

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

Nos. 04-035182 & 04-035183

In re: the EXXON VALDEZ

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

MOTION TO STAY MANDATE

Appellants Exxon Mobil Corporation and Exxon Shipping Company (collectively “Exxon”) hereby move to stay the issuance of the mandate in the above captioned action, pending the filing and disposition of a petition for a writ of certiorari. *See* Fed. R. App. P. 41(b); 9th Cir. R. 41-1. As grounds for this motion, Exxon states as follows:

1. This Court’s decision on remand from the U.S. Supreme Court was issued June 15, 2009. In response to Exxon’s timely petition for rehearing and

rehearing en banc, a judge of this Court requested a vote on whether to rehear the matter en banc, but a majority of eligible judges did not vote in favor of en banc review. Exxon's petition was denied on October 28, 2009. Absent a stay, the Court's mandate must issue on November 4, 2009.

2. Under Federal Appellate Rule 41(b) and Ninth Circuit Rule 41-1, this Court may stay the mandate upon motion if the moving party intends to file a petition for a writ of certiorari. The standards for issuance of a stay in such circumstances are not exacting. "Ordinarily . . . a party seeking a stay of the mandate following this court's judgment need not demonstrate that exceptional circumstances justify a stay." *Bryant v. Ford Motor Co.*, 886 F.2d 1526, 1528-29 (9th Cir. 1989); *see U.S. v. Pete*, 525 F.3d 844, 850 & n.9 (9th Cir. 2008); *Campbell v. Wood*, 20 F.3d 1050, 1051 (9th Cir. 1994) (en banc). Indeed, it "is often the case" that "the appellate mandate [is] stayed while [a party seeks] certiorari from the Supreme Court." *Pete*, 525 F.3d at 850. A motion to stay the mandate pending a petition for a writ of certiorari "will be denied if the Court determines that the petition for certiorari would be frivolous or filed merely for delay." 9th Cir. R. 41-1; *see* 9th Cir. R. 41-1 Adv. Comm. Note (same).

3. Exxon's motion for a stay of the mandate satisfies these standards.

a. A petition for a writ of certiorari would not be frivolous. The panel was sharply divided on the question whether Exxon should be completely denied its

appellate costs—particularly the costs required to secure the portion of the award ultimately invalidated on appeal—and Judge Kleinfeld’s dissent expressly stated that the majority’s ruling conflicts with “the Supreme Court’s decision in this case and precedent in other circuits.” Op. 7089 (Kleinfeld, J., dissenting). Whereas the panel decision holds that allocating appellate costs proportional to the appellant’s monetary success would invite “increased and wasteful litigation” over appellate costs, Op. 7088, other circuits have held a simple arithmetic allocation of costs is generally appropriate and unproblematic, *see* Exxon Rhr. Pet. 15-17. Conflict with decisions of the Supreme Court or other federal circuits is, of course, the archetypal basis for certiorari under Supreme Court Rule 10. And while plaintiffs obviously will disagree that any petition for certiorari would be meritorious, they cannot credibly argue that the petition would be frivolous, especially given Judge Kleinfeld’s dissent from the panel decision.

b. Exxon most certainly would not seek certiorari merely for delay. Indeed, given the panel’s unanimous ruling on the post-judgment interest rate applicable to the \$507.5 million award, the remaining \$70 million Exxon has withheld pending resolution of this costs dispute award is currently accruing interest at a rate (5.9%) vastly higher than Exxon’s cost of borrowing that same amount would be for the same 90-day period (the current rate for a 90-day Treasury bill is .05%). In other words, Exxon is paying an exorbitant price to continue withholding the \$70 million

pending resolution of this dispute. Delay for delay's sake is decidedly not in Exxon's interest—as evidenced by the fact that Exxon paid its entire principal obligation on the award into the Qualified Settlement Fund (“QSF”) just two weeks after the Supreme Court's judgment formally issued, and similarly paid its entire interest obligation into the QSF shortly after this Court ruled on the timing and rate of interest on the judgment.

4. While denial of a stay would impose substantial and likely irreparable economic injury on Exxon, granting a stay would impose no prejudice on plaintiffs. If a stay is denied and the mandate issues, the district court will likely enter final judgment for plaintiffs within a matter of days or week, requiring Exxon to pay the \$70 million into the QSF. If Exxon then successfully petitions for a writ of certiorari and prevails in the Supreme Court, it will be required to “claw back” the \$70 million from the class, which may be difficult or impossible depending on the status of the award's distribution (over which Exxon has no control). By contrast, if the stay is granted, the remaining \$70 million will continue to accrue interest at the supramarket rate described above, ensuring that plaintiffs will be significantly *over*compensated for the short delay in the payment of this final fraction of their total judgment (only approximately 7% of the combined award and interest). And the remaining amount is still secured by an irrevocable letter of credit, so plaintiffs are exposed to no risk of nonrecovery.

CONCLUSION

For the foregoing reasons, the motion for a stay of the mandate should be granted.

DATED: November 2, 2009

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on November 2, 2009, the foregoing Motion for Stay of the Mandate was served by first class U.S. Mail, postage prepaid, to Liaison Counsel for Plaintiffs at the following address:

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Dated: November 2, 2009

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