No. 07-219

IN THE
Supreme Court of the United States

EXXON SHIPPING CO. and EXXON MOBIL CORP.,

Petitioners,

v.

GRANT BAKER, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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INTRODUCTION

This is a one-of-a-kind case that, in context, has resulted in an unexceptional judgment. Unlike any other shipowner of which we are aware, Exxon placed a relapsed alcoholic, who it knew was drinking aboard its ships, in command of an enormous vessel carrying toxic cargo across treacherous and resource-rich waters. And unlike any previous shipping disaster, Exxon's wrongdoing inflicted such widespread harm to private parties' interests that the district court, at Exxon's request, certified a mandatory punitive damages class to protect Exxon from the threat of multiple punitive damage verdicts. The 83-day trial and subsequent appeals established that 32,677 claimants suffered an average of about $15,500 in economic harm and awarded them an average of approximately $76,500 each in punitive damages – a sum that is just less than five times their average individual economic harm. Viewed collectively, the aggregated judgment is $2.5 billion, which represents barely more than three weeks of Exxon's current net profits.[1]

Exxon now seeks *certiorari* to challenge the court of appeals' analysis of the case's unique facts, intricate procedural history, and idiosyncratic legal issues.

STATEMENT

1. In 1973, Congress authorized the Trans-Alaska Pipeline to allow oil companies, including Exxon, to bring crude oil from Alaska's North Slope to market in the lower 48 States. From the pipeline's terminus in Valdez, Alaska, oil companies would load oil tankers and set sail through the "icy and treacherous waters" of Prince William Sound, Pet. App. 22a (quotation omitted), before proceeding south.

The opening of the Port of Valdez promised Exxon the opportunity to reap enormous economic returns. At the same

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[1] *See* Exxon Mobil 2006 Annual Report, at 5, *available at* http://www.exxonmobil.com/corporate/files/corporate/XOM_2006_SAR.pdf.

time, Exxon took on a well-documented responsibility to respect the resources on which Alaskans depend. The waters of the Sound were "pristine" and "valuable [for their] fishing resources." Pet. App. 41a, 155a. The proceedings leading to the authorization of the pipeline emphasized that "[t]he economy of [the Prince William Sound] area depends almost entirely on commercial fishing, the processing of the catch, and related activities." 3 U.S. Dep't of Interior, Final Envtl. Impact Stmt., Proposed Trans-Alaska Pipeline, at 370 (1972) (C.A. 2004 Supp. ER 1775).

Like the rest of the industry, Exxon knew that "a major spill in the Valdez area would cause [an] incalculable disaster to the rich fisheries," as well as to Native Alaskans' subsistence living. C.A. 2004 Supp. ER 1797; *see also* Pet. App. 122a, 232a. Equipment adequate to contain such a spill did not exist in Alaska. The official contingency plan for the area acknowledged that any spill exceeding 200,000 barrels (8.4 million gallons) could not be contained; Exxon, like others, knew that oil from such a spill would "persist for years." C.A. 2004 Supp. ER 913-15, 1114.

Exxon Shipping Company ran Exxon's transportation operations out of the Port of Valdez, and an alcoholic culture pervaded the company.[2] Supertanker crews held parties on board ship; drank together in port; "destroyed" confiscated liquor by drinking it; and violated rules that forbade returning to duty within four hours of drinking.[3] Although on paper Exxon had a policy that prohibited drinking aboard ship, it did not enforce the policy, and Exxon's crews were "pretty

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[2] Petitioners stipulated that Exxon Corporation (now Exxon Mobil Corporation) and its subsidiary Exxon Shipping Company would be treated as one entity and that the acts and omissions of each would be chargeable against both. Pet. 5; Stipulation and Order re: Certain Trial and Evidentiary Issues (No. 1), Dkt. 4365. Except where context requires, this brief refers to the two entities collectively as "Exxon."

[3] Tr. 144-54, 352-54, 365-66, 383-85, 415-18, 875, 1696, 1710-12, 2221, 2223-24; C.A. 2004 Supp. ER 978-88.

conscious of" the fact that reporting alcohol violations by officers "could come back to haunt you."[4]

Exxon put Captain Joseph Hazelwood in command of the EXXON VALDEZ, one of the supertankers that regularly transited Prince William Sound. Hazelwood was a relapsed alcoholic, and Exxon knew it. "[T]he highest executives in Exxon Shipping knew Hazelwood had an alcohol problem, knew he had been treated for it, and knew that he had fallen off the wagon and was drinking on board their ships and in waterfront bars." Pet. App. 64a. Exxon began receiving reports of Hazelwood's relapse in the spring of 1986, less than a year after he returned to duty following a 28-day alcohol treatment program. Pet. App. 63a, 121a, 154a-155a. At that time, an Exxon employee warned Exxon's port captain that Hazelwood "had fallen off the wagon." Tr. 2490; Pet. App. 121a. The report was relayed to the President of Exxon Shipping, who was told that Hazelwood was "acting kind of crazy or kind of strange." Tr. 2914-16. Multiple reports of Hazelwood's relapse continued until just two weeks before the grounding of the EXXON VALDEZ. At that time, Hazelwood's supervisor received a report that Hazelwood had been drinking and making insulting comments about another Exxon captain, including hurling curses at the other captain over the ship's radio. It was apparent that "something was wrong with" Hazelwood. Tr. 2140-53, 2189-96. Thus, as the district court later explained:

> For approximately three years, Exxon's management knew that Captain Hazelwood had resumed drinking, knew that he was drinking on board their ships, and knew that he was drinking and driving. Over and over again, Exxon did nothing to prevent Captain Hazelwood from drinking and driving. Exxon repeatedly allowed Captain Hazelwood to sail into

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[4] Tr. 800, 1070, 1631, 1707-08, 2153, 2175, 2183, 2207, 3456; C.A. 2004 Supp. ER 1321.

> and out of Prince William Sound with a full load of crude oil.[5]

Pet. App. 154a; *see also* Pet. App. 64a, 83a, 89a-91a, 121a-122a, 155a-157a. To make matters worse, Exxon "routine[ly]" staffed its ships, including Hazelwood's, with overworked and fatigued crews. Pet. App. 90a, 254a.

On the night of March 23, 1989, the EXXON VALDEZ departed Valdez almost fully loaded with 53 million gallons of crude oil. Hazelwood was the captain and the only officer on board licensed to navigate through the critical parts of Prince William Sound. Predictably, he also was drunk – "so drunk that a non-alcoholic would have passed out." Pet. App. 87a. Before boarding the ship, Hazelwood had consumed "at least five doubles (about fifteen ounces of 80 proof alcohol) in waterfront bars." Pet. App. 64a. Once underway, Hazelwood pointed the vessel toward Bligh Reef, a "known and foreseen hazard," Pet. App. 61a, and then left the bridge and descended to his cabin, leaving control to the "fatigued" third mate. Pet. App. 64a. Shortly thereafter, with the third mate left to perform both his own job and Hazelwood's, the tanker ran aground on the reef. Although Exxon tells this Court that the "immediate cause of the grounding" was the third mate's failure to execute a turn to avoid the reef, Pet. 3, Exxon stipulated in the district court that Hazelwood "was negligent in leaving the bridge on the night of the grounding, that such negligence was a legal cause of the oil spill, and that the Exxon defendants are responsible for this act of negligence." Tr. 5.

The reef ripped open the ship's hull, releasing 11 million gallons of crude oil into the Sound, causing the "most notorious oil spill in recent times." *United States v. Locke*, 529 U.S. 89, 96 (2000). Wind and water spread the oil across 600 linear miles (roughly the distance from Cape Cod, Mass-

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[5] Westlaw's electronic version of this opinion, from which Exxon's Appendix apparently is drawn, omits nine words from this quotation.

achusetts to Cape Lookout, North Carolina) and over 10,000 square miles of the surrounding saltwater ecosystem.

"In keeping with its legal obligations, Exxon undertook a massive cleanup effort." Pet. App. 124a (citing 33 U.S.C. § 1321). But the jury could have concluded that Exxon directed its efforts more at appearances than effects. Exxon cleaned up only 14 percent of the oil. *See* Exxon Valdez Oil Spill Trustee Council, *Lingering Oil*, *available at* http://www.evostc.state.ak.us/Habitat/lingering.cfm (last visited Sept. 18, 2007). Audiotape captured an Exxon official demanding cleanup equipment as follows: "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." C.A. 2004 Supp. ER 1096.

As the courts below observed, the oil spill "disrupted the lives (and livelihood) of thousands of [people in the Prince William Sound area] for years." Pet. App. 24a. It made it likely that any "fish harvested [would be] adulterated by oil," Tr. 4495-96, requiring the State of Alaska to close fishing seasons in 1989, reduced harvests in later years, and caused fish prices to drop. It damaged approximately 1,300 miles of shoreline, much of it privately owned. It destroyed the subsistence activities of Native Alaskans, "for whom subsistence fishing is not merely a way to feed their families but an important part of their culture." Pet. App. 123a. As would be expected from a disaster that cripples an entire regional economy, "[t]he social fabric of Prince William Sound and Lower Cook Inlet was torn apart," producing a high incidence of severe depression, post-traumatic stress, and generalized anxiety disorder among those whose lives depended on harvesting the resources of the Sound. Pet. App. 150a-151a, 166a-167a.

2. Thousands of private claimants sued Exxon. While state and federal governments separately sought civil and criminal penalties against Exxon for the oil spill's effect on the environment, this consolidated case was (and is) the only proceeding addressing harm to "private economic and quasi-economic interests." Pet. App. 2a. And because Exxon quickly entered into settlements with the governments, this litigation provided the first opportunity for an adversarial proceeding to develop the facts fully. Pet. App. 174a n.111.

As the Ninth Circuit later observed, the district court "did a masterful job of managing this very complex case." Pet. App. 67a. After years of discovery, it tried the case in 1994 to a jury in three phases over 83 trial days (reported in 7,714 pages of transcript), with 155 witnesses and 1,109 exhibits. Because counsel advised Exxon that it "will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood," App. 43a, Exxon did not seek to limit its liability under the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181 *et seq.*

In the first trial phase, the jury found that Hazelwood and Exxon had each been reckless, which allowed the punitive damage claims to proceed. Pet. App. 67a.

In the second phase, the jury awarded $287 million in compensatory damages for economic harm to fishermen in the major commercial fisheries. Pet. App. 160a. Other proceedings addressed harm to other victims, including fishermen in other fisheries, fish processors, other area businesses, landowners, Native Alaskans, municipalities, and others. In post-trial proceedings, the district court and the court of appeals determined that class members suffered economic harm exceeding $500 million. Pet. App. 38a, 160a-163a. Unlike plaintiffs in an ordinary modern tort action, however, these plaintiffs could not recover damages for all their harm: maritime law retains narrow nineteenth-century conceptions of compensatory damages that preclude recovery for certain kinds of economic harms or for any

emotional and psychological injuries. *See generally Union Oil Co. v. Oppen*, 501 F.2d 558, 565-71 (9th Cir. 1974).

In the third phase, the jury was asked "to determine liability for and the amount of punitive damages, if any, for all plaintiffs." Third Amended Revised Trial Plan, Dkt. 4798, at 4. At Exxon's request, the district court certified a mandatory punitive damages class of 32,677 commercial fishermen, related individuals and businesses, private landowners, Native Alaskans, and others, encompassing "all persons or entities who possess or have asserted claims for punitive damages against Exxon . . . which arise from or relate in any way to the grounding of the EXXON VALDEZ or the resulting oil spill." Pet. App. 126a. Accordingly, unlike any other punitive damages trial before or since, this case would determine, once and for all, the total amount of any punitive liability. *See* Pet. App. 126a, 146a-147a.

The Phase III instructions told the jury that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made." App. 17a.[6] Exxon therefore urged that it should not have to pay punitive damages because even if it had been reckless, it did not act reprehensibly. Tr. 7602-03. After "unusually detailed" instructions that "embodied" "the very same concepts" later elaborated in this Court's due process cases, Pet. App. 127a, 146a, the jury returned a verdict for $5 billion against Exxon.

3. The Ninth Circuit issued an opinion in 2001 affirming the jury's compensatory verdict and its decision to award punitive damages against Exxon, confirming that Exxon's knowledge of Hazelwood's relapse and the attendant risks rendered its conduct reprehensible. Pet. App. 97a. Nevertheless, the court of appeals remanded for the district court to reconsider the size of the punitive award in light of this

[6] The Appendix to this brief reproduces the Phase III jury instructions (App. 1a-25a), which Exxon's petition unaccountably omits.

Court's intervening decisions in *BMW v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). Pet. App. 104a.

4. On remand, the district court analyzed the voluminous record and concluded that "a $5 billion award was justified by the facts of the case and is not grossly excessive so as to deprive Exxon of . . . its right to due process." Pet. App. 221a. However, because the Ninth Circuit had asked it not only to apply *BMW*'s guideposts "in the first instance," Pet. App. 95a, but also to reduce the award, Pet. App. 104a, the district court cut the amount to $4 billion. Pet. App. 223a.

5. Exxon appealed, and the plaintiffs cross-appealed. While the cross-appeals were pending, this Court further elucidated the due process principles governing punitive damages in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003). Accordingly, the Ninth Circuit again remanded the case to the district court, so it could reconsider its latest decision in light of *State Farm*.

In an eighty-one page opinion that painstakingly applied this Court's guidance, the district court again concluded that the $5 billion jury verdict satisfied due process. It based this conclusion on findings that: (1) Exxon's conduct was "highly reprehensible"; (2) the ratio of punitive damages to concrete economic harm was 9.74 to 1,[7] which lies within the "single-digit" guidepost endorsed in *State Farm* and falls still lower once non-economic and potential harms are taken into account; and (3) "comparable criminal and civil penalties could have exceeded $5 billion." Pet. App. 179a. But because the Ninth Circuit's second remand order had not disturbed its direction to reduce the verdict, the district court entered a new judgment setting punitive damages at $4.5 billion – representing roughly a 9 to 1 ratio between punitive damages and economic harm. Pet. App. 179a-180a.

[7] The district court found that the economic harm totaled $513 million. Pet. App. 163a. The Ninth Circuit later adjusted that calculation downward to $504 million, Pet. App. 38a, making the ratio 9.92 to 1.

6. Both sides again cross-appealed. A divided Ninth Circuit reduced the award to $2.5 billion. The majority accepted the district court's factual findings, but concluded that Exxon's actions, including its mitigation efforts immediately following the spill, placed its misconduct in the "mid" or "higher realm" of reprehensibility, "but not in the highest realm." Pet. App. 31a. Unlike the district court, the panel majority interpreted *State Farm* as "reserv[ing] the upper echelons of constitutional punitive damages (a 9 to 1 ratio) for conduct done with the most vile of intentions." Pet. App. 24a. Accordingly, the majority settled on a 5 to 1 ratio to economic harm, without accounting for the additional non-economic harm and potential harm. Pet. App. 40a.

Judge Browning dissented. Pet. App. 42a. He concluded that Exxon's conduct was "highly, if not extremely reprehensible" and that its post-tort actions did not retroactively diminish the reprehensibility of what it did. Pet. App. 46a, 52a. He reasoned that a ratio higher than 5 to 1 was permissible in view of the uncompensated harm and potential harm. Pet. App. 53a, 55a. He "therefore agree[d] with the district court's assessment that there is no principled means by which this award should be reduced." Pet. App. 56a.

7. Exxon petitioned for rehearing en banc. The Ninth Circuit denied the petition, with two of its twenty-three non-recused active judges dissenting. Without even a nod to the district court's and the panel's extensive factual findings detailing Exxon's failure to remove Hazelwood from command despite multiple reports of his relapse, Judge Kozinski argued that Exxon should not have to pay punitive damages at all because it merely had "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a.[8] Judge Bea argued that a 5 to 1 ratio was excessive on the facts. Pet. App. 293a.

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[8] In 1995, shortly after the jury's verdict, and before the Ninth Circuit commenced review, Judge Kozinski publicly criticized the verdict in a widely circulated op-ed piece that questioned the common law system of

8. In the 13 years during which Exxon has pursued its post-verdict challenges, about 20 percent of the class has died. Exxon, however, has more than recouped the $2.5 billion judgment by operation of the differential between its internal rate of return and the statutory judgment rate.

REASONS FOR DENYING THE WRIT

Exxon's portrait of this litigation bears no resemblance to the case that the parties tried in 1994. At trial, the evidence showed that over a span of years Exxon's highest executives condoned placing an alcoholic who they knew had relapsed at the helm of an oil supertanker that regularly transited the resource-rich waters of Prince William Sound. The catastrophe that predictably resulted "disrupted the lives of thousands of people who depend on Prince William Sound for their livelihoods." Pet. App. 31a. The jury awarded punitive damages proportionate to the harm.

None of Exxon's arguments for further review has force. "Although rarely imposed, punitive damages have long been recognized as an available remedy in general maritime actions where [a] defendant's intentional or wanton and reckless conduct amounted to a conscious disregard of the rights of others." *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694, 699 (1st Cir. 1995). This is such a case. In any event, Exxon has waived, or is estopped from raising, most of the arguments it presses. Many are fact-bound and depend on distorting this case's complex procedural history and voluminous record. Others pertain to issues that rarely arise, including one that will never arise again. And none of the questions presented implicates any conflict among the

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allowing private plaintiffs to recover punitive damages. The piece bracketed this verdict with such widely criticized punitive damage verdicts as that in the McDonald's "hot coffee case." Alex Kozinski, *The Case of Punitive Damages v. Democracy*, WALL ST. J., Jan. 19, 1995, at A18, *available at* http://alex.kozinski.com/articles/Case_of_Punitive_Damages.pdf. Judge Kozinski nevertheless did not recuse himself from the en banc proceedings here. *See* 28 U.S.C. § 455(a).

circuits or any tension between the decision below and this Court's precedent. After more than eighteen years, it is "time for this protracted litigation to end." Pet. App. 42a.

I. Exxon's Vicarious Liability Argument Does Not Warrant Review.

Exxon first asks this Court to consider whether a shipowner may be held vicariously liable for punitive damages under maritime law based solely on "the conduct of a ship's master at sea," even when the conduct runs counter to policies "enforced by the owner." Pet. i. But this case does not present any vicarious liability issue. The jury instructions during the punitive damages phase of this multi-phased trial required the jury to base any award against Exxon on its own corporate conduct, and Exxon never seriously pressed the proposition that Captain Hazelwood's actions violated company polices that it enforced. Even if this case did raise the question Exxon posits, it still would not merit this Court's review because waiver and harmless error principles render any supposed error irrelevant; the issue hardly ever arises; the Ninth Circuit's decision does not implicate any conflict; and the jury instruction that Exxon challenges was correct under the circumstances.

1. This case does not present any vicarious liability issue because the phase of this multi-phase trial in which punitive damages were assessed focused exclusively on Exxon's corporate conduct, and the jury awarded punitive damages on that basis. The parties tried this case in three separate phases. Pursuant to that agreed plan, Phase I of the 1994 trial considered whether reckless conduct had caused the grounding of the EXXON VALDEZ. Consistent with *Protectus Alpha Navigation Co. v. N. Pac. Grain Growers, Inc.*, 767 F.2d 1379 (9th Cir. 1985), a Phase I instruction told the jury that a "corporation is responsible for the reckless acts of those employees who are employed in a managerial capacity while acting in the scope of their employment." Pet. App. 301a. Thus, the jury was allowed to find Exxon reckless based on

the conduct of Hazelwood's superiors – the managerial agents who left him in command despite knowing that he had relapsed – or on Hazelwood's own conduct, as Exxon never disputed that it gave Hazelwood the responsibilities of a managerial agent. Pet. App. 264a n.8. The jury found both Exxon and Hazelwood reckless. Pet. App. 303a.

But the Phase I verdict did *not* impose punitive damages. Phase III of the trial dealt with that issue from scratch, using instructions that never mentioned vicarious liability. The Phase III instructions emphasized that the Phase I verdict "does not mean that you are required to make an award of punitive damages against either" Exxon or Hazelwood. App. 12a. The court explained that "[t]he fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made." App. 17a. The court gave twenty instructions covering every nuance of evolving punitive damages jurisprudence, directing the jury to consider the relevant factors separately as to "each of" Exxon and Hazelwood. App. 11a-21a. The verdict form, using language that Exxon proposed, contained separate interrogatories for Exxon and Hazelwood. As to each, the jury was first asked to decide *whether* punitive damages should be awarded against that defendant. App. 26a. Only if the jury answered "yes" would it decide what amount of punitive damages was necessary to punish and deter that defendant. *Id.*

In line with the jury instructions, the Phase III closing arguments focused on whether *Exxon's* conduct warranted punitive damages. Plaintiffs' counsel never mentioned vicarious liability. *See* Tr. 7556-88, 7629-44. Exxon's counsel likewise focused on the conduct of Hazelwood's superiors, not Hazelwood. Tr. 7600-05. He stressed to the jury that the Phase I recklessness verdict "does not mean that you are required to make an award of punitive damages," Tr. 7603, and, echoing the verdict form, noted that the "first

issue you have is, should you award punitive damages at all." *Id.* Exxon emphasized the Phase III instruction that the earlier recklessness finding did not necessarily mean that Exxon's conduct was sufficiently reprehensible to warrant punitive damages, *id.*, and argued that while Exxon may have acted recklessly, it did not act reprehensibly:

> I don't know why precisely you found us reckless, *and it's not relevant*, you may have found that returning Captain Hazelwood was such a bad judgment, that was reckless, so be it. And we tried to monitor Captain Hazelwood. I suspect we didn't do the world's best job of monitoring Captain Hazelwood, and as I think about it now, it's probably impossible to monitor the master of a seagoing vessel. . . . [W]e tried, and we may have made bad mistakes in there and that may be why you found us reckless, but we didn't ignore – we didn't ignore the risk.

Tr. 7602 (emphasis added).

This Court presumes that juries follow their instructions, especially when counsel's arguments reinforce them. *Buchanan v. Angelone*, 522 U.S. 269, 278-79 (1998). Accordingly, the verdict assessing punitive damages against Exxon means that the jury found that "the corporation, not just [Hazelwood], was reckless." Pet. App. 83a. The subsequent *de novo* reviews of the punitive damage verdict similarly emphasized that "the relevant misconduct" and the "critical factor" supporting punitive damages was "Exxon's keeping Hazelwood in command with knowledge of Hazelwood's relapse," Pet. App. 22a, 155a-156a, and confirmed that the verdict was supported by the evidence: "The 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." Pet. App. 83a. *See also* Pet. App. 64a, 89a-91a, 121a-122a, 154a-157a.

The question Exxon frames also is not presented here because Exxon's discussion of its purported policies likewise lacks any basis in this record. The Phase III instructions told the jury it could consider whether the "wrongful" "conduct . . . was contrary to corporate policies" in deciding whether to award punitive damages. C.A. 2004 Supp. ER 880-81. During Phase III testimony, however, Exxon discussed only one policy: the requirement that two officers man the bridge when transiting Prince William Sound, Tr. 7400-01, which Exxon enforced inconsistently at best. Tr. 1066-67, 1080, 1111, 3666-67. In its closing, Exxon did not claim diligence in enforcing *any* policy, Tr. 7588-7628; instead, it conceded that it "didn't have a written detailed policy" to monitor alcoholics returning to duty, Tr. 7613; *see also supra* at 2-3 & n.4, and acknowledged criticism that the policy of two officers on the bridge "was ambiguous." Tr. 7616. Exxon did not even argue to the Ninth Circuit that it enforced any alcohol policy; it argued instead that the Americans with Disabilities Act prevented it from doing so – a claim the Ninth Circuit easily rejected, and which Exxon does not pursue here. Pet. App. 89a; Exxon 1997 C.A. Br. 65.

2. Even if one could ignore the structure of this trial and suppose that the Phase I managerial-agent instruction caused the punitive verdict against Exxon in Phase III, any problem with the instruction lacks significance because it would not warrant a new trial. This is so for three independent reasons.

First, "[i]n the absence of a pertinent objection to the charge or a request for a specific interrogatory a general verdict is upheld where there is substantial evidence supporting any [permissible] ground of recovery in favor of an appellee." *Union Pac. R.R. Co. v. Lumbert*, 401 F.2d 699, 701 (10th Cir. 1968) (quotation omitted); *accord Kossman v. Northeast Ill. Reg. Commuter R.R. Corp.*, 211 F.3d 1031, 1037 (7th Cir. 2000); *Gen. Indus. Corp. v. Hartz Mountain Corp.*, 810 F.2d 795, 801 (8th Cir. 1987). Exxon never requested an interrogatory in Phase III to pinpoint whose

conduct supported the punitive award against Exxon, and Exxon does not dispute (nor could it) the Ninth Circuit's conclusion that the record contains evidence sufficient to find that the corporation itself acted recklessly in placing Hazelwood in charge of the EXXON VALDEZ. *See* Pet. App. 88a-90a. Accordingly, Exxon has waived any ability to seek reversal now on the ground that "it is impossible to know whether the jury imposed liability on a permissible or an impermissible ground." Pet. 13.

Second, it is a settled rule that when two theories of liability are submitted to a jury but one is improper, the error is harmless if "the 'entire focus' of the plaintiff's case" was on the proper theory. *Muth v. Ford Motor Co.*, 461 F.3d 557, 564-65 & n.15 (5th Cir. 2006) (collecting cases). This rule applies here. Phase III focused on Exxon's conduct, and plaintiffs never urged the jury to award punitive damages against Exxon based on Captain Hazelwood's recklessness.

Third, even when jury instructions improperly allow a jury to presume that a defendant acted with a requisite level of culpability, the error is harmless when the evidence of culpability was so strong that the jury would have found it anyway. *Carella v. California*, 491 U.S. 263, 265-66 (1989) (per curiam); *see also Neder v. United States*, 527 U.S. 1, 8-16 (1999); *Benigni v. City of Hemet*, 879 F.2d 473, 480 (9th Cir. 1989) (jury's punitive award showed that failure to require jury to find *mens rea* element of underlying claim was harmless). Though not couched in terms of harmless error, that is exactly what the Ninth Circuit concluded here, finding that "Exxon is not in the position of the owners in *The Amiable Nancy* [16 U.S. (3 Wheat.) 546 (1818)] or *Lake Shore* [*& Mich. S. Ry. Co. v. Prentice*, 147 U.S. 101 (1893)]" because "[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." Pet. App. 83a. Lest there be any doubt, the *de novo* due process reviews below have

detailed that "[p]lacing a relapsed alcoholic in control of a supertanker" carrying tens of millions of gallons of oil through one of the Nation's most productive commercial fisheries was not only reckless but "highly reprehensible." Pet. App. 31a; *see also* Pet. App. 22a, 26a-30a, 121a-122a, 147a-157a.[9]

3. Even if this case presented the issue that Exxon postulates, that issue would not merit this Court's review because it hardly ever arises. Exxon cites only two cases over the past *one hundred fifty years* in which a court has found it necessary to decide whether a shipowner may be held liable for punitive damages based solely on the reckless actions of a "ship's master at sea." Pet. i.[10] This paucity of precedent reflects the fact that the Limitation of Shipowners' Liability Act of 1851, 46 U.S.C. § 181 *et seq.*, limits a vessel owner's liability to the value of the owner's interest in the vessel – an amount that does not leave room for a significant punitive award – whenever the vessel causes damage "without the owner's privity or knowledge." *Lewis v. Lewis & Clark Marine, Inc.*, 531 U.S. 438, 446 (2001). A corporate owner lacks "privity or knowledge" with respect to

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[9] A memorandum that Exxon's own attorneys authored just two months after the shipwreck confirms that remanding based on an alleged error in giving the vicarious liability instruction in Phase I would not achieve anything besides delay. The memo explains that there is "no room for reasonable doubt that Exxon Shipping will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood." App. 43a. In other words, Exxon's own lawyers understood that it could never convince a jury that it merely had "the misfortune of hiring a captain who committed a reckless act." Pet. App. 291a (Kozinski, J., dissenting from denial of rehearing).

[10] Those cases, more fully discussed *infra*, are *CEH, Inc. v. F/V Seafarer*, 70 F.3d 694 (1st Cir. 1995), and *Pacific Packing & Nav. Co. v. Fielding*, 136 F. 577 (9th Cir. 1905). The Sixth Circuit in *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143 (6th Cir. 1969), discussed the issue, but its comments were *dicta* because the captain had a "good faith" reason to believe he had taken "the best course of action under the circumstances for the benefit of all concerned." *Id.* at 1147. *Protectus* itself involved the reckless actions of a "dock foreman," not a master. 767 F.2d at 1381.

an employee's actions unless the employee was an "executive officer, manager or superintendent" of the corporation "whose scope of authority includes supervision over the phase of the business out of which the loss or injury occurred." *Coryell v. Phipps*, 317 U.S. 406, 410 (1943); *accord Great Lakes Dredge & Dock Co. v. City of Chicago*, 3 F.3d 225, 230-31 (7th Cir. 1993), *aff'd sub nom. Jerome B. Grubart, Inc. v. Great Lakes Dredge & Dock Co.*, 513 U.S. 527 (1995). Accordingly, for Exxon's question to arise: (1) a serious tort must occur involving a ship; (2) the damage must be solely attributable to reckless acts of the ship's master at sea; (3) the vessel must have a corporate owner; and (4) the master must be an executive officer, manager, or superintendent of the owner and be acting within his scope of authority within the meaning of the Limitation Act.

This constellation of circumstances hardly ever arises. Shipping calamities are rare, and those caused by captains' recklessness are rarer still. And in contrast to Exxon, which "enlarge[d] the responsibilities and authority of its senior fleet officers" with a "major shift of responsibility and authority from the shoreside staff to the shipboard teams," C.A. 1997 Supp. ER 257, 259; *see also* Pet. 6; Tr. 2934-36, 3866, shipowners do not typically give their captains sufficient authority to make their actions binding under the Limitation Act criteria. *See* 3 BENEDICT ON ADMIRALTY § 42, at 5-17 & n.4 (7th ed. 2005).

4. Nor do the facts of this case implicate any conflict respecting punitive liability and ship masters. Both courts outside the Ninth Circuit that have considered the issue – courts that Exxon contends correctly state the law (Pet. 12) – have held that punitive damages "may be recoverable if the acts complained of were those of an unfit master and the owner was reckless in employing him." *U.S. Steel Corp. v. Fuhrman*, 407 F.2d 1143, 1148 (6th Cir. 1969) (denying punitive damages because "the evidence does not show that Captain Joppich was an unfit master"); *see also CEH, Inc. v.*

F/V Seafarer, 70 F.3d 694, 705 (1st Cir. 1995) (upholding punitive award because the owner "fail[ed] to supervise" the captain under circumstances the owner should have known could lead to problems).[11] That, at a minimum, is what happened here. "[T]he highest executives in Exxon Shipping knew Hazelwood . . . had fallen off the wagon." Pet. App. 64a. Exxon "knew that he was going on board to command its supertankers after drinking, yet let him continue to command the EXXON VALDEZ." Pet. App. 89a; *see also* Pet. App. 83a, 89a-91a, 121a-122a, 154a-157a, 255a-256a.

As in *CEH*, the Court "need not resolve," 70 F.3d at 705, whether *Protectus* correctly held that a shipowner may be liable for punitive damages based *solely* on the recklessness of a managerial agent. This case involved much more.

5. Even though irrelevant to this case's outcome, the Phase I instruction based on *Protectus* was correct under the circumstances. Because a corporation is inanimate, its liability for damages, whether punitive or compensatory, *must* be vicarious. *Coryell*, 317 U.S. at 410-11. The question is simply how high ranking an agent must be before a court will impute the agent's conduct or knowledge to the corporation. Thus, this Court explained in *Lake Shore* that a corporation could be held liable in punitive damages for the misconduct of "[t]he president and general manager, or, in his absence, the vice president in his place." 147 U.S. at 114.

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[11] Exxon also cites *Matter of P&E Boat Rentals, Inc.*, 872 F.2d 642 (5th Cir. 1989), and *The State of Missouri*, 76 F. 376 (7th Cir. 1896), as pertaining to this question. But the Fifth Circuit in *P&E* considered only whether it should drop "the punitive damages hammer on the principal for the wrongful acts of the simple agent or lower echelon employee," not a ship's master. 872 F.2d at 652. Even then, the Fifth Circuit suggested that such damages might be available when, as here, the corporation failed to "formulate[] policies and direct[] its employees properly." *Id.* In *Missouri*, none of the damages were "other than compensatory," 76 F. at 380, so the Seventh Circuit did not decide what standard might have governed punitive recoveries in maritime cases during that era.

Allowing corporate liability based on the misconduct of modern managerial agents comports with *Lake Shore*, scaled to our commercial era. At least in large modern corporations, such as Exxon, managers have as much authority as did typical presidents and vice-presidents in the nineteenth century. Recognizing this development, almost every state has adopted the rule, embodied in the Restatement (Second) of Torts § 909, that corporations may be liable in punitive damages for the misconduct of their managerial employees; a majority of courts has gone further, holding corporations responsible for punitive damages based on the acts of *any* agent. *See American Soc'y of Mech. Engineers, Inc., v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982); *see also Kolstad v. American Dental Ass'n*, 527 U.S. 526, 541-45 (1999) (adopting Restatement for Title VII claims subject to the defense, based on Title VII considerations, that the manager's actions were contrary to the employer's good-faith efforts to comply with the statute). As the First Circuit has observed, the Restatement test reflects an "appropriate evolution of" maritime law. *CEH*, 70 F.3d at 705.[12]

II. The Question Whether Statutory Law in 1989 Inhibited Respondents' Ability To Recover Punitive Damages Does Not Merit This Court's Attention.

Exxon long ago waived its argument that the Clean Water Act ("CWA") forecloses punitive damages here. In any event, the question does not present any conflict of authority; the court of appeals correctly resolved it; and the question does not have ongoing significance.

1. As the Ninth Circuit noted, Exxon never raised its CWA argument until October 23, 1995, thirteen months after trial had concluded. On that date, Exxon filed a so-called

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[12] Given Exxon's argument that maritime common law should reflect federal statutory policies, it is worth noting that the Oil Pollution Act of 1990 requires corporations to pay civil penalties that can run into the hundreds of millions of dollars whenever gross negligence by *any agent* causes an oil spill. 33 U.S.C. § 2704(c)(1); *see* Pet. App. 104a.

"renewed motion" "pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, for an order that the judgment to be entered on the special verdict of the jury . . . shall not include an award of punitive damages." App. 30a. Plaintiffs countered that the filing was "thrice untimely," in part because motions for judgment as a matter of law must be filed under Rule 50(b), *see* 9A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 2513, at 235 (2d ed. 1995), and the stipulated deadline for filing any motion under that rule had passed many months before. App. 33a. In addition, Exxon never made a Rule 50(a)(2) motion on this ground during trial, which is a prerequisite to a post-trial motion for a judgment as a matter of law under Rule 50(b). App. 33a. The district court summarily denied Exxon leave to file its motion. Pet. App. 73a-74a; App. 35a.[13]

When Exxon advanced its CWA argument in the court of appeals, plaintiffs argued that it was waived because Exxon filed its October 23, 1995 motion beyond the deadline for post-verdict motions. Pltfs. 1997 C.A. Br. 79. Exxon responded that its motion had been timely made "under Rules 49(a) and 58(2)." App. 37a. Calling the circumstances "ambiguous," the Ninth Circuit elected to reach the issue on the ground that it presented a significant question of law and "Exxon clearly and consistently argued statutory preemption" in the district court – albeit under the Trans-Alaska Pipeline Authorization Act, *not* the CWA. Pet. App. 73a-74a.

The Ninth Circuit erred in reaching the merits of this issue. Exxon does not dispute that it filed its CWA motion beyond the deadline for filing a motion under Rule 50(b) for judgment as a matter of law. App. 37a. And Exxon's resort to Rules 49(a) and 58(2) cannot salvage its tardy filing. Rule 49(a) describes how to submit special verdicts to juries, and

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[13] Deluged by motions, the district court had imposed a stay on motion practice, requiring the parties to seek leave to file new motions. As a technical matter, therefore, the district court denied Exxon's request to lift the stay in order to file its motion. App. 35a; *see also* App. 28a.

Rule 58(2) (now recodified as Rule 58(a)(2)(B)) is purely ministerial, directing district courts to "approve the form of the judgment" right after the clerk has prepared it. *Robles v. Exxon Corp.*, 862 F.2d 1201, 1204 (5th Cir. 1989). No case suggests that either rule provides a platform for making an untimely substantive motion for judgment as a matter of law.

Although lower courts sometimes choose to glide over waiver problems to affirm on other grounds, this Court takes filing deadlines seriously. *See, e.g., Bowles v. Russell*, 127 S. Ct. 2360 (2007); *Burton v. Stewart*, 127 S. Ct. 793 (2006) (per curiam). And, contrary to the Ninth Circuit's *sua sponte* suggestion, which even Exxon did not have the temerity to advance, a party cannot preserve a preemption-type argument by arguing that *an entirely different federal statutory scheme* precludes relief that a plaintiff seeks. *See, e.g., Helvering v. Wood*, 309 U.S. 344, 348-49 (1940); *Lyons v. Jefferson Bank & Trust*, 994 F.2d 716, 722 (10th Cir. 1993). Exxon's CWA argument is not properly before this Court.

2. Even if Exxon had preserved this issue, it would not merit review because no conflict, or even confusion, over the issue exists. In the thirty-five years since Congress passed the CWA, no court has suggested that the statute forecloses punitive damages in private tort actions arising from oil spills. To the contrary, several circuits have recognized the availability of punitive damages for private tort claims arising from polluting water with substances regulated by the CWA, without mentioning any colorable argument standing in their way. *See, e.g., Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (polluting stream with acidic water); *Knabe v. National Supply Div.*, 592 F.2d 841, 844-45 (5th Cir. 1979) (dumping industrial waste); *Doralee Estates, Inc. v. Cities Serv. Oil Co.*, 569 F.2d 716, 722-23 (2d Cir. 1977) (spilling oil). The only published opinion besides this case to consider the question explicitly agreed that the CWA imposes no barrier to recovering punitive damages

pursuant to such a tort claim. *Poe v. PPG Indus.*, 782 So.2d 1168, 1175-78 (La. Ct. App. 2001).

3. Exxon cannot avoid the absence of any authority questioning the availability of punitive damages under these circumstances by manufacturing a generalized question about whether maritime common law allows plaintiffs to recover punitive damages when federal statutes "controlling" the defendant's conduct do not provide for any such damages. Pet. i. This formulation conflates two analytically distinct lines of cases: (a) those dealing with rights, and (b) those dealing with remedies. Neither supports Exxon's claim that a conflict exists or even its position on the merits.

a. A federal statutory scheme can preclude punitive damages if the plaintiff's underlying *substantive cause of action* would "interfere[]" or be "incompatible" with the scheme's operation. *See Int'l Paper Co. v. Ouellette*, 479 U.S. 481, 494, 497 (1987); *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 21-22 (1981) (CWA, which sets standards for effluent discharges, forecloses common-law nuisance action that might result in different effluent standard); *City of Milwaukee v. Illinois*, 451 U.S. 304, 320 (1981) (same); *Conner v. Aerovox, Inc.*, 730 F.2d 835, 839-42 (1st Cir. 1984) (same).

But nothing about respondents' private tort claim risks interference with the CWA's provisions allowing the federal government to impose penalties on oil spillers to recoup its cleanup costs. Indeed, the CWA "le[aves] . . . room" for tort claims arising from water pollution. *Int'l Paper*, 479 U.S. at 492. So this case bears no resemblance to *Sea Clammers* or *Conner*. Exxon, in fact, does not even argue (nor did it ever suggest in the Ninth Circuit) that the CWA forecloses respondents' substantive cause of action.

b. A federal statutory scheme also might preclude punitive damages by providing a comprehensive set of *remedies* for a given cause of action. In general, a plaintiff who brings a legitimate cause of action may seek the full

panoply of remedies. *Int'l Paper*, 479 U.S. at 498 n.19; *see also Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984). But when a plaintiff asserts a common law claim within the ambit of a congressionally-prescribed "comprehensive tort recovery regime to be uniformly applied," the plaintiff may not seek remedies beyond what that statutory scheme provides. *Yamaha Motor Corp. v. Calhoun*, 516 U.S. 199, 215 (1996); *see also Dooley v. Korean Air Lines*, 524 U.S. 116, 121-24 (1998) (Death on the High Seas Act sets forth exclusive remedies for survival actions arising from deaths on high seas); *Miles v. Apex Marine Corp.*, 498 U.S. 19, 31-33 (1990) (Jones Act remedies for wrongful death actions govern suit for seaman's wrongful death caused by unseaworthiness); *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 626 (1978) (DOHSA sets forth exclusive types of recoverable damages for wrongful death actions arising from deaths on high seas); *In re Oswego Barge Corp.*, 664 F.2d 327 (2d Cir. 1981) (limiting government suits for cleanup costs to governmental remedies provided for such actions in the CWA); Pet. 18 (citing federal cases precluding punitive damages in claims for wrongful death, survival, and violation of Jones Act). Accordingly, when Exxon asks in its question presented whether common law remedies beyond those provided in a "controlling statute" are available, it begs the only possible question here – namely, whether the CWA's remedies actually "control" respondents' cause of action.

As the Ninth Circuit recognized, the CWA does *not* prescribe a comprehensive recovery regime covering private tort claims arising from oil spills, so cases such as *Miles* and *Oswego* do not govern. Pet App. 75a, 78a-79a. The CWA deals with "punishing harm [that pollution causes] to the environment," while leaving untouched common law remedies to address the interests respondents assert regarding harm to "private economic and quasi-economic resources." Pet. App. 79a. Indeed, the savings clause in the CWA's section relating to oil spills preserves all legal "liability" and

"obligations" of vessel owners arising from damage to private property "resulting from a discharge of any oil." 33 U.S.C. §§ 1321(*o*)(1) & (2); *see also id.* § 1365(e); *Askew v. American Waterways Opers., Inc.*, 411 U.S. 325, 329 (1973) (identically worded prior version of § 1321(*o*) allowed state regulation). Respondents thus stand in the same position as the plaintiffs in *Yamaha*, where this Court held unanimously that parents bringing a common law tort action for the wrongful death of their daughter, who had died riding a jet ski in territorial waters, could seek punitive damages because "Congress has not prescribed remedies for the wrongful deaths of nonseafarers in territorial waters." 516 U.S. at 215.

4. Even if doubt existed over whether the CWA left room for punitive damages in cases involving oil spills occurring before 1990, there would be no reason for this Court to consider the issue because no dispute over the question will ever arise again. In response to the disaster at issue here, Congress enacted the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702 *et seq.*, establishing steep civil penalties for at least some of the harm that oil spills cause to economic and quasi-economic interests. Pet. App. 104a. Since OPA's passage, the question whether *the CWA* forecloses private plaintiffs who bring maritime tort claims based on oil spills from recovering punitive damages has been overtaken by the question (not presented here because OPA is not retroactive) whether *OPA* forecloses such claims seeking such damages.

In *South Port Marine, LLC v. Gulf Oil Ltd. Partnership*, 234 F.3d 58 (1st Cir. 2000), the First Circuit noted, consistent with the court of appeals' decision here, that "the general admiralty and maritime law that existed prior to the enactment of [OPA] . . . permitted the award of punitive damages for reckless behavior" that caused oil spills. *Id.* at 65. It then held that OPA's new remedies replace private parties' previous ability to recover such damages. *Id.* at 64-66. Regardless of whether this interpretation of OPA is correct, it makes clear that any inquiry into statutory

remedies in any future tort action such as this would focus on OPA's new statutory framework, not the CWA's.

III. The Size of the Punitive Award Does Not Warrant Further Review.

Exxon challenged the size of the punitive award in the courts below primarily on due process grounds. Indeed, after eleven pages of briefing presenting exclusively constitutional arguments, Exxon told the Ninth Circuit that "*if the Court does not wish to reach the issue of constitutional excessiveness*, it should exercise its power as a common law maritime court to reduce the award to no more than the amount, if any, that is necessary to the objective of punishment and deterrence in a maritime context." Exxon 1997 C.A. Br. 81 (emphasis added). Following Exxon's suggested hierarchy, the Ninth Circuit reviewed the Phase III verdict only under the Due Process Clause. Accordingly, we shall address the Due Process Clause before responding to Exxon's attempt to change the playing field.

1. This case does not raise any due process issue meriting this Court's review. Space limitations prevent recounting the district court's extensive findings of historical fact, which are entitled to deference, *Cooper*, 532 U.S. at 440 n.14, and which the court of appeals accepted, concerning Exxon's reprehensible conduct and the harm it inflicted. Nor is there room here to detail all of Exxon's distortions of, and omissions from, the record in its attempt to recast the case. Respondents thus refer this Court to the findings of both courts below and the accompanying legal analyses. *See* Pet. App. 22a-42a, 60a-67a, 88a-90a, 120a-124a, 142a-180a. Given those opinions, a brief response to Exxon's arguments suffices.

a. *Reprehensibility.* Exxon contests the court of appeals' conclusion that Exxon's conduct was "in the higher realm of reprehensibility" and was reduced only to "a mid range" by its legally-compelled post-spill mitigation. Pet. App. 31a.

This conclusion, and Exxon's quibbles with it, Pet. 29-30, are entirely fact-bound and do not warrant further review.

Exxon suggests that it should have gotten *more* credit for its post-spill claims program than the Ninth Circuit gave because, in Exxon's words, it paid claimants (1) "voluntarily," (2) "quickly," and (3) "fairly." But this ignores that (1) Alaska law rendered Exxon strictly liable for economic harm, Pet. App. 124a & n.17, so Exxon had a legal obligation to pay claims; (2) Exxon did not pay all, or even most, claimants "quickly"; many were paid only during trial or by different entities, such as the Trans-Alaska Pipeline Liability Fund, sometimes over Exxon's objection; and (3) Exxon refused to pay anything for various types of fishing losses for which the jury awarded $168.5 million, refused to pay entire categories of claimants, and never paid anything for harm beyond the purely economic. *See* Pltfs. 2004 C.A. Br. 35-37, 47-50 (detailing payment history). Exxon's additional claim that respondents did not suffer any "non-economic" injuries also ignores the findings that this disaster, which crippled the regional economy (and for Native Alaskans, their way of life), inevitably had profound non-economic effects. *See* Pet. App. 25a-26a, 123a-124a, 150a-152a, 166a-167a. Finally, Exxon's suggestion that the Ninth Circuit improperly considered potential harm to the ship's crew ignores this Court's recent holding that courts may consider the effects of a defendant's conduct on nonparties "to determine reprehensibility." *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007). That is all the Ninth Circuit did. Pet. App. 27a.

b. *Ratio.* Exxon claims that the 5 to 1 ratio of punitive damages to economic harm contravenes this Court's statement in *State Farm* that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. In addition to ignoring the words "perhaps" and "can" in this quotation, Exxon ignores three important matters specific to this case.

First, the average amount of economic harm per class member was not "substantial"; it totaled less than $15,500 per person. Pet. App. 38a, 168a-69a. Because class certification cannot "abridge, enlarge or modify any substantive right" of class members, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the fact that Exxon sought and obtained certification of a mandatory class cannot reduce plaintiffs' punitive recoveries by aggregating their modest individual economic harms into a large collective injury. *See Lambert v. Fulton County*, 253 F.3d 588, 598 (11th Cir. 2001) (calculating ratios separately for each plaintiff). Indeed, even if there were a colorable argument to the contrary, Exxon would be estopped from making it. When respondents questioned Exxon's certification motion, Exxon emphasized to the district court that "certification of a mandatory punitive damages class would not in any way . . . prejudice any of the parties" or "alter the substantive rights of any parties." Exxon Reply in Support of Motion to Certify Mandatory Punitive Damages Class, Dkt. 4539, at 5. At the very least, the unique mandatory class framework of this trial distinguishes it from all of the cases Exxon discusses and makes it a poor vehicle for resolving any supposed confusion over *State Farm*'s ratio discussion.[14]

Second, *State Farm*'s one-to-one suggestion (as well as its "single-digit" guidance) assumes a situation in which the monetary value of a plaintiff's noneconomic harm has been quantified, and the plaintiff "has been made whole for his injuries by compensatory damages." 538 U.S. at 419, 425. In *State Farm*, each plaintiff recovered $500,000 "for a year

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[14] Exxon suggests (Pet. 28 n.9) that the 5 to 1 ratio conflicts with the 2 to 1 and 1.4 to 1 ratios, respectively, in *Estate of Moreland v. Dieter*, 395 F.3d 747, 757-58 (7th Cir. 2005), and *Stamathis v. Flying J, Inc.*, 389 F.3d 429, 443 (4th Cir. 2004). But in those cases, the courts *upheld* punitive damage awards, while noting that they fell comfortably within the single-digit range. *Stamathis* also emphasized that a court calculating a ratio must account not only for economic damages but also for the value of "insult, pain, and mental suffering." 389 F.3d at 443.

and a half of emotional distress" over whether an insurance claim would be covered. *Id.* at 426. Here, by contrast, respondents' noneconomic harm was never quantified, and maritime law's conception of compensatory damages prevented respondents from being made whole for that harm. *See supra* at 6-7; Pet. App. 24a-26a, 53a (Browning, J., dissenting), 166a-168a; *cf. Cooper*, 532 U.S. at 437 n.11.

Third, this Court has made clear that the ratio analysis must consider not just the actual harm the tort inflicted but also the potential harm it threatened. *State Farm*, 538 U.S. at 424-25; *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993). Here, the 42 million gallons of crude that the EXXON VALDEZ fortuitously did not discharge threatened "immense" additional harm. Pet. App. 167a.

c. *Penalties.* The court of appeals analyzed penalties in both of its opinions. Pet. App. 40a-41a, 101a-104a. Exxon attempts to argue the details of that analysis yet again, asserting that "[c]ombined federal and state civil penalties for this oil spill could not have exceeded about $80 million." Pet. 30. But this tells only part of the story. In fact, "Exxon was fairly on notice that reckless conduct could cause the loss of the entire cargo thereby putting it at risk for state civil penalties . . . in excess of $255 million." Pet. App. 176a-177a. Further, federal criminal penalties for the three crimes to which Exxon pleaded guilty could have exceeded $3 billion. Pet. App. 173a-175a. And federal and state legislation passed in response to this disaster – reflecting "legislative judgments concerning appropriate sanctions for the conduct at issue" *BMW*, 517 U.S. at 583 (quotation omitted) – would have subjected Exxon to $1.3 billion in civil penalties.

2. Nor should this Court entertain Exxon's request to create a new maritime law excessiveness doctrine tailored to its repeatedly rejected version of the facts of this case.

a. Exxon waived its maritime law argument. Because it told the Ninth Circuit that it need not address maritime law if it considered the due process challenge, Exxon cannot now

claim (Pet. 21-23) that the absence of a freestanding common law analysis is erroneous or creates some kind of conflict. Appellate courts cannot be sandbagged in this manner.

b. Prudential considerations also make this an improper vehicle for devising a brand new legal doctrine. This Court will not consider issues neither pressed nor passed on below. *Adickes v. S.H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970). Exxon did not press a maritime excessiveness claim below; after failing to seriously urge any such claim in the district court,[15] it told the Ninth Circuit there was no need to reach the issue. And neither the district court nor the Ninth Circuit passed on the issue. *See* Pet. App. 90a-104a, 224a-228a. Worse yet, no other court has ever considered any maritime excessiveness argument resembling Exxon's here. Under such circumstances, this Court should not break new ground.

c. In any event, Exxon's substantive argument is both meritless and fact-bound. Exxon does not explain exactly what rule of law it urges, but to the extent Exxon suggests this Court should create a new excessiveness doctrine on the theory that maritime law "is concerned with . . . limitation of liability," Pet. 23 (quotation omitted), Congress already has addressed that concern in the Limitation Act. That Act protects shipowners from any tort liability beyond their interest in vessels as long as they lack privity or knowledge with respect to the tort. *See* 46 U.S.C. § 183; *supra* at 16-17.

Nothing justifies eliminating the line that Congress drew so as to bestow similar protection upon those shipowners, such as Exxon, that *do* act recklessly with privity or knowledge. The common law always has permitted imposing punitive damages with single-digit ratios, *State Farm*, 538 U.S. at 425, and this Court may not "limit the right of the injured party to a recovery" allowed by common law beyond

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[15] Apart from a heading and three scattered sentences asserting that both constitutional "and maritime law" limit the size of punitive awards, Exxon's 73-page Rule 50(b) excessiveness brief in the district court contained less than one and one-half pages discussing maritime law.

what is "necessary to effectuate" the purpose of the Limitation Act. *The Main v. Williams*, 152 U.S. 122, 132-33 (1894). Indeed, in the only case recently to consider the size of a punitive award in a maritime case for conduct at all similar to Exxon's, the court approved a 7.5-to-1 ratio, reasoning that "the imposition of punitive damages . . . encourages shipowners to hire qualified and responsible captains and to exercise supervisory power over them. In addition, it fairly punishes [the owner] for his failure to provide any supervision over his captains." *CEH*, 70 F.3d at 705 (quotation omitted). Such awards "protect[] maritime commerce," *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 25 (2004) (quotation omitted), not only by encouraging safety and accountability, but also by safeguarding the interests of other mariners – such as the commercial fishermen here.

Exxon's plea for this Court to craft a brand new four-pronged exception to this legal landscape tailored to the supposed facts of this case amounts to nothing more than an unfounded request for error correction. Exxon's claim that its cleanup costs and governmental payments for environmental harm provided sufficient "punishment or deterrence" (Pet. 24-25) ignores the non-environmental nature of respondents' injuries, Pet. App. 79a, as well as the fact that the criminal payment "d[id] not reflect the true extent of the harm" later revealed at this trial. Pet. App. 240a, 174a n.111. Exxon's arguments about the "substantiality" of the damages and about comparable penalties fail for the same reasons as do its identical due process arguments. And Exxon's final point (Pet. 26) ignores the fact that this Court has never cast doubt, in the context of due process or common law, upon the "well-settled" and "typical" practice of informing juries of a defendant's financial condition. *TXO*, 509 U.S. at 462 n.28; *see also State Farm*, 538 U.S. at 427-28.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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September 2007

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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-0095-CV (HRH)
the EXXON VALDEZ	)	(Consolidated)

JURY INSTRUCTION NO. 1

MEMBERS OF THE JURY:

We have now completed Phase III of this trial.

Now that you have heard the evidence and the arguments, it becomes my duty to give you the instructions as to the law applicable to this part of the case. Copies of these instructions will be available for you in the jury room for further review. I urge you to review these instructions from time to time as you progress with your deliberations.

It is your duty as jurors to follow the law as stated in these instructions, and to apply that law to the facts as you find them from the evidence in this case.

You are not to single out one instruction alone as stating the law, but must consider the instructions as a whole.

Neither are you to be concerned with the wisdom of any rule of law stated by the court. Regardless of any opinion you may have as to what the law ought to be, it would be a violation of your sworn duty to base a verdict upon any other view of the law than that given in the instructions of the court. Similarly, it would be a violation of your sworn duty, as judges of the facts, to base a verdict

upon anything but the evidence in the case presented here in open court.

Nothing I say in these instructions is to be taken as an indication that I have any opinion about the facts of the case, or what that opinion is. It is not my function to determine the facts, but rather yours.

Justice through trial by jury must always depend upon the willingness of each individual juror to seek the truth as to the facts only from the same evidence presented to all the jurors; and to arrive at a verdict by applying the same rules of law, as given in the instructions of the court.

JURY INSTRUCTION NO. 2

You have been chosen and sworn as jurors in this case to try the issues of fact presented by the plaintiffs and the defendants. You are to perform this duty without bias or prejudice as to any party. Our system of law does not permit jurors to be governed by sympathy, prejudice, or public opinion as to either party. The law requires, and both the parties and the public expect, that you will carefully and impartially consider all the evidence in the case, follow the law as stated by the court, and reach a just verdict, regardless of the consequences.

JURY INSTRUCTION NO. 3

Unless otherwise stated, the jury should consider each instruction given to apply to all of the plaintiffs and to all of the defendants in the case.

JURY INSTRUCTION NO. 4

This case should be considered and decided by you as an action between persons of equal standing in the same community, of equal worth, and holding the same or similar stations in life. In your decisions on issues of fact, a corporation is entitled to the same fair trial at your hands as a private individual. All persons, including corporations, partnerships, unincorporated associations, and other organizations, stand equal before the law, and are to be dealt with by the judge and jury as equals in a court of justice.

JURY INSTRUCTION NO. 5

For purposes of this trial, the parties will refer to Exxon Shipping Company and Exxon Corporation as the Exxon defendants and you should consider all evidence, arguments, and questions submitted to you for decision as though the Exxon defendants were one party.

Any act or failure to act of Exxon Shipping Company or any knowledge or information known or available to Exxon Shipping Company shall be considered to be equally the act or knowledge of Exxon Corporation. Any act or failure to act by Exxon Corporation or any knowledge or information known or available to Exxon Corporation shall

be considered the act or failure to act of or the knowledge of Exxon Shipping Company.

JURY INSTRUCTION NO. 6

There are, generally speaking, two types of evidence from which a jury may properly find the truth as to the facts of a case. One is direct evidence – such as the testimony of an eyewitness. The other is indirect or circumstantial evidence – the proof of a chain of circumstances pointing to the existence or non-existence of certain facts.

As a general rule, the law makes no distinction between direct or circumstantial evidence, but simply requires that the jury find the facts in accordance with the preponderance of all the evidence in the case, both direct and circumstantial.

JURY INSTRUCTION NO. 7

The evidence from which you are to decide what the facts are consists of: (1) the sworn testimony of witnesses, both on direct and cross-examination, regardless of who called the witness; (2) the exhibits which have been received into evidence; and (3) any facts to which all the lawyers have agreed or stipulated. Plaintiffs and the defendants have agreed or stipulated to certain facts. You should treat those facts as having been proved.

JURY INSTRUCTION NO. 8

Certain things are not evidence and you may not consider these things except insofar as they are supported by the evidence. These things include:

1. Arguments and statements by lawyers are not evidence. The lawyers are not witnesses. What they say in their opening statements, closing arguments, and at other times is intended to help you interpret the evidence, but it is not evidence. If the facts as you remember them differ from the way the lawyers have stated them, your memory of them controls.

2. Objections by lawyers are not evidence. Attorneys have a duty to their clients to object when they believe a question is improper under the rules of evidence. You should not be influenced by the objection or by the court's ruling on it.

3. Testimony that has been excluded or stricken, or that you have been instructed to disregard, is not evidence and must not be considered.

4. Evidence admitted for a limited purpose is not evidence for any other purpose. Thus, when I have admitted some evidence for a limited purpose, it would be improper to consider that evidence for any other purpose.

5. Anything you may have seen or heard when the court was not in session is not evidence. You are to decide the case solely on the evidence received during trial.

6. Some of you have taken notes during the trial. Such notes are not evidence, and are only for the personal use of the person who took them.

JURY INSTRUCTION NO. 9

Certain charts and summaries have been shown to you in order to help explain the facts disclosed by the books, records, and other documents which are in evidence in the case. However, such charts or summaries are not in and of themselves evidence or proof of any facts. If such charts or summaries do not correctly reflect facts or figures shown by the evidence in the case, you should disregard them.

In other words, such charts or summaries are used only as a matter of convenience; so if, and to the extent that you find they are not in truth summaries of facts or figures shown by the evidence in the case, you are to disregard them entirely.

JURY INSTRUCTION NO. 10

You are to consider only the evidence in the case. But in your consideration of the evidence you are not limited to the bald statements of the witnesses. In other words, you are not limited solely to what you see and hear as the witnesses testify or what appears on the face of exhibits. You are permitted to draw, from facts which you find have been proved by the evidence in this phase of the trial, such reasonable inferences as seem justified in the light of your experience.

Inferences are deductions or conclusions which reason and common sense lead the jury to draw from the facts which have been established by the evidence in the case.

JURY INSTRUCTION NO.11

You are not bound to decide any issue of fact in accordance with the testimony of any number of witnesses which does not produce in your minds belief in the likelihood of truth, as against the testimony of a lesser number of witnesses or other evidence which does not produce such belief in your minds.

The test is not which side brings the greater number of witnesses, or presents the greater quantity of evidence; but which witness, and which evidence, appeals to your minds as being most accurate and otherwise trustworthy.

JURY INSTRUCTION NO. 12

The testimony of a single witness which produces in your minds belief in the likelihood of truth is sufficient for the proof of any fact, and would justify a verdict in accordance with such testimony, even though a number of witnesses may have testified to the contrary, if, after consideration of all the evidence in the case, you hold greater belief in the accuracy and reliability of the one witness.

JURY INSTRUCTION NO. 13

During this part of the trial, certain depositions were read or played to you. These consist of sworn recorded answers to questions asked of the witness in advance of the trial by one or more of the attorneys for the parties to the case.

Such testimony is entitled to the same consideration, and is to be judged as to credibility, and weighed, and

otherwise considered by the jury, insofar as possible, in the same way as if the witness had been present, and had testified from the witness stand.

JURY INSTRUCTION NO. 14

The rules of evidence ordinarily do not permit witnesses to testify as to opinions or conclusions. An exception to this rule exists as to those whom we call "expert witnesses". Witnesses who, by education or experience, have become expert in some art, science, profession, or calling, may state their opinions as to relevant and material matters in which they profess to be expert, and may also state their reasons for the opinion.

You should consider each expert opinion received in evidence in this case, and give it such weight as you may think it deserves. If you should decide that the opinion of an expert witness is not based upon sufficient education and experience, or if you should conclude that the reasons given in support of the opinion are not sound or if you feel that it is outweighed by other evidence, you may disregard the opinion entirely.

JURY INSTRUCTION NO. 15

The burden is on the plaintiffs in a civil action, such as this, to prove every essential element of their claims by a preponderance of the evidence. If the proof should fail to establish any essential element of a claim by a preponderance of the evidence in the case, the jury should find for the defendant as to that claim.

To "establish by a preponderance of the evidence" means to prove that something is more likely so than not so. In other words, a preponderance of the evidence in the case means such evidence as, when considered and compared with that opposed to it, has more convincing force, and produces in your minds belief that what is sought to be proved is more likely true than not true. This rule does not, of course, require proof to an absolute certainty, since proof to an absolute certainty is seldom possible in any case.

In determining whether any fact in issue has been proved by a preponderance of the evidence in the case, the jury may, unless otherwise instructed, consider the testimony of all witnesses, regardless of who may have called them, and all exhibits received in evidence, regardless of who may have produced them.

JURY INSTRUCTION NO. 16

When I say in these instructions that a party has the burden of proof on any proposition, or use the expression "if you find" or "if you decide", I mean you must be persuaded, considering all the evidence in the case, that the proposition is more probably true than not true.

JURY INSTRUCTION NO. 17

In deciding whether plaintiffs have proved a fact or an element of a claim by a preponderance of the evidence, you must evaluate all the evidence. In doing this, you must decide which testimony to believe and which testimony not to believe. You may believe all or any part or none of any

witness' testimony. In making that decision, you may take into account a number of factors including the following:

1. Was the witness able to see, or hear, or know the things about which that witness testified?

2. How well was the witness able to recall and describe those things?

3. What was the witness' manner while testifying?

4. Did the witness have an interest in the outcome of this case or any bias or prejudice concerning any party or any matter involved in the case?

5. How reasonable was the witness' testimony, considered in light of all the evidence in the case?

6. Was the witness' testimony contradicted by what that witness has said or done at another time, or by the testimony of other witnesses, or by other evidence?

In deciding whether or not to believe a witness, keep in mind that people sometimes forget things. You need to consider therefore whether a contradiction is an innocent lapse of memory or an intentional falsehood, and that may depend on whether it has to do with an important fact or with only a small detail.

JURY INSTRUCTION NO. 18

A witness may be discredited or impeached by contradictory evidence; or by evidence that at some other time the witness has said or done something, or has failed to say or do something, which is inconsistent with the witness' present testimony.

If you believe any witness has been impeached and thus discredited, it is your exclusive province to give the testimony of that witness such credibility, if any, as you may think it deserves.

If a witness is shown knowingly to have testified falsely concerning any material matter, you have a right to distrust such witness' testimony in other particulars; and you may reject all the testimony of that witness or give it such credibility as you may think it deserves.

An act or omission is "knowingly" done, if done voluntarily and intentionally, and not because of mistake or accident or other innocent reason.

JURY INSTRUCTION NO. 19

Counsel have worked with the court in preparing these jury instructions and have been provided with a copy of the same. Counsel may properly refer to some of these instructions on the law applicable to this case in their arguments. If, however, any difference appears to you between the law as stated by the court in these instructions and any law stated by counsel, either in their opening statements or closing arguments, you are of course to be governed by these instructions now given by the court.

JURY INSTRUCTION NO. 20

In Phase I of the trial, you determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless, and that such conduct was a legal cause of the oil spill. In Phase II of the trial, you awarded sums of money

for actual damages to various commercial fishermen to compensate them for the losses legally caused by the oil spill.

The fact that you have determined that the conduct of Joseph Hazelwood and of the Exxon defendants was reckless does not mean that you are required to make an award of punitive damages against either one or both of them. An award of punitive damages may be made only if you find that plaintiffs have shown by a preponderance of the evidence that an award is proper, applying the instructions that I will give you.

JURY INSTRUCTION NO. 21

In your Phase III deliberations, you may consider the evidence admitted in Phases I and II, in addition to the evidence admitted in this Phase III.

JURY INSTRUCTION NO. 22

The purposes for which punitive damages are awarded are:

(1) to punish a wrongdoer for extraordinary misconduct; and

(2) to warn defendants and others and deter them from doing the same.

JURY INSTRUCTION NO. 23

It is for you to decide as to each of defendant Hazelwood and the Exxon defendants whether or not plaintiffs have established by a preponderance of the evidence that:

(1) an award of punitive damages would serve the purposes of punishment and deterrence; and

(2) if so, what amount is necessary and appropriate to achieve those purposes.

"Punishment" means to impose a penalty because of wrongful conduct of defendants.

"Deterrence" means to discourage or prevent future wrongful conduct by defendants and others.

JURY INSTRUCTION NO. 24

The amount of punitive damages that is necessary to punish a defendant is the penalty that is necessary to express society's disapproval of conduct that society condemns.

The amount of punitive damages that is necessary to deter a defendant and others is the amount of money you find will induce a defendant and others not to repeat the conduct that you have found to be wrongful.

JURY INSTRUCTION NO. 25

Punitive damages are not favored in the law, and are never awarded as a right, no matter how egregious the defendant's conduct. This means that you have discretion to award or not to award punitive damages in accordance with these instructions.

If you find that punitive damages are appropriate, the amount of punitive damages may not be determined arbitrarily. You must use reason in setting the amount.

When I say you must use reason, I mean that any punitive damages award must have a rational basis in the evidence in the case. A punitive damages award may not be larger than an amount that bears a reasonable relationship to the harm caused to members of the plaintiff class by a defendant's misconduct, including any harm to the persons set forth in the stipulation that was read to you. Also, the award may not be larger than what is reasonably necessary to achieve society's goals of punishment and deterrence. Punitive damages, if any, should not reflect dislike for, bias, prejudice, or sympathy toward any party. An award of punitive damages may not be made for the purpose of taking revenge on a defendant. Rather, in determining whether to award punitive damages, your focus should be on the amount, if any, that you find reasonably necessary to effect just punishment and deterrence considering the factors discussed in these instructions.

You may impose punitive damages against one or more of the defendants and not others, and may award different amounts against different defendants.

JURY INSTRUCTION NO. 26

An award of punitive damages is not intended to provide compensation for any loss suffered by any plaintiff. In determining whether to make an award of punitive damages you should assume that all plaintiffs have been or will be fully compensated for all damages they may have suffered as a result of the oil spill. You may not make an award of punitive damages for the purpose of compensating any plaintiff.

JURY INSTRUCTION NO. 27

In determining the amount of punitive damages to award, if any, you may consider, among other factors:

(a) the degree of reprehensibility of the defendants' conduct,

(b) the magnitude of the harm likely to result from the defendants' conduct, as well as the magnitude of the harm that has actually occurred, and

(c) the financial condition of the defendants.

You may also consider, as mitigating factors:

(a) the existence of prior criminal sanctions or civil awards against the defendants for the same conduct, and

(b) the extent to which a defendant has taken steps to remedy the consequences of his or its conduct or prevent repetition of that conduct.

The following instructions, No. 28 through No. 38, amplify and explain the foregoing factors which you may consider.

JURY INSTRUCTION NO. 28

In determining the harm to plaintiffs, you may consider harms to all persons who suffered actual damages as a legal result of the spill. All such claims have been consolidated into this single proceeding for purposes of determining whether punitive damages should be awarded against the defendants and, if so, the amount of such damages. This includes claims of persons who are suing

for their actual damages in the state courts. Because of this consolidation of claims, there will be no other claims for punitive damages in any other court.

With the exception of the claims you resolved in Phase II-A, you will not be asked to decide the true amount of the actual damages, if any, to which other claimants are entitled. In a few cases, the parties have agreed to the amount of actual damages sustained by certain claimants. As to other claimants, the parties have entered into a stipulation, which was read to you, which states the approximate amount of the actual damages claimed by other persons who contend that they were injured as a legal result of the oil spill. This information was provided to give you an idea of the amounts of additional actual damages claimed by other plaintiffs, although these claims are disputed in whole or in part by defendants.

JURY INSTRUCTION NO. 29

In determining the harm caused by the oil spill, you should not consider any damage to natural resources or to the environment generally; you may not base an award of punitive damages on such harms. Any liability for punitive damages relating to these harms has been fully resolved in proceedings involving the Exxon defendants and the Natural Resource Trustees. Although from time to time in the course of this case, you have heard evidence about the Trustees for Natural Resources and about damage to the environment generally, such evidence was admitted only to the extent it may have been of assistance to you in considering the extent of the injuries sustained by some or all of the plaintiffs.

JURY INSTRUCTION NO. 30

In evaluating the degree of reprehensibility of a defendant's conduct, you may take into account the nature of the conduct, the duration of the conduct, and defendant's awareness that the conduct was occurring. The fact that you have found a defendant's conduct to be reckless does not necessarily mean that it was reprehensible, or that an award of punitive damages should be made.

In considering whether an award of punitive damages is appropriate against a corporation, you may consider not just the fact that a corporation may have legal liability for the acts of its employees, but also whether corporate policy makers actually participated in or ratified the conduct that was wrongful, and whether the conduct that was wrongful was carried out by a lower-level employees [sic] and was contrary to corporate policies. If you find that corporate policy makers did not actually participate in or ratify the wrongful conduct, this is a factor that you may consider in mitigation of any award of punitive damages that you might otherwise find proper. Similarly, if you find that wrongful conduct was contrary to company policies, you may take this factor into account in mitigation of any award of punitive damages that you might otherwise find proper.

In considering whether an award of punitive damages is appropriate against a corporation, you may also consider the number of corporate employees who played some role in the conduct you are considering, the duties and responsibilities of such employees, the nature of their participation in or failure to prevent the wrongful conduct, and whether the wrongful conduct and the participation of

the employees in such conduct was in conformity with corporate policies.

If you find that a number of Exxon defendants' employees participated in or failed to prevent the wrongful conduct and that those employees held positions involving significant duties and responsibilities within the corporation, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in increasing any award of punitive damages that you might otherwise find proper.

In the alternative, if you find that only a limited number of corporate employees participated in or failed to prevent the wrongful conduct and that these employees had lesser duties or responsibilities within the corporation, and that the wrongful conduct was not in conformity with corporate policies, then, in judging the reprehensibility of the Exxon defendants' conduct, you may take these factors into consideration in mitigation of any award of punitive damages that you might otherwise find proper.

JURY INSTRUCTION NO. 31

To "mitigate" means to reduce, diminish, or lessen.

JURY INSTRUCTION NO. 32

In considering whether an award of punitive damages is appropriate in this case and, if so, in what amount, you may consider the financial condition of a defendant. This does not necessarily mean that you should punish one defendant more than another defendant simply because of their relative financial conditions. If you find that a

defendant's financial condition affects the level of award necessary to punish the defendant and to deter future wrongful conduct by that defendant and others, you may take the defendant's financial condition into account for that purpose.

JURY INSTRUCTION NO. 33

In considering a defendant's financial condition, you may not consider the defendant's gross wealth, that is, the value of its assets without subtracting any debts or obligations that the defendant may owe, but only the defendant's net worth, that is, the difference between the defendant's assets and the defendant's liabilities. Similarly, if you consider a defendant's income in assessing its financial condition, you may not consider a defendant's gross income (that is, the total amount of money received by the defendant) but only the difference between gross income and all expenses that must be paid out of that income.

JURY INSTRUCTION NO. 34

In considering a defendant's net worth or net income, you may consider what portion of the defendant's net worth or net income is most relevant to a defendant's activities that were implicated in the defendant's wrongful conduct. You may also decide that all of a defendant's net worth and net income is relevant to determining the appropriate amount of punitive damages, if any, necessary to punish a defendant and deter a defendant and others.

JURY INSTRUCTION NO. 35

In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you should consider steps taken by a defendant to prevent recurrence of the conduct in question – in this case, another oil spill. Evidence of changes in policies, practices, and procedures by the Exxon defendants has been put before you so that you can consider this issue. The fact that changes have been made after an event does not tend to show that such changes should have been made before the event, or that the policies, practices, or procedures in place before the event were negligent or otherwise improper. Accordingly, if you find that changes were made that have reduced the likelihood of an oil spill in the future, you may consider the making of such changes as a factor tending to mitigate any punitive damages award that you might otherwise find proper.

JURY INSTRUCTION NO. 36

In considering whether an award of punitive damages is appropriate in this case, and, if so, in what amount, you may consider whether a defendant has paid other criminal fines or civil penalties. You may also consider whether a defendant has made payments for compensatory damages, settlements, and incurred other costs and expenses of remedial measures. You may also consider the extent to which a defendant has been subjected to condemnation or reproval by society as a result of other means, such as loss of standing in the community, public vilification, loss of reputation, and similar matters. These are factors which

you may consider in mitigation of any award of punitive damages that you might otherwise find proper.

JURY INSTRUCTION NO. 37

In considering whether to make an award of punitive damages, and if so in what amount, you [sic] decision should not take into account or be affected in any way by the tax consequences of such an award – either to defendants who would pay such an award or to plaintiffs who would receive it.

JURY INSTRUCTION NO. 38

In determining whether an award of punitive damages should be made, and if so in what amount, you may consider whether, and if so to what extent, an award of punitive damages against the corporate Exxon defendants might be borne by the Exxon shareholders. Consideration of who may bear the ultimate financial impact of punitive damages is but one of many factors you may consider in fixing the amount of punitive damages.

JURY INSTRUCTION NO. 39

You should not speculate as to how any award of punitive damages you may make would be divided amongst the plaintiff class.

JURY INSTRUCTION NO. 40

The law forbids you to decide any question in this case by relying on chance. For example, it would be unlawful for each juror to make an individual estimate of damages and for the jury as a whole to agree in advance to use the average of these estimates as the proper measure of any damages that are to be awarded. Each juror may express views on the correct amount of damages so that all jurors may thoughtfully consider each other's views in order to determine what damages, if any, reasonably should be awarded in light of the law and the evidence.

JURY INSTRUCTION NO. 41

In your deliberations and in any verdict which you may render, you shall not consider the matters of interest, costs, or attorney's fees. These subjects are matters for the court to consider after your verdict has been rendered.

JURY INSTRUCTION NO. 42

It is proper to add the caution that nothing said in these instructions and nothing in any form of verdict prepared for your convenience is meant to suggest or convey in any way or manner any intimation as to what verdict I think you should find. What the verdict shall be is your sole and exclusive duty and responsibility.

JURY INSTRUCTION NO. 43

The verdict must represent the considered judgment of each juror. In order to return a verdict, it is necessary

that each juror agree thereto. Your verdict must be unanimous.

It is your duty, as jurors, to consult with one another, and to deliberate with a view to reaching an agreement, if you can do so without violence to individual judgment. Each of you must decide the case for yourself, but only after an impartial consideration of the evidence in the case with your fellow jurors. In the course of your deliberations, do not hesitate to reexamine your own views, and change your opinion, if convinced it is erroneous. But do not surrender your honest conviction as to the weight or effect of evidence, solely because of the opinion of your fellow jurors, or for the mere purpose of returning a verdict.

Remember at all times that you are not partisans. You are judges – judges of the facts. Your sole interest is to seek the truth from the evidence in the case.

JURY INSTRUCTION NO. 44

Upon retiring to the jury room, the presiding juror you previously chose will preside over your deliberations, and will continue to be your spokesman here in court.

A special verdict form has been prepared for your convenience.

This special verdict form contains four interrogatories. The answer to each interrogatory must be the unanimous answer of the jury. Your presiding juror will write the unanimous answer of the jury in the space provided under each interrogatory.

When you have finished answering the interrogatories, you will have your presiding juror date and sign the form, and then return with your verdict to the courtroom.

JURY INSTRUCTION NO. 45

If you should agree upon your verdict before 2:00 p.m. this afternoon, your presiding juror should date and sign the verdict. This will indicate that all of you have agreed on the verdict. You should return your verdict immediately into open court in the presence of the entire jury, together with the exhibits and these instructions.

If you do not agree upon your verdict before 2:00 p.m. this afternoon, you may return to your homes. You must not talk about the case or your deliberations outside of the jury room. Before you go home, the presiding juror should lock the jury room so that the exhibits, instructions, and unsigned verdicts will remain undisturbed. None of these materials should be removed from the jury room until you reach a verdict. You should return to your jury room at 8:00 a.m. tomorrow to continue your deliberations. Deliberations should not be commenced until all jurors are present in the jury room.

JURY INSTRUCTION NO. 46

If it becomes necessary during your deliberations to communicate with the court, you may send a note by a bailiff, signed by your presiding juror, or by one or more members of the jury. Any note to the court should include the date and time the note was signed. No member of the jury should ever attempt to communicate with the court by

any means other than a signed writing; and the court will never communicate with any member of the jury on any subject touching the merits of the case, otherwise than in writing, or orally here in open court.

Bailiffs, as well as all other persons, are forbidden to communicate in any way or manner with any member of the jury on any subject touching the merits of the case.

Bear in mind also that you are never to reveal to any person – not even to the court – how the jury stands, numerically or otherwise, on the questions before you, until after you have reached a unanimous verdict.

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	
	)	No. A89-0095-CV (HRH)
the EXXON VALDEZ	)	(Consolidated)

SPECIAL VERDICT
FOR PHASE III OF TRIAL

Interrogatory No. 1: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against defendant Hazelwood is necessary in this case to achieve punishment and deterrence?

Answer: Yes _____ No _____

Interrogatory No. 2: If your answer to Interrogatory No. 1 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $_____

Interrogatory No. 3: Do you unanimously find from a preponderance of the evidence that an award of punitive damages against the Exxon defendants is necessary in this case to achieve punishment and deterrence?

Answer: Yes _____ No _____

Interrogatory No. 4: If your answer to Interrogatory No. 3 is "yes", what amount of punitive damages do you find to be necessary for those purposes?

Answer: $_____

DONE at Anchorage, Alaska, this ___ day of August, 1994.

_____
Presiding Juror

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	Case No. A89-095-CV (HRH)
the EXXON VALDEZ	)	(Consolidated)

RE: ALL CASES

MOTION OF DEFENDANTS EXXON CORPORATION (D-1) AND EXXON SHIPPING COMPANY (D-2) TO LIFT STAY TO FILE MOTION AND RENEWED MOTION FOR JUDGMENT ON PUNITIVE DAMAGES CLAIMS

(Filed Oct. 23, 1995)

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (collectively "Exxon") respectfully move for leave to file the attached motion and renewed

motion for judgment on plaintiffs' punitive damage claims. This motion is supported by the attached memorandum.

Respectfully submitted this 23d day of October, 1995 at Anchorage, Alaska.

BOGLE & GATES, P.L.L.C.

By /s/ Douglas J. Serdahely
Douglas J. Serdahely
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Exxon Shipping Company (D-2)

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IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re	)	Case No. A89-095-CV (HRH)
the EXXON VALDEZ	)	(Consolidated)

RE: ALL CASES

MOTION AND RENEWED MOTION BY DEFENDANTS EXXON CORPORATION (D-1) AND EXXON SHIPPING COMPANY (D-2) FOR JUDGMENT ON PUNITIVE DAMAGES CLAIMS

Defendants Exxon Corporation (D-1) and Exxon Shipping Company (D-2) hereby move the Court, pursuant to Rules 49(a) and 58(2) of the Federal Rules of Civil Procedure, for an order that the judgment to be entered on the special verdict of the jury in this consolidated Action shall not include an award of punitive damages in favor of

plaintiffs, on the ground that recent decisions of the Ninth and Fifth Circuits make plain that punitive damages are not legally available under maritime law in the circumstances present here. In light of this recent authority, defendants also renew their previous motions concerning the legal unavailability of punitive damages. This motion is also made, to the extent they may be applicable, pursuant to Rules 50(b), 56(b), 56(d), 59(a), and 59(e) of the Federal Rules of Civil Procedure and pursuant to the constitutional requirement of due process, as set forth in the Ninth Circuit's decision in *Morgan v. Woessner,* 997 F.2d 1244 (9th Cir. 1993).

A Memorandum in support of motion is filed herewith.

Respectfully submitted this 23d day of October, 1995 at Anchorage, Alaska.

BOGLE & GATES, P.L.L.C.

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Douglas J. Serdahely
Attorneys for defendant
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Honorable H. Russel Holland

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ	)	Case No. A89-095-CV (HRH) (Consolidated)
THIS DOCUMENT RELATES TO ALL CASES	)	

MEMORANDUM IN OPPOSITION TO EXXON'S MOTION TO LIFT STAY TO FILE MOTION FOR JUDGMENT ON PUNITIVE DAMAGE CLAIMS

(Filed Oct. 30, 1995)

As its title itself reflects, Exxon's "Motion and Renewed Motion . . . for Judgment On Punitive Damage Claims" is nothing more than an attempt to dredge up arguments that were fully debated and decided in Order No. 158.[1] In order to prevent unconscionable further delay in entry of judgment, the Court should deny Exxon's motion for leave to file yet another round of papers in its undying effort to avoid the punitive damage verdict.

Exxon's attempt to rehash these issues is thrice untimely:

- first, under Rule 50(a)(2) because a motion was never made prior to submitting the case to the jury;
- second, under the stipulated deadline for post-trial motions under Rules 50 and 59, which expired more than one year ago (September 30, 1994);[2] and,
- third, as a request for reconsideration of Order No. 158, it is grossly out of time, having been filed more than two years after that Order was entered on October 21, 1993. *See* District of Alaska Local Rule 7.1(1) (requiring motions for reconsideration to be brought within five days of the notice of ruling).

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[1] Clerk's Docket No. 3982 dated October 21, 1993.

[2] Clerk's Docket No. 5918 dated September 26, 1994.

Not only is Exxon's motion tardy but, as we now demonstrate, Exxon's motion also does not meet the standard set by this court for revisiting such prior decisions.

* * *

MINUTES OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF ALASKA

In re the EXXON VALDEZ — CASE NO. A89-095-CV (HRH) (Consolidated)

THE HONORABLE H. RUSSEL HOLLAND

Deputy Clerk — Official Recorder

APPEARANCES: for PLAINTIFF: — for DEFENDANT: —

PROCEEDINGS: **ORDER FROM CHAMBERS**

(Filed Nov. 2, 1995)

Exxon Corporation (D-1) and Exxon Shipping Company (D-2) (Exxon) have filed a motion to lift the stay to file a motion and renewed motion for judgment on punitive damages claims.[1] Plaintiffs oppose the motion.[2] The motion to lift the stay is denied.

DATE: November 2, 1995 INITIALS: tdm
Deputy Clerk

[Rev. 06/92] cc: L. Miller
D. Serdahely
D. Ruskin

[1] Clerk's Docket No. 6496.

[2] Clerk's Docket No. 6516.

IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 97-35191
97-35193

In re: the EXXON VALDEZ

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

Plaintiffs-Appellees,

v.

EXXON CORPORATION, et al.,

Defendants-Appellants.

DANIEL R. CALHOUN, et al.,

Plaintiffs-Appellants,

v.

EXXON CORPORATION, et al.,

Defendants-Appellees.

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

JOINT REPLY BRIEF (NO. 97-35191)
AND JOINT ANSWERING BRIEF (NO. 97-35193)
OF EXXON CORPORATION AND EXXON
SHIPPING COMPANY

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* * *

It follows that maritime law will not supplement the CWA by allowing nonstatutory recoveries of punitive damages for the same acts. OB 39-43.[40]

* * *

[40] Plaintiffs wrongly claim that Exxon did not argue CWA preclusion below. Exxon did so by motion under Rules 49(a) and 58(2) on Oct. 23, 1995, ER 704-13, RER 86-98; contradicting what they say now, plaintiffs told the district court that the issues raised by Exxon were "identical" to those considered and rejected by the district court in 1993. ER 718. Exxon's motion under Rules 49(a) and 58(2) was not untimely; the deadline plaintiffs refer to (but do not cite) was for motions under Rules 50 and 59. RER 84. Exxon raised the matter again March 18, 1996, ER 747-57, for the express purpose of preserving the record, ER 754, and expressly incorporated its prior memorandum raising CWA issues. ER 755-56. The district court denied leave to file the first motion; and summarily denied the second motion. ER 721, 758. The district court's failure to listen does not mean Exxon's arguments were not raised. But even if they had not been, whether the CWA precludes punitive damages under maritime law is an important, purely legal question which the Court may and should consider. *United States v. Northrop Corp.,* 59 F.3d 953, 957 n.2 (9th Cir. 1995); *People of Village of Gambell v. Hodel,* 774 F.2d 1414, 1426-27 (9th Cir. 1985).

No. 93-40252

EXXON CORPORATION	:	IN THE DISTRICT COURT OF
vs.	:	
CERTAIN UNDERWRITERS AT LLOYDS OF LONDON	:	HARRIS COUNTY, TEXAS
	:	189TH JUDICIAL DISTRICT
	:	

* * *

BE IT REMEMBERED that on the 28th day of May, 1996, before the Honorable Carolyn Marks Johnson, judge presiding, the following proceedings were had, to wit:

MARTHA C. ADAMS
OFFICIAL COURT REPORTER

* * *

[5] Q Mr. Bluestein, could you please state your full name for the record?

A Edwin Alexander Bluestein.

Q All right. You are an attorney with Fulbright & Jaworski?

A Yes.

Q And how long have you been with Fulbright & Jaworski?

A Since June of 1959.

* * *

[19] Q I have got before you what's been marked as Defendant's Exhibit 4898, and I will ask you to look at that, sir.

A Yes, sir. I'm able to identify this as a letter which I wrote to Exxon Company USA to Ken Roberts, dated June 23, 1989.

Q And this was something that you wrote to Mr. Roberts before the joint memorandum marked as 4893 was sent to ITIA?

A Yes, sir, that's correct.

Q And this letter to Mr. Roberts marked as 4898 addresses Exxon Shipping Company's ability to limit liability?

A Yes, sir, that's correct.

Q And I believe in the first paragraph of this letter you state, "Based upon our understanding of the [20] facts and the applicable law, we are of the opinion that Exxon Shipping stands virtually no chance whatever of obtaining an order granting limitation of liability in this case." Did you write that?

A That is what I wrote.

Q And that was your understanding of the facts and circumstances of the law back on June 23, 1989?

A That's correct.

Q And then you go on in this letter to describe the reasons for our opinion – or for that opinion that you just stated?

A Yes.

Q And we have a 12-page letter setting forth those reasons?

A I believe that's correct.

Q I would like for you to turn to Page 9 of the letter.

A All right.

Q And you have a heading "Negligence and Unseaworthiness of the EXXON VALDEZ." Do you see that?

A Yes, I do.

Q And in the first sentence you state, "We have no doubt but that the Exxon Shipping will be found liable for this casualty by any court which might [21] hear the case." Do you see that?

A Yes, I do.

Q And then you go on to discuss the reasons why you believe Exxon Shipping Company will be found liable?

A Yes.

Q And in the first paragraph you describe acts of negligence?

A That's correct.

Q In the second paragraph you discuss the unseaworthiness of the EXXON VALDEZ.

A That is true.

Q And you state in the first sentence, "we believe the EXXON VALDEZ additionally will be declared to have been unseaworthy." Do you see that?

A Yes.

Q And you wrote, "A ship owner has a non-delegable duty to provide a competent master and crew and unseaworthiness exists if there is an incompetent crew."

Was that your understanding of the law?

A Yes, it is.

Q And you go on to state, "We would expect a court to find the vessel was unseaworthy at the time of the casualty because the mate on watch did not possess [22] the required pilotage endorsement for Prince William Sound and accordingly was incompetent as a matter of law to navigate those waters." Do you see that?

A Yes.

Q And that was your conclusion at the time?

A That is – that is correct.

Q You go to state, sir, "We further are of the opinion that the use of alcohol by the master will result in a finding that he was incompetent to carry out the duties of a master and that the vessel was rendered unseaworthy by virtue thereof." Do you see that?

A I do.

Q And that was your conclusion at the time, wasn't it?

A Yes, it was.

Q And that – for those of us who have not spent our time working in the maritime area, when you refer to a master, you are referring to the captain of the ship?

A That's correct.

Q And the reference to the master is a reference to Captain Hazelwood?

A Yes.

[23] Q The next Page, Page 10, you discuss – you have a heading "Privity and Knowledge." Do you see that?

A I do.

Q And that's a separate issue from the issue of unseaworthiness, isn't it?

A It is.

Q And as I understand it – and correct me if I'm wrong – an unseaworthy condition is relevant if there is privity or knowledge by management?

A That's correct.

Q And what is privity or knowledge?

A It's been described as being a vessel that the size of which depends upon who the court is that's pouring the facts into it. That's a rather colorful way of saying it is a question for the maritime court to determine under all of the facts whether or not the owner of the vessel had participated and knew of and appreciated that the conditions which are found to be negligent are unseaworthy.

Q And here the question would be whether – at least one of the questions would be whether management was aware of or had knowledge of or participated in Captain Hazelwood's alcohol or incompetence due to alcohol use?

[24] Well, when we use the term "management," I want to be sure you understand that the courts have held that fleet managers, operational personnel, port engineers

and superintendents have sufficient supervisory capacity to satisfy the privity or knowledge standard as a representative of the owner.

Q And with that clarification, there would be privity if management knew of Captain Hazelwood's incompetence due to use of alcohol?

A That's my understanding, yes.

Q And if you look down in the third paragraph on Page 10, you wrote: "Our inquiries leave no room for reasonable doubt that Exxon Shipping will never be able to sustain its burden to show lack of privity or knowledge with the use of alcohol by Captain Hazelwood."

A Yes, sir.

Q And that was your conclusion back in 1989?

A It was.

Q In the next paragraph you state, "The following facts which claimants will establish readily cannot be denied." Do you see that.

A Yes, sir.

* * *