduct the $10 million from the

For these reasons, nearly $350 million of the credits Exxon seeks are unfounded, even if the proposed "general" rule applied here.[32] Such a rule could reduce the $513 million of economic harm by only $149 million,[33] to $364 million.

3. The Single-Digit Ratio between the Verdict and the Harm Falls Well Within the Standard Range.

The district court correctly held that the 9.74:1 ratio between punitive damages and quantified harm falls comfortably within contemporary due process precedents.

a. Single-Digit Ratios Are Presumptively Valid.

In *TXO,* the Supreme Court upheld a punitive award that produced a 10:1 ratio between the award and potential harm of $1 million. 509 U.S. at 462. *BMW* discussed that holding with approval. 517 U.S. at 581. *State Farm* "decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed"

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harm and deduct a corresponding $100 million (10:1) from the punitive award ***and*** (2) then give 10% of the remaining $900 million punitive award ($90 million) to the cooperating plaintiff, to pay back to the defendant through the cede-back agreement. Thus, the defendant's settlement of 10% of the harm would reduce its punitive damage liability by 19% ($100 million + $90 million).

[32] This figure is less than the total of the figures discussed in the previous four paragraphs because several payments (*e.g.*, post-trial payments to processors) are addressed in multiple paragraphs.

[33] Order 364, categories 1 ($112,066,217, SER 1541, 1546; CD 6463), 9 ($3,254,576), 12 ($8,521,667), 17 ($12,795,527; remainder paid by TAPL Fund, SER 1311), 19 ($11,964,793), 20 ($388,596). ER 625-28.

because "there are no rigid benchmarks that a punitive damages award may not surpass." 538 U.S. at 425. Consistent with *BMW*'s endorsement of *TXO*, however, *State Farm* indicated that punitive awards with ratios up to 10:1 normally should be upheld:

> Our jurisprudence and the principles it has now established demonstrate . . . that, in practice, few awards exceeding a ***single-digit ratio*** between punitive and compensatory damages, ***to a significant degree***, will satisfy due process. . . . ***Single-digit multipliers*** are ***more likely*** to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1, [*BMW*, 517 U.S.] at 582, or, in this case, of 145 to 1.

538 U.S. at 425 (emphasis added).

This Court confirmed the single-digit benchmark in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003). Upholding a $2.6 million punitive award with a 7:1 ratio, this Court explained:

> This is of course a single digit ratio, far below the ratios at issue in *BMW*, *Cooper Industries*, and *State Farm*. ***We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages***, and we decline to extend the law in this case.

Id. at 1044 (emphasis added). This Court since has reiterated that "the Supreme Court's suggested range for constitutional punitive damages awards" encompasses single-digit multipliers. *Hangarter*, 373 F.3d at 1015. These holdings follow

existing circuit precedent. *See Neibel*, 108 F.3d at 1132 ("in economic injury cases if the damages are significant and the injuries not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio") (internal quotation omitted). Indeed, consistent with this reading of Supreme Court jurisprudence, this Court in *Leatherman* and the state supreme courts in *BMW* and *State Farm* reduced punitive damages on remand to amounts yielding ratios of 10:1, 12.5:1, and 9:1, respectively. *Leatherman*, 285 F.3d at 1152; *BMW v. Gore*, 701 So.2d 507, 515 (Ala. 1997); *Campbell*, 2004 WL 869188 at *10. Numerous other post-*State Farm* decisions likewise have read *State Farm* as generally allowing single-digit ratios.[34]

If single-digit ratios were permissible in all of those cases, surely they are here. *See* Theodore Eisenberg, *Damages Awards and Perspective*, 36 Wake Forest

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[34] *See, e.g., Rhone-Poulenc Agro, S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (3.33 ratio "does not even approach the possible threshold of constitutional impropriety"); *Gibson v. Total Car Franchise Corp.*, ___ F.R.D. ___, 2004 WL 1763219 at *10 (M.D.N.C. 2004); *Interclaim,* 2004 WL 725287 at *18; *Millazzo,* 289 F. Supp. 2d at 1258; *McClain,* 259 F. Supp. 2d at 1231; *Harrelson v. R.J.*, ___ So. 2d ___, 2003 WL 22520219 (Ala. 2003) at *6; *Union Pacific*, ___ S.W.3d ___, 2004 WL 352525; *Romo,* 6 Cal. Rptr. 3d at 811, 813; *Austin v. Specialty Transp. Serv. Inc.*, 594 S.E.2d 867, 877 (S.C. App. 2004); *Haggar Clothing Co. v. Hernandez,* 2003 WL 21982181 (Tex. App. 2003) at *6; *Campbell*, ___ P.3d ___, 2004 WL 869188 at *9–*10; *Smith v. Fairfax Realty Inc.*, 82 P.3d 1064, 1075 (Utah 2003); *Trinity Evangelical Lutheran Church v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003).

L. Rev. 1129, 1145 (2001) ("any harm in the neighborhood of $500 million would put the *Exxon Valdez* punitive award in the range of the relation between punitive damages and harm in the mass of cases"). Permissible ratios escalate as reprehensibility escalates, *State Farm*, 538 U.S. at 419, and there was "a vast gulf between the reprehensibility of Exxon's conduct in willfully allowing a relapsed alcoholic to continue to command a supertanker filled with toxic cargo and the conduct at issue in *BMW*, *Cooper*, and *State Farm*." Order 364, ER 647.

b. Due Process Does Not Mandate the 1:1 Ratio Exxon Seeks.

Plucking a single sentence out of *State Farm*, Exxon insists that due process mandates a 1:1 limit whenever compensatory damages are "substantial," a term Exxon defines as $250,000 or more. Exxon Br. 47-48. But the Supreme Court established no such rule. Instead, *State Farm* emphasized that "[t]he precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." 538 U.S. at 425.

Further, Exxon's supposed rule conflicts with the result in *Zhang* and with this Court's specific rejection of this 1:1 ratio argument in *Hangarter*. 373 F.3d at 1014-15; *see also EEOC v. Farmer Bros. Co.*, 31 F.3d 891, 904 (9th Cir. 1994) (rejecting "suggestion that courts should limit the punitive award to four times the compensatory award where the compensatory award is substantial"). Numerous

other post-*State Farm* cases have reached the same conclusion, upholding ratios in excess of 1:1, despite compensatory damages in excess of $250,000.[35]

But even if there were a 1:1 limit when damages are "substantial," it would not apply here. As the district court recognized, the per-plaintiff harm here was not "substantial." ER 636. On an individual basis, the 32,677 "plaintiffs' average share of the total [compensatory] recovery is $15,704, . . . a far cry from the half-million dollars each plaintiff in *State Farm* received." *Id.* Although Exxon would prefer to view the harm it caused in the aggregate, the district court correctly recognized that ratio analysis in class actions should be conducted from the perspective of individual class members. *Id.* Class certification cannot "abridge, enlarge or modify any substantive right" of class members. *Amchem*, 521 U.S. at 613 (quotation omitted). Thus, to ensure that class members sacrifice no claims through use of the mandatory class that Exxon advocated, plaintiffs' recovery must be analyzed on a per capita basis.

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[35] *See, e.g., Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 828-29 (8th Cir. 2004); *Rhone-Poulenc,* 345 F.3d at 1371-72; *Bogle v. McClure*, 332 F.3d 1347, 1359 (11th Cir. 2003); *Interclaim,* 2004 WL 725287 at *18; *Planned Parenthood,* 300 F. Supp. 2d at 1063; *Union Pacific,* ___ S.W.3d ___, 2004 WL 352525; *Advocat, Inc. v. Sauer,* 111 S.W.3d 346, 361 (Ark. 2003); *Romo,* 6 Cal. Rptr. 3d at 810-12; *Bocci,* 76 P.3d at 676; *Hollock v. Erie Ins. Exch.,* 842 A.2d 409, 421-22 (Pa. 2004); *Austin,* 594 S.E.2d at 877; *Campbell,* ___ P.3d ___, 2004 WL 869188 at *9; *Smith,* 82 P.3d at 1075; *Trinity,* 661 N.W.2d at 803.

To be sure, *State Farm* protects defendants from a plaintiff's recovery of punitive damages that are based on harm to other potential plaintiffs. 538 U.S. at 423. But, contrary to Exxon's claim, it does not entitle defendants to ***reduce*** punitive damages exposure when the claims of all plaintiffs are consolidated in the same action.[36]

c. The Non-Economic Harm and Potential Harm Warrant an Enhanced Ratio.

If there be any doubt that the $513.1 million in quantified economic harm bears a reasonable relationship to the punitive award, the additional non-economic harm that Exxon inflicted and additional potential harm that it fortuitously avoided make clear that the ratio here is permissible. As the district court recognized, these factors would permit an even "higher ratio to pass constitutional muster." ER 635, 640.

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[36] Similarly, the Constitution allows a single criminal act against multiple persons to result in separate and undiminished sentences. *See Hawkins v. Hargett*, 200 F.3d 1279, 1285 n.5 (10th Cir. 1999) (when defendant is sentenced based on a single incident, "[t]he Eighth Amendment [excessive punishment] analysis focuses on the sentence imposed for each specific crime, not on the cumulative sentence for multiple crimes."); *Gentry v. MacDougall,* 685 F.2d 322 (9th Cir. 1982) (upholding constitutionality of two consecutive sentences for single drunk driving crash that hurt two people).

(1) Non-Economic Harm.

Due process analysis focuses on the relationship between punitive damages and the actual or potential harm. *State Farm*, 538 U.S. at 418. When compensatory damages do not account for all the harm, either because some components of harm are not recoverable or because "the monetary value of noneconomic harm might have been difficult to determine," *id.* at 425 (quoting *BMW*, 517 U.S. at 582), the total harm inflicted, rather than the compensatory award, provides the relevant basis for comparison. *See, e.g.*, *Swinton,* 270 F.3d at 818 (value of personal distress difficult to calculate); *Tronzo v. Biomet, Inc.*, 236 F.3d 1342, 1350 (Fed. Cir. 2001) ("compensatory damages did not adequately reflect the actual harm caused"); *Dean v. Olibas,* 129 F.3d 1001, 1007 (8th Cir. 1997) ("Dean's financial harm [reflected in compensatory award] was minimal but his emotional damage great"); *Planned Parenthood*, 300 F. Supp. 2d at 1063 (considering uncompensated future harm); *Southern Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1104 & n.5 (D. Ariz. 2003) (higher ratio justified where defendant may have inflicted lost profits, even though evidence was insufficient to support compensatory recovery); *Tate v. Dragovich,* 2003 WL 21978141 (E.D. Pa. 2003) at *9 (considering emotional and psychological injuries for which statute barred recovery); *Romo,* 6 Cal. Rptr. 3d at 810-11 (ratio analysis

must take into account harm suffered by deceased even though that harm was not recoverable).

State Farm did not present issues of uncompensated harm; the Supreme Court assumed the plaintiffs had been made whole for their injuries by compensatory damages of $1 million for 18 months of emotional distress. 538 U.S. at 426. Indeed, the Court determined that because compensatory damages for emotional distress "already contain [a] punitive element" that "was duplicated in the punitive award," a lower ratio between punitive damages and harm was justified than otherwise would be the case. *Id.* In contrast, the class members here suffered extensive non-economic harm, *see* § II.A.1, *supra*, for which they were not permitted to recover damages under maritime or state law. Order 242 (CD 5590). The district court correctly determined that this uncompensated harm would permit a higher ratio of punitive damages to quantified harm than otherwise would be allowed. ER 635; *accord Tate,* 2003 WL 21978141 at *9; *Romo,* 6 Cal. Rptr. 3d at 810-11.

Using *State Farm* as a yardstick, it is easy to see why this is so. The plaintiffs there recovered $500,000 each for 18 months of emotional distress due to uncertainty over whether *State Farm* would pay a judgment. 538 U.S. at 426. The plaintiffs here had the social fabric of their communities "torn apart," "disrupt[ing]

the[ir] lives and livelihood," but they received nothing for their emotional distress. ER 613-14. Valuing each class member's harm at even $125,000 (one-fourth of the compensatory recovery in *State Farm*) and adding that figure to the $513 million of quantified harm would bring the punitive-damages-to-harm ratio here into the 1:1 range. Even valuing average emotional distress as low as $25,000 would increase harm from $513 million to $1.33 billion, reducing the ratio to less than 4:1.[37]

(2) Potential Harm.

TXO upheld a punitive award with a ratio of 526:1 because the ratio shrank to 10:1 when compared to the "potential harm." 509 U.S. at 459-62. *State Farm* and *BMW* reaffirmed that a reviewing court should take into account potential harm that was foreseeable but did not occur. *State Farm,* 538 U.S. at 418, 424; *BMW*, 517 U.S. at 581. Such potential harm existed here: the district court found it "very likely" that "immense and incalculable" additional damage would have occurred if the Exxon Valdez had spilled its entire cargo. ER 634-35, 640.

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[37] These compensatory estimates are consistent with emotional distress awards in Alaska cases. *See, e.g., Ace v. Aetna Life Ins. Co.,* 139 F.3d 1241, 1243, 1249-50 (9th Cir. 1998) ($100,000); *Kodiak v. Samaniego*, 83 P.3d 1077, 1080-81 (Alaska 2004) ($35,000 for temporary restraint by officers); *ERA Aviation, Inc. v. Lindfors,* 17 P.3d 40 (Alaska 2000) ($50,000); *VECO, Inc. v. Rosebrock,* 970 P.2d 906, 909 (Alaska 1999) ($27,500 for enduring sexual harassment for six weeks); *see also Swinton,* 270 F.3d at 799 ($30,000 for enduring racially offensive jokes for seven months).

Although Exxon contends there was only a distant likelihood of additional harm, ample evidence supports the district court's finding. Hazelwood attempted to back the Exxon Valdez off Bligh Reef after the grounding, which likely would have capsized the vessel. *See* 2016:19-2021:11, 2394:2-2397:8; SER 937, 969, 973-77. Those who removed the remaining oil called the situation "very dangerous" and believed that "the chances were better than average" that the vessel would break up, spilling 42 million more gallons. 148:8; 7220:1-15; *see also* 1326:16-1327:13, 1333:6-1334:4, 7199:14-7210:5; SER 1096, 1706 ("precarious").[38]

"If more oil would have been spilled, it is very likely that the oil would have spread further so as to affect more fisheries and more fishermen than the thousands who are plaintiffs in this case," causing closures to additional fisheries in 1989 and subsequent years. Order 364, ER 634-35; *see also* SER 1701 ("would have made

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[38] Even if the chances had not been better than average, Exxon's suggestion (Exxon Br. 50) that the Supreme Court requires the likelihood of potential harm to be more than 50% to factor into the ratio is wrong. Because the *BMW* guideposts ensure that defendants have fair notice of exposure, *State Farm*, 538 U.S. at 417, it is enough that the defendant could foresee the consequences that could flow from its misconduct. Indeed, *TXO* relied on potential harm, even though the defendant's scheme was unlikely to succeed, 509 U.S. at 448-49, and *State Farm* merely refers to "potential," not "likely," harm. 358 U.S. at 418, 424. *See also People v. Ghilotti*, 44 P.3d 949, 968, 972 (Cal. 2002) ("likely" refers to "a serious and well founded risk," which need not be "higher than 50 percent").

the impact that much greater"). The actual spill closed portions of five fishing management areas in 1989, but other portions of those areas remained open for at least part of the season. SER 1048-69, 1097-1101. The salmon and herring fishermen earned $200.4 million from the open areas within the partially closed fisheries[39] – income that would have been lost had the closures been complete. Processors, Natives and other class members dependent on those fisheries, as well as fisheries in later years, also would have suffered additional harm in the event of a spill five times as large. The district court had ample reason to find that the potential harm from loss of the entire cargo was "immense." ER 634.

C. The District Court Correctly Determined That "Comparable Penalties" Gave Exxon Fair Notice That It Could Be Subjected to Fines in Excess of the Verdict Here.

"The third *BMW* 'indicium of excessiveness' is the penalties, civil or criminal, 'that could be imposed for comparable misconduct.'" 270 F.3d at 1245 (quoting *BMW*, 517 U.S. at 582). The Supreme Court clarified in *State Farm* that this guidepost is not particularly rigorous, indicating that a comparable fine of $10,000 could support a punitive award of at least $1 million. 538 U.S. at 428-29. In other words, contrary to what this Court may have assumed in the prior appeal,

[39] DX3315 (at 50, 64-65), 3329 (at 39, 115), 3334 (at 50), 3811 (at 76, 108), 3812 (at 41, 178-79), 3826 (at 12), 5765 (at 66).

see 270 F.3d at 1245-46, a "100-to-1 ratio" between a punitive award and a comparable statutory sanction "does not offend due process." *Campbell*, ___ P.3d ___, 2004 WL 869188 at *10; *see Zhang*, 339 F.3d at 1044-45 (after *State Farm*, a punitive award may be many times greater than comparable sanction).

This case does not test the limits of the comparables guidepost. The district court determined that "Exxon knew that billions of dollars were at stake if it were to criminally spill a tanker-load of oil in Prince William Sound," ER 644, and that its officials could be imprisoned and the company made to pay large civil fines. *Id.*, ER 640-46.

1. Exxon Was Subject to Criminal Fines in Excess of $5 Billion and Imprisonment.

Exxon does not contest that 18 U.S.C. § 3571(d) permitted a maximum fine of $5.1 billion for the criminal conduct for which the United States indicted it. Order 364, ER 642-44; Exxon Br. 55-56. Nor does it dispute the district court's determination that the supervisors who knowingly left Hazelwood in command of the Exxon Valdez could be imprisoned for up to one year, ER 644 n.113, which justifies a punitive damage award "much in excess of the fine that could be imposed." *BMW*, 517 U.S. at 583. Instead, Exxon suggests that *State Farm* renders criminal penalties irrelevant and that, even if such penalties are relevant,

the remitted $25 million fine it paid under its plea bargain provides the appropriate comparison. Exxon Br. 52-53. Exxon is wrong on both counts.

First, "*State Farm* did not proscribe the comparison of criminal penalties authorized for the conduct in question to the punitive damages awarded." *Rhone-Poulenc*, 345 F.3d at 1372.[40] Indeed, *State Farm* emphasized that the "existence of a criminal penalty does have bearing on the seriousness with which a State views the wrongful action." *State Farm,* 538 U.S. at 428. When the instigation of a criminal proceeding is merely a "remote possibility," as in a run-of-the-mill tort case, the theoretical availability of a criminal sanction does not "automatically sustain" a punitive award. *Id.* But when criminal liability is a realistic possibility, as it was here, then the available criminal penalties are, as this Court already has stated, "particularly informative." 270 F.3d at 1245. *See* Order 364, ER 643.

Second, while this Court's prior opinion discussed both potential and actual criminal penalties, 270 F.3d at 1245-46, the statutory maximum, rather than the eventual plea, furnishes the more pertinent measure. Because *BMW* rests on "fair

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[40] *See also Mathias,* 347 F.3d at 678; *Planned Parenthood*, 300 F. Supp. 2d at 1064 n.7; *Diesel Machinery Inc. v. B.R. Lee Indus., Inc.*, ___ F. Supp. 2d ___, 2003 WL 23705143 at *18 (D.S.D. 2003); *Southern Union,* 281 F. Supp. 2d at 1105; *Motherway, Glenn & Napleton v. Tehin,* 2003 WL 21501952 at *8 (N.D. Ill. 2003); *Campbell,* ___ P.3d ___, 2004 WL 869188 at *9.

notice," it requires deference to legislatively established penalties that "could be imposed." 517 U.S. at 582. Accordingly, as this Court indicated, "[c]eilings" on liability set the relevant benchmarks. 270 F.3d at 1245. Indeed, the defendant in *State Farm* – as well as Exxon in an *amicus* brief – argued that the Utah Supreme Court "erroneously looked exclusively to the ***maximum penalties hypothetically available*** rather than consider the penalties that realistically might be imposed" for its conduct. *State Farm*, Petitioner's Br. 40, 2002 WL 1968000 (emphasis added); *accord* Br. of Certain Leading Business Corporations in Support of Petitioner 29-30, 2002 WL 1964582. The Supreme Court rejected this argument and – just as it had in prior cases – compared the punitive judgment to the most relevant statutory maximum penalty. 538 U.S. at 428. *See also BMW*, 517 U.S. at 584 ("maximum civil penalty authorized"); *Zhang*, 339 F.3d at 1044-45 ("maximum fine" authorized); *Zimmerman v. Direct Federal Credit Union*, 262 F.3d 70, 83 (1st Cir. 2001) ("most prudent choice" is maximum penalty, rather than typical penalties in decided cases, because statutes "furnish[] a far more trenchant source of notice").

The district court also explained that the particular facts of this case render the actual penalties here less probative. ER 642 n.111. Because the government strongly preferred a plea agreement to the alternative of years of litigation against a

determined opponent, ER 120-121, the penalty here was significantly lower than the penalty the government could have obtained at trial. Further, the government struck the plea agreement before discovery revealed the extent of Exxon's knowledge of Hazelwood's relapse and before the district court had "the benefit of the more robust development of actual damages which took place later in the civil proceedings." Order 364, ER 642 n.111; *see also* Order 267, SER 1176-79. At the time of the plea, the government was prepared to prove only that the pecuniary losses exceeded $75 million, ER 121, a fraction of the harm eventually established.

Finally, as this Court has explained, in a passage that Exxon omits and replaces with ellipses (Exxon Br. 55), the plea bargain is valued at $150 million, not $25 million. 270 F.3d at 1245-46. So even if the plea bargain constrained the maximum permissible punitive award here, the $150 million agreement produces a ratio of only 33:1, far less than the 100:1 comparison deemed acceptable in *State Farm*. That the punishment was remitted to a $25 million fine and a $100 million restitution payment does not vitiate the primacy of the initial judgment any more than early parole erases a person's initial court-imposed sentence.

2. Exxon Was Subject to Civil Fines of at Least $80.5 Million; Legislative Judgments Since the Spill Would Expose It to Billions of Dollars in Fines.

Exxon recognizes that the spill subjected it to state and federal civil penalties, but asserts that Alaska law dictated a penalty of only $11 million. Exxon Br. 53 & n.26. Exxon is wrong. The applicable state civil penalty as of March 24, 1989, was the product of four numbers:

(1) Gallons spilled (11 million);

(2) A base penalty per gallon, determined according to "the most sensitive receiving environment." 18 AAC 75.570(3). Contrary to Exxon's assertion that this penalty was $1 per gallon because the supertanker spilled its oil into an "unconfined saltwater environment," Exxon Br. 53 & n.26, the base penalty was $2.50 per gallon, because the oil reached a number of receiving environments designated as "critical," such as the Kodiak National Wildlife Refuge and the southern Kenai Peninsula coast. *See* SER 1013, 1806;

(3) "The arithmetic mean of the toxicity, degradability, and dispersability factors" for the product spilled, 18 AAC 75.570(3), which was 0.583;[41] and

[41] 18 AAC 75.540(2)(D); 75.550(2)(D); 75.560(2)(D); 75.570(2)(A)(ii), (B)(ii), (C)(ii); SER 1805-09 (0.5 x 0.75 x 0.5 = 0.583).

(4) A multiplier of five for "discharges of oil which are caused by the gross negligence or intentional act of the discharger." AS 46.03.758(b)(2).

These factors yield a penalty of $80.2 million.[42] Exxon was also subject to federal civil penalties of $270,000. Order 364, ER 645. Consequently, the jury's award is only 62 times the civil penalties that could have been imposed, a much smaller multiple than *State Farm* deemed permissible. Moreover, Exxon was on notice that a grounding could spill the entire 53-million-gallon cargo, thereby subjecting it to even larger civil penalties. Order 364, ER 645-46.

On the prior appeal, this Court called attention to federal and state civil penalty amendments, passed in response to the Exxon Valdez disaster. These amendments have "value as a legislative judgment, made in the course of legislative evaluation of this particular oil spill, of what amount of punishment serves the public interest in deterring and punishing, but not overdeterring, the conduct that caused the spill." 270 F.3d at 1246. Given the Supreme Court's emphasis on "accord[ing] 'substantial deference' to ***legislative judgments*** concerning appropriate sanctions for the conduct at issue," *BMW*, 517 U.S. at 583

[42] Plaintiffs' briefing prior to the district court's Order 358 erroneously used the $2.00 base penalty applicable to Prince William Sound. 18 AAC 75.520(2)(c). Although plaintiffs' briefing prior to Order 364 corrected this error, SER 1806, Order 364 referenced the $63.8 million contained in plaintiffs' earlier briefing. ER 645.

(emphasis added; internal citation omitted), the Exxon Valdez-inspired amendments supply far more pertinent post-conduct benchmarks than the plea agreement. Were the Exxon Valdez to spill 11 million gallons today, it would be subject to state and federal civil penalties totaling $1.3 billion. 33 U.S.C. § 1321(b)(7)(D) ($786 million); AS 46.03.759(a)(1), (a)(2), (c)(1) ($500 million). Were the vessel to spill its entire 53-million gallon cargo, the civil penalties would be $4.3 billion – nearly the amount of the district court's judgment.

CONCLUSION

The district court correctly concluded that the jury's punitive damages verdict comports with due process. For that reason, this Court should reconsider its direction to reduce the verdict and remand with instructions to enter a judgment of $5 billion, with interest calculated as directed by the district court's Order 364. At a minimum, the Court should affirm the judgment entered by the district court.

RESPECTFULLY SUBMITTED this 30th day of August, 2004.

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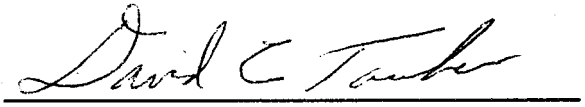
BRIEF FORMAT CERTIFICATION
(Circuit Rule 32(e)(4))

I certify that this brief is proportionately spaced, using 14 point typeface, and contains 15,383 words, based on the word count of the word processing software currently in use by our firm.



David C. Tarshes

STATEMENT OF RELATED CASES
(Circuit Rule 28-2.6)

Pursuant to Circuit Rule 28-2.6, plaintiffs state that *In re: the Exxon Valdez*, *Baker v. Exxon Corp.*, No. 04-35174, is a pending related case, concerning the district court's award of attorneys' fees. A motion to dismiss that appeal is pending.

PROOF OF SERVICE

I, the undersigned, declare that I am, and was at the time of service of the papers herein referenced to, over the age of 18 years and not a party to the within action or proceeding. My business address is 1501 Fourth Avenue, Suite 2600, Seattle, WA 98101-1688, which is located in the country in which the within mentioned mailing occurred. I am readily familiar with the practice at my place of business for collection and processing of correspondence for overnight delivery by Federal Express. Such correspondence will be delivered to an authorized courier or driver authorized by Federal Express to receive documents or deposited with a facility regularly maintained by Federal Express for receipt of documents on the same day in the ordinary course of business.

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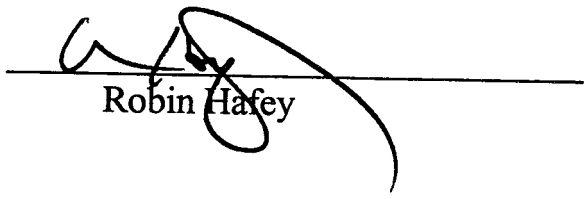
EXECUTED on August 30, at Seattle, Washington.

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct and that I am employed in the office of a member of the bar of this Court at whose direction the service was made.



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