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

REPLY BRIEF OF PLAINTIFFS/CROSS-APPELLANTS

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INTRODUCTION

In the first appeal, this Court praised the district court's "masterful job of managing this very complex case." *In re: the Exxon Valdez,* 270 F.3d 1215, 1225 (9th Cir. 2001). At that time, the district court had not yet had an opportunity "to consider the constitutionality of the amount of the [punitive damages] award in light of the guideposts established in *BMW* [*v. Gore,* 517 U.S. 559 (1996)]." 270 F.3d at 1241. This Court therefore remanded, with directions that the district court apply the *BMW* factors "in the first instance." *Id.* After having conducted two painstaking reviews of the punitive damages verdict in compliance with this Court's instructions, ER 505-651, the district court found itself compelled to conclude that "the $5 billion award was not grossly excessive" and was unable to "perceive any principled means by which it could reduce the award." ER 649.

Exxon now proclaims that the same district court that expertly and conscientiously handled this case for over a decade before the remand has now become "fundamentally lawless." Exxon Reply 6. In fact, the district court followed this Court's direction to set a lower amount. At the same time, the district court encouraged this cross-appeal, so this Court would have the opportunity to consider the propriety of the jury's award in light of the full due process analysis it now has before it. ER 650 n.116. Plaintiffs submit that the district court's analysis justifies reinstatement of the full $5 billion class verdict.

JURISDICTION

For the reasons stated in plaintiffs' response to Exxon's motion to dismiss, filed March 29, 2004, this Court has jurisdiction over plaintiffs' cross-appeal.

ARGUMENT

I. THIS COURT SHOULD REJECT EXXON'S INVITATIONS TO IGNORE THE DISTRICT COURT'S CAREFUL ANALYSIS

Despite the district court's intimate familiarity with the record, accumulated over 15 years of civil and criminal proceedings, Exxon urges this Court to disregard the very *BMW/State Farm* analysis it directed the district court to provide. Exxon's contentions that the analysis is inconsistent with the mandate and deserves no deference misinterpret this Court's remand and defies basic principles of appellate review.

A. The District Court Faithfully Followed the Mandate.

In accusing the district court of "repudiat[ing] this Court's mandate," Exxon Reply 1, Exxon fails to recognize that the mandate relating to punitive damages had two parts. To be sure, this Court reached the initial conclusion that the $5 billion verdict was too high. But at the same time this Court recognized that the case was not ripe for determination of the due process limit on punitive damages, because it had "no constitutional analysis by the district court over which to exercise any de novo review." 270 F.3d at 1241. This Court recognized that "on these facts," "the better approach" was to have the district court conduct its own

full due process analysis. *Id.* This Court did not direct the district court to skew that analysis to reach any particular number.

The district court complied with the first part of the mandate by setting a due process limit $500 million lower than the amount of the verdict. The district court also implemented the second part in a faithful and candid manner. Just as other courts, including this Court, have done when presented with remands for further due process review of punitive awards, the district court drew upon its familiarity with the record to portray the full context to which the *BMW/State Farm* guideposts are to be applied. *See, e.g., Leatherman Tool Group, Inc. v. Cooper Indus.,* 285 F.3d 1146, 1150 (9th Cir. 2002) (correcting Supreme Court's assumption as to what jury might have found under instructions); *Campbell v. State Farm Mut. Ins. Co.,* 98 P.3d 409, 412 (Utah 2004) (discussing necessity of using "independent judgment" on remand), *cert. denied,* 125 S. Ct. 114 (2004). The district court paid close attention to the analysis this Court provided "to aid . . . consideration" of "the guideposts established in *BMW,*" 270 F.3d at 1241, and advised this Court of the conclusions the guideposts compelled.

No matter how many inflammatory adjectives Exxon uses to describe the district court's conclusions, the court acted properly in setting forth its views on the guideposts' applicability in light of the more intensive analysis of the facts and

circumstances of this case that it was elaborating for the first time.[1] Nothing in either the law of mandate or the law-of-the-case doctrine precludes this Court from reconsidering its initial assessment of excessiveness in light of the district court's new analysis. After doing so, this Court should reinstate the jury's verdict, for the reasons articulated by the district court.

B. This Court Should Defer to the District Court's Factual Findings.

Exxon vastly over-reads *Cooper Indus. v. Leatherman Tool Group,* 532 U.S. 424 (2001), as requiring *de novo* review of every aspect of the district court's opinion. *Cooper* directed *de novo* review of the ultimate constitutional question whether, given the facts and circumstances in a case, a punitive award is too high. *Id.* at 437; *see also id.* at 426 (framing question presented). Nothing in the opinion suggests that the Court was creating a radical new system – heretofore unknown in constitutional law – of reviewing *de novo* every single conclusion, factual and legal, that a district court reaches in the course of its analysis. To the contrary, the Court specifically noted that "of course it remains true that the Court of Appeals should defer to the District Court's ***findings of fact*** unless they are clearly

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[1] Indeed, although Exxon argues in general that this Court's prior observations placed a straitjacket on the district court (and on this Court), it contradicts that position whenever it suits its purposes. *See, e.g.,* Exxon Reply 49 n.43 (disputing statement that the Oil Pollution Act of 1990 "has value as a legislative judgment," 270 F.3d at 1246); Exxon Reply 54 (asserting that this Court should look only to "what fine would likely have been imposed," rather than to "[c]eilings" and "exposure," 270 F.3d at 1245).

erroneous." *Id.* at 440 n.14 (emphasis added). Examples of such "findings" include the "character of the defendant's conduct," "the defendant's motive," and "the extent of [the plaintiff's] injury." *Id.* at 439 n.12. *See also id.* at 437; *Leatherman*, 285 F.3d at 1150.

Exxon contends that *Cooper*'s two-tiered standard of review applies only in bench trials, not "[i]n cases involving punitive damages tried to a jury" when the district court applies the *BMW* guideposts as an overlay, or check, on a jury verdict. Exxon Reply 3. But *Cooper* itself involved a jury trial. 532 U.S. at 428. And on remand in that case, this Court confirmed that it had to defer to "the underlying facts as found by the jury ***and the district court.***" *Leatherman*, 285 F.3d at 1150 (emphasis added). That holding controls here.

II. THE *BMW/STATE FARM* GUIDEPOSTS SUPPORT THE FULL AMOUNT OF THE JURY'S VERDICT

The district court correctly held that the highly reprehensible nature of Exxon's conduct, the reasonableness of the relationship between the jury's $5 billion verdict and the actual and potential harm, and Exxon's exposure to criminal and civil penalties in excess of $5 billion together bring the jury's verdict within due process limits.

A. The District Court Correctly Concluded That Exxon's Misconduct Was Highly Reprehensible.

Exxon's opening brief did not dispute that the facts found by the district court describe highly reprehensible conduct. Instead, it argued that the evidence would not support those factual findings. Exxon Brief 33. Now, faced with plaintiffs' exposition of the record, Plaintiffs' Brief 18-25, Exxon has changed its argument. Exxon now contends (1) the district court's analysis was a nullity because this Court already had held that Exxon's conduct was not "sufficiently reprehensible to support a large award," Exxon Reply 9, and (2) the reprehensibility factors outlined in *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), negate the district court's conclusion. Exxon Reply 10-21. Neither argument fares any better than Exxon's initial attempt to rewrite the record.

On the first point, this Court's opinion did not decide whether Exxon's decision to leave Captain Hazelwood at the helm of the Exxon Valdez was "sufficiently reprehensible to support a large award." Exxon Reply 9. Rather, this Court suggested, based on its understanding of the facts at the time, that Exxon's misconduct may not justify punitive damages "at so high a level" – a "level" it estimated to be "between 12 . . . and 17" times the total quantified harm. 270 F.3d at 1242-43. Now, however, the district court has more fully explained the egregious nature of Exxon's conduct and its devastating consequences. ER

609-35. It has clarified that the actual ratio here is not in double digits, but is 9.74 to 1 – a level that *State Farm* and this Court's subsequent decisions have confirmed is presumptively reasonable – even before taking additional unquantified harm and potential harm into account. ER 647, 649-50; *infra* at 23-26; Plaintiffs' Brief 50-52.

On the second point, Exxon's mechanical parsing of the list of reprehensibility factors listed in *State Farm* improperly treats those factors as if they were rigid and exclusive criteria. Rather, those factors are guides for assessing the totality of the circumstances – in order to distinguish between truly ignominious behavior and the type of conduct at issue in *BMW, Cooper* and *State Farm*.

Viewed as a whole, Exxon's misconduct was "in an entirely different galaxy" from the comparatively minor wrongdoing in those cases. Order 364, ER 621. Only last year, this Court held in a criminal case that the term "'reckless' . . . does not begin to describe the magnitude" of culpability for drunk driving a "massive vehicle" – an 80,000-pound, 18-wheel truck – after ignoring repeated warnings of danger. *United States v. Semsak,* 336 F.3d 1123, 1125-27 (9th Cir. 2003). Here, Exxon deliberately and repeatedly permitted Hazelwood's drunk driving a 211,000-ton supertanker, carrying over 53 million gallons of toxic cargo, after ignoring repeated warnings of Hazelwood's relapse. ER 575-76, 617-21.

Exxon's specific advance knowledge of the likely consequences of a major spill in Prince William Sound, where the entire economy was based on fishing and subsistence, made its conduct even more egregious. Plaintiffs' Brief 20. But Exxon and the other members of the Alyeska consortium viewed the probable consequences of such a spill as "acceptable" because (and only because), when proper safety procedures were followed, "the chances of such a large spill [were] 'highly unlikely.'" Exxon Reply 9 n.6. That is exactly why leaving a drinking alcoholic at the helm of the Exxon Valdez was so egregious: it dramatically altered this calculus, making a massive spill – with all the disastrous consequences Exxon had foreseen – vastly more likely. Worse yet, Exxon had no business or social justification for what it did. Plaintiffs' Brief 22-24, 33-35; *see also* Order 364, ER 637-38 (Exxon's actions were economically irrational); Exxon Reply 20 (conceding that Exxon had no financial reason to act as it did).

Seen in this light, the *BMW/State Farm* reprehensibility factors reinforce the district court's conclusion.

1. Type of Harm.

Exxon argues in various ways that the profound personal harm (in the form of emotional distress) it caused plaintiffs does not matter, suggesting that its misconduct should be regarded as no different in this respect from, for example, a

competitive tort where one company affects another's bottom line. None of Exxon's assertions has merit.

Exxon initially contends that this harm cannot be taken into account because this case excludes consideration of "***public*** rather than private harms." Exxon Reply 10-11 (emphasis in original). But the district court's assessment of the harm Exxon caused did not rest on such "public" harms; rather, the court found Exxon's conduct more reprehensible because it inflicted "depression, post-traumatic stress disorder, [and] generalized anxiety disorder" on "thousands of claimants." ER 613-14; *see also id.* 578. Each of those class members experienced harm that was "uniquely private." Exxon Reply 11. This individual harm is "distinct from the harm to the environment and natural resources that [this Court] held in *Alaska Sport Fishing* [*Ass'n v. Exxon Corp.,* 34 F.3d 769 (9th Cir. 1994),] had already been vindicated," 270 F.3d at 1228, and distinct from the generalized harm to Native culture at issue in *Alaska Native Class v. Exxon Corp.*, 104 F.3d 1196 (9th Cir. 1997).

Exxon also contends that emotional distress is irrelevant in the absence of compensatory recoveries for that harm. Exxon Reply 13. But every court to consider Exxon's argument has held to the contrary, recognizing that the inquiry for purposes of due process review is the extent to which the defendant caused intangible harm, not whether plaintiffs recovered, or could recover, compensatory

damages for it. *See EEOC v. W&O, Inc.,* 213 F.3d 600, 614 (11th Cir. 2000) (considering defendant's "infliction of worry and emotional upset" where plaintiffs recovered compensatory damages only for "economic" harm); *Tate v. Dragovich,* 2003 WL 21978141 (E.D. Pa. 2003) at *9 (considering plaintiff's emotional and psychological injuries where compensatory recovery was barred by statute); *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 810-11 (Cal. App. 2003) (considering harm suffered by deceased where law did not permit recovery); *cf. Southern Union Co. v. Southwest Gas Corp.,* 281 F. Supp. 2d 1090, 1104 (D. Ariz. 2003) (considering potential lost profits for which evidence was insufficient to support compensatory recovery).

Although Exxon suggests these holdings are inconsistent with *Cooper*, Exxon Reply 13 n.13, Exxon has *Cooper* backwards. *Cooper* noted that "[u]ntil well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time." 532 U.S. at 437 n.11.[2] The general shift "in modern times" broadening the scope of compensatory damages and thereby moving "'the theory of punitive damages

[2] For sources describing the common law system, see KENNETH R. REDDEN, PUNITIVE DAMAGES 28-29 (1980) (early punitive awards were quasi-compensation for "mental anguish" and "other intangible harms"); Note, *Exemplary Damages in the Law of Torts,* 70 Harv. L. Rev. 517, 519-20 (1957) (collecting decisions upholding punitive verdicts "as compensation to the plaintiff for mental suffering, wounded dignity, and injured feelings").

towards a more purely punitive . . . understanding,'" Exxon Reply 13 n.13 (quoting *Cooper,* 532 U.S. at 437 n.11), thus narrows the permissible rationale for punitive damages in cases such as *State Farm,* where the plaintiffs were "made whole for [their] injuries by [receiving] compensatory damages" for their intangible harm. 538 U.S. at 419; *see also id.* at 426 (noting that compensatory award already contained a "punitive element"). But this case was tried under admiralty law's limited, 19th century-style conception of compensatory damages. Accordingly, in contrast to *State Farm,* the absence of any compensatory remedy for class members' extensive intangible injuries reinforces the propriety of the punitive award. *See* Order 364, ER 635-36; Plaintiffs' Brief 28; *see also Pacific Mutual Life Ins. Co. v. Haslip,* 499 U.S. 1, 41-42 (1991) (Kennedy, J., concurring) (punitive awards consistent with "common-law method" and standards are entitled to greater respect on review).

Nor is there any basis for Exxon's protest that the district court could not rely on "human experience" or "common sense" in factoring these intangible injuries into its reprehensibility assessment. Exxon Reply 12-13. At common law, juries were entitled to award punitive damages for emotional distress "not based on any particular proof of suffering" but as quasi-compensatory punishment for the "great disadvantages" they could presume followed from a defendant's egregious conduct. *Coryell v. Colbaugh,* 1 N.J.L. 77, 77 (1791). If "mental suffering and

injury" were "natural and proximate in view of the nature of the damage of the act," they could support punitive damages "without special allegations." *Wise v. Daniel,* 190 N.W. 746, 747-78 (Mich. 1922) (quoting *Rogers v. Bigelow,* 96 A. 417, 420 (Vt. 1916)); *see also In re New Orleans Train Car Leakage Fire Litig.*, 795 So. 2d 364, 385 (La. App. 2001) (considering mental anguish that "must have accompanied" defendant's release of toxic chemical).

In any event, ample specific evidence, in the form of studies detailing plaintiffs' intangible harms, supports the district court's findings. Order 364, ER 613-14; SER 1347-1533. Although Exxon now suggests it objected "in the district court on remand" to plaintiffs' citations to these studies, Exxon Reply 11-13, this is not so. Exxon argued below only that the district court should reject the studies on the merits because it had ruled plaintiffs' compensatory claims for emotional distress to be "not legally cognizable." Plaintiffs' Reply Excerpts of Record (PRER) 39-42.[3] Indeed, Exxon itself recognized the district court's *BMW* review as an opportunity to present new material: it presented lengthy, fact-intensive

[3] Even if Exxon had objected on evidentiary grounds below, it would not matter. Due process review allows parties to present specific evidence on post-verdict review that was not put before the jury. *See, e.g., Haslip,* 499 U.S. at 6, 22 (considering evidence of defendant's financial condition even though state law barred jury from hearing this evidence); *Owens-Corning Fiberglas Corp. v. Malone,* 972 S.W.2d 35, 53 (Tex. 1998) (considering evidence from post-trial hearing as to whether defendant had been punished enough by other similar litigation); *Garnes v. Fleming Landfill, Inc.,* 413 S.E.2d 897, 910-11 (W. Va. 1991) (evidence not put to jury is proper "to instruct the trial judge's understanding of the appropriateness of a particular punitive award at the post-trial review stage").

declarations and exhibits concerning matters not presented to the jury, ER 411-497. Exxon relies on these very submissions here in contesting the extent of plaintiffs' emotional distress. Exxon Brief 43 (citing ER 411-14, 436-37, 452-55); Exxon Reply 13 & n.12 (citing Exxon Brief 43, ER 455).

2. Health and Safety.

Exxon says that spilling 11 million gallons of toxic crude into Prince William Sound did not threaten the health or safety of the Native Alaskans who gathered food for their own table from the Sound, or of the thousands of people whose emotional health was harmed by the spill. Exxon Reply 13-14. This defies common sense.

3. Vulnerability.

Exxon says that plaintiffs' vulnerability to a massive oil spill was irrelevant because Exxon spilled the oil recklessly, not on purpose. Exxon Reply 15. While Exxon's hand-picked cases hold that intentionally harming vulnerable victims is highly reprehensible, they do not negate the holding of other cases that recklessly harming vulnerable persons is highly reprehensible as well. *See, e.g., Hopkins v. Dow Corning Corp.,* 33 F.3d 1116, 1126-27 (9th Cir. 1994); *Romo,* 6 Cal. Rptr. 3d at 806.

4. Repeated Actions.

"For approximately three years, . . . over and over again," Exxon received reports of Hazelwood's alcoholic relapse but "did nothing to prevent Captain Hazelwood from drinking and driving." Order 364, ER 617. Exxon nevertheless argues it did not engage in "repeated" wrongdoing because this was the first shipwreck that resulted from Hazelwood's drunk driving. Exxon Reply 16-17. Basic principles of culpability negate Exxon's thesis. Defendants are more blameworthy if they "ignore[] repeated warnings" regarding reckless conduct, even if the conduct caused actual harm only once. *Semsak,* 336 F.3d at 1126 (drunk driving); Plaintiffs' Brief 31-32; *cf.* U.S. Sentencing Comm'n, Federal Sentencing Guidelines § 1B1.3 ("all acts and omissions" of a defendant are "relevant conduct" for sentencing, even if only last act resulted in harm).

5. Deliberate Conduct.

State Farm states that acts involving "intentional malice" are worse than "mere accident[s]." 538 U.S. at 419. Ignoring that this obviously sets up a *mens rea* continuum, not a binary test, Exxon strains to argue it did not act with "intentional malice" in deliberately placing a relapsed alcoholic at the helm of its supertanker. Exxon Reply 17-21. The district court's determination that "the grounding was no mere accident" and that Exxon's state of mind was much closer to "intentional malice" speaks for itself. Order 364, ER 617-20.

6. Post-Tort Conduct.

Exxon says that *Swinton v. Potomac Corp.*, 270 F.3d 794 (9th Cir. 2001), demonstrates that its post-spill conduct must mitigate its culpability. Exxon Reply 21. But *Swinton* actually confirms the propriety of the district court's ruling that the jury has already given Exxon whatever credit is due for its post-spill conduct. ER 631-33. While *Swinton* ruled that defendants may argue to juries that their remedial conduct shows a large punitive award is unnecessary – as Exxon did, 7592:1-7593:2, 7607:24-7610:10 – this Court also held that juries are "free to discount such evidence on the grounds that the remedial action undertaken" by the defendant was "nothing more than window dressing" or a strategy to minimize legal exposure. 270 F.3d at 815. Indeed, this Court noted that it had "little doubt that some juries [would] cast a skeptical eye on such evidence of after-the-fact good works." *Id.*

There is ample reason to believe the jury here properly cast such a skeptical eye on Exxon's post-spill actions. Exxon cloaks itself as a model corporate citizen for its cleanup efforts and claims payments. But plaintiffs argued at trial that Exxon's post-spill actions deserved no special praise, for they merely acknowledged indisputable obligations and were designed more to create a public relations counteroffensive than to atone for its misconduct. 7567:19-7570:9, 7631:6-9.

Viewing the evidence here in the light most favorable to plaintiffs, *Hangarter v. Provident Life & Accident Ins. Co.,* 373 F.3d 998, 1013 (9th Cir. 2004), the jury could well have agreed with plaintiffs' position. Even Exxon does not dispute that the law required it to clean up its mess and to pay claims to which it had no legal defense. Order 364, ER 578-79 & nn.16, 17.

Furthermore, as plaintiffs already have explained, Exxon's claims program was neither prompt nor comprehensive. Exxon suggests that it paid plaintiffs before they would have been paid had there been no spill, but this is false. *See* Plaintiffs' Brief 36, 47-49. Commercial fishermen receive most of their yearly income when they deliver the fish to the dock (subject to the possibility of a small bonus later). At the time the 1989 season for most of the major fisheries would have ended, Exxon had paid those fishermen about 17% of what they eventually recovered for that year. ER 456; SER 1541, 1546, 1548. Seafood processors at that time had received about 7% of their total eventual recovery. ER 460, 626, 628.

Nor was Exxon's legally mandated cleanup effort – even if it mattered here in light of the fact that "this is not a case about befouling the environment," 270 F.3d at 1221; ER 629 n.101 – prompt or comprehensive. Although Exxon says its cleanup "prevented additional harm," Exxon Reply 23, the U.S. Senate Environmental and Public Works Committee found Exxon's response was "slow,

confused, and inadequate" and "failed miserably in containing the spill and preventing damage." Senate Report No. 101-94 at 2 (1989), *reprinted in* 1990 U.S.C.C.A.N. 722, 723-24. And although Exxon says 98% of the oil was eventually "removed," Exxon Reply 23, 13% of it – over 1.4 million gallons – actually sank to the sea floor. Exxon Valdez Oil Spill Trustee Council, *Lingering Oil* <http://www.evostc.state.ak.us/facts/lingeringoil/html>. To this day, remaining oil is impeding the recovery of the region and its resources. *Id.*; Exxon Valdez Oil Spill Trustee Council, *2003 Annual Status Report* at 6-7, <http://www.evostc.state.ak.us/pdf/2003 status_report.pdf>.

B. The Relationship Between the Jury's Verdict and the Harm Falls Within Due Process Limits.

1. The District Court Properly Calculated the Quantified Economic Harm.

Exxon argues that the district court's finding that Exxon caused $513.1 million in economic harm, ER 625-29, overstates the total by $131.9 million. Exxon Reply 38-42. But none of Exxon's challenges shows that the district court's tabulation was "clearly erroneous." *Cooper,* 532 U.S. at 435, 440 n.14.

a. Alyeska's $98 Million Payment Does Not Reduce the Harm Exxon Caused.

Exxon does not contest that "[f]oreseeable intervening forces are within the scope of the original risk, and hence of the defendant's negligence." Plaintiffs' Brief 39 (quoting W. PAGE KEETON, ET AL., PROSSER & KEETON ON TORTS (5th ed.

1984) § 44). Nor does Exxon dispute that Alyeska's failure to contain the spill was eminently foreseeable. Plaintiffs' Brief 40. Exxon asserts, however, that the "proportional fault" rule of *McDermott, Inc. v. AmClyde,* 511 U.S. 202 (1994) diminishes its responsibility here. Exxon Reply 38. But Exxon neglects to tell this Court that the parties stipulated, consistent with an earlier district court ruling, that *McDermott* ***would not apply*** to this litigation. PRER 30; *see also* Orders 163, 182 (PRER 1, 26). Exxon is responsible for all of the harm.[4]

Moreover, the cases cited in plaintiffs' prior brief establish that settlements by a co-defendant do not reduce the harm for purposes of reviewing punitive awards. *See* Plaintiffs' Brief 39 (citing *Kelley v. Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995); *Evans v. Dean Witter Reynolds Inc.*, 5 P.3d 1043, 1053-54 (Nev. 2000); *Exxon Corp. v. Yarema*, 516 A.2d 990, 997-98 (Md. App. 1986)). Although Exxon attempts to distinguish *Kelley* on the basis that the settling defendant was paying for harm that the nonsettling defendant caused, Exxon Reply 39, in *Evans* the settling defendant was the active tortfeasor. *See Evans,* 5 P.3d at 1046-47, 1053-54. The principle is the same in either circumstance.

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[4] Exxon's contractual obligation to indemnify Alyeska confirms Exxon's responsibility. Although Exxon denies that it "reimbursed Alyeska under a contractual indemnity," Exxon Reply 39 n.38, the evidence (which, contrary to Exxon's suggestion, plaintiffs cited in their opening brief as well) shows that Exxon agreed to "[i]ndemnify and hold Alyeska harmless from all claims." Plaintiffs' Brief 40 (quoting Order 163 at 18 n.10, PRER 18, and Port Information Manual).

Exxon's accusation that the district court "changed its position" regarding whether the Alyeska payment should be deducted from the $287 million harm to fisherman in the major fisheries is simply wrong. Exxon Reply 38. In Order 267, the district court found that "the harm to commercial fishermen was $287,000,000," and held that the punitive verdict was valid even "***[i]f***" it accepted Exxon's "argu[ment]" that the Alyeska settlement should be deducted, so it did not need to pass on Exxon's argument. SER 1167-68 (emphasis added). When the district court quantified the harm on remand, it correctly valued the harm at $287 million, without any deduction for the Alyeska settlement. ER 625.

b. This Court Should Reject Exxon's $33.9 Million of Additional Quibbles.

Expanding on a single obscure sentence in a footnote of its opening brief, Exxon Brief 45 n.19, Exxon argues that three other categories of harm totaling $33.9 million should be excluded. Exxon Reply 40-42. Even if that footnote could suffice to avoid waiver, Exxon's arguments would not show any clear error.

First, Exxon argues that the district court overvalued certain harm to Native Corporations. Exxon Reply 40. After the Fund Administrator valued this claim at $25.2 million and a jury valued the claim at just under $9 million, the claim was compromised at $17.8 million. ER 473-74, 626; SER 1308-09. The district court's use of the compromise figure, ER 626, was reasonable.

Second, Exxon's allegation that the district court double-counted the $13.4 million received by Phase IV plaintiffs is false. The aquaculture association and minor fishery participants who received these payments are not included in any of the district court's 23 other categories of harm. *See* ER 625-29; SER 1310-11, 1693.

Third, Exxon asserts that $11.5 million it paid Native Corporations and municipalities to reimburse them for the expenses of boom deployment, spill reconnaissance and the like, is "not compensation for harm." Exxon Reply 42. But it is hornbook law that "expenditures reasonably made" by a plaintiff "in a reasonable effort to avert the harm threatened" by the defendant's tortious conduct are compensable losses. RESTATEMENT (SECOND) OF TORTS § 919(1) (1977).

2. Exxon Is Not Entitled to Offset Pretrial Payments.

a. There Is No Basis for Ignoring Any of the Actual Harm in This Case.

Exxon insists that the "federal civil policy" encouraging settlements supports deducting pretrial payments from the quantified harm. Exxon Reply 29. But Exxon still does not cite any authority suggesting that ***the Due Process Clause*** requires courts to encourage settlements. That being so, any considerations with respect to settlements cannot justify reducing the punitive award based on *BMW/State Farm* review. *See* Order 364, ER 630; Plaintiffs' Brief 41-43.

Exxon's attempt to avoid its stipulation of economic harm between $432 million and $768 million, SER 1136-37, 1554-59, fares no better. Exxon contends that it entered into the stipulation only because of a prior ruling by the district court that the jury could consider these harms. Exxon Reply 28. But Exxon cites nothing for this assertion – and, in fact, the district court never made any such ruling. The stipulation arose from the parties' own negotiations, and is binding. Plaintiffs' Brief 39.

Exxon says that *In re: the Exxon Valdez (Icicle Seafoods),* 229 F.3d 790 (9th Cir. 2000), and *In re: the Exxon Valdez (Baker),* 239 F.3d 985 (9th Cir. 2001), do not judicially estop it to seek an offset because "*Icicle* and *Baker* go to what is assignable; *BMW* goes to the value of what is assigned." Exxon Reply 33. This is disingenuous. In *Icicle* and *Baker,* Exxon asserted, and this Court held, that portions of punitive awards should be assignable ***precisely because a partial pretrial settlement "does not reduce the [punitive] award's amount.***" *Icicle*, 229 F.3d at 796 (emphasis added). *See also* Plaintiffs' Brief 44-46; SER 1230-33, 1272-74.

Exxon's current brief, in fact, does not even dispute that if it were to prevail here on its offset argument, cede-back agreements would become unnecessary, because ***all*** pretrial payments would give the same benefit as cede-back agreements. *See* Plaintiffs' Brief 46. But Exxon contended in *Icicle* and *Baker*

that it was "impossible" for a defendant to reduce its punitive damage exposure through pretrial settlements in the absence of cede-back agreements. SER 1272-74. *See also* Plaintiffs' Brief 44; SER 1230-33. This Court agreed. *Baker*, 239 F.3d at 986-987; *Icicle*, 229 F.3d at 793, 796.

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

Exxon implicitly accepts that, ***if*** some of the harm to plaintiffs could be ignored because of offsets, those offsets would have to meet the prerequisites stated at Plaintiffs' Brief 47. Although Exxon disputes the prerequisites' applicability in several respects, Exxon Reply 36-38, these arguments lack merit.

First, Exxon incorporates by reference its flawed argument that it is not bound by its harm stipulation with regard to $20 million paid to natives and $123 million paid to processors. Exxon Reply 36. That argument should be rejected for the reasons discussed above, at 21. Even if the stipulation were not binding, Exxon errs in contending that the native settlement was a "pretrial settlement." Exxon Reply 36-37. In fact, the settlement was reached three months after the commencement of trial. CD 5705 (Aug. 4, 1994). And Exxon offers no defense to the fact that granting it an offset for the $83 million it paid to processors in exchange for cede-back agreements would reduce its punitive damage exposure twice by virtue of the same payments. *See* Plaintiffs' Brief 49 & n.31.

Second, Exxon claims that it should receive full credit for all but $19.6 million of the $168.5 million that it flatly refused to pay fishermen prior to trial, *see* Plaintiffs' Brief 47-48, because most of those claims were eventually satisfied by Alyeska's settlement and a $50 million overpayment on the claims that Exxon did settle before trial. Exxon Reply 37. The Alyeska argument should be rejected for the reasons discussed in plaintiffs' prior brief. *See* Plaintiffs' Brief 38-39, 48-49. Exxon's overpayment of other claims does not change the fact that it refused to pay anything with respect to the $168.5 million until after the jury returned a verdict.[5]

Finally, Exxon argues that it should get credit for payments made by the TAPL Fund, saying the Fund "acted essentially as an independent claims adjuster for Exxon." Exxon Reply 37-38. In fact, the Fund resolved claims in adversarial proceedings in which Exxon opposed plaintiffs' efforts to recover. SER 1297-99.

3. The Single-Digit Ratio Here Comports With Due Process.

a. Single-Digit Ratios Are Presumptively Valid.

An unbroken line of holdings from the Supreme Court's decision in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), through the decisions and remands in *BMW, Cooper,* and *State Farm,* and to this Court's recent

[5] Exxon says it refused to pay the $168.5 million because plaintiffs' claims were overstated. Exxon Reply 36-37. Most of this amount ($130 million), however, represents the claim for price diminishment in 1989, as to which the jury awarded plaintiffs 90% of what they requested. SER 1548; RER 155.

decisions in *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020 (9th Cir. 2003), and *Hangarter* establishes that single-digit ratios are presumptively valid. *See also* Order 364, ER 640-647, 649-50; Plaintiffs' Brief 50-52. Exxon nevertheless asserts that "if *State Farm* is to be honored" the ratio here must be near 1:1. Exxon Reply 43.

The subsequent history of *State Farm* itself rejects Exxon's argument. On remand, the Utah Supreme Court ordered a 9:1 ratio. *Campbell,* 98 P.3d at 418. State Farm and supporting *amici* sought certiorari in the Supreme Court, contending that the Utah Supreme Court's decision – as well as ***nearly all other*** post-*State Farm* decisions (including *Zhang* and *Hangarter*) considering punitive damages in the context of "substantial" compensatory damages – violated the supposed 1:1 rule.[6] The Supreme Court, consistent with its prior decisions, denied *certiorari.* 125 S. Ct. 114 (2004).

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[6] *See, e.g.*, Petition for Writ of Certiorari, *State Farm Mut. Auto Ins. Co. v. Campbell* (No. 04-116), at 25-28 (July 20, 2004), *available at* 2004 WL 1638765; *Amicus* Brief of National Association of Manufacturers at 8-9 (Aug. 23, 2004), *available at* 2004 WL 1882159 ("of the 27 post-*State Farm I* decisions released by state and federal appellate courts in which the compensatory award or potential harm has exceeded $200,000 (and thus fairly could be said to be 'substantial'), only once has a court construed *State Farm I* to necessitate a reduction to a 1:1 ratio"); *Amicus* Brief of Chamber of Commerce at 8 (Aug. 23, 2004), *available at* 2004 WL 1900739.

b. The Noneconomic Harm and Potential Harm Warrant an Enhanced Ratio.

The district court determined that multiple factors, including the noneconomic harm that Exxon caused but did not pay for and the potential additional harm that could have occurred, justified the ratio in this case. ER 633-40. Exxon's arguments that the district court erred in considering noneconomic and potential harm, Exxon Reply 45-48, are not well founded.

Exxon contends that plaintiffs' noneconomic injuries are irrelevant because they were not "prove[n] . . . at trial." Exxon Reply 45-46. As explained above, at 9-12, however, Exxon has waived this argument and, in any event, it misapprehends the nature of due process review. *See also* Plaintiffs' Brief 56-58.

With respect to potential harm, Exxon does not seriously dispute that the Exxon Valdez easily could have spilled its entire cargo into Prince William Sound, causing as much as $200 million additional economic harm to the fishermen in 1989, as well as more harm to the other plaintiffs and in subsequent years. Plaintiffs' Brief 58-60; Order 364, ER 634-35. Exxon asserts, however, that this potential additional harm is irrelevant because "Exxon itself prevented [it]" by lightering the remaining oil off the ship. Exxon Reply 48. But this misses the mark. The risk of additional harm existed in large part due to the collision with Bligh Reef itself and to Captain Hazelwood's attempt to dislodge the supertanker

from the reef, *see* Plaintiffs' Brief 59; Order 364, ER 634, both of which occurred long before the lightering operation began.

Exxon also introduces two new arguments, contending that the Supreme Court intended potential harm to be relevant only when the defendant "tried, but failed" to cause the harm or when the actual harm was "minimal" but the potential harm was "tremendous." Exxon Reply 46-47. But the Supreme Court's decisions have never so limited the relevance of potential harm. *See State Farm*, 538 U.S. at 418, 424; *Cooper*, 532 U.S. at 441-42; *BMW*, 517 U.S. at 581-82; *TXO*, 509 U.S. at 459-62; *Haslip*, 499 U.S. at 21. Due process allows a punitive award to punish and deter based on the full range of the potential consequences of a defendant's misconduct. *See* Order 364, ER 603-04. Cases applying *BMW* and *State Farm*, therefore, have considered potential harm regardless of whether the defendant specifically attempted to cause it,[7] and regardless of the quantity of actual harm.[8]

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[7] *See, e.g., Dean v. Olibas,* 129 F.3d 1001, 1007 (8th Cir. 1997); *Southern Union,* 281 F. Supp. 2d at 1104; *Grabinski v. Blue Springs Ford Sales, Inc.,* 1998 WL 755019 (W.D. Mo. 1998) at *4, *aff'd in relevant part,* 203 F.3d 1024, 1025-27 (8th Cir. 2000); *Craig v. Holsey*, 590 S.E.2d 742, 748 (Ga. App. 2004); *New Orleans*, 795 So.2d at 383-86.

[8] *See, e.g., Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634, 639-40 (10th Cir. 1996) (considering $769,000 in potential harm despite $269,000 in actual harm); *Southern Union,* 281 F. Supp. 2d at 1099-1105 (considering "unquantifiable" potential harm despite $390,000 in actual harm); *New Orleans,* 795 So.2d at 383-86 (considering potential harm despite estimate that class of 8,047 members would recover compensatory damages "in the low to middle tens of thousands of dollars" per member).

C. Comparable Penalties Gave Exxon Fair Notice That It Could Face Over $5 Billion in Penalties.

Nothing in Exxon's brief casts any doubt on the district court's conclusion that "Exxon knew that billions of dollars were at stake" if it recklessly spilled millions of gallons of oil into Prince William Sound. ER 644.

1. Criminal Penalties.

Exxon argues that the statutory maximum criminal penalty it faced has "no relevance" because it is unlikely that it would have been required to pay the maximum fine. Exxon Reply 54. But Exxon confuses *State Farm*'s guidance respecting penal provisions that were unlikely to be invoked with its treatment of the proper benchmark once a penalty has been deemed relevant. *State Farm* cautioned against comparing criminal penalties when there was only a "remote possibility" that criminal charges would have been brought. 538 U.S. at 428. But this does not affect this Court's prior conclusion that criminal penalties are "particularly informative" here, 270 F.3d at 1245, where the defendant was actually indicted and pleaded guilty. *Id*; *see also* Order 364, ER 641-43; Plaintiffs' Brief 62-63. And once criminal penalties are deemed informative, *State Farm* reinforces this Court's prior statement that "[c]eilings," 270 F.3d at 1245, control the due process comparison. *See State Farm,* 538 U.S. at 428 (comparing to statutory maximum); *Zhang*, 339 F.3d at 1044-45 (comparing to "maximum fine" authorized); Plaintiffs' Brief 62-64.

Exxon next argues that $5.1 billion was not a "permissible" criminal fine because the Alternative Fines Act, 18 U.S.C. § 3571(d), and the basic sentencing statute, 18 U.S.C. § 3553(a), each set lower maximums. Exxon Reply 54-55. Exxon waived this argument by not raising it either in the district court or in its opening brief here. In any event, the argument lacks merit because § 3571(d) prescribes the penalty for a single criminal "offense." Since each of the five federal crimes for which Exxon was indicted contains an element the others do not, Exxon could have been punished separately under § 3571(d) for each separate offense. Order 364, ER 580, 643; *Blockburger v. United States,* 284 U.S. 299 (1932) (double jeopardy); *United States v. Freeman,* 6 F.3d 586, 600 (9th Cir. 1993) (double jeopardy); *Watts v. Bonneville,* 879 F.2d 685, 687-88 (9th Cir. 1989) (due process). The notion that § 3553(a)'s general "not greater than necessary" language modifies specific crimes' statutory maximums is frivolous.

Exxon's further suggestion that the district court's acceptance of the 1991 plea bargain was a binding determination that $150 million or $25 million represents appropriate punishment in the civil litigation ignores reality. As an initial matter, Exxon's insistence that the plea bargain was meant to address the harm at issue here, Exxon Reply 55, is simply false. *See* Plaintiffs' Brief 26. This Court already has held that "the harm and punishment" to the individual plaintiffs here is "distinct from the harm to the environment" addressed in the criminal case.

270 F.3d at 1228. The Sentencing Memorandum's reference to "the people of Alaska" is boilerplate language in criminal cases, where "the people" always are theoretically harmed.

What is more, whatever comments the district court may have made in the context of accepting a plea agreement in 1991, the best evidence of the district court's determination of the appropriate punishment in this case is what the court said in Order 364. There, after 13 years of additional litigation, including a lengthy trial and extensive post-trial proceedings that revealed the full nature of Exxon's conduct and the harm it caused, the district court found that the jury's $5 billion verdict was consistent with due process.

2. Civil Penalties.

Exxon continues to ignore this Court's prior statement that federal legislation enacted in direct response to the spill, which would have subjected Exxon to a $786 million penalty, has "value as a legislative judgment." 270 F.3d at 1246. Exxon also ignores the post-spill state legislation yielding a penalty of $500 million, which complements the federal penalty to produce $1.3 billion in fines for a spill this large. Exxon's denials are especially peculiar in light of its insistence that "where a specific and substantial legislative penalty addresses ***exactly*** the conduct in issue," that penalty "should be accorded great weight in the *BMW* analysis." Exxon Reply 53 (emphasis in original).

Exxon's contention that the Alaska civil penalty as it existed on March 24, 1989, was $28 million, Exxon Reply 51, rather than $80 million, distorts several parts of the regulatory scheme:

1. Exxon's argument that the $2.50/gallon base penalty applies only to the "portion" of the oil that reached the most sensitive environments, Exxon Reply 50, ignores the context in which that word appears. 18 AAC 75.570(3) (SER 1824) provides that when oil has entered more than one receiving environment, the base rate for the most sensitive of the environments governs. Nor is Exxon's proposed requirement that the final resting place for each gallon of oil must be tracked a workable test in the real world.

2. Even if Exxon's construction of 18 AAC 75.570(3) were correct, the regulations explicitly, and quite understandably, classify "Prince William Sound" as a "sensitive" environment, carrying a fine per gallon of $2, not $1. 18 AAC 75.520(2)(C), 75.570(1) (SER 1821, 1824).[9] This base penalty would yield a total fine of $63.8 million.

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[9] Exxon's suggestion that 18 AAC 75.520(2)(C) violates Alaska statutory law, Exxon Reply 51 n.46, hardly merits a response. Even if it were appropriate for this Court to review state regulations during a due process review for consistency with other state laws, AS § 46.03.758(*l*)(2) (SER 1815) classifies a "sound" as a sensitive environment, so the regulation's determination that Prince William ***Sound*** qualifies as such an environment is a reasonable and valid interpretation of the statute. *See Lauth v. State*, 12 P.3d 181, 185-86 (Alaska 2000) (regulations are presumed valid and violate state law only if unreasonable interpretation of statute); 2A NORMAN SINGER, STATUTES AND STATUTORY CONSTRUCTION § 47.33 (6th ed.

3. Exxon's assertion that it would have received credit for the 14% of the oil that was cleaned up, Exxon Reply 50-51, ignores the fact that no credit is available for oil removed by "government[al]" agencies. AS 46.03.758(f) (SER 1814). Here, governmental agencies removed a significant amount of the oil. *See generally* ER 112 (Sentencing Memorandum discussing money expended by Exxon "and the two governments in clean up efforts"); DX-2304. Accordingly, any credit would have been much lower than Exxon posits.

CONCLUSION

For the foregoing reasons, this Court should remand with instructions to enter judgment in the amount of the jury's $5 billion punitive damages verdict, with interest calculated as directed by the district court's Order 364.[10]

2003) ("Referential and qualifying words and phrases, where no contrary intention appears, refer solely to the last antecedent.").

[10] Exxon has not challenged the district court's ruling with respect to interest. Order 364, ER 650 n.117.

RESPECTFULLY SUBMITTED this 19th day of November, 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 7319 words, based on the word count of the word processing software currently in use by our firm.

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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 November 19, 2004, 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.

Robin Hafey