UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 04-035182
04-035183

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

Plaintiffs-Appellees-Cross-Appellants,

v.

EXXON MOBIL CORPORATION, et al.,

Defendants-Appellants-Cross-Appellees.

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

---

PLAINTIFFS' RESPONSE TO EXXON'S PETITION FOR REHEARING OR REHEARING *EN BANC*

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street N.W.
Washington, D.C. 20006-5403
(202) 420-2200

Brian B. O'Neill
FAEGRE & BENSON
2200 Norwest Center
90 South 7th Street
Minneapolis, Minnesota 55402-3901
(612) 336-3000

David W. Oesting
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
Suite 1450
550 W. Seventh Avenue
Anchorage, Alaska 99501
(907) 257-5300

Attorneys for Plaintiffs

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authority

Rules

INTRODUCTION AND BACKGROUND

"It is time for this protracted litigation to end." December 22, 2006 Slip op. 19747. It has been 18 years since the Exxon Valdez spilled oil into Prince William Sound. For more than 12 years, the September 1994 punitive damage verdict has been embroiled in post-trial motions and appeals. Meanwhile, about 20 percent of the plaintiff class has died, and Exxon has more than recouped the entire amount of the verdict by operation of the differential between its internal rate of return and the statutory judgment rate. Although Plaintiffs believe the decision to reduce punitive damages to one-half the jury's award is erroneous – and should be corrected if reviewed en banc – we do not press that point now because we agree it is time to close this chapter and proceed to the inevitable certiorari petition.

This case is atypical in important ways that counsel against further review. It arises from an environmental tort of unparalleled magnitude. Unlike other punitive damage cases, the award was not to one plaintiff, but to a mandatory class comprising some 32,677 victims. In consequence, Exxon will be punished solely for harms inflicted on persons before the Court, and this will be the only punitive damage award ever for its massive tort.[1] The aggregate harm that Exxon caused to class members exponentially exceeds the harm considered in other cases. But

[1] This case is thus entirely unlike *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007), which vacated a punitive damage award because it may have punished a defendant "for harming persons who [were] not before the court (*e.g.*, victims whom the parties [did] not represent)." *Id.* at 1060.

notwithstanding that fact, and the Court's conclusion that Exxon's corporate conduct was "in the higher range of reprehensibility," Slip op. 19735, the decision limits punitive damages to five times the quantified harm, well within the single-digit ratio that the Supreme Court and this Court generally have accepted.

Even though Exxon now stands to pay only one-half the amount the jury awarded (an award that two of the four federal judges to review the case have found constitutionally sound), Exxon still is not satisfied. Exxon asks this Court (1) to reopen belatedly two threshold issues that this Court decided five years ago and (2) to conduct a ***sixth*** post-verdict review of the facts pertinent to the punitive amount. Exxon's challenges rest on mischaracterizations of a voluminous record that the district court and this Court have reviewed several times with extraordinary care. None implicates any genuine conflict or live issue of "exceptional importance." There is no reason for en banc review.

REASONS FOR DENYING REHEARING

I. Exxon's Arguments Concerning the Permissibility of Punitive Damages Do Not Warrant Further Review

Exxon's petition does not challenge the rule, reaffirmed in *In re the Exxon Valdez*, 270 F.3d 1215, 1226-27 & n.14 (9th Cir. 2001) ("*Valdez I*"), that punitive damages are available in maritime tort cases to punish and deter reckless conduct. Instead, Exxon revives two arguments – one based on the Clean Water Act

("CWA") and the other on vicarious liability principles – that such damages are impermissible here.

This Court rejected these arguments in *Valdez I*, and Exxon could have petitioned for rehearing en banc at that time. *E.g.*, *Gorbach v. Reno*, 219 F.3d 1087, 1091 (9th Cir. 2000) (en banc). Had Exxon succeeded, this case would have ended or been retried long ago, and judicial resources would not have been expended in repeatedly evaluating the amount of the 1994 verdict. Exxon's petition with respect to these old issues is thus five years too late. *See* Fed. R. App. P. 40(a)(1) and 35(c) (petition must be filed within 14 days after entry of the court of appeals judgment sought to be reheard). In any event, this Court should decline on prudential grounds to reopen these points at this late date. *See Kyocera Corp. v. Prudential-Bache Servs.*, 341 F.3d 987, 994 & n.11 (9th Cir. 2003) (en banc); *Landell v. Sorrell*, 406 F.3d 159 (2d Cir. 2005); *Washington Mobilization Comm. v. Cullinane*, 566 F.2d 107 (D.C. Cir. 1977).[2]

---

[2] *Kyocera* held that an en banc court has the ***power*** to consider *sua sponte* any issue in a case before it, but went on to emphasize its prudential discretion. The en banc court there revisited a prior panel decision *sua sponte* and affirmed the district court's original decision as a better ground for reaching the same result as the second panel decision. That conformed with the rule that a trial court judgment can be affirmed on any ground, *e.g.*, *Barnes v. Logan*, 122 F.3d 820, 822 (9th Cir. 1997). In contrast, Exxon seeks to revisit the Court's 2001 decision in order to ***reverse*** a district court judgment that this Court's most recent decision leaves in place (subject only to a reduction in its amount).

Wholly apart from their staleness, neither of Exxon's arguments raises any issue warranting en banc review.

A. Clean Water Act

In the thirty-five years since Congress passed the CWA, no court has suggested that the statute forecloses punitive damages in 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 Engineering, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (polluting stream with acidic water); *Knabe v. National Supply Div.,* 592 F.2d 841, 845 (5th Cir. 1979) (dumping industrial waste); *Doralee Estates, Inc. v. Cities Servs. Oil Co.,* 569 F.2d 716, 723 (2d Cir. 1977) (spilling oil). The only published opinion besides *Valdez I* explicitly considering the question agreed that the CWA imposes no barrier to a punitive damage recovery. *Poe v. PPG Indus.,* 782 So.2d 1168, 1175-78 (La. App. 2001).

These precedents reflect the settled principle that the CWA "le[aves] . . . room" for tort claims arising from water pollution. *International Paper Co. v. Ouellette,* 479 U.S. 481, 492 (1987). The Act's savings clause expressly provides that it does not restrict "any right which any person (or class of persons) may have under any statute or common law . . . to seek any other relief." 33 U.S.C.

§ 1365(e); *see also* 33 U.S.C. § 1321(*o*). A statutory scheme with such a savings clause can foreclose the availability of a certain type of relief in only two circumstances. This Court correctly concluded that neither is present here.

First, 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 scheme provides. *Yamaha Motor Corp. v. Calhoun,* 516 U.S. 199, 215 (1996); *see also Miles v. Apex Marine Corp.,* 498 U.S. 19, 31-33 (1990) (while general maritime law permits suit for seaman's wrongful death caused by unseaworthiness, remedies are limited to those provided by the Jones Act for wrongful death); *Saavedra v. Korean Air Lines,* 93 F.3d 547, 553-54 (9th Cir. 1996) (giving similar effect to Death on the High Seas Act); *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 CWA).

But the CWA does not prescribe a comprehensive recovery regime covering private tort claims, so *Miles, Saavedra,* and *Oswego* do not control. The CWA addresses the "public interest in punishing harm [that pollution causes] to the environment," but does not address the "private interests" Plaintiffs assert regarding harm to "private economic and quasi-economic resources." *Valdez I* at 1231. Accordingly, Plaintiffs' maritime tort action is not substantively derived

from or within the ambit of the CWA.[3] And because the CWA does not prescribe any remedies for such private tort claims, this Court's holding that Plaintiffs may pursue the full range of available remedies, including punitive damages, necessarily follows. *See Yamaha*, 516 U.S. at 215-16; *International Paper,* 479 U.S. 481, 499 n.19 (when cause of action is legitimate, plaintiff may seek full panoply of remedies).

Second, a statutory scheme preempts any cause of action that "interferes" or is "incompatible" with the scheme's operation. *International Paper,* 479 U.S. at 491-97; *see also Middlesex County Sewage 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); *Conner v. Aerovox, Inc.,* 730 F.2d 835, 839-42 (1st Cir. 1984) (CWA forecloses maritime-law nuisance action for same reason).

Nothing about Plaintiffs' private tort claim risks interference with the CWA's system allowing the federal government to impose penalties on oil spillers to recoup cleanup costs, so this case bears no resemblance to *Sea Clammers* or *Conner*. Exxon does not even argue "that the plaintiffs seek any remedies that might conflict with the decision of an administrative agency charged with

[3] Exxon's Petition asserts that Plaintiffs' tort claim is cognizable only because the savings clause in 33 U.S.C. § 1321(*o*) "preserves" it. Pet. 9 n.4. In fact, Plaintiffs can bring their tort claim not because of anything in the CWA, but because the CWA does not address private economic interests. *Valdez I* at 1231.

enforcement responsibility" or with the regulatory balance struck in "the statutory scheme." 270 F.3d at 1230-31. That reality negates its preemption argument.

Even if doubt existed regarding CWA preemption, there would be no reason for this Court to revisit the issue. Following this oil spill, Congress enacted the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. § 2702 *et seq.*, establishing civil penalties for at least some of the harm that oil spills cause to private economic interests. Since OPA's passage, the question whether ***the CWA*** forecloses private maritime tort claims to recover punitive damages has been overtaken by OPA. The only relevant question (not presented by this case) is whether ***OPA*** forecloses such claims seeking such damages.[4] For that reason, Exxon's CWA argument does not merit further attention from this Court.

B. Vicarious Liability

Exxon asks the Court to reconsider one jury instruction from the opening phase of this multi-phase trial, which supposedly raises the question "[w]hether a ship owner may be held vicariously liable for punitive damages under maritime

---

[4] The First Circuit has held that the new remedies OPA affords private parties foreclose punitive damages with respect to future oil spills. *South Port Marine, LLC v. Gulf Oil Ltd. Partnership,* 234 F.3d 58, 64-66 (1st Cir. 2000). In so holding, *South Port* noted 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. Thus, contrary to Exxon's unfounded reliance on the First Circuit's *Conner* decision, that court agrees with this Court's holding here.

law based solely on the recklessness of the master of the vessel at sea." Pet. 1, 10.[5] In fact, because the instructions during the punitive damages phase expressly required the jury to base any award on Exxon's corporate conduct, this case does not present any vicarious liability issue. Even if it did, the Court's analysis of this Circuit's precedents would not merit reexamination.

Pursuant to an agreed trial plan, Phase I of the 1994 trial considered whether reckless conduct had caused the grounding of the Exxon Valdez. Consistent with *Protectus Alpha Nav. Co. v. N. Pac. Grain Growers*, 767 F.2d 1379 (9th Cir. 1985), the Phase I instructions told the jury that "the reckless act or omission of a managerial officer or employee of a corporation, in the course and scope of the performance of his duties, is held in law to be the reckless act or omission of the corporation." *Valdez I* ER 394.[6] The jury found both Exxon and Hazelwood reckless. *Valdez I* ER 423-24.

But the Phase I verdict did ***not*** mean that Exxon would be liable for punitive damages. Instead, Phase III of the trial dealt with that issue from scratch, using instructions that did not mention vicarious liability for a managerial agent's conduct. The Phase III instructions emphasized that the Phase I verdict "does not

---

[5] If Exxon's challenge to this instruction were correct and material (and it is neither), the only remedy would be to retry the case.

[6] The excerpts of record in *Valdez I* are cited in the form "*Valdez I* ER." All other "ER" citations refer to the excerpts in the current appeal.

mean that you are required to make an award of punitive damages against either" Exxon or Hazelwood. SER 875. 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." SER 880. Then, the court gave twenty instructions covering every nuance of evolving punitive damages jurisprudence, repeatedly directing the jury to consider the relevant factors separately as to "each of" Exxon and Hazelwood. Slip op. 19706; SER 865-88. The verdict form asked the jury ***separately*** as to Hazelwood and Exxon whether punitive damages were "necessary ... to achieve punishment and deterrence." ER 375-76.

The Phase III closing arguments focused on whether ***Exxon's*** conduct warranted punitive damages. Plaintiffs' counsel did not mention vicarious liability concepts at all. *See* 7556:17-7588:13, 7629:3-7644:7. Exxon's counsel stressed that the Phase I verdict "does not mean that you are required to make an award of punitive damages," 7603:3-19, and argued about Exxon's conduct, not Hazelwood's. 7588:21-7628:11.

Thus, the jury's Phase III verdict against Exxon – the only one that matters now – rested only on Exxon's conduct. *See Hovey v. Ayers*, 458 F.3d 892, 913 (9th Cir. 2006) (juries presumed to follow instructions). The ensuing due process reviews have confirmed that Exxon's reprehensible conduct, irrespective of

Hazelwood's, justifies the punitive award. Slip op. 19722-30; *Valdez I* at 1236-37, 1242; 296 F. Supp. 2d at 1093-97.

But even if the punitive award had turned on vicarious liability, rehearing still would not be warranted. "[T]he majority of courts" have "held corporations liable for punitive damages ... because of the acts of their agents [even] in the absence of approval or ratification." *American Soc'y of Mech. Eng'rs, Inc. v. Hydrolevel Corp.*, 456 U.S. 556, 575 n.14 (1982). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) (punitive award resting on *respondeat superior* satisfied due process). Rather than go that far, this Court in *Protectus* (and the district court in Phase I) followed the Restatement (Second) of Torts § 909 (1979), which – absent the principal's approval or ratification – holds a principal vicariously liable in punitive damages ***only*** for the conduct of an agent "employed ***in a managerial capacity*** and ... acting in the scope of employment." 767 F.2d at 1386 (emphasis added).

Recognizing that any corporation can act only through its agents, there is no "conflict" between *Protectus* and *Pacific Packing & Nav. v. Fielding*, 136 F. 577 (9th Cir. 1905). As *Protectus* explained, "[t]he Restatement standard largely follows" *Fielding* by limiting an owner's vicarious liability to acts of managerial employees; the Restatement merely goes "a step farther than ... *Fielding*" in light of "the reality of modern corporate America" and the development of punitive

damages precedent. 767 F.2d at 1386 (citing *Hydrolevel*, 456 U.S. at 575 n.14). Such incremental jurisprudential evolution over a century does not merit en banc review, particularly given that this Court has never cited *Fielding* in a case involving an alleged managerial agent – except in *Protectus* and here.

Nor need the Court give further consideration to the compatibility of *Protectus* with other Circuits' decisions. The First Circuit has called *Protectus* an "appropriate evolution of the law" in maritime cases, affirming a punitive damages award in admiralty based on the fact that, as here, the jury could find corporate culpability. *CEH, Inc. v. F/V SEAFARER*, 70 F.3d 694, 705 (1st Cir. 1995). As the First Circuit observed, no policy suggests that vicarious liability for punitive damages "should be treated differently on sea than on land." *CEH*, 70 F.3d at 704. Although Exxon claims the Fifth Circuit rejected *Protectus*, that court 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 managerial agent. *Matter of P&E Boat Rentals*, 872 F.2d 642, 652 (5th Cir. 1989).[7]

Finally, Exxon has no basis for its attempt to manufacture an issue concerning corporate liability for actions of managers who violate diligently

---

[7] Exxon also cites *United States Steel v. Fuhrman*, 407 F.2d 1143, 1145 (6th Cir. 1969), but that case predated *Protectus*, *Hydrolevel* and *Haslip*, and nothing in the opinion suggests that the plaintiff alleged the company's liability for punitive damages based on the master's managerial status. In any event, *Fuhrman* 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." *Id.* at 1148.

enforced policies. Pet. 12. The Phase III instructions explicitly told the jury it could consider whether "wrongful conduct was contrary to company policies" in deciding whether to award punitive damages. SER 880-81. During Phase III testimony, Exxon discussed only one such policy: the requirement that two officers man the bridge when transiting Prince William Sound, 7400:18-7401:12, which Exxon enforced inconsistently at best. 1066-1067, 1080, 1111, 3666-3667. In its Phase III closing, Exxon did not claim diligence in enforcing ***any*** policies, 7588:21-7628:11; instead, it conceded that it "didn't have a written detailed policy" to monitor alcoholics returning to duty, 7613:12-13, and acknowledged criticism that the policy of two officers on the bridge "was ambiguous and maybe the master did have the right to go off the bridge." 7616:12-15. Exxon's policy arguments are merely second thoughts on a failed trial strategy; they raise no appellate issue.

II. Exxon's Arguments Concerning the Size of the Punitive Damage Award Do Not Merit Further Review.

Exxon seeks to prolong this case through a ***sixth*** review of the amount of the punitive damages award, even though the reduced award falls comfortably within Supreme Court and Circuit guidance. Exxon does not contest the finding by the district court and this Court that Exxon's corporate conduct was "highly reprehensible." Slip op. 19735; *see id.* 19722-35; 296 F. Supp. 2d at 1093-97. Exxon's conduct caused catastrophic economic harm, which this Court has

quantified at $504 million for purposes of ratio analysis. The ratio between the reduced $2.5 billion judgment and this economic harm is only 5:1, well within the "single digit" guideline that the Supreme Court and this Court have endorsed.

But the relevant harm also includes unquantified emotional devastation that class members suffered, Slip op. 19724; 296 F. Supp. 2d at 1094, 1103, and the potential harm that would have resulted but for Exxon's good fortune, 296 F. Supp. 2d at 1103-04.[8] When one takes these harms into account, the true ratio falls still lower on the single-digit scale. For these reasons, and for reasons articulated in Judge Browning's dissent, Plaintiffs believe the jury's award is constitutionally sound – and will so argue if this Court grants rehearing. Because it is time for this case to proceed to its final stage, however, Plaintiffs ask that this Court deny Exxon's Petition.

A. Ratio

Exxon argues that the ratio between punitive damages and harm cannot exceed 1:1 because the jury awarded "substantial" compensatory damages to the class. Pet. 15-16. Exxon's argument misapprehends *State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408 (2003), and ignores the record.

---

[8] *See, e.g., BMW v. Gore*, 517 U.S. 559, 582 (1996) (higher ratio "justified" where "the monetary value of non-economic harm might have been difficult to determine"); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 459-62 (1993) (potential harm); *Planned Parenthood v. ACLA,* 422 F.3d 949, 963 (9th Cir. 2005) (unquantified and uncompensated harm).

Far from establishing the rule Exxon advocates, *State Farm* indicated that single-digit ratios generally satisfy due process in serious cases and commented only that, under some circumstances, a 1:1 ratio can "perhaps" reach the due process limit. 538 U.S. at 418. But the Supreme Court also reaffirmed its oft-repeated guidance that there is no "bright-line ratio which a punitive damages award cannot exceed," recognizing that "[t]he precise award in any case ... must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.* at 424-25. Indeed, the *Philip Morris* Court reiterated *State Farm*'s statement that "single-digit multipliers are more likely to comport with due process." 127 S. Ct. at 1062 (quoting *State Farm*, 538 U.S. at 425). In *Planned Parenthood*, even though most of the plaintiffs received "substantial" awards, this Court held that "[o]ur constitutional sensibilities are not offended by a 9 to 1 ratio." 422 F.3d at 962-63.[9]

Even if Exxon's view of the law were correct, it would not matter. The class members did ***not*** receive "substantial" awards for purposes of ratio analysis. Assuming economic harm of $504 million, as this Court has found, the 32,677 class members' per capita shares amount to only about $15,000. *See* 296 F. Supp.

[9] *See also Bains LLC v. Arco Prods. Co.*, 405 F.3d 764, 776-77 (9th Cir. 2005) (mandating ratio between 6:1 and 9:1; "substantial" economic damages of $50,000); *Hangarter v. Provident Life & Accident Ins. Co.*, 373 F.3d 998, 1015 (9th Cir. 2004) ($5 million punitive award; $2.67 million compensatory damages); *Zhang v. American Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) ($2.6 million punitive award; $360,000 compensatory damages).

2d at 1104. Because class certification cannot "abridge, enlarge or modify" class members' substantive rights, *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997), the fact of a mandatory class cannot reduce Plaintiffs' punitive damage recovery by aggregating modest individual amounts into a "substantial" collective judgment. *See Planned Parenthood*, 422 F.3d at 960-62 (ratio must be assessed on plaintiff-by-plaintiff basis); Slip op. 19759 (Browning, J., dissenting).

B. Calculation of Harm

This Court's opinion exposes the illogic of Exxon's contention that its pretrial payments should automatically reduce the economic harm figure for purposes of ratio analysis. Slip op. 19739-40; *see also* 296 F. Supp. 2d at 1101-03. Accepting this argument would permit a defendant to "buy full immunity from punitive damages by paying the likely amount of compensatory damages before judgment," thus defeating the goals of punishment and deterrence. Slip op. 19739. Exxon does not cite any authority to support such an extraordinary result.

In any event, two circumstances unique to this case bar Exxon's unprecedented argument.

First, to allow the jury to assess the relationship between harm and punitive damages, Exxon ***stipulated*** at trial that its spill caused Plaintiffs harm ranging between $432 million and $768 million (including the Phase II compensatory damage verdict). SER 1137, 1554-59. "[A]bsent indications of involuntary or

uninformed consent" – neither of which are present here – parties are bound by such stipulations. *CDN, Inc. v. Kapes,* 197 F.3d 1256, 1258 (9th Cir. 1999).

Second, judicial estoppel precludes Exxon from seeking to reduce its punitive exposure based on pretrial payments. In appeals concerning settlement agreements that contained "cede-back" provisions, which gave Exxon a share in punitive damages claims against it, Exxon told this Court that those agreements were necessary to reduce its punitive damages exposure because the jury was entitled to consider all harm, ***including harm compensated by pre-trial settlements***, in setting punitive damages. SER 1216, 1230-34, 1272-74. This Court accepted that argument, holding that "[p]artial settlement does not reduce the [punitive] award's amount." *In re the Exxon Valdez*, 229 F.3d 790, 796 (9th Cir. 2000); *In re the Exxon Valdez*, 239 F.3d 985 (9th Cir. 2000). Exxon cannot now assert an "inconsistent position in the same litigation." *Humetrix, Inc. v. Gemplus, S.C.A.,* 268 F.3d 910, 917 (9th Cir 2001).

C. Comparable Penalties

Exxon contends the Court's consideration of comparable penalties, Slip op. 19745-46, slighted this factor. Exxon's argument ignores both Supreme Court guidance and the most relevant penalties.

BMW v. Gore, 517 U.S. 559, 575, 580 (1996), emphasized reprehensibility and ratio analysis, making clear that comparable penalties have the least

significance of the three due process factors. *See Kemp v. AT&T Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004) (penalties receive "less weight in the reasonableness analysis than the first two guideposts"). *State Farm* confirmed the point, suggesting that a comparable fine of $10,000 could support a punitive award of at least $1 million. 538 U.S. at 428-29.

In any event, comparable penalties amply supported the punitive award. This Court has noted the availability of criminal penalties in excess of $1 billion. Slip op. 19745; *Valdez I* at 1245. *See also* 296 F. Supp. 2d at 1107-08 ($5.1 billion). The Court also has explained the relevance of Exxon-Valdez-motivated amendments to oil spill penalties, *Valdez I* at 1246, under which Exxon would now be subject to civil penalties of $1.3 billion for spilling 11 million gallons (and $4.3 billion for spilling an entire 53-million gallon cargo). 33 U.S.C. § 1321(b)(7)(D); AS 46.03.759(a)(1), (a)(2), (c)(1).

CONCLUSION

This Court should deny Exxon's Petition.

RESPECTFULLY SUBMITTED this 1st day of March, 2007.

James vanR. Springer
DICKSTEIN SHAPIRO LLP
1825 Eye Street N.W.
Washington, D.C. 20006-5403
(202) 420-2200

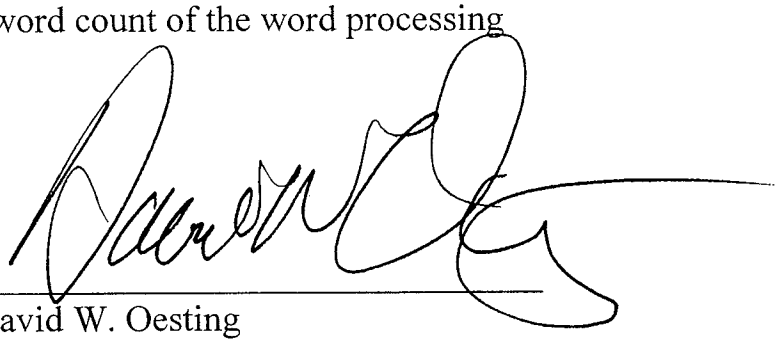
Brian B. O'Neill
FAEGRE & BENSON
2200 Norwest Center
90 South 7th Street
Minneapolis, Minnesota 55402-3901
(612) 336-3000

David W. Oesting
Stephen M. Rummage
David C. Tarshes
Jeffrey L. Fisher
DAVIS WRIGHT TREMAINE LLP
Suite 1450
550 W. Seventh Avenue
Anchorage, Alaska 99501
(907) 257-5300

Attorneys for Plaintiffs

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

I certify that this brief is proportionately spaced, using 14 point typeface, and contains 4,164 words, based on the word count of the word processing software currently in use by our firm.



David W. Oesting

PROOF OF SERVICE

I hereby certify that the foregoing Plaintiffs' Response To Exxon's Petition For Rehearing Or Rehearing *En Banc* has been served by hand delivery on the 1st day of March, 2007 to the following:

Lloyd B. Miller
SONOSKY, CHAMBERS, SACHSE,
MILLER & MUNSON
900 West 5th Avenue, Suite 700
Anchorage, AK 99501

Douglas J. Serdahely
PATTON BOGGS, LLP
601 West 5th Avenue, Suite 700
Anchorage, AK 99501

Samuel J. Fortier
FORTIER & MIKKO
101 W. Benson Blvd., Suite 304
Anchorage, AK 99503

and courtesy copies of the same were sent via DHL Airways to the following counsel:

John Daum
O'MELVENY & MYERS LLP
400 S. Hope Street, Suite 1060
Los Angeles, CA 90071

Taylor F. Snelling, III
Counsel-Law Dept.
EXXON MOBIL CORPORATION
800 Bell Street, 16th Floor
Houston, TX 77252-2180

Charles C. Lifland
O'MELVENY & MYERS LLP
400 South Hope Street, Suite 1060
Los Angeles, CA 90071

Brian B. O'Neill
FAEGRE & BENSON
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901

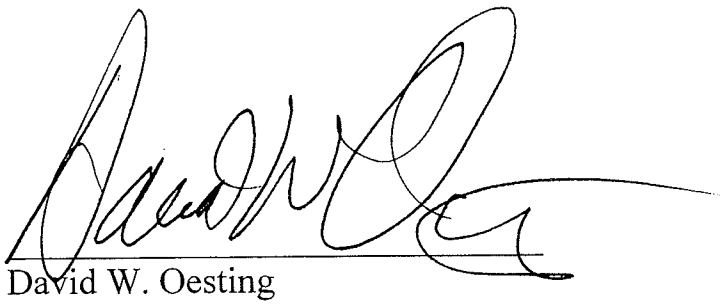
James vanR. Springer
DICKSTEIN, SHAPIRO LLP
1825 Eye Street NW
Washington, DC 20006-5403

David C. Tarshes
DAVIS WRIGHT TREMAINE LLP
1501 Fourth Avenue, Suite 2600
Seattle, WA 98101-1688

Kenneth F. McCallion
GOODKIND, LABATON,
RUDOLF & SUCHAROW
100 Park Avenue, 12th Floor
New York, NY 10017

Michael G. Chalos
FOWLER RODRIGUEZ & CHALOS
366 Main Street
Port Washington, NY 11050

Bradley S. Keller
BYRNES & KELLER
1000 Second Avenue
38th Floor, Key Tower
Seattle, WA 98104



David W. Oesting